



Constituting Equality

Gender Equality and
Comparative Constitutional Law

Edited by Susan H. Williams

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CONSTITUTING EQUALITY

Gender Equality and Comparative Constitutional Law

Constituting Equality addresses the question, how would you write a constitution if you really cared about gender equality? The book takes a design-oriented approach to the broad range of issues that arise in constitutional drafting concerning gender equality. Each section of the book examines a particular set of constitutional issues or doctrines across a range of different countries to explore what works, where, and why. Topics include (1) governmental structure (particularly electoral gender quotas), (2) rights provisions, (3) constitutional recognition of cultural or religious practices that discriminate against women, (4) domestic incorporation of international law, and (5) the role of women in the process of constitution making. Interdisciplinary in orientation and global in scope, the book provides a menu for constitutional designers and others interested in how the fundamental legal order might more effectively promote gender equality.

Susan H. Williams is the Walter W. Foskett Professor of Law at the Indiana University Maurer School of Law, where she also serves as the Director of the Center for Constitutional Democracy. Professor Williams graduated from Harvard Law School, where she served as the Supervising Editor of the *Harvard Law Review* and then clerked for Hon. Ruth Bader Ginsburg on the U.S. Court of Appeals for the District of Columbia Circuit (1985–1986). She has been a visiting faculty member at the University of Paris II (Pantheón-Assas) and a Fellow at Wolfson College, Cambridge University, and at the European University Institute in Fiesole, Italy.

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Constituting Equality

GENDER EQUALITY AND COMPARATIVE
CONSTITUTIONAL LAW

Edited by
SUSAN H. WILLIAMS

Indiana University



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This book is dedicated to Justice Ruth Bader Ginsburg, who has been for me, as for so many others, a mentor, a role model, and an inspiration.



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Finally, my deep thanks go to my husband, David, and to our children, Ben and Sarah. Their love and support make all things possible.

Susan H. Williams
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Introduction: Comparative Constitutional Law, Gender Equality, and Constitutional Design

Susan H. Williams

Constitutionalism is sweeping the world. Since 1990, at least 110 countries around the globe have been engaged in writing new constitutions or major revisions of old ones.¹ In many of these countries, issues of gender equality have been a central concern in the constitutional process. Women have been active participants in these constitutional projects, and they have worked for the inclusion of a broad range of constitutional provisions and mechanisms to promote gender equality.² One might expect that this phenomenon of worldwide constitution drafting would have generated a rich literature concerning gender-equality issues in comparative constitutional law, but, in fact, it has not. As the editors of one of the very few books on the subject put it, “there is a huge gap – a gender gap – in contemporary comparative constitutional analysis.”³

The lack of attention to these issues in the literature became painfully clear to me in 2003, when I began to work with women’s groups from Burma and Liberia on constitutional reform addressing gender-equality issues. For the past several years, I have been working with constitutional drafting teams in the Burmese democracy movement to write state and federal constitutions that will, hopefully, one day soon, provide the legal frameworks for a free and democratic Burma. As part of this work, I have acted as an advisor to the Women’s League of Burma (WLB) – an umbrella organization for many of the women’s groups in the democracy movement – helping them draft constitutional provisions addressing most of the issues in this book, write position

¹ See <http://confinder.richmond.edu/index.php>.

² For an excellent discussion of this phenomenon, see *Women Making Constitutions: New Politics and Comparative Perspectives* (Alexandra Dobrowolsky & Vivien Hart, eds., 2003).

³ Beverly Baines & Ruth Rubio-Marín, *Introduction: Toward a Feminist Constitutional Agenda in The Gender of Constitutional Jurisprudence* 1, 2 (Beverly Baines & Ruth Rubio-Marín, eds., 2005).

papers, and design advocacy campaigns in support of these provisions. The WLB and other groups like it around the world are participating in law reform and constitutional drafting projects. In this process, they need assistance on specific issues: information about the range of possible constitutional mechanisms for promoting gender equality; data on the effectiveness of different mechanisms in different countries; and guidance about drafting legal language to implement these mechanisms. But, in my efforts to research these issues, I ran into one dead end after another.

The subject appears to have fallen into a gap between the two fields of comparative constitutional law and gender equality. Although each literature has grown individually, there has been little attention to the intersection of the two. For example, the past decade has seen an explosion of interest in other aspects of comparative constitutional law. A burgeoning literature addresses issues of federalism, judicial review, separation of powers, and individual rights.⁴ But, there is a conspicuous hole in this lively debate: there is a noticeable lack of literature addressing questions of gender in the design of constitutions around the world. On the other hand, there is also a large literature addressing issues of gender equality within particular constitutional regimes.⁵ But, this literature is rarely broadly comparative in focus; it most often works within a single legal system or a small number of closely related systems. In addition, this scholarship tends to be focused on the basic equality guarantee and not on the broad range of other constitutional provisions or mechanisms that can contribute to gender equality.⁶ Finally, this literature is not design-oriented: it is focused on the interpretation of existing constitutions rather than on the drafting, design, and modification of constitutional language.

Two recent works are the only books that bridge the gap between these two literatures. Beverly Baines and Ruth Rubio-Marin's book, *The Gender of Constitutional Jurisprudence*, was the first book-length treatment of issues of gender in comparative constitutional law. The introduction to that book sets out a synoptic vision of the interaction between constitutionalism and

⁴ See, e.g., *Defining the Field of Comparative Constitutional Law* (Mark Tushnet & Vicki C. Jackson, eds. 2002); *Michael Burgess, Comparative Federalism: Theory and Practice* (2006); *Donald W. Jackson, Comparative Judicial Review and Public Policy* (1992); *Daniel C. Kramer, Comparative Civil Rights and Liberties* (1982); *Ronald J. Krotoszynski, Jr., The First Amendment in Cross-Cultural Perspective: a Comparative Legal Analysis of the Freedom of Speech* (2006).

⁵ See, e.g., *The Constitution of South Africa from a Gender Perspective* (Sandra Liebenberg, ed. 1995); *Miriya Matembe, Gender, Politics, and Constitution Making in Uganda* (2002); *Nivedita Menon, Gender and Politics in India* (1999); *Women and the United States Constitution: History, Interpretation, and Practice* (Sibyl A. Schwarzenbach & Patricia Smith, eds., 2003).

⁶ See *Helen Irving, Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, 162 (2008).

gender equality, and was one of the inspirations for this book. The second book, by Helen Irving, is *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, the first book to take a design-based approach to the subject.

My hope is that the present book, although building on the achievements of these earlier works, will advance this developing field in a distinctive way. As I discovered in my work advising women's groups on constitutional reform, there is a particular approach that is needed by reformers: a comparative, design-oriented approach to gender equality in constitutional law with a broad, global, and interdisciplinary perspective. This book grows out of a conference at Indiana University Maurer School of Law in March 2007, which was intended to address that need. The conference brought together a distinguished group of lawyers, activists, and scholars from several disciplines to consider issues of gender equality in comparative constitutional law. The essays in this book, which are based on the participants' contributions to the conference, address a broad range of constitutional issues of concern to women around the world. Together, these essays offer a unique combination. First, they represent a design-oriented approach to gender in constitutional law. Second, they offer the depth and breadth provided by an interdisciplinary dialogue on these issues. And third, the book's coverage is global in scope. This is the first book to offer this distinctive combination of features on this subject.

The book's design-oriented approach is implemented in three ways. First, some of the chapters address design issues explicitly and directly. For example, the first chapter, by Drude Dahlerup and Lenita Freidenvall, discusses many of the issues confronting drafters who are considering electoral gender quotas. Second, some of the chapters are written by people involved in the constitutional drafting process, and reflect on that process. Thin Thin Aung and Adrien Katherine Wing, for example, have both been participants in constitutional design processes, and their chapters offer an insider's look at the issues that shape the consideration of gender equality in such processes.

Finally, the design focus led to a conceptual, rather than geographical, organization for the book: each section of the book addresses a particular area of constitutional law and its implications for gender equality. For those engaged in designing constitutions, one of the most useful (and least available) resources is a cross-country comparison on particular constitutional issues relating to gender. Designers need to be informed about the range of constitutional possibilities on a particular issue because, without such information, their imaginations are too likely to be limited by the particular legal approaches that are already part of their own system. They need a literature that will expose them to the great variety of constitutional approaches around the world.

In addition, drafters need information about which of those constitutional possibilities are working well or poorly, in which countries, and why. This sort of information must be grounded in a sensitive understanding of the meaning and operation of a constitutional system within a particular legal, political, and cultural context. To make intelligent choices about constitutional language, drafters need to understand what sorts of conditions facilitate or frustrate the effectiveness of particular constitutional provisions so that they can assess the suitability of those provisions for a particular country. The organization of this book around specific constitutional issues or mechanisms, and the cross-country comparisons within each section, are designed to respond directly to these needs.

The second distinctive aspect of this book is its interdisciplinary approach. The attention to context and the pragmatic focus on what works, where, and why, requires analysis of more than just legal doctrine. An interdisciplinary approach that considers culture, politics, and theory – along with law – is necessary to adequately address the concerns of people interested in constitutional design, both drafters and scholars. The contributors to this book are a distinguished collection of law professors, political scientists, activists, and government officials. Among the contributors are a former Supreme Court Justice from Liberia, a democratic activist from Burma, three political scientists, and law professors from the United States, Canada, Australia, and Colombia. All of the participants are leaders in their fields and they bring an extremely broad range of educational backgrounds and practical experiences to the project. The interaction of different sets of disciplinary assumptions and goals, different theoretical lenses, different practical agendas, and different experiences generates the exciting synergy of this new field.

The third way in which this book is unusual is in the breadth of its geographical coverage. The contributors to the book come from every continent on earth, except Antarctica. Some of the chapters in the book address issues relevant to a wide range of legal systems, such as Helen Irving's chapter on rights. Other chapters address particular regions of the world, such as Aili Mari Tripp's chapter on African customary law, or particular legal issues in a collection of countries, such as Pascale Fournier's chapter on Mahr in four different legal systems. And, some chapters focus on an issue within a particular country, including Burma, Liberia, Germany, the United States, Britain, Guatemala, Colombia, Canada, and Palestine. The book, taken as a whole, is truly global in scope.

One goal of this book is to offer a vision of the general landscape of constitutional law in relation to gender equality. Rather than focusing on a particular constitutional provision, such as the equality guarantee, the book addresses a

broad range of constitutional provisions and mechanisms that can be used to promote gender equality. No one book could, of course, cover all of the possible issues or strategies concerning gender in the drafting of constitutions. In an effort to raise the many issues that are not discussed in the individual chapters, this introduction offers a roadmap to guide readers through that landscape by providing an overview of the range of constitutional mechanisms available for promoting gender equality.

Each section of the book is described in this introduction, and the discussion in each section begins with a brief outline of the particular area of constitutional law under consideration in that section. These descriptions suggest the range of issues and possibilities related to gender within that area of constitutional law – not only those issues covered by the chapters in that section, but also those not discussed here that could form the basis for future research. The purpose of these descriptions is to offer a menu of possibilities to those interested in constitutional design. The chapters in each section serve as examples of the ways in which one might approach such issues from the perspective of promoting gender equality.

A. SECTION ONE: STRUCTURE

The first section of the book addresses an area of constitutional law often overlooked in discussions of gender equality: the constitutional provisions concerning the structure of the government. Structural issues include federalism versus unitary systems, presidential versus parliamentary systems, and the choice of an electoral system. In the literature on comparative constitutional law, these structural aspects of constitutions are generally seen as responses to issues of cultural, religious, or ethnic division within a society or as mechanisms for regulating political life, but they can have profound, and often ignored, implications for gender equality.

Sometimes, a particular structural choice is clearly preferable from the perspective of gender equality. For example, the choice of a proportional representation (PR) electoral system as opposed to a first-past-the-post (FPP) system has a large impact on the level of women's political representation. Women do much better in PR than in FPP systems, as explained by Drude Dahlerup and Lenita Freidenvall in the first chapter in this section. The inclusion of a constitutional mandate for a PR electoral system is, therefore, an extremely useful mechanism for promoting women's equality.

In other cases, the choice is less clear, although the impact on gender equality may be no less profound. For example, the choice of a federal system, in which substantial authority is constitutionally assigned to subnational units

of government, may either help or hurt women. The issues assigned to states or other units often include areas of law of particular concern to women, such as family law. Federalism may promote equality if women are better able to make their concerns heard in these smaller units, or it may retard equality if women must fight every issue over and over again in each state rather than being able to resolve it once and for all at the national level.

Structural issues also include the relationship between the branches of government. Judicial review – a central subject of the comparative constitutional law literature – may have important consequences for gender equality, particularly when examined from the perspective of the composition of the judiciary. Similarly, constitutional provisions concerning a “state of emergency” – in which the normal rules regarding the powers of branches vis-à-vis each other and in relation to the people are changed – can have a serious impact on the lives and status of women, as Thin Thin Aung and Susan H. Williams explain in their description of the new constitution proposed by Burma’s ruling military junta.

Finally, structural issues also include the role of the military in domestic affairs. This issue arises not only in the context of states of emergency, but also in “normal” constitutional times. The question of whether the military may be used domestically and whether it has any official role in government – for example through reserved seats in the legislature – has significant consequences for the level of gender equality in a society.

Thus, structural issues include (1) the division of power vertically (i.e., federalism and local government) and (2) horizontally (presidentialism v. parliamentarism), (3) the power and composition of the judiciary, (4) states of emergency, (5) the electoral system, and (6) the role of the military. Although these issues are the main subjects of the comparative constitutional law literature, there is still much work to be done on the questions concerning their implications for gender equality.

Both of the chapters in this first section of the book focus on one particular structural mechanism for promoting gender equality: electoral quotas. The first chapter, “Gender Quotas in Politics – a Constitutional Challenge,” by Drude Dahlerup and Lenita Freidenvall, provides an overview of the landscape of electoral gender quotas. It offers a taxonomy of quotas based on two characteristics: (1) the stage in the electoral process they address, that is, aspirants, candidates, or seats; and (2) their legal status, that is, constitutionally required, statutory, or voluntary by parties. The chapter describes the operation of different forms of quotas in a number of countries and it offers a summary of the evidence on the particular aspects of quotas that make them more or less effective. These factors include how well the quota fits with the

electoral system in a given country, how specific it is about the placement of women's names on candidate lists, and what sorts of sanctions can be brought to bear on parties who resist the quota system.

The second chapter in this section is "Equality, Representation, and Challenge to Hierarchy: Justifying Electoral Quotas for Women," by Susan H. Williams. This chapter ties the discussion of electoral quotas to some current issues in political theory by examining the justifications for electoral gender quotas and the objections to them. The chapter argues that the models of equality and democracy on which feminists have relied to respond to these objections are missing a crucial element. This necessary element is a permanent capacity to challenge the reassertion of hierarchy. Models of equality and democracy are incomplete if they do not reckon seriously enough with the ineradicability of hierarchy and its tendency to reassert itself even within the very structures designed to resist it. As a result, we need to build mechanisms into our constitutions to provide us with warning signals for when hierarchy reemerges. Regardless of whether quotas are effective at generating woman-friendly legislation, they are a necessary element of such a warning system for challenging the reassertion of hierarchy. The chapter concludes that we should add this element of challenge to our models of equality and democracy not only to provide a stronger justification for quotas, but also because the element is important for feminism as both a theoretical stance and a political movement.

These two chapters together offer both a detailed and practical assessment of electoral gender quota regimes around the world and a theoretical foundation for understanding the role of quotas in the promotion of equality and democracy. They also suggest certain themes that are likely to be relevant across the many structural issues mentioned earlier. First, it is unlikely that any structural issue can be fruitfully assessed from a gender perspective in isolation from the rest of the constitution or from the cultural and political realities on the ground. The impact of any given structure will vary because of its interaction both with other constitutional structures and with the culture and politics of the society. Just as an electoral gender quota must be consistent with the electoral system generally and with the culture and politics of a given nation, so, too, the impact of any other structural provision on gender equality (such as a federal allocation of powers) will depend both on its interaction with the other structures of government (such as the electoral system for each level of government) and with the culture and politics of the country (such as the cost and difficulty of national level organizing).

Second, it will be difficult to convince either political elites or citizens generally that fundamental structural issues should be assessed from a gender perspective unless proponents offer a convincing account of the underlying

political values that makes it clear why gender inequality is a threat to democracy. There is a powerful impulse for people to think that they should seek democracy first and worry about gender equality later.⁷ For gender equality to be high on the agenda when constitutional drafting and reform are undertaken, it is necessary to offer a strong explanation of the reasons that democracy and freedom require gender equality. The close look at electoral gender quotas provided by these chapters thus highlights themes that are important to the consideration of structural issues more generally.

B. SECTION TWO: RIGHTS

This section of the book addresses the area of constitutional law most often examined by feminists: individual rights. There are at least three aspects of rights that have implications for gender equality. First, the structure of the rights protected under the constitution can have a significant impact on their usefulness in promoting gender equality. For example, if the constitution protects positive rights that guarantee citizens certain resources or opportunities, along with negative rights that protect them from interference, it can be much more effective in generating greater equality. Second, the nature of the constitutional right to equality can make a real difference. Most notably, if the constitution protects a right to substantive equality rather than merely to formal equality, it will be much more effective in addressing structural forms of discrimination. And third, protection for certain specific rights of particular concern to women, such as reproductive rights or rights to be free of private violence, can be extremely helpful. Each of these aspects is explored further below.

First, there are, generally, issues related to the structure of the rights protected by the constitution. For example, some constitutions protect only negative rights, which shield the individual from interference, whereas others also protect positive rights, which entitle the individual to demand a resource or opportunity, such as education or health care. The choice about whether to protect positive rights and, if so, which ones, has important gender implications, even if the rights are cast in gender-neutral terms. Positive rights are of particular concern to women because, worldwide, women are much more likely than men to be poor.⁸ As a result, women often cannot command the resources to exercise their rights unless they can demand assistance from the government. For example, a negative right to reproductive choice is worth

⁷ See Mihaela Miroiu, "Not the Right Moment!": *Women and the Politics of Endless Delay in Romania*, *Women's History Review* (forthcoming 2009) (manuscript on file with author).

⁸ See Irving, *supra* note 6 at 168.

little to the many women who have no access to birth control or abortion. A positive right to demand reproductive health services from the government may be necessary to make this freedom a reality.

Similarly, some constitutions protect rights only against government interference; private parties cannot be held accountable under the constitution for a violation of fundamental rights. But, many of the violations of women's rights are the product of private action rather than state action. For example, discrimination by private employers and violence by family members are both private actions. Rights provisions are of greater assistance to women if they are able to reach at least some private actors as well as state agencies. As Helen Irving explores in her chapter in this section, these issues about the structure of rights can have a large impact on gender equality.

The second area of concern is the constitutional protection for equality rights specifically. There is a large literature about equality rights, so the chapters in this section do not focus on this issue in particular. Kathleen Sullivan has provided a useful list of the choices facing constitutional designers considering the framing of an equality right. She suggests that they need to choose

- (1) between a general provision favoring equality or a specific provision favoring sex equality;
- (2) between limiting classifications based on sex or protecting the class of women;
- (3) between reaching only state discrimination or reaching private discrimination as well;
- (4) between protecting women from discrimination or also guaranteeing affirmative rights to the material preconditions for equality; and,
- (5) between setting forth only judicially enforceable or also broadly aspirational equality norms.⁹

Perhaps the single most important issue from the perspective of promoting gender equality is whether the constitutional provision adopts a substantive model of equality rather than a formal one. Formal equality requires that the law treat like cases alike. This model is useful for eliminating legal discrimination based on irrational stereotypes, but it does not address the underlying gender hierarchies that lead men and women to actually be different in so many ways, including (in many societies) levels of income, education, child care responsibility, and susceptibility to violence. Substantive equality requires that the law address these underlying hierarchies so as to promote greater equality of results, regardless of whether that path involves treating men and women the same or treating them differently. Much of the large feminist literature on equality guarantees is focused on explaining the advantages of a

⁹ Kathleen Sullivan, *Constitutionalizing Women's Equality*, 90 *Cal. L. Rev.* 735, 763 (2002).

substantive model of equality and arguing for its inclusion in the constitutional jurisprudence of one country or another.¹⁰

Third, there is a range of specific rights that are of special concern to women, aside from the general right to equality. Such rights include reproductive rights, rights to be free of violence, positive rights to education, housing, or employment, and rights concerning marriage, children, and family life. Although many of these rights are facially gender neutral, they are of particular concern to women because robust rights on these subjects can sometimes function as powerful mechanisms for reducing the barriers to women's equality. For example, raising the age of marriage can increase the level of education for girls, decrease the serious health effects of pregnancy on very young women, and decrease the likelihood of violence within the marital unit.¹¹ Some constitutions (like our own, in the United States) give very little explicit attention to such rights, whereas others (such as the South African Constitution) contain a rich and interesting range of provisions addressing them.

Thus, from a gender-equality perspective, constitutional design issues relating to rights include (1) questions about the structure and function of rights; (2) concerns about the nature of the basic equality rights; and (3) issues about a range of specific rights of particular concern to women. The chapters in this section of the book address all of these issues in various ways.

The first chapter in this section is "More than Rights," by Helen Irving. This chapter addresses the dangers of a limited focus on equality rights as the central issue in constitutional drafting concerning gender equality. The chapter highlights the way in which such a narrow focus obscures choices about the nature of rights, such as those discussed above, and ignores the broad range of particular rights that have a distinctive impact on or significance for women. The chapter also examines the procedural issues and "opportunity structures" that exist conceptually and temporally prior to the interpretation

¹⁰ See, e.g., Colleen Shepard, *Constitutional Recognition of Diversity in Canada*, 30 *Vt. L. Rev.* 463, 475 (2005); Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *U. Chi. Legal F.* 21, 33–34 (1999); Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?* 9 *J. Contemp. Legal Issues* 279, 279 (1998); Claire L'Hereux-Dube, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 *Yale J.L. & Fem.* 363, 368–70 (2002); Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 *Georgia J. of Int'l & Comp. L.* 557, 597 (2006); Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence Under the Colombian Constitution*, in *The Gender of Constitutional Jurisprudence*, *supra* note 3 at 75, 86–91; Blanca Rodriguez Ruiz & Ute Sacksosky, *Gender in the German Constitution*, in *The Gender of Constitutional Jurisprudence*, *supra* note 3 at 149, 154–155.

¹¹ See *Child Marriage Fact Sheet: State of the World Population 2005* (United Nations Population Fund) at http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm (last visited 11/7/08).

or enforcement of constitutional rights, such as the role and composition of the legislatures that pass the laws and the courts that interpret them.

The central focus of the chapter is on the potential shortcomings of a rights-based approach from the perspectives of women. The chapter argues that a rights-based approach prioritizes litigation, which creates systematic disadvantages for the poorer segments of the population, including women. Focusing on rights and litigation also leaves many crucial decisions to courts, rather than legislatures. And, a preoccupation with judicial interpretation of constitutional text can freeze our understandings of injustice or discrimination so that we are unable to imagine certain experiences as violations of equality, because they do not fit the terms of the constitutional description of the right. This chapter serves as a powerful reminder of the limits of rights-based arguments and the need for a broader focus in the consideration of the gendered aspects of constitutions.

The other two chapters in this section address one of the most important sets of substantive rights from the perspective of gender equality: reproductive rights. Mary Anne Case's chapter, "Perfectionism and Fundamentalism in the Application of the German Abortion Laws," examines the German Constitutional Court's approach to abortion. The chapter highlights the distinctive aspects of this jurisprudence, including the requirement for counseling of pregnant women, the focus on providing social services for mothers and children that relieve some of the burdens of child-rearing, and the issue of public funding of abortions. The chapter proposes a distinction between "perfectionist" and "fundamentalist" approaches as a useful heuristic for understanding these aspects of the German system and the politics surrounding abortion in Germany. A fundamentalist approach is one in which no compromise on the commitment to principle is possible, but the fundamentalist does not necessarily want to impose his or her principles on others. A perfectionist approach is one in which the goal is to get everyone (including other people) to live by particular principles, but the perfectionist may be willing to compromise on some aspects of the principle to achieve a broader application of the principle. The chapter suggests that the approach of the German Court (and of many Catholics in Germany) to abortion is perfectionist (seeking to effectively reduce the number of abortions performed) rather than fundamentalist (because it compromises on the condemnation of abortion in favor of measures that more effectively prevent it). The chapter raises important concerns about the differences between these two approaches for feminists and for consideration of constitutional rights.

The last chapter in this section is "Moral Authority in English and American Abortion Law," by Joanna N. Erdman. This chapter examines the decision of

an English High Court in the 2006 *Axon* case, in which the court decided that health professionals may provide abortion services to minors without parental notification or consent. The court's opinion distinguishes the British approach from the American jurisprudence (in which parental notification laws are often upheld) by casting the issue in England as a tension between the rights of the minor and the rights of her parents, whereas, in the United States, the conflict is between the rights of the woman (of any age) to abort versus the interest of the state in the life of the fetus. The chapter calls into question this self-understanding of the British court by highlighting a similar concern for fetal life under English law and the central role of third parties as moral authorities in both the English and American approaches, whether parents, courts, or medical professionals. The chapter then assesses the arguments for requiring a third-party authority to make the abortion decision and finds that the asserted need does not exist and the mandated procedures do not provide any meaningful benefit. The chapter criticizes such delegation on the grounds that it rests on a gendered model of authority and a distrust of women's moral agency. Finally, the chapter explores an alternative model of moral authority for women in abortion decisions, a model that is individual, subjective, and experience-based. Thus, the chapter concludes that the underlying issue is respect for women's moral authority.

These three chapters highlight themes that are central to the consideration of rights issues generally. First, the chapters place issues of agency at the forefront of our consideration in a number of different ways. Practical issues of agency are relevant to the opportunity structures that Helen Irving identifies and respect for agency is crucial to the moral authority for women that Joanna Erdman finds lacking in both the American and British approaches to abortion. Mary Anne Case also questions the construction of women's agency underlying the counseling requirements in German abortion law. As these examples suggest, rights depend on our understandings of agency and, if our model of agency is gendered or our gender stereotypes undermine the claims of women to act as moral agents, then there are serious implications for the ability of rights to promote gender equality.

The chapters in this section also raise important issues about pragmatism as a feminist approach. Mary Anne Case's exploration of the difference between perfectionist and fundamentalist approaches highlights the tensions that sometimes exist between ideological commitments and consequentialist calculations. And Helen Irving's criticisms of rights approaches asks us to look in a hard and practical way at the outcomes of certain legal strategies rather than focusing only on their (admittedly, often attractive) theoretical underpinnings.

Finally, all three chapters in this section of the book challenge us to stretch our imaginations when thinking about rights issues. There are unexplored alternatives that may be foreclosed by the frameworks we unreflectively adopt. In all three chapters, the authors identify sets of assumptions that restrict the debate in ways that may limit our ability to respond creatively to the challenge of promoting gender equality. To make progress towards equality, we may need to break free of these limitations.

C. SECTION THREE: CULTURE/RELIGION AND GENDER EQUALITY

The third section of the book addresses the tension between constitutional protection for culture or religion and the constitutional guarantee of gender equality. In many countries, the protection for culture or religion takes the form of constitutional recognition of systems of customary or religious law. And, many of these customary or religious legal systems include rules, institutions, and procedures that discriminate against or oppress women. There is a large literature in political theory addressing this tension and debating whether the legal system should allow such discriminatory applications of customary or religious law.¹² The chapters in this section, however, open up a new dimension of this issue by examining the ways in which particular constitutions address this tension. These chapters are in dialogue with the political theorists, but are seeking to apply their insights to the particular responses of various legal systems to the challenges posed by cultural and religious claims. They examine the types of constitutional responses that seem to be working and the types that have caused specific problems, either for women's equality or for the stability of a society in which cultural and religious issues are important dividing lines.

The legal systems in which these issues arise might be fruitfully divided into three categories based on the particular form of interaction between the cultural/religious system and the state-based legal system. The first category involves legal systems where cultural or religious claims are seen as individual or group rights that pose a potential conflict with gender-equality rights. Both sets of rights are understood as operating within a single, nonsectarian and state-based legal system. In these situations, the central issues generally concern the limits of tolerance for minority cultural or religious practices that are inconsistent with the majority's view of gender equality.

¹² See, e.g., Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995); Susan Muller Okin, *Is Multiculturalism Bad for Women?* (1999); Anne Phillips, *Multiculturalism Without Culture* (2007); Ayelet Schachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001); Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (2007).

The second category involves legal systems in which the constitution gives recognition to a system of religious or customary law that exists alongside the state-based legal system. Here, the conflict with gender equality is also a conflict between parallel legal systems with sometimes separate institutions, both of which have constitutional status. This category is exemplified by some African legal systems in which the constitution recognizes the legitimacy of customary legal systems. Other examples of this sort of system can be found in countries like India or Israel, in which personal status law is administered by religiously based institutions. The issues in this situation vary dramatically with the particular cultural context. The parallel religious/customary legal system may represent the culture of a majority or a minority, or both, and it may include institutions that have much greater practical control in rural or isolated communities than do the institutions of the state.

The third category of legal systems in which these issues arise involves state legal systems explicitly based on religious foundations, as in those Moslem nations where the constitution bases the state on the principles of Islam. When the constitution also protects gender equality, then a distinctive set of issues arises. Unlike the first category described above, the primary issue in this third category of systems is not usually the protection of minority cultures; rather, the central conflict often concerns the mechanisms for growth and change within the majority culture and religion. Unlike the second category described above, there may be little tension between parallel and competing legal regimes. If the religious foundation is incorporated into the state-based legal system, then there may be a single system in which religious institutions or individuals exercise state power (e.g., religious authorities sit on a court) or a high level of cooperation between religious and state institutions. This conjoining of state and religion raises, of course, its own set of issues from the perspective of gender equality. Thus, there are three distinct sets of issues in this area of the law that arise within three different sorts of legal systems.¹³ The chapters in this section of the book address the first two categories of legal systems and explore the issues raised in each.

The first two chapters address the first model outlined above: where both religious/cultural rights and gender equality are protected as rights within a single, nonsectarian legal system. The first chapter in this section is by Beverly Baines and is entitled, "Must Feminists Support Entrenchment of Sex

¹³ And, of course, some legal systems will involve combinations of two or more of these models and correspondingly complicated mixtures of the issues detailed above. For example, the state-based legal system might explicitly incorporate a particular religious or cultural model in its foundation (category 3), but also allocate certain areas of law, such as personal status law, to religious institutions that operate parallel to the state institutions (category 2).

Equality? Lessons from Quebec.” The chapter addresses the controversy over whether or not to entrench a second gender-equality provision in the Quebec Charter. The provision was proposed as a response to a set of controversies over multiculturalism in which minority religious practices with gender discriminatory aspects were accommodated by public and private entities. Although secular feminists largely supported the proposal, those women who were committed to both gender equality and religious identities often opposed it. The chapter describes the constitutional background in Canada, outlines the history of the controversies, and canvasses the public debate over the proposed provision. Drawing on the work of Ayelet Schachar, the chapter argues that several lessons can be drawn from this debate about the multiple purposes that can be served by gender-equality provisions and about the need to address the concerns of “intersectional” feminists as well as secular feminists.

The second chapter, “Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue” is by Pascale Fourrier. The chapter examines the treatment of Mahr – the gift from the bridegroom to the bride, which is required by Islamic law and becomes the property of the wife – by civil courts in the United States, Canada, France, and Germany. The chapter argues that a substantive equality approach to the issue of Mahr suffers from unpredictability and inconsistency with respect to outcomes: in some cases Mahr is enforced and in others it is ruled unenforceable. The chapter suggests that a series of deep contradictions animate and shape the discourse of the courts and obscure the similarities across legal systems. Western legal systems include gendered traditions in marriage and divorce law that are parallel to Mahr, such as dower rights. And, even within Islamic systems, Mahr is complex and contradictory, neither simply religious nor simply contractual, neither clearly patriarchal nor clearly egalitarian. The chapter argues that the antinomies shaping judicial perceptions of Islamic law must be overcome to develop a useful approach to the issue of Mahr, in particular, and legal transplants, in general.

The last two chapters in this section address the issues that arise in the second model outlined above: where the constitution recognizes parallel legal systems – one state-based and one cultural or religious – and must provide a means of harmonizing them. These chapters explore this set of issues in the context of African constitutional protection for systems of customary law. The chapter by Aili Mari Tripp, entitled “Conflicting Agendas? Women’s Rights and Customary Law in African Constitutional Reform,” addresses the movement in Africa, since the 1990s, to adopt constitutional provisions that prohibit customary law practices that discriminate against or subordinate women. Many of the constitutions include both general guarantees of gender equality and

provisions protecting customary practices and customary legal systems, creating a potential conflict between the two clauses. But, these recent constitutional provisions explicitly resolve that conflict in favor of gender equality. The chapter describes the political activism of women, which led to the adoption of such clauses and the subsequent passage of legislation on many gender-equality issues. The chapter notes, however, that laws reforming institutions created or regulated by the state (such as electoral quotas, employment discrimination laws, and citizenship laws) are much easier to pass than laws reforming family and clan-based practices or institutions (such as bride wealth, child custody, and land ownership and inheritance). The chapter offers a detailed description of the struggles over these more challenging issues in several countries, including the treatment of women as minors, inheritance rights, and land rights. It concludes that, although much work remains to be done, the legal changes represent some real progress and illustrate the growing influence and effectiveness of women's movements on African constitutionalism.

The last chapter in this section is by Felicia V. Coleman. This chapter, entitled "Gender Equality and the Rule of Law in Liberia: Statutory Law, Customary Law, and the Status of Women," canvasses some of the most crucial issues concerning gender equality in Liberia. The chapter raises the issue of intra-gender inequality created by legal systems, like Liberia's, that recognize two different legal regimes affecting family and personal status law. In Liberia, marriages can be either "statutory" or "customary," with dramatically different consequences for women in terms of inheritance, custody, and other issues. The chapter suggests that the goals in such dual systems should be, first, to ensure that the customary law system functions as a living system, rather than one frozen by codification and, second, to reform the customary system as necessary to ensure the gender equality guaranteed by the Constitution. The chapter also describes some of the other pressing gender-equality issues and outlines the strategy of the Association of Female Lawyers of Liberia (AFELL), an advocacy group that has successfully worked for law reform on some of these issues. The chapter concludes with a list of recommendations for future legal reform in Liberia.

Despite the differences between the three kinds of legal contexts in which these issues arise, the themes highlighted in the chapters in this section are relevant to the consideration of the conflict between culture/religion and gender equality in all three types of systems. First, the chapters describe the importance of women's own actions and self-perceptions in the resolution of these issues. As Beverley Baines points out, when minority communities are involved, any effort to impose solutions that do not reckon seriously with women's sense of belonging to these communities is likely to prove problematic. And, as Aili Mari Tripp argues, it is those reforms that were designed and

implemented under the direction of women that are most likely to have some success. Finally, Felicia Coleman underscores the importance of including different groups of women in reform efforts so that they will not be seen as aimed only at the concerns of the most privileged groups of women. Understanding the complicated, multifaceted identities of the women whose lives are affected by cultural and religious practices and involving those women in the process of reform is crucial to resolving these issues in ways that actually promote gender equality.

Second, the chapters also make clear that there are underlying issues of power and resources that must be taken into account in any effort to address these issues. As Felicia Coleman argues, if women have few resources or options, then they are unable to effectively resist the power of traditional leaders or take advantage of the legal rights they may have. And, as Aili Mari Tripp points out, women's poverty and lack of access to political power can make the process of legal reform an uphill battle. In other words, the difficult issues involved in protecting both gender equality and cultural/religious groups cannot be separated from the underlying distribution of wealth, education, and political power among different groups and across genders.

Finally, the chapters helpfully remind us that it is rarely the case that one system of law or ideology has a monopoly on the value of gender equality. As Pascale Fournier points out, Western courts often assume that the values of their own legal systems are superior on the issue of gender equality without recognizing the parallels between Islamic institutions, like Mahr, and Western legal traditions such as dower. Similarly, Aili Mari Tripp points out that the complicated relationships between state law and customary law in much of Africa were deeply shaped by the experience of colonialism and cannot be understood without that background. In all three categories within this area of law, we need to be reminded that gender equality is an achievement rather than an assumption in every legal system, otherwise we risk falling into an easy complacency about the superiority of Western, liberal legal models that will only undermine the effort to find solutions.

E. SECTION FOUR: CONSTITUTIONS AND INTERNATIONAL LAW

Some of the most substantively powerful legal tools for promoting gender equality are international law instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The difficulty with such instruments is that they are often unenforceable by individuals or nongovernmental organizations. One way of leveraging the power of such international instruments is through constitutional incorporation of international law.

Constitutions around the world fall along a continuum of approaches to the relationship between the constitution and international law. At one end of the continuum lie countries like Costa Rica, in which the constitution states that international human rights conventions to which the nation is a signatory will be directly enforceable in domestic courts and will be given a status superior to all domestic law, including the constitution itself.¹⁴ One step away from this pole of the continuum would be a system in which international law is directly enforceable, but subordinate to some or all sources of domestic law. In the middle of the continuum, lie countries like South Africa, in which the constitution requires the courts to consider international law (and allows them to consider the constitutional law of other nations) in the process of interpreting its own constitution.¹⁵ And, at the other end of the spectrum, lie countries like the United States, in which there is great controversy over whether international law can be considered at all in the interpretation of our own constitution.¹⁶

The issues raised by this area of constitutional law can be seen through a series of different lenses. First, there are the practical issues: what are the real world consequences of requiring or allowing the use of international legal norms in the interpretation of domestic constitutions? Whom does it empower and how? What are the political/economic/social conditions that allow women to use this tool effectively to promote gender equality? Second, there are the questions of political and legal theory: what is the model of democracy or of constitutionalism that makes sense of the incorporation of international norms? Who is the “demos” in this understanding? What is the meaning of sovereignty or citizenship? And, finally, there are the questions of legal doctrine: which particular legal vehicles are the best ones for incorporating international law norms into domestic constitutions? What are the advantages and disadvantages of specific constitutional language or methods of interpretation?

The two chapters in this section both address Latin American countries in which the courts are crafting a role for international law within the constitutional order. The first chapter, which is coauthored by Verónica Undurraga and Rebecca J. Cook, is entitled “Constitutional Incorporation of International and Comparative Human Rights Law: the Colombian Constitutional Court Decision C-355/2006.” This chapter examines the recent decision of the Constitutional Court of Colombia holding that a statute criminalizing abortion under all circumstances was a violation of the constitution. The chapter

¹⁴ See Alda Facio, Rodrigo Jimenez Sondova, & Martha Morgan, *Gender Equality and International Human Rights in Costa Rican Constitutional Jurisprudence in The Gender of Constitutional Jurisprudence*, *supra* note 3 at 102.

¹⁵ See *Constitution of the Republic of South Africa*, sec. 39 (1996).

¹⁶ For a discussion of this controversy, see Vicki C. Jackson’s concluding chapter in this book.

argues that the decision represents an important new development in the use of the continental legal concept of a “constitutional block” because it incorporates international human rights law into the block of values that must be used in the interpretation of the constitution. This approach invites the creative melding of domestic constitutional law with international human rights law, in a process that holds the potential for the transformation of both. The chapter discusses the promise of such an approach, but also highlights the risks, including the uncertainty and variability that might result for international human rights laws. In particular, the chapter explores the implications of this approach for the dignity of women, the possibilities for transnational feminist activism, and the recognition of reproductive rights in other Latin American countries.

The second chapter in this section is by Christiana Ochoa. This chapter, entitled “Guatemalan Transnational Feminists: How Their Search for Constitutional Equality Interplays with International Law,” uses recent developments in Guatemala to explore the impact of globalization on constitutions. The chapter argues that the growing significance of actors and sources of law both larger and smaller than the state poses a challenge to the centrality of the nation-state and its constitution as the source of rights. On a level larger than the state, the chapter points to the expansion in international law on human rights and the international institutions designed to interpret and apply that law. On a level smaller than the state, the chapter describes the activities of individual women and women’s organizations, often with strong connections across race, religion, and nation, in challenging and shaping the meaning of their constitutions through the use of international law, and institutions. These connections may cause women to develop a multilayered, “rooted cosmopolitan” sense of self in which their membership in certain transnational, gender-based groups is as important to their self-identity as is their nationality. The chapter examines the impact of these developments on issues of gender equality in the constitutional law of Guatemala, including two cases brought before the Inter-American Commission on Human Rights. The chapter concludes that the shift to transnational sources of rights and multilayered identities may have a significant impact on the constitutional meaning of equality in Guatemala, and perhaps in other countries as well.

These chapters highlight two themes that are relevant to many of the questions in this area of the law: practical, theoretical, and doctrinal. First, both chapters recognize the growing role of cross-national women’s movements as a powerful engine for change. Verónica Unduragga and Rebecca J. Cook trace the important role of women’s organizations in bringing a case challenging the Colombian abortion law and in framing the legal arguments about its unconstitutionality. And, as Christiana Ochoa points out, these movements have implications not only for many of the practical questions concerning this

area of the law, but also for the theoretical ones: the movements are helping to forge a new sense of identity that may have profound consequences for our ideals of citizenship and our understandings of the source of rights.

Second, both chapters emphasize the ways in which the state is becoming open to greater influence from a global community. The particular mechanisms of influence may vary from one country or region to another, and there is certainly still great resilience in the boundedness of the nation-state, but the boundaries are more permeable than once they were. Both chapters trace the influence of transnational actors and international norms on the decision of domestic constitutional issues. They highlight the growing porosity of national boundaries in terms of the actors and legal materials that shape constitutional interpretation. This fact also has important implications for the practical, theoretical, and legal questions raised above. In terms of practical issues, the influence of international and cross-national actors and sources of law provides new practical resources for women seeking to remake their nation's constitutional commitment to gender equality. In terms of the theoretical issues, the interpenetration of different sources and systems of law provides a basis for new models of citizenship and constitutional values, as the two chapters explain. And in terms of legal issues, the use of these new materials requires the development of new legal doctrines, like the reenvisioned "constitutional block," to serve as vehicles for this incorporation.

F. SECTION FIVE: WOMEN IN THE PROCESS OF CONSTITUTION MAKING

The last section of the book addresses the role of women in the process of constitutional drafting and revision. For any of the substantive issues relating to constitutional protection for gender equality to receive adequate attention, women must be present and active in the process of constitution making. There is growing attention to the need for women's participation in the process of conflict resolution, which often includes constitutional drafting. UNSCR. 1325 calls on all member states to "ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict."¹⁷

Moreover, women's participation is crucial to the democratic legitimacy of constitutional drafting. Whereas many older constitutions were written without

¹⁷ See UNSCR 1325, sec.1 (October 31, 2000) at PeaceWomen (Women's International League for Peace and Freedom) (<http://www.peacewomen.org/un/sc/1325.html>) (last visited 11/7/08).

the participation of women, it is unlikely that a modern constitutional process would be viewed as adequately participatory if it did not include women. In a country evenly divided between two different ethnic groups, a constitutional process that included no members of one group would surely fail to be seen as representative and democratic. Similarly, if the female half of the population is absent from the constitutional process, serious questions would be raised about whether their needs and perspectives were taken into account in the drafting.

But, there are significant and systematic barriers to women's participation in the political processes that lead up to and include constitutional drafting. These barriers include cultural expectations about women's abilities, interests, and behaviors; educational disadvantages that reduce women's chances for the training in law or politics that would facilitate their participation in constitution making; economic disadvantages created by women's responsibility for household survival and child care; and political habits and cultures that keep women from holding positions in mainstream political organizations that would lead naturally to their presence in constitutional deliberations. In addition, in a post-conflict situation, emphasis is often placed on participation by the leaders of combatant groups, and these positions are rarely held by women.

To make women's participation a reality, several different approaches must be combined to counteract the effect of these barriers. In the short run, mechanisms must be adopted to ensure the participation of women, even if women continue to suffer from the sorts of educational, economic, and other disadvantages described above. Such mechanisms include (1) incentives for the players in the process to include women within their own organizations in decision-making positions and (2) guaranteed representation for independent women's organizations in the process. International organizations often wield considerable power over the processes of conflict resolution and they also have great influence, even in cases of constitutional adoption or amendment within relatively stable states. Such influence can be brought to bear to create these incentives. In the long run, of course, the underlying structures of disadvantage must be addressed so that women will have greater access to decision-making positions in the future. The chapters in this section offer detailed descriptions of the operation of these barriers and women's responses to them in two different constitutional processes.

The first chapter is by Thin Thin Aung and Susan H. Williams and is entitled "Women in the Constitutional Drafting Process in Burma." The chapter describes the historic exclusion of women from constitutional processes in Burma and the current efforts by women to be a part of these processes among the democracy organizations in the Burmese community. The chapter offers a

critical examination of the gender-equality aspects of the constitution recently proposed by the ruling military junta in Burma. It then proceeds to outline the particular vision of the gender-equality goals for the democratic federal constitution developed by the WLB, as the umbrella group for the women's organizations in the democracy movement. The chapter explains the WLB's position on the need for a substantive model of equality and for electoral gender quotas. It describes the process the WLB developed, including self-education, policy development, and broader public education on constitutional gender issues. It canvasses the successes achieved, the challenges remaining, and the plan for the future.

The second chapter in this section is coauthored by Adrien Katherine Wing and Hisham A. Kassim. This chapter, entitled "Founding Mothers for a Palestinian Constitution?" grows out of Adrien Katherine Wing's experience as an advisor to the Palestinian constitutional process. The chapter explores the existing legal regime, including customary law, religious law, and electoral law. It describes the two constitutional documents that have been created and the very limited role of women within the constitutional processes that gave rise to them. It outlines the constitutional provisions of relevance to women, including both the equality guarantees and the provisions relating to the role of Islamic law, and explores their relevance to certain issues of great concern to women, such as domestic violence. The chapter concludes with reflections on the possible future paths of this constitutional process under a series of different scenarios.

These chapters suggest some guidelines that may be useful for future efforts to increase women's participation in constitution making. First, they indicate that there may often be a need for women to participate both as members of women's organizations and also as members of other groups (defined by political party, religion, ethnicity, or other divisions) that are parties to the process. As the experience of the Burmese democracy movement indicates, when women's groups are included, but few women participate as members of other parties to the process, then the concern for women's issues may be marginalized and seen as the desire of one interest group to be balanced against the others. As the experience of the Palestinian women suggests, on the other hand, if women participate primarily as members of other groups, then those groups may choose women members who can be controlled by the male leadership and who may be unable to act as strong advocates for women's interests. Thus, a combination of these two strategies may often hold the greatest hope for effective representation of women's interests and perspectives.

Second, they suggest that the international community has a crucial, but complicated, role to play in increasing the participation of women in constitution making. The pressure and influence of international actors is extremely

powerful and often necessary, but it is both insufficient and potentially counterproductive. It is insufficient because such pressure must be combined with support and encouragement of domestic women's groups or it will simply be seen as illegitimate coercion. It can be counterproductive if such pressure comes in forms or degrees that cause a backlash against the women within the country who have accepted or benefitted from such aid. These chapters highlight, but do not resolve, the difficult questions about how international influence can be tailored to the situation of each nation so as to maximize its potential impact, but minimize the risks of backlash.

G. CONCLUSION

The conclusion of the book is by Vicki C. Jackson and is based on her keynote address at the conference, "Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, and Interpretation." This chapter takes a step back from the issues concerning specific constitutional provisions or mechanisms addressed by the rest of the book and looks at some of the meta-issues of constitutionalism and their relation to gender. The chapter explores the issues of entrenchment, jurisdiction, and interpretation, which cut across specific constitutional provisions, and asks whether a concern for gender equality would lead to particular arguments or positions on these issues of constitutional theory. Although some of these issues have come up in the context of particular legal doctrine earlier in the book, in the conclusion they are examined from the perspective of the constitution as a whole.

Entrenchment is generally considered one of the hallmarks of a constitution: constitutions are harder to change than regular laws and often require a specific and rigorous amendment process. The chapter investigates the idea of entrenchment from a feminist perspective, asking whether this insulation from majoritarian politics is an advantage or a disadvantage in terms of promoting gender equality. The chapter notes that this issue is closely connected to the age and substantive content of the constitution, but offers some observations that are relevant across these distinctions, including raising concerns about amendment procedures and the possibility of legislative overrides of constitutional rights.

Constitutions also characteristically construct a variety of jurisdictional boundaries. They divide public from private decision making by marking out realms of individual autonomy; they determine the jurisdiction of different forms and levels of government; and they determine the role, if any, of supranational sources of law, such as international conventions. The chapter explores the implications of each of these choices for women and for gender equality by examining the uses of jurisdictional arguments in cases from India,

Canada, and the United States. The chapter offers a sophisticated assessment of the interaction of different levels of jurisdiction in a federal system and related principles of preemption or “redundancy” from the perspective of gender equality.

Finally, all constitutions require interpretation, and different theories or models of interpretation will have significant impact on the capacity of a constitution to promote gender equality. Moreover, the standard account of “good” interpretive theory in constitutional law is in tension with much feminist scholarship on method and epistemology. The chapter analyzes the challenges posed to interpretive theory by feminist scholarship and assesses the models of interpretation current in constitutional literature, including the purposive model, the textual/historical model, and the “common law” or “living tree” model. The last model is illustrated through a sensitive analysis of abortion jurisprudence in the United States and Germany. The chapter then explores the issue of reliance on foreign or international law within this interpretive model and argues for a particular “engagement” approach.

This concluding chapter beautifully illustrates the power and utility of a gender-equality perspective in comparative constitutional law. By taking a step back and surveying the constitution as a whole, the chapter raises issues that transcend particular provisions or legal doctrines and affect every aspect of constitutional law. The issues raised in all of the previous chapters are deeply shaped and affected by the understanding of entrenchment, jurisdiction, and interpretation that is adopted by a particular constitutional order. These understandings are part of the groundwork on which particular constitutional doctrines to address specific issues are constructed.

And, a gender-equality perspective offers important insights about this groundwork. Looking at these foundational understandings from the perspective of gender equality illuminates arguments and concerns that are otherwise very likely to go unnoticed, but have an enormous impact on the men and women who live under that constitutional order. To take just one example from the many in that chapter: from a gender-equality perspective, issues of structural inequality are highlighted. These issues have significant implications for the question of entrenchment (e.g., should systematically disadvantaged groups like women prefer the political process to the processes of constitutional interpretation or amendment?), issues of jurisdiction (e.g., do provisions dividing the jurisdiction of the state from the area of individual autonomy reflect the realities of women’s experience and address their concerns about private oppression?), and questions of interpretation (i.e., what is the interpretive value of historical intent and precedent from the perspective of those who had little role in creating them?).

Thus, the conclusion and all of the other chapters in this book demonstrate that constitutions at all levels – from the details of particular provisions to the theoretical foundations of the whole document – can benefit from an analysis that asks about gender equality. The dearth of such analysis in the literature until very recently was a serious lack in need of correction. The recent, growing attention to gender issues is a promising sign of change. The contributors hope that this book will help to instigate and inspire many more such efforts to include the experiences, concerns, and perspectives of half of the people who live under constitutions as a regular part of the study and design of those documents.

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1

Gender Quotas in Politics – A Constitutional Challenge

Drude Dahlerup and Lenita Freidenvall

INTRODUCTION

Constitutions and laws have recently been recognized by feminists as an important site through which decision making, influence, and power are organized and exercised. Given that laws contribute to the shaping of gender attitudes and values, laws could also be used as an instrument by which to create change. One example of constitution making in terms of gender is the adoption of electoral gender quotas. During the past ten years, an increasing number of states have enacted statutes to promote the number of women in public decision making. Today, forty-eight countries have introduced special measures in the form of legislative quotas stipulated in their constitution and/or electoral laws. In addition to these legal reforms, in more than fifty other countries at least one political party represented in parliament has adopted voluntary party quotas stipulated in its party statutes.¹ This recent and rapid diffusion of gender quotas has been labeled a “fast track” to equal representation.²

Legislative quotas have often been introduced at times when new constitutions were being written and structures of government were being rebuilt or as part of broader constitutional reforms. These situations have opened windows of opportunity for quota proponents to place questions of gender representation on the political agenda. The women’s movement’s long advocacy of and lobbying activities for more women in elected positions have also found more resonance, because international reputation is becoming increasingly important for political elites. Having many female parliamentarians is seen as an indicator of progress, evident in the many international indices of gender

¹ See *Women, Quotas and Politics*. (Drude Dahlerup, ed. 2006); www.quotaproject.org.

² Drude Dahlerup & Lenita Freidenvall, *Quotas as a ‘Fast Track’ to Equal Representation of Women: Why Scandinavia is No Longer the Model*, *Int’l Feminist J. of Politics* 26–48 (2005).

equality. Moreover, governments that are signatories to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) must report regularly on their progress on gender equality. In particular, Articles 3, 4, and 7 of CEDAW facilitate legal reforms regarding women's political representation by approving affirmative action. In addition, the 1995 UN Beijing Platform for Action stresses "gender balance" in nominations and in all decision-making processes. Also, political parties have an incentive to promote more gender-balanced representation in their bid to voters for electoral support. Furthermore, in post-conflict states, donors, transnational feminist organizations, and other external actors have been active in promoting gender equality and gender quotas.

As Table 1 shows, most of the countries with more than 30 percent women in their national parliaments have adopted gender quotas, in the form of either legislative quotas or party quotas. But, countries may have a high level of political representation of women without having adopted quotas. As the table also illustrates, most countries exceeding the 30 percent threshold apply a proportional representation system (PR). On average, women's representation is highest in countries with a PR system, 19.6 percent compared to 10.5 percent for majority/plurality systems, with mixed systems in the middle with 13.6 percent.³

This chapter describes the different types of quotas and their relation to constitutional law, electoral systems, and enforcement systems. It will provide an outline of the taxonomy of quotas. Based on case studies, the chapter will also discuss particular aspects of quotas that make them more or less effective in terms of electoral systems, placement on candidate lists, and sanctions for non-compliance. In particular, the chapter compares legislative quotas with voluntary party quotas. Legislative quotas with strong sanctions for non-compliance are believed to be the most effective measure, but are they always so?

I. TAXONOMY OF QUOTAS

Designers of new constitutions or electoral systems sometimes mistakenly assume that quotas to increase the representation of women or other under-represented groups are unambiguous phenomena. However, more recent research has been able to identify many different types of electoral quotas.⁴ Knowledge of these variations is crucial for constitutional designers, because a

³ Pippa Norris, *The Impact of Electoral Reform on Women's Representation*, 41 *Acta Politica* 197–213 (2006).

⁴ Pippa Norris, *Electoral Engineering: Voting Rules and Political Behavior* (2004); *Women, Quotas and Politics*, *supra* note 1; Dahlerup & Freidenvall, *supra* note 2.

TABLE 1. *The top of the World Rank order of women in parliament (more than 30%)*

Country	Women in national parliaments (%)	Quota type	Electoral system
1. Rwanda	56.3 (2008)	Legal quotas	PR
2. Sweden	47.3 (2006)	Party quotas	PR
3. Cuba	43.2 (2008)	Non-free elections	Major
4. Finland	42.0 (2007)	–	PR
5. Argentina	40.0 (2007)	Legal quotas	PR
6. Costa Rica	38.6 (2006)	Legal quotas	PR
7. Denmark	38.0 (2007)	–	PR
8. Norway	37.9 (2005)	Party quotas	PR
9. Angola	37.3 (2008)	Legal quotas	PR
10. The Netherlands	36.7 (2006)	Party quotas	PR
11. Spain	36.3 (2007)	Legal quotas	PR
12. Mozambique	34.8 (2004)	Party quotas	PR
13. Belgium	34.7 (2007)	Legal quotas	PR
14. New Zealand	33.6 (2008)	–	MMP
15. South Africa	32.8 (2004)	Party quotas	PR
16. Austria	32.2 (2006)	Party quotas	PR
17. Belarus	31.8 (2008)	Non-free elections	Major
18. Germany	31.8 (2005)	Party quotas	MMP
19. Iceland	31.7 (2007)	Party quotas	PR
20. Macedonia	31.7 (2008)	Legal quotas	PR
21. Burundi	30.5 (2005)	Legal quotas	PR
22. Tanzania	30.4 (2005)	Legal quotas	Major
23. Guyana	30.0 (2006)	Legal quotas	PR

Key to electoral system: *PR*: proportional representation system with party lists including several candidates; *MMP*: mixed member proportional, a combination of PR and single-member constituencies; *Major*: plurality/majority system, usually with single-member constituencies, e.g. each party nominates only one candidate.

Key to quota types: *Legal or legislated quotas* are written into the constitutions and/or the electoral law. *Party quotas* are voluntary measures adopted by individual political parties.

Source: Interparliamentary Union (2009): www.ipu.org; International IDEA and Stockholm University (2009): www.quotaproject.org; official statistics: election day figures.

quota system that is vague or that does not match the electoral system in place may end up having no effect. Quota systems with no effect might, of course, be intentional, but sincere quota advocates should be aware of the choices available.

A taxonomy of quota systems for public elections has to be based on several dimensions. The following distinctions of three types of quotas are quite common: reserved seats, legislative (or statutory) quotas, and voluntary party quotas.⁵ Although this distinction covers the three most widespread types currently in use, it fails to indicate the broader range of quota systems and subsystems based on the following two dimensions: first, their legal status, and second, the stage in the electoral process they address.

A. *The First Dimension*

Legal quotas are quotas written into the constitution or otherwise mandated by law, usually in the electoral law or in laws on political parties in countries where parties are regulated by law. In contrast, voluntary party quotas are formal quota regulations that individual political parties have adopted for their own practice. Whereas legal quotas are binding for all political parties in a country and may include legal sanctions for non-compliance, voluntary party quotas are only binding for the party in question and its local branches in accordance with its own internal regulations.

B. *The Second Dimension*

On the first level of the electoral process, we find aspirant quotas, which regulate the pool of potential candidates from which the nominating body in a political party selects the electoral list. Aspirant quotas ensure that the nominating body can choose between both female and male potential candidates. This is especially important in a first-past-the-post system, as in the United Kingdom and the United States, where each party nominates only one candidate in each electoral district. On the second level, we find candidate quotas, for instance, a rule requiring that at least 30 or 40 percent of each gender be represented on the candidate list that the political parties present to the voters. On the third level, we find quotas as reserved seats: regulations concerning the gender

⁵ See Norris, *supra* note 4; Pippa Norris, *Opening the Door: Women Leaders and Constitution Building in Iraq and Afghanistan in Women and Leadership: The State of the Play and Strategies for Change 197–225* (Barbara Kellerman & Deborah L. Rhode, eds. 2007); Krook, Mona Lena, *Politicizing Representation: Campaigns for Candidate Gender Quotas Worldwide*. (Ph.D diss., Columbia University 2005).

TABLE 2. *Regional variations in preferred quota type^a*

Mandate by / level	Aspirants quotas	Candidate quotas	Reserved Seat quotas
Legal quotas (Constitution or law)	1. Primaries (Panama, Paraguay)	3. Latin America, The Balkans	5. Arab region, South Asia, Africa ^b
Voluntary party quotas	2. Women's short lists (UK)	4. Europe, Africa	6. Morocco: Charter signed by the political parties

^a According to the predominant type of quota. A region placed in two categories indicates that two quota types are used equally or almost equally. No clear pattern in the Pacific Ocean Region.

^b Reserved seats in one-party states are categorized as legislated quotas.

Source: DRUDE DAHLERUP WOMEN, QUOTAS and POLITICS 294 (2006) updated.

composition of those actually elected or appointed. In contrast to aspirant quotas and candidate quotas, reserved seat quotas entail the election of a fixed number of women, often as a minimum requirement. A new trend is that reserved seats are increasingly filled, not by appointment, but by election, where women compete against women in women-only elections, like in Rwanda, Morocco, and Uganda.⁶

Electoral gender quotas may thus be defined as legal or voluntary regulations of public elections that require a certain minimum number or percentage of women (quotas for women) or of both sexes (gender-neutral quotas) on one of the three levels: the level of aspirants, candidates, or electees.

C. Combining the Two Dimensions: Six Quota Types

Table 2 shows the regional variations in preferred quota type among the six types, derived from the combination of the two dimensions.

No. 1. *Legal aspirant quotas*, as in Paraguayan law that requires 20 percent women in the party primaries.

No. 2. *Voluntary aspirant quotas*, as in the British Labour Party's contested all-women short lists. Aspirant quotas fit single-member constituency systems, because it is very difficult to combine candidate quotas with a single-member constituency electoral system. How can a quota of 30 or 40 percent women be required when each party only has one candidate in each electoral district?

⁶ Drude Dahlerup, *Electoral Gender Quotas: Between Equality of Opportunity and Equality of Results*, 43 *Representation* 73–92 (July 2007).

- No. 3. *Legal candidate quotas*, popular in Latin America, require by law a certain gender composition of the candidates nominated for public election by the political parties.
- No. 4. *Voluntary candidate quotas*, which is the most widespread quota type in the Western world and in southern Africa. Prominent examples are the Swedish Social Democratic Party's "Every other one for the ladies," a 50–50 quota, or the 30 percent quota of the ANC in South Africa.
- No. 5. *Legal reserved seat quotas*, which is the predominant quota type in the Arab region, South Asia, and central Africa, with Rwanda and Uganda and, at the local level, India as outstanding examples.
- No. 6. *Voluntary reserved seat quotas* are in principle unfeasible. Reserved seats are normally legally mandated, because they regulate the very election. However, the Moroccan case does constitute a sixth type, because the political parties in Morocco, after the rejection of the proposed quota law by the Supreme Court, decided to reserve thirty seats on a special national list entirely for women candidates – an example of an election exclusively among women candidates.

As seen in Table 2, various regions prefer different gender quota systems. There are at least two reasons for this. First, different types of gender quotas are chosen to match different electoral systems, but also to correspond to the prevailing national discourse about representation and democracy. Second, the contagion effect from one party to another within a country – usually starting from leftist parties⁷ – is also at work within regions.⁸ In Latin America, the Argentine law from 1991 with legal candidate quotas thus spread to other Latin American countries.⁹

D. Gender Neutral?

Gender quotas may be designed to require a minimum level of representation for women or may state a maximum-minimum level of representation for both sexes, for instance, no more than 60 percent and no less than 40 percent

⁷ Richard Matland & Donley T. Studlar, *The Contagion of Women Candidates in Single Member and Multi-Member Districts*, 58 *J. of Politics* 707–733 (1996).

⁸ Aili Tripp, et al., *On the fast track to women's political representation in Women, Quotas and Politics*, *supra* note 1 at 112–137.

⁹ Clara Araújo & Ana Isabel Garcíá, *The experience and the impact of quotas in Latin America in Women, Quotas and Politics*, *supra* note 1 at 83–111; Leslie Schwindt-Bayer, *Making Quotas Work: A Statistical Test of the Effectiveness of Gender Quota Laws*. Paper to the Annual Meeting of the American Political Science Association (Chicago, August 29–September 30, 2007).

TABLE 3 *Guaranteed seats and competition under different quota regimes*

Quota types	Target group representation guaranteed	Competition between individual candidates
Aspirant quotas	No	Yes
Candidate quotas	No	Yes
Reserved seat (RS) quotas	Yes	Varies
<i>RS, with election</i>	Yes	<i>Only between women</i>
<i>RS, appointment</i>	Yes	No

Source: Dahlerup, *supra* note 6 at 83.

for each sex. In the case of the latter, gender-neutral regulation, the quota provision sets a maximum for both sexes, which quotas for women do not. No doubt, a gender-neutral formula may be a method to tone down conflicts over quotas. In countries with many politically active women, such as the Scandinavian countries, gender-neutral quotas have, in some instances, led to the election of men, who have been moved up on the lists to fulfill the quota provision.¹⁰ But, this effect is quite unusual, because the dominant problem is the underrepresentation of women.

E. Do Quotas Suspend Competition?

The liberal opponents of gender quotas usually argue that quotas are unfair to men, because they entail that merit be disregarded and women given seats without competition. Quotas, thus, function as a form of “reverse discrimination,” it has been argued.¹¹ To scrutinize the strength of this argument, Dahlerup has asked two crucial questions:

- 1) Do the quota rules in place guarantee the target group, in this case women, a certain number or percentage of the seats in the political assembly?
- 2) Do individuals of the target quota group receive their positions in political assemblies without any competition?¹²

Table 3 shows the answer according to quota type. With the exception of reserved seat systems, where the number of the target group, here women, to be

¹⁰ Lenita Freidenvall et al., *The Nordic Countries: an Incremental Model in Women, Quotas and Politics*, *supra* note 1 at 55–82.

¹¹ Carol Bacchi, *Arguing for and against quotas: Theoretical issues*, in *Women, Quotas and Politics*, *supra* note 1 at 32–51.

¹² Dahlerup, *supra* note 6 at 83.

elected is fixed in advance, gender quotas in general do not guarantee women any specific level of representation (question 1). Aspirant quotas and candidate quotas only ensure that there are women among the pool of aspirants or among the candidates on the party lists for election. Whether any women are actually elected depends on the voters and on the position of women candidates on the ordered candidate lists of the party.

Table 3 further illustrates that competition for positions is not suspended for aspirant quotas and candidate quotas (question 2). Individuals have to compete for their positions. Even reserved seats usually involve competing in elections, but, in this case, the competition is between only women, because men are formally excluded from these seats. Only in case of appointment, as in the British House of Lords, is competition suspended, but this is usually so for men as well. In general, through quota provisions, women receive a better chance to compete for election. One may in fact argue that quotas increase the competition over elected positions, because quotas change what is most common today – that men compete only with men.

Consequently, one may argue – contrary to what is commonly believed – that gender quotas in politics come closer to providing real equality of opportunity than equality of result.¹³ It could, thus, be argued that by contributing to the transformation of social patterns of discrimination in this way, quotas are associated with the goal of formal, as well as substantive, equality.

F. From Candidate to Electee

It was concluded earlier that gender quotas themselves do not guarantee an elected position, apart from reserved seat systems. The next question is, then, under which additional circumstances gender quotas may produce what most quota advocates seek: an increase in women's political representation or even "gender balance" in political assemblies.

Among the most important factors are the electoral system, including district and party magnitudes, open and closed lists, and the strength of various political parties. Although it is generally agreed that large electoral districts, or more precisely large party magnitudes in each district (PR systems), are favorable to the election of women and make the quota system work better, researchers disagree on the importance of closed- versus open-list elections for women's chances to be elected.¹⁴ Under open lists, the voters can by personal voting change the order of the candidates, whereas in closed-list systems

¹³ *Id.*

¹⁴ See Richard E. Matland, *Electoral Quotas – Frequency and effectiveness in Women, Quotas and Politics*, *supra* note 1 at 275–292; Schwindt-Bayer, *supra* note 9.

the nominating party's rank ordering of the candidates is decisive for which candidates will be elected. In evaluating the two systems, it all comes down to whether the parties or the voters are expected to be the most favorable to women candidates. No general conclusion is, however, possible, because the result of preferential voting seems to vary over time, between countries, and even between parties within the same country.

Under all electoral systems, it is important that the quota provision includes rules about rank ordering of candidates according to sex. In fact, a quota system that does not include such rank order regulations may be completely symbolic. A quota of 30 percent women candidates who are placed at the bottom of a candidate list in PR systems, closed or open, means nothing but disappointment. Consequently, many quota systems today include rank order provisions and sanctions for non-compliance. The most widespread rule is that there must be at least one woman (or one candidate of each sex) among the top three of the list of candidates, among the next three, and so forth. Here are two additional examples. The election law of 2005 for the Palestinian Occupied Territories demands at least one woman among the first three candidates, but only one woman among the next four, and one woman among every five for the rest of the list for the PR part of the election. In Belgium, the quota regulations have been gradually strengthened: the law passed in 2002 states that the lists must include an equal share of women and men. In case of non-compliance, these places on the lists have to be left open. Furthermore, in the first election to which the law applies, the top three positions on the lists cannot all be held by members of the same sex. In the subsequent election, the top two on the list should not be of the same sex.¹⁵

But, even the most radical quota system, the zipper system, which requires 50 percent women and 50 percent men to be placed alternately on party lists, might in the case of small parties lead to no women being elected, whether the quotas are legislated or voluntary, if men top all lists and the party only gets one elected representative in each electoral district.

All in all, there are good reasons to be careful when designing a quota system. Examples of both the best and the worst cases can be very illustrative. But, first the frequency of gender quotas is described.

II. FREQUENCY OF GENDER QUOTAS

How frequent is the use of gender quotas in different political systems? [Table 4](#) provides an overview of all countries in the world that have introduced electoral

¹⁵ See www.quotaproject.org.

TABLE 4. Countries with legal quota regulations for national parliaments¹

National parliaments	First year of introduction	Present quota system	Women in parliament (last election)
Americas			
Argentina	1991	C: 30%	40.0 (2007)
Bolivia	1997	C: 30%	16.9 (2005)
Brazil	1997	C: 30%	8.8 (2006)
Costa Rica	1996	C: 40%	38.6 (2006)
Dominican Republic	1997	C: 33%	19.7 (2006)
Ecuador	1997	C: 35%	25.0 (2006)
Honduras	2000	C: 30%	23.4 (2005)
Mexico	2002	C: 40%	22.6 (2006)
Panama	1997	A, C: 30%	16.7 (2004)
Paraguay	1996	A, C: 20%	12.5 (2008)
Peru	1996	C: 30%	29.2 (2006)
Europe			
Albania	2008	C: 30%	7.2 (2005)
Armenia	1999	C: 15%	9.2 (2007)
Belgium	1994	C: 50%	34.7 (2007)
Bosnia and Herzegovina	1998	C: 30%	14.3 (2006)
France	1999	C: 50%	18.5 (2007)
Macedonia	2002	C: 30%	31.7 (2008)
Portugal	2006	C: 33%	19.5 (2005)
Serbia	2003	C: 30%	20.4 (2007)
Slovenia	2004	C: 25, later 35%	13.3 (2008)
Spain	2007	C: 40%	36.3 (2007)
Africa and the Middle East			
Angola	2005	C: 30%	37.3 (2008)
Burundi	2004	R: 30%	30.5 (2005)
Djibouti	2002	R: 10%	13.8 (2008)
Eritrea	N/A	R: 30%	22.0 (1994)
Iraq	2004	C: 30%	25.5 (2005)
Jordan	2003	R: 6/110	6.4 (2007)
Kenya	1997	R: 6/224	7.1 (2002)
Liberia	2005	C: 30%	12.5 (2005)
Mauritania	2006	C: 20%	17.9 (2006)
Morocco	2002	R: 30/325	10.5 (2007)
Niger	2002	R: 10%	12.4 (2004)
Palestinian o.t.	2005	C: 20%	12.9 (2006)
Rwanda	2003	R: 24/80	56.3 (2008)
Somalia	2004	R: 12%	7.8 (2004)
Sudan	1978	R: 60/450	14.7 (2005)
Tanzania	2000	R: 75/319	30.4 (2005)
Uganda	1995	R: 85/332	29.8 (2006)

TABLE 4 (cont.)

National parliaments	First year of introduction	Present quota system	Women in parliament (last election)
Asia			
Afghanistan	2004	R: 68/249	27.3 (2005)
Bangladesh	1972	R: 45/345	15.1 (2001/5)
China	2007	R: 22%	21.3 (2008)
Indonesia	2003	C: 30%	11.3 (2004)
Korea, Dem. People's Rep. of	N/A	R: 20%	20.1 (2003)
Korea, Rep. of	2004	C: 30/50%	13.7 (2008)
Pakistan	1954	R: 60/342	22.5 (2008)
Philippines	1995	R: 2% for marg. groups	20.4 (2007)
Taiwan	1997	R: 10–25%	22.2 (2001)
Uzbekistan	2004	C: 30%	17.5 (2005)

A: Aspirant gender quotas; C: Candidate gender quotas; R: Reserved seat quotas (in some countries stipulated in percentage of those elected, in others in absolute numbers).

¹ Legal gender quotas for provincial and/or local elections are found in a number of countries, among others in Bolivia, Brazil, Peru, Greece, Slovenia, France, Namibia, Tanzania, Bangladesh, India, Pakistan, and Taiwan, see www.quotaproject.org.

Source: www.quotaproject.org, and *Women, Quotas and Politics*, *supra* note 1; Election day figures.

gender quotas by constitution or law. The table shows that about forty-eight countries in the world today have introduced legal gender quotas in some form. It is estimated that in more than fifty other countries, one or more parties represented in parliament have introduced a voluntary gender quota system (not included in the table). Table 4 shows that among countries with legal candidate quotas, 30 percent is the most frequent quota. Moreover, the table illustrates that among those countries that have introduced gender quotas by law or constitution, twenty-nine have legal candidate quotas (No. 3 in the taxonomy), whereas nineteen countries apply reserved seats (No. 5 in the taxonomy). Moreover, the table clearly shows the many discrepancies between the goal expressed in the quota percentage and the actual representation of women in parliament.

Today, gender quotas in some form, be they legal or voluntary, are being introduced in all kinds of political systems. In 2006, fifty-five percent of democratic countries, 47 percent of semi-democratic countries, and 38 percent of non-democratic countries have introduced gender quotas for public elections, most of them recently.¹⁶

¹⁶ See Dahlerup, *supra* note 6 at 80–81. The levels of democracy used in this calculation are based on Freedom House's (2006) ranking system, which included both political rights and civil liberties.

Furthermore, voluntary party quotas are the most frequent gender quota system in democratic countries, whereas legal gender quotas dominate among semi-democratic countries. Variations in quota frequency are also considerable in relation to electoral systems. Partly because of the difficulties in introducing a quota system in majority/plurality electoral systems, only one-third of countries with such systems have some sort of gender quotas, in contrast to four-fifths of countries with PR systems.¹⁷

In the following sections, we discuss first legislated candidate quotas, then voluntary candidate quotas, and finally reserved seat quotas. In the concluding section, we compare the effects of these different quota systems.

III. LEGISLATED CANDIDATE QUOTAS

The adoption of legal gender quotas has experienced both successful implementation and serious setbacks. In this section, legislated candidates quotas are discussed (No. 3 in the taxonomy). We discuss why some countries are more successful than others in changing the under-representation of women in politics. In particular, we discuss the specific formulations of the legal quotas, the electoral systems in use, and the outcomes of the quota provisions.

The Argentine *Ley de Cupos* and the French *Loi sur la parité* represent two cases with different outcomes. In 1990, prior to the introduction of legal quotas, the national parliaments in these two countries consisted of approximately 6 percent women. By 2005, after the introduction of quotas, the percentage of female parliamentarians increased to 30.7 percent in Argentina and to 12.2 percent in France.¹⁸

Latin America is the leading continent with regard to the introduction of legal quotas. Since Argentina adopted legal quotas in 1991, eleven of nineteen countries in the region have adopted legal quotas (see Table 4). In Argentina, discussions on gender quotas took place at a time when the country was rebuilding its democratic institutions after years of military dictatorship.¹⁹ Although party quotas had been applied by the Peronist Party in the 1970s, debates on quotas gained new life in the late 1980s when a cross-party network of women was established and began lobbying for a national quota law. In 1991, both houses of the Argentine parliament approved the *Ley de Cupos* (Law 24.102), initiated by female legislators. According to *Ley de Cupos*, which amends Article 60 of the Electoral Code, “the lists that are presented must have women in a minimum of 30 percent of the offices to be elected and in proportions

¹⁷ *Id.*

¹⁸ See www.ipu.org.

¹⁹ See Aratújo & Garcíá, *supra* note 9 at 91.

which make their election possible.” Furthermore, “lists that do not meet these requirements will not be approved.” This law laid the groundwork for acceptance of corrective or compensatory measures in the legislative and judicial realms.²⁰

After the adoption of this quota provision, discussion began on the meaning of the phrase “in proportions which make their election possible.” Did it refer to the entire list or merely to the seats the parties were expected to win? On International Women’s Day in 1993, President Menem issued Executive Decree 379/93, according to which the 30 percent minimum should be interpreted as a “minimum quantity” that should apply to the entire list, in addition to the number of seats a political party is expected to win. A placement mandate was also included. According to Article 4 of the same decree, the list must consistently include “one (1) woman for every two (2) men until the percentage required by Law 24.012 is met across all the seats up for election.” If political parties place a female candidate in a lower position than required by law, they must replace the present candidate within 48 hours of being notified. An annex to the decree specifies the number of women to be included in relation to how many party seats are available for reelection.

Although the law clearly outlined the application of the quota, many party lists for the election in 1993 did not conform to the law. In several lawsuits on cases of non-compliance, disputes revolved around the constitutionality of quotas, especially whether quotas violated the principle of equality before the law. This dispute was settled in 1994, by a larger constitutional reform that incorporated CEDAW as well as the legitimacy of affirmative action in relation to the quota law. Thus, Article 37 of the Constitution of the Argentine Nation (1994) states that “the real equality of opportunity between men and women regarding access to elective and political party positions will be guaranteed by positive actions in the regulations of the political parties and in the electoral code.” In the first election held under the new quota law in 1995, 25.3 percent female parliamentarians were elected (www.ipu.org).

Despite these changes, disputes continued. A series of lawsuits in the 1990s eventually resulted in a presidential decree in 2000 requiring judges to adjust lists in cases in which political parties failed to do so (Decree 1.246/2000). The quota law was also applied to Senate elections, beginning with the first direct election to the Senate in 2001. In the 2007 election to the Chamber of Deputies, the proportion of female parliamentarians increased to 40 percent (see Table 1.1).

²⁰ See *id.*; Mala Htun & M.T. Jones, *Engendering the Right to Participate in Decision-Making: Electoral Quotas and Women’s Leadership in Latin America in Gender and the Politics of Rights and Democracy in Latin America* 32–56 (N. Craske & M. Molyneux, eds. 2002).

Another example of successful implementation of legal candidate quotas is Costa Rica. The Electoral Code of 1996 (Código Electoral, Article 58 (n)) and its subsequent amendments require political parties to ensure that 40 percent of their candidates for all levels of popular elections are women and that women hold 40 percent of other party positions. In contrast to Argentina, quotas were not adopted out of the need to legitimize an emerging democracy. Rather, in Costa Rica quotas were introduced to further strengthen a comparatively long-standing democratic tradition. As in many Latin American countries, the major arguments in favor of quotas, beside common references to justice and symbolism, revolved around utilitarian arguments, especially the argument that more women in politics would improve the quality of democracy, because women were perceived as more honest and less corrupt than men.²¹

As in Argentina, the quota law in Costa Rica was not explicit at first as to whether quotas were to be applied to eligible positions. This led the National Electoral Tribunal to clarify and strengthen the constitutional and statutory bases for the quota law. In Resolution No. 1863–99, issued in 1999, the Tribunal established that the stipulated 40 percent of female candidates must be listed in “electable positions.” In the subsequent Resolution No 2837, this requirement was reiterated. The Tribunal also emphasized that the 40 percent quota was a minimum requirement that could be exceeded and that electable positions were to be calculated according to the average results of the previous elections.²² In 2002, in the first election held under the new quota law and after the two resolutions, the proportion of female parliamentarians increased from 19.3 (1998) to 35.1 percent.²³ After the 2006 election, the Costa Rican parliament included 38.6 percent female Members of Parliament (see Tables 1.1 and 1.2).

A less successful example in terms of legal candidate quotas is France. Party quotas were adopted by the Socialist Party in 1974, and legal quotas were particularly high on the political agenda in 1982, when Parliament passed a provision on quotas for town council elections whereby “candidates’ lists shall not comprise more than 75 percent of people of the same sex.” This quota law was invalidated by the Constitutional Council, which ruled that gender quotas violated the principle of universalism and equality before the law laid down in the *Declaration of the Rights of Man and of the Citizen of 1789*, by dividing

²¹ See Aratijo & Garcíá, *supra* note 9 at 92.

²² Aldo Facio, Rodrigo Jiménez Sandoval & Martha I. Morgan, *Gender Equality and International Human Rights in Costa Rica* 99–121 in *The Gender of Constitutional Jurisprudence* (Beverly Baines & Ruth Rubio-Marín, eds. 2005).

²³ See www.ipu.org.

voters and candidates into two categories. Representatives were supposed to represent the whole nation rather than groups of citizens.²⁴

It was not until the 1990s that discussions on quotas surfaced again. Activists tried to transcend the opposition between *universalisme* and *differentialisme* by mobilizing around the concept of “parity” and, thus, create consensus across the political spectrum.²⁵ Parity did not contravene the principle of universalism, it was argued, because sex represented a universal difference among human beings, cutting across all other groups. Instead, the duality of humankind was recognized – the two sexes of the abstract universal citizen.

A provision was added to Article 3 of the new 1999 Constitution whereby “statutes shall promote the equal access of women and men to elective offices and positions.” In addition, a provision was added to Article 4 of the Constitution whereby “Political parties shall contribute to the implementation of the principle [of parity] as provided by the statute” (Constitutional Law no. 99–569). At the same time as a constitutional basis for further legislation was laid, the amendment did not oblige the legislature to guarantee parity. Moreover, it did not deal with the practical issues of the reform, such as how to implement parity in elections that do not use a list system.

In the June 2000 6, Act (Law no. 2000–403), these practical issues were clarified. It was specified that the parity law applied to all political elections, with four exceptions – the presidential election, elections to departmental councils, elections to half of the seats in the Senate (seats elected by the senate member district system) and elections to town councils in small towns (fewer than 3,500 inhabitants). The statute, thus, applied to elections to larger town councils, regional councils, the Corsican Assembly, the half of the Senate elected via the proportional representation system, and the European Parliament. For all these elections, each list must include 50 percent of either sex, plus or minus one person. For regional elections as well as elections to the Senate and the European Parliament, parties must alternate between women and men on all candidate lists. Any list that does not meet these requirements is to be rejected. For regional elections held on the basis of PR in two rounds, parties are obliged to achieve parity for each group of six candidates.

For elections to the National Assembly, which is elected on a two-round majority basis with single candidates, parties must present 50 percent female

²⁴ Eleonore Lépinard, *Identity without Politics: How Cultural Repertoires Shaped the Implementation of the Sex-Parity Laws in French Local Politics*, Paper to the Annual Meeting of the American Political Science Association (Chicago, August 29-September 30, 2006).

²⁵ See *id.*; Mariette Sineau, *Parité in Politics: From a Radical idea to Consensual Reform in Isabelle de Courtivron, et al., Beyond French Feminisms: Debates on Women, Politics and Culture in France, 1981–2002* at 11–126 (2002).

and 50 percent male candidates across all electoral districts, allowing for 2 percent gaps in either direction. For deviations larger than 2 percent, state funding equal to half the difference in percentage of female and male candidates is withheld from the party.

In the first election held under the new parity law in June 2002, 507 men and 77 women were elected to the National Assembly. The proportion of female parliamentarians increased from 10.9 to 12.2 percent, far from the stipulated goal, and in the subsequent 2007 election the proportion increased only to 18.5 percent.²⁶ Parties that failed to comply with the law, for instance, by placing women candidates in constituencies that were considered difficult to win or even likely to be lost, suffered financial sanctions. The cost for non-compliance was smaller for major parties, which were able to opt out of some state funding.

French local elections (based on PR) held under the new parity law in 2001 resulted in an increase from 25.7 to 47.5 percent female councillors. Despite the predictions of many quota critics, a majority of the local nomination committee leaders reported to a poll conducted by the Observatory for Parity that it was easy to implement the new quota law in composing their lists.²⁷

These three cases – Argentina, Costa Rica, and France – thus show that the implementation of legal quotas is dependent on the actual formulation of the quota provisions and the electoral system as well as the sanctions for non-compliance. The French example demonstrates the difficulties in introducing quota provisions in majority/plurality systems and that PR systems, to a greater extent, facilitate successful quota implementation. One key is the number of available seats for which candidates are competing. The French example also highlights the importance of good-faith compliance by parties. The Argentine and Costa Rican examples point to the importance of rank ordering rules. All of the cases underscore the need for strong sanctions, either in the form of robust financial sanctions or the right of Electoral Tribunals to reject or reorder lists. And, in all of these cases, later election results confirm the importance of these differences.

IV. VOLUNTARY CANDIDATE QUOTAS IN POLITICAL PARTIES

Voluntary gender quotas introduced by individual political parties for their own candidate lists at election (No. 4 in the taxonomy) is the preferred gender

²⁶ See Lépinard, *supra* note 24; Sineau, *supra* note 25; www.ipu.org.

²⁷ See Sineau, *supra* note 25.

quota type in Europe, if quotas are applied at all. The widespread resistance in Western Europe to regulating women's access to political institutions by law is probably a consequence of the long history and strength of the political parties, which do not want any legal interference in their historical prerogatives when it comes to nominations for elected office. Contrary to what many believe, even the Scandinavian countries, with their historically very high level of women's representation, have never passed quota laws for elections.²⁸ In Eastern Europe, all types of quotas are unpopular because of a general, although not totally accurate, perception that gender quotas were widespread under communism – they are seen as “forced emancipation” Soviet style.²⁹ The negative attitude toward gender quotas in Eastern Europe resembles that of the United States, Canada, and New Zealand, where quotas are considered violations of liberal democratic principles.³⁰

Voluntary party quotas for candidate lists have usually first been introduced by leftists and green parties. International Socialist Women, an organization of Social Democratic Women, has also very actively and successfully campaigned for gender quotas in both Western and Eastern Europe. Later, centrist parties and maybe even rightist parties may have followed suit. However, in many countries, rightist parties reject quotas as “unliberal” or “undemocratic” and prefer either to rebuff the question as irrelevant or to start recruiting women candidates to prove that gender quotas are unnecessary.

Voluntary candidate quotas tend to be most successful in systems with large constituencies, where each political party tends to have many electees.³¹ The required quota percentage varies – but, as in the case of legal candidate quotas, 30 percent is the most widespread – in line with the contested argument of the importance of a “critical mass.”³² But 40 and 50 percent quotas are increasingly popular. The percentage in itself might, however, not be the most important factor. It is the regulation of the *rank order* of men and women on the lists that is decisive. The following example shows that voluntary candidate quotas can be just as effective as legal candidate quotas.

²⁸ Lenita Freidenvall, et al., *supra* note 10 at 55–82.

²⁹ *Women, Quotas, and Politics*, *supra* note 1 at 297.

³⁰ See *Has Liberalism Failed Women? Assuring Equal Representation in Europe and the United States*, (Jytte Klausen & Charles S. Maier eds. 2001); Mona Lena Krook, et al., *Western Europe, North America, Australia and New Zealand: gender quotas in the context of citizenship models in Women, Quotas and Politics*, *supra* note 1 at 194–221.

³¹ See Matland, *supra* note 14 at 275–292.

³² Drude Dahlerup, *The Story of the Theory of Critical Mass*, 2 *Politics and Gender* 511–522 (2006).

A. Swedish Political Parties

Quotas for women were not introduced in Sweden and Norway until the 1980s and 1990s, when women already had attained a representation of 20 to 30 percent in parliament and local councils – so-called “high echelon quotas.”³³ Today, Sweden is number two after Rwanda on the world rank order with 47 percent women in parliament (see [Table 1.1](#)). After a long historical development with increasing demands by women’s organizations within and outside the parties, most lists for elections presented by political parties today are gender balanced, even at the top of the lists. However, the specific rules vary slightly.

At the 1993 Social Democratic Party Congress, it was decided that party lists for municipal, county, and national elections “are to be zipped,” meaning that all places on the party lists should be based on alternation between women and men.³⁴ The rules of the Social Democratic Party state that “party lists are to be comprised of an equal proportion of women and men” (Statutes 1995:39). In the first election with quotas, the proportion of women in the Social Democratic parliamentary group increased from 41 to 48 percent. After the 2006 election, the Social Democratic parliamentary group was comprised of 50 percent women.

In the Left Socialist Party and in the Green Party, the two parties first to introduce gender quotas in Sweden, the nomination committees – always gender balanced themselves – usually propose balanced lists. However, the results of the voting procedure within the parties might be slightly unbalanced lists, in which case candidates are moved up or down the lists by the nomination committee to end up with lists for the election on which women and men alternate, at least in the top positions. Today, both male and female candidates may experience such changes, which by some may be sensed as a little embarrassing. This situation is avoided in the Social Democratic Party – for a long time the ruling party in Sweden – because two lists are nominated, one with female and one with male candidates. In combining these two lists on the basis of the zipper principle, the only thing left to decide is whether the first name of the combined list will be a man or a woman.

The bourgeois parties have adopted recommendations or targets (soft quotas) to increase the number of women in elected bodies.³⁵ For instance, the Liberal Party has issued a recommendation that all party lists should be

³³ Freidenvall, et al., *supra* note 10 at 56.

³⁴ Lenita Freidenvall, *A Discursive Struggle – The Swedish National Federation of Social Democratic Women and Gender Quotas*, 13 NORA 175–186 (2005)(Party congress Statement 1993).

³⁵ Freidenvall, et al., *supra* note 10.

zippered, and the Christian Democratic Party has recommended that all party lists be comprised of a minimum of 40 percent of either sex. After the 2006 national election, the level of women's representation in bourgeois parties was 42 percent on average, ranging from 50 percent for the Liberal Party to 37.5 percent for the Christian Democratic Party. Because of both external and internal pressures, these parties have to show that they can live up to the demands of fair gender representation, without formal quotas.

There are, however, also examples of less successful implementation of voluntary candidate quotas. For instance, in the 1998 election, the Swedish Left Socialist Party, which has adopted a principle of "at least 50 percent women" on party lists, elected 58 percent men. This was explained by the fact that the party had only one safe seat in most constituencies and that men topped most of the party lists in these constituencies. This result highlights the importance not only of the mean district magnitude, but also of the number of safe seats for individual parties.

Voluntary candidate quotas are not always successful, as many cases from parties around the world show. Indonesia is a mixed case between legal and voluntary quotas, because the electoral law of 2003 recommends that political parties "propose candidates for members of the national, provincial and local parliaments for each electoral district with consideration of at least 30% of women's representation." The law was passed after strong pressure from women's organizations, but the poor outcome demonstrates that quota regulations that are unspecified and noncompulsory will have very little effect, unless the political parties establish new strategies of their own to open up doors for women candidates.³⁶

V. RESERVED SEAT QUOTAS

Today, many post-conflict countries include gender quotas in their new constitutions. There is a window of opportunity for including a gender perspective, sometimes alongside the reconciliation of ethnic and religious groups. Present international discourses and, not least of all, international donors stress that the inclusion of women is an essential part of democratization. This discourse is new and was not to be found just some decades ago. Active national women's organizations and quota advocates have been essential for the inclusion and implementation of quotas.

³⁶ Wahidah Zein Br Siregar, *Gaining Representation in Parliament: A Study of the Struggle of Indonesian Women to Increase their Numbers in the National, Provincial and Local Parliaments in the 2004 Elections*. (PhD thesis, The Australian National University 2007).

Rwanda is an outstanding example: post-genocide Rwanda is now number one in the world rank order in terms of women's parliamentary representation, having surpassed all the Scandinavian countries (see [Table 1.1](#)). Other examples of reserved seats are Uganda, Afghanistan, and Burundi. Reserved seats entail that a fixed number or percentage of those elected must be women (No. 5 in the taxonomy). Reserved seats have also recently been introduced in older parliaments, such as Jordan, Morocco, and Tanzania. In fact, reserved seats for women as well as for other groups have, in some countries, a substantial history on the national level and sometimes also on the local level, as in Egypt, Pakistan, and Bangladesh.³⁷

Htun argues very interestingly that whereas ethnic quotas tend to be found in the form of reserved seats, gender quotas tend to be found in the form of candidate quotas in political parties, because ethnic identities intersect with partisan cleavages in various ways, whereas gender crosscuts political boundaries.³⁸ However, we do see an increasing number of reserved seat quota systems designed for the election of women. One may even argue that the existence of quotas for ethnic and religious groups may pave the way for gender quotas because of a predominant group-based concept of citizenship. However, recognizing women as an underrepresented group does not follow automatically from such a group-based conception of citizenship, because that recognition may conflict with strong patriarchal norms about women's proper place being in the home.

But, whereas ethnic quotas, as Htun rightly states, often follow geographical districts because of the physically separate communities of different ethnic groups, it is not obvious how reserved seats for women should be constructed. Many different systems are being tried out at present.

A. Rwanda

Article 9.4 in the 2003 Constitution of Rwanda states that the principle of equality between all Rwandans and between women and men "is reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs." Inspired by the reserved seat system in Uganda, the Rwandan constitution reserves twenty-four seats for women, two from each province and from the City of Kigali (Art.76.) These women MPs are elected among women-only candidates by an electoral college consisting of local councils and local women's organizations.

³⁷ *Women, Quotas, and Politics*, *supra* note 1, chapters 7 and 9.

³⁸ Mala Htun, *Is Gender Like Ethnicity? The Political Representation of Identity Groups*, 2 *Perspectives on Politics* 439–458 (2004).

Based on her interviews with people involved in the constitutional process in Rwanda, Frida Hansson concludes that there was never any doubt about including a quota in the constitution, in contrast to voluntary party quotas. In fact, representatives from women's organizations argue that the system chosen was advantageous because women themselves are electing their representatives, whereas candidate quotas are controlled by the party.³⁹

The theory that reserved seats might become a glass ceiling for women's representation is not supported by the Rwandan case. Apart from the twenty-four women elected on the basis of reserved seats, fifteen other women were elected in the so-called free seats in competition with men in the 2003 election, twenty-one in 2008. The result was a total 48.8 percent women elected in 2003 and 56.3 percent women in 2008, the highest percentages in the world thus far.

B. Other Examples

In other countries, women's organizations do find it difficult to get more women elected than the prescribed quota. In Morocco, all voters have an additional vote for an all-women candidates list of thirty MPs. In Jordan, women are guaranteed six seats in parliament. The six non-elected women who have received the highest percentage of personal votes in their respective constituencies receive a seat. In both countries, women's organizations complain that it is difficult to get more women elected than prescribed by the quota. But, it is worth noting that, in contrast to candidate quotas (legal or voluntary), reserved seat quotas usually fulfill their goal, because the quota regulates the number of electees, not just the number of candidates.

In India, the 1992 73rd and 74th Constitutional Amendment Acts reserved 33 percent of the seats in local elections for women. The consequence has been that several million women have served on the local councils, the Panchayats, a substantial achievement in rural India. The quota system is applied to the single-member constituency system on a principle of rotation between the wards. If there is a Panchayat with nine villages and nine local councilors, in three of these villages only women candidates can stand for election. In the next election, these reserved seats are moved to three other villages. The problem is, however, that many elected women do not stand for reelection once their seat is no longer reserved for women, saying that "we don't want

³⁹ Frida Hansson, *Constitution-making Explanations to Gender Quota: A Case Study of the Introduction of Reserved seats for Women in the Rwandan Parliament* at 41 (Master Thesis, Uppsala University 2007).

to compete with men.”⁴⁰ In the Indian system, the women elected have a ward of their own to represent, whereas the reserved seats for women on the local level in Bangladesh are “added seats” covering, for instance, three wards, each of which already has an elected representative – often a man. In both systems, women councilors have many problems when performing their job as representatives. But, research has shown that women elected locally in Bangladesh have specific problems concerning access to development funds for “their” constituencies and concerning campaigning, as they must cover a much bigger area.⁴¹ More research is needed on the effect of different quota systems for women’s effectiveness and legitimacy as politicians.

CONCLUSION: VOLUNTARY OR LEGISLATIVE GENDER QUOTAS?

Are legislative quotas to be preferred (in the taxonomy Nos. 1, 3, and 5) or are voluntary quotas in political parties a more appropriate option (Nos. 2 and 4)? Our research on electoral gender quotas around the world has shown that there is no general answer to this important question. There are many different types of gender quotas, and it is crucial to study how they function in different political systems. Quota systems may be evaluated in terms of how many women are nominated or elected. Moreover, it is important to study whether the construction of a quota system hampers the effectiveness and performance of women politicians once elected – in either the short or long run – perhaps because they lack a solid base in a constituency of their own, as in some reserved seat systems.

Gretchen Bauer has made an interesting comparison between the implementation of the voluntary party quotas (No. 4 in the taxonomy), applied in southern Africa (Mozambique, Namibia, and South Africa) and the reserved seat systems (No. 5 in the taxonomy) in use in eastern Africa (Rwanda, Tanzania, and Uganda).⁴² They all have very high representation of women in national parliaments, ranging from 25 to 49 percent, far above the world average of 18 percent. This comparison concludes that in all six countries, women MPs and women activists are worried about the power of the political parties, which are the gatekeepers in determining which women are elected to

⁴⁰ Shirin M. Rai, et al., *Gender Quotas and the Politics of Empowerment – A comparative study in Women, Quotas and Politics*, *supra* note 1 at 222, 235–237.

⁴¹ See *id.*; E. Frankl, *Quota as Empowerment: The Use of Reserved Seats in Union Parishad as an Instrument for Women’s Political Empowerment in Bangladesh*. Working Paper Series 2004:3, (Stockholm University, Department of Political Science).

⁴² Gretchen Bauer, *Fifty/Fifty by 2020, Electoral Gender Quotas for Parliament in Eastern and Southern Africa*, 10(3) *Int’l Feminist Stud. of Pol.* 343–368 (2008). (Chicago August 29–September 30, 2007).

parliament. Bauer's conclusion, that reserved seats are more problematic than voluntary party quotas because of the way women are elected to the reserved seats, is partly contradicted by the statement from women's organizations, mentioned under the section above on Rwanda, where reserved seats are seen as giving the elected women more independence from party control than do party quotas. This discussion points to the need for developing more elaborated criteria for the evaluation of the effectiveness and legitimacy of elected women under different conditions. In this work, we should keep in mind that ever since the suffrage, the autonomous women's organizations have been rather critical of women politicians, especially of their attachment to political parties.

Comparing legislative and voluntary party quotas, our *first dimension*, the conclusion is that there are no major differences in terms of successful implementation. What is crucial is *the second dimension* – the level in the nomination process that the quota provision targets. Also important are the specific type of electoral system, the mean party and district magnitude, rank ordering rules, open and closed lists, and sanctions for non-compliance. When we look especially at candidate quotas, legislative and voluntary (No. 3 and 4), the conclusion is that the two types to a large extent function in the same way and that the success of the process of implementation depends very much on the same factors. The main difference is that legislative quotas apply to all the political parties in a country. Legal quotas also allow for legal sanctions for non-compliance – most effectively, we know now, if the electoral commission has the authority and uses it to reject lists without a sufficient number or percentage of women among the candidates.

The chance of getting a quota reform through is another relevant consideration. Obviously, it takes a majority in parliament to introduce legal gender quotas, whereas voluntary party quotas may begin with only one party – usually the most gender-sensitive party. This first move may start a chain reaction providing legitimacy and momentum to demands for gender quotas in other parties because of party competition. But, this will of course only happen if the voters demand more women on the candidate lists – or if the political parties believe that the voters have this demand.

Some see legal gender quotas as emanating “from above,” leaving potential women candidates unprepared. However, seen from the point of view of local party organizations, even voluntary party quotas may be viewed as coming from above. The only sanction available in case of voluntary candidate quotas is pressure from central party organizations and from public exposure, if a local nominating body does not comply with the party rules on quota. In general, local organizations must be stakeholders in this process, be it legal or voluntary

party quotas, to create a long-term result in terms of the empowerment of women.

In general, the strength of women's groups within the political parties and of the international, national, and local women's movement, as well as the good faith compliance by political parties is vital. Or, to sum it up, what is important is the power to introduce and implement gender quotas as well as the power to identify, promote, and preserve the constitutional, judicial, and party norms and strategies aimed at achieving more inclusive and gender-balanced decision-making bodies.

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Equality, Representation, and Challenge to Hierarchy: Justifying Electoral Quotas for Women

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Electoral gender quotas, although increasingly common,¹ remain extremely controversial throughout much of the world. There is a lively debate in many countries over the justifications for quotas. And, as many observers have noted, the issues raised are remarkably similar, even in countries with very different political systems, and cultural and historical backgrounds.² This chapter will explore the connection between the issue of justifying quotas, on the one hand, and models of equality and democratic representation, on the other.

The process of explaining why quotas are justified highlights a significant gap in current feminist models of equality and democracy. The majority of feminist writers call for a shift to particular models of equality and democratic representation as a basis for justifying quotas. Specifically, feminists tend to argue for a substantive model of equality rather than a formal one, and for a deliberative model of democratic representation rather than an aggregative one. My argument in this chapter is that we should supplement these models with an element that, although implicit in both models, needs to be more explicit and much stronger. This supplementary element involves challenging the reassertion of hierarchy and oppression. Adding this element of challenge to our models of equality and democratic representation will create a more effective justification for electoral gender quotas. And, equally important, adding this element of challenge will move us toward a stance that I believe

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¹ Approximately forty-eight countries have electoral gender quotas in their constitutions, statutes, or regulations. Over fifty more have quotas that have been voluntarily adopted by their political parties. See Dahlerup and Freidenvall, *Gender Quotas in Politics – A Constitutional Challenge*, *supra* 29.

² See, e.g., Drude Dahlerup, *Conclusion 296 in Women, Quotas, and Politics* (Drude Dahlerup, ed., 2006); Carol Bacchi, *Arguing For and Against Quotas: Theoretical Issues in Women, Quotas, and Politics*, *supra* at 46.

to be important for feminism, both as a theoretical project and a political movement.

The chapter begins by describing the most common objections raised against electoral gender quotas. It will then turn to the feminist literature on models of equality and democratic representation. These models address several of the standard objections to quotas, but leave one major concern without a sufficient response. The third part of the chapter suggests that adding the element of challenge to the models provides a more powerful response to this remaining objection and corrects some of the inherent dangers of these models.

I. OBJECTIONS TO ELECTORAL GENDER QUOTAS

There is a long and largely standard litany of objections to electoral quotas. Some of these objections are specific to particular forms of quota systems. For example, some critics argue that a quota will function as a ceiling rather than a floor on the level of women's representation,³ and that the women elected through a quota system will lack the legitimacy of their male counterparts.⁴ Both of these objections are, however, dependent on the particular form of the quota. The legitimacy argument, for example, appears to have real strength with respect to women who have no clear constituency from which they are elected, but very little strength with regard to women who are elected from a party list that includes both male and female candidates on the same terms.⁵ The objections considered in detail here are those that have at least prima facie relevance to all, or at least a very broad cross section of, quota systems.

First, some critics argue that a quota system will result in less-qualified women replacing more-qualified men. This argument is particularly common in developing nations, where the levels of wealth and education for women tend to be significantly lower than for men.⁶ But, the argument is also heard in more-developed democracies, where the idea of qualifications is often focused on political effectiveness rather than on education or economic power.⁷

³ See Aili Mari Tripp, Dior Konate, & Colleen Lowe-Morna, *Sub-Saharan Africa: On the Fast Track to Women's Political Representation in Women, Quotas, and Politics*, *supra* note 2 at 126; Tricia Gray, *Electoral Gender Quotas: Lessons from Argentina and Chile*, 22 *Bull. Latin Am. Res.* 52, 55 (2003).

⁴ See Tripp et al., *supra* note 3, at 125; Judith Squires, *Gender Quotas: Comparative and Contextual Analyses*, 3 *Eur. Pol. Sci.* No. 3, 51–58 (2004) available at <http://www.essex.ac.uk/ECpR/publications/eps/onlineissues/summer2004/research/squires.htm>.

⁵ See Yvonne Galligan, *Bringing Women In: Global Strategies for Gender Parity in Political Representation*, 6 *U. Md. L.J. Race, Religion, Gender & Class* 319, 329 (2006).

⁶ In fact, in these contexts, the argument often takes the form that there simply are not enough qualified women to fill the quota. See Gray, *supra* note 3, at 55.

⁷ See Mona Lena Krook, Joni Lovenduski, and Judith Squires, *Western Europe, North America, Australia and New Zealand: Gender Quotas in the Context of Citizenship Models in Women, Quotas and Politics*, *supra* note 2 at 203.

In this context, being qualified means being more electable or more effective at promoting the goals of the party or constituency. In both cases, the argument is that the competence of representatives is being sacrificed to promote gender equality.

The second common argument is that quotas are unfair to men. If certain seats or positions on party lists are reserved for women, then men are unable to compete for those seats. Assuming that more men than women are seeking political office, this means that the odds of being elected for a male candidate are significantly worse than the odds for a female candidate. This imbalance in opportunities for political office based solely on gender is said to be a violation of the commitment to gender equality, and unfair to the individual men who are at a disadvantage.⁸

The third common argument is that having women in the legislature will not ensure that women's interests or concerns are represented because women are too different from each other to share any particular interests. This argument is often cast in terms of forms of representation. Descriptive representation means having representatives who share certain characteristics, such as gender, with the people they represent. Substantive representation means that the representatives will work for the interests and concerns of those people. The argument, then, is that descriptive representation is no guarantee of substantive representation.⁹

This argument rests on an understanding of the diversity of women and the observation that women seem to be on every side of every issue. The claim is that women are too varied a group to share any specific interests. As a result, there is no reason why one woman should be able to represent other women's interests just by virtue of being a woman. This objection is made more powerful because it is consistent with the concern among feminists to avoid essentializing women and to recognize the deep and important differences among women that often track other forms of hierarchy, such as race, class, and sexual orientation.¹⁰

Finally, some observers argue that electoral gender quotas are not a good solution to gender inequality because they fail to address the underlying conditions that generate the unbalanced legislatures in the first place. Quotas are,

⁸ See Blanca Rodriguez Ruiz & Ruth Rubio-Marin, *The Gender of Representation: On Democracy, Equality, and Parity*, 6 *Int'l J. Comp. Const. L.* 287, 289 (2008) (describing this argument); Claus Offe, *The Politics of Parity*, in *Has Liberalism Failed Women? Assuring Equal Representation in Europe and the United States* 39, 52 (Jytte Clausen & Charles S. Meier, eds. 2001) (suggesting that it might also be contrary to the interests of the party).

⁹ See Squires, *supra* note 4.

¹⁰ See Elizabeth Spelman, *Inessential Woman* (1988); Susan H. Williams, *Feminist Legal Epistemology*, 8 *Berkeley Women's L.J.* 63, 75–80 (1993); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stanford L. Rev.* 581 (1990).

in Nancy Fraser's terms, affirmative rather than transformative remedies.¹¹ A quota may guarantee that there are a certain number of women on party lists or even in parliamentary seats, but it does not change the fact that women have a systematic disadvantage in all of the factors that facilitate access to political power, such as education, economic status, work history, leadership experience, family responsibilities, and so on.¹²

These objections cover a wide range, and appeal to a number of different groups and perspectives. The concern about government effectiveness appeals to a collectivist impulse to improve social welfare (or at least to improve the political standing of a party), whereas the concern about fairness to male candidates appeals to an individualist impulse to allow every person to succeed based on his or her own merits. These two perspectives or orientations are not inimical to a feminist approach, of course, but neither are they dependent on it. Many people share concerns about social welfare and individual fairness, regardless of whether they also share feminist goals. But, the last two objections appeal specifically to feminist concerns as the basis for rejecting gender quotas. The issues of anti-essentialism and of transformative rather than ameliorative approaches are issues within feminist theory. These last two objections, then, are addressed by feminists to other feminists as a reason for rejecting quotas.

II. MODELS OF EQUALITY AND DEMOCRATIC REPRESENTATION

A. *Models of Equality*

In responding to these four objections, feminist theorists have often relied on particular models of equality and democratic representation. In the comparative constitutional literature, there are two basic models of equality: formal and substantive.¹³ Formal equality requires that the law treat like persons and cases alike. This model has obvious limitations in addressing gender inequality. First, the model simply does not apply where the people involved are not seen as similar. But, men and women are often seen as different because of gender

¹¹ See Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation* 7, 77–80, in Nancy Fraser & Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (2003).

¹² See, e.g. Squires, *supra* note 4.

¹³ See Claire L'Hereux-Dube, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 *Yale J.L. & Fem.* 363, 368–370 (2002). This distinction is also common in non-feminist discussions of equality. See Kent Greenawalt, *How Empty is the Idea of Equality?* 83 *Colum.L.Rev.* 1167, 1170–1183 (1983).

stereotypes or gender role-training. For example, the Indian Supreme Court has upheld sex-based classifications in a number of cases because, relying on gender stereotypes, the Court saw men and women as different. The Court upheld “an adultery law criminalizing the conduct of the man and not the woman because women tend to be the victim and not the perpetrator, and an employer’s marriage proscription for women and not men, because Indian women should be deterred from marrying too young.”¹⁴ Because formal equality does not demand equal treatment where people are seen as different, and because perceptions of the differences between the sexes are all too likely to be influenced by stereotypes about gender roles, formal equality will fail to address many aspects of gender hierarchy.

Second, formal equality does not speak to those situations in which treating men and women the same has the effect of creating or exacerbating inequality. For example, many employment situations are arranged in ways that are difficult or impossible to fulfill for a person with the primary responsibility of caring for a child.¹⁵ The rules in such situations are gender neutral and apply equally to men and women. But, these neutral rules will, systematically be a disadvantage to women, who are more likely to bear child-care responsibilities than men.¹⁶ Formal equality, in other words, does not address structural discrimination – discrimination built into the nature of formally gender-neutral institutions and cultural practices.¹⁷

In response to the failures of formal equality, feminists and others have developed the alternative model of substantive equality. Substantive equality looks not to whether the law is formally treating everyone the same way, but to whether the law is causing an increase or decrease in equality as a practical matter. Sometimes, the goal of equality is advanced by treating everyone the same way, but sometimes not. In particular, substantive equality takes into account the social and cultural practices and institutions that can cause a

¹⁴ Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 *Georgia J. of Int'l & Comp. L.* 577, 597 (2006) (describing *Vishnu v. Union of India*, A.I.R. 1985 S.C. 1618 and *Air India v. Meerza*, A.I.R. 1981 S.C. 1829).

¹⁵ See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 64–113 (2000).

¹⁶ See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 *U. Mich. J.L. Reform* 371, 429 (2000); Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 *Ohio St. L.J.* 105, 117–18 (2005).

¹⁷ See Catherine A. MacKinnon, *Towards a Feminist Theory of the State* 224 (1989) (“[E]very quality that distinguishes men from women is already affirmatively compensated in society’s organization and values, so that it implicitly defines the standards it neutrally applies.”).

facially neutral rule to have a systematically discriminatory effect.¹⁸ Thus, under a substantive equality approach, affirmative or positive action to raise the status of a disadvantaged group – such as an electoral quota for women – is seen as fulfilling the demands of equality rather than creating an exception to it.¹⁹

Although substantive equality raises some difficulties of its own, it does avoid the pitfalls of formal equality, and there is little question that substantive equality is a vast improvement over formal equality in terms of addressing gender hierarchy. Constitutions where both the drafters and interpreters are working with a substantive model of equality, such as in Canada and South Africa, have systematically offered greater protection and support to women in their struggles for equality than have constitutions, such as ours in the United States, where a formal model predominates.²⁰ As a result, much of the feminist literature on constitutional equality guarantees focuses, as it should, on incorporating a more substantive model or eliminating the vestiges of a formal model, in the constitutions of various countries.²¹

With respect to electoral gender quotas in particular, several of the objections to quotas rest on an implicit commitment to formal equality. A shift to a substantive model of equality, therefore, provides a strong response to these arguments. For example, the argument that quotas are unfair to men rests on the presumption that treating people differently on the basis of a characteristic such as gender is a violation of equality. But, substantive equality eliminates this presumption because it asks about the effects of the legal rule on gender hierarchy rather than about the form of the rule. From the perspective of substantive equality, gender-based rules do not violate equality if their result is to promote greater equality between the sexes.

¹⁸ See *Introduction*, in *The Gender of Constitutional Jurisprudence* 1, 14 (Beverly Baines & Ruth Rubio-Marin, eds., 2005).

¹⁹ See, e.g. Christine Littleton, *Equality and Feminist Legal Theory*, 48 *U. Pitt. L. Rev.* 1043, 1051–52 (1987) (describing “equality as acceptance” model in which underlying rules and institutions are adjusted so that difference does not result in hierarchy.)

²⁰ Compare Colleen Shepard, *Constitutional Recognition of Diversity in Canada*, 30 *Vt. L. Rev.* 463, 475 (2005) (Canada as substantive equality); Po-Jen Yap, *Four Models of Equality*, 27 *Loyola L.A. Int'l & Comp. L. Rev.* 63, 66 (2005) (Canada as substantive, South Africa as “normative”) with Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *U. Chi. Legal F.* 21, 33–34 (1999) (U.S. as formal equality); Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?* 9 *J. Contemp. Legal Issues* 279, 279 (1998) (same).

²¹ See, e.g. Kaufman, *supra* note 14, at 560–561; Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence Under the Colombian Constitution*, in *The Gender of Constitutional Jurisprudence*, *supra* note 18, at 75, 86–91; Blanca Rodriguez Ruiz & Ute Sacksosky, *Gender in the German Constitution*, in *The Gender of Constitutional Jurisprudence*, *supra* note 18, at 149, 154–155.

Moreover, a substantive model of equality pays attention to the background of structural discrimination that systematically is a disadvantage for women in the competition for political office. Because the underlying expectations and institutions are unfair to women, any facially neutral rule of access to political power would perpetuate the effects of that unfairness. As Marian Sawer puts it: “Indirect discrimination may include factors such as the electoral system or the structures of political work and public careers, particularly the failure to accommodate family responsibility, or the privileging of gladiatorial styles of politics.”²² From this perspective, quotas are simply an effort to correct the preexisting imbalance. It is not unfair to men to reduce their advantage in politics if that advantage is itself unfair.

Substantive equality also helps with the issue of qualifications. Here, too, the objection rests on an assumption that there are neutral criteria for political office that are applicable in the same way to all people. But, substantive equality highlights the ways in which our present politics and political institutions are gendered: they are designed with men in mind and shaped by the patterns and expectations of men. For example, the combative style of political discourse common to many parliaments is likely to be even more uncongenial to the average woman member of parliament MP than to her male counterpart.²³ This recognition opens up the possibility that other qualities might serve as useful political skills in a politics where women play a larger role. For example, if women are more likely to design cooperative or consensus-based mechanisms for decision making, as some evidence suggests, then their skills in those areas will make them more effective in a politics where women occupy a substantial percentage of positions.²⁴ In other words, as politics becomes less masculinized, women’s abilities will be revealed as qualifications for political effectiveness.

Thus, the substantive model of equality, by focusing our attention on structural inequality and the capacity of law to generate more equal outcomes, provides a foundation for responses to the first two objections to electoral gender quotas.

²² Marian Sawer, *Parliamentary Representation of Women: From Discourses of Justice to Strategies of Accountability*, 21 *Int’l Pol. Sci. Rev.* 361, 363 (2000).

²³ Louise A. Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada* 74–76 (2002) (describing the ways in which parliamentary culture is masculine and the difficulties women MPs experience in responding to it.).

²⁴ See Sawer, *supra* note 22, at 365–366 (describing the perceived differences between male and female politicians), 369–370 (describing some of the structural issues in parliaments that lead women to be – or be perceived as – less effective, including the need for a critical mass of women, the adversarial style of argument, the committee structure, the physical space, and the non-family friendly policies).

B. *Models of Democracy*

Feminist theorists have also turned to a particular model of democratic representation in responding to these objections to quotas. The two primary models of democracy in current political theory are aggregative democracy and deliberative democracy, and each carries important consequences for the understanding of representation.²⁵ In an aggregative model of democracy, the purpose of democratic politics is to add up the preexisting preferences and interests of the people and come to a result that best satisfies the greatest number of them. In this model, representatives are the proponents of certain interests or ideologies held by their constituents. They are chosen for their commitment to those interests or ideas and their role is to vigorously promote them in the political process.

By contrast, in the deliberative model, the purpose of democratic politics is to bring people together to form a political community in which they can seek a way forward together.²⁶ Representatives are participants in a collective process of deliberation to seek this path. Their role is to bring their particular perspectives and expertise to this deliberation and listen carefully to the contributions of the other deliberators so as to reach a consensus on the best path forward. Their ideas, and even their perceptions of the interests of their constituents, are expected to be changed in this process.

Many feminists have found the deliberative model attractive and, as Anne Phillips has argued in *The Politics of Presence*, a particular form of deliberative representation may offer the strongest justification for electoral gender quotas.²⁷ In particular, this model of deliberative representation helps with the anti-essentialist objection to quotas. This objection implicitly assumes an aggregative model of democracy, in which we elect our representatives to promote our interests and ideas. The objection rests on the idea that women representatives cannot fulfill this function because there is no particular interest or idea that all women can be said to share. Thus, having women in the

²⁵ See Iris Marion Young, *Inclusion and Democracy* 6 (2000).

²⁶ In some versions of deliberative democracy, the goal of this deliberation is to seek the common good of the community. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 8 (1988). In other versions, the deliberative process itself is the goal, understood as “free and reasoned deliberation among individuals considered as moral and political equals.” Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *Democracy and Difference: Contesting the Boundaries of the Political* 67, 68 (Seyla Benhabib, ed., 1996). The point about representation in the text applies to both the republican (“common good”) versions and the Habermasian (“public rationality”) versions of deliberative democracy. In both types of theories, the role of the legislator is different from the role in aggregative theories in these ways.

²⁷ See Anne Phillips, *The Politics of Presence* 148–156 (1995).

legislature will not guarantee that any interest or idea favored by women in the polity will be promoted. In other words, a person's gender does not guarantee that she will represent a certain political agenda, which is undoubtedly true.

But, in a deliberative model, representing a particular political agenda is not the central role of a representative. Rather, the most important function of the representative is to participate in the process of deliberation. In this process, the experiences and values of the participants are crucial: it is only if all perspectives with anything to contribute are present and heard that the necessary dialogue can take place.²⁸ In particular, if a group with a different experience is systematically excluded from the discussion, then the deliberation is, to that extent, less legitimate.²⁹ One need not believe that all women have the same experiences, but only that women's experiences are systematically different from men's, to see the importance of including women among the deliberators.³⁰ If women's experiences – many and varied though they be – are nonetheless systematically different from men's, then the absence of women in the legislature means that this set of experiences is likely to be ignored or misunderstood. As a result, government policy is likely to be less effective in promoting the common good, and the dialogue is likely to be more skewed and limited than it would be if these experiences and perspectives had been considered. And, women are likely to feel that they have had inadequate representation because of this failure.

Iris Marion Young has suggested a useful heuristic for understanding the idea of women's commonality without falling into the trap of essentializing women. Young offers an adaptation of the Sartrean idea of a series.³¹ A series is defined not by shared characteristics, goals, or experiences, but by a shared place in relation to the material and social world. People waiting for a bus are an example of a series. The people may share no single characteristic; they may understand their situation completely differently (i.e., have different explanations for why they take the bus, why the bus is late, or what they should

²⁸ See *id.* at 151–152. Although she is suspicious of formal quotas, Jane Mansbridge has argued that the need for deliberators from a particular group increases in relation to two factors: a history of communicative distrust between groups and a condition of uncrystallized interests. See Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument* at 19 in *Has Liberalism Failed Women? Assuring Equal Representation in Europe and the U.S.* (Jytte Klausen & Charles S. Maier, eds., 2001).

²⁹ See Iris Marion Young, *Justice and Communicative Democracy, in Tradition, Counter-Tradition, Politics: Dimensions of Radical Philosophy* 136 (R. Gottlieb ed., 1994).

³⁰ See Phillips, *supra* note 27, at 68 (“The variety of women's interests does not refute the claim that interests are gendered.”).

³¹ See Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* 22 (1997).

do about it); and they may experience their situation differently in terms of their responses to it (e.g., anger, cheerfulness, or relief). But, they share a position in relation to a physical and social world, a world made up of transportation systems, work schedules, and the social geography of towns and cities in which home and work are separate. That shared position can sometimes generate a sense of commonality, and that sense of commonality can then transform them from a series into a more cohesive social group.³²

Young suggests that women can be seen as a series because they share a position in relation to certain material and social conditions, such as heterosexuality and the sexual division of labor.³³ This shared position does not guarantee that they will share any interests or ideas. But, it does mean that they will experience a set of constraints and relations that are shaped by that position and are, therefore, distinct from the experiences of those who do not share that position. Those experiences should be included in any political deliberation for reasons of both effectiveness and democratic legitimacy.³⁴

This deliberative model of representation is also helpful in responding to the issue of women's qualifications for political office. When representatives are seen as deliberators, the set of qualifications is expanded in an important way. In this model, it is precisely their experiences as women that are among their necessary qualifications for the role as deliberator. It does not matter that this experience may have led different women to different ideas or different beliefs about their own interests. Their ideas – whatever they may be – have been shaped by occupying this social position and it is that experience that makes them so important to the process of deliberation.

There is a marvelous example of this phenomenon from the Indian *panchayats*, the local government level in which a one-third quota for women representatives has been in effect since 1993. In Indian villages, it is traditional for women to collect the water. This often requires them to walk substantial

³² See *id.* at 24.

³³ See *id.* at 27–29.

³⁴ Young denies that seriality involves any shared experience, see *id.* at 33–34, but I believe that is because she is using the term in a different way from the sense I intend. By “experience” I simply mean to refer to the lived reality of these constraints and relations: the way in which they affect a particular individual in the series. I believe that Young is using “experience” to refer to a more conscious representation of that lived reality that results when the person reflects upon it and makes it into an object in its own right. I agree that this process of reflection and objectification may not be shared by the members of the series (both in the sense that some members may not do it at all and in the sense that those members who do, may come to very different representations.) My point is that the lived reality itself is what justifies the inclusion of members of the series in democratic deliberations. But, as I will suggest shortly, reflection may, indeed, be necessary for that experience (in my sense) to become a useful basis for political action. See *infra* at 70.

distances to streams or rivers and carry the water back to their homes. Before the quota, few women served on the panchayats and the issue of clean, available water was not high on the agenda. Instead, the panchayats often used their resources on larger development projects, such as dams or highways, which required outside contractors. When women started to serve in large numbers, the focus of attention shifted and many panchayats invested in local wells, day care, and local roads, generating a clear and immediate increase in the welfare of the community.³⁵ The experience of women was crucial to good government policy making.

There are two caveats that are important to add to this argument. First, we must reject the *reductio ad absurdum* that every possible social position requires political representation.³⁶ Obviously, this would be unworkable as well as undesirable, so a line must be drawn between those social positions that must be represented for purposes of good deliberation and democratic legitimacy, and those that need not. There are some difficult cases, and I do not intend to offer a general rule to resolve all such issues. Instead, I simply mean to assert that if one accepts that any position deserves representation, the position of women must qualify.

There are several possible qualifications for inclusion in the category of positions that deserve representation, and one might argue over their relative weight or importance. Perhaps the percentage of people who occupy the position should matter: the larger the number of people, the stronger the claim for representation. Or, perhaps, the range of life affected by the position is important: a position relevant to experiences across a broad range of life would have a greater claim to representation than one that affects only a very limited range (like the people waiting for a bus). Or, perhaps, the history of exclusion from political representation is crucial: positions with a history of exclusion would have a stronger claim than those without such a history.³⁷

But, regardless of the particular metric adopted, women would be an easy case. Women are half the population, occupy a position that affects almost all aspects of life – from family and reproduction to work and social relations – and have a long history of exclusion from political power. Thus, whatever one may decide about the harder cases, the claim for representation for women is quite strong in a deliberative model.

³⁵ See Louise Harmon and Eileen Kaufman, *Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*, 19 *Berkeley Women's L.J.* 33, 82 (2004).

³⁶ Cf. Offe, *supra* note 8, at 49–50 (arguing that quotas are not justified unless their proponents also advocate for other underrepresented categories).

³⁷ See Phillips, *supra* note 27, at 46–47 (suggesting history of exclusion is central).

The second caveat concerns the understanding of deliberation adopted. The deliberative model must not be too rationalistic or it also will fall into the trap of seeing women as less qualified because, in general, they receive less training and attain lower educational levels. As Iris Marion Young has argued, the skills of a deliberator must include multiple forms of communication – including storytelling and rhetoric along with rational argumentation – and multiple forms of decision making – including consensus building along with the power of argument.³⁸ If deliberation is understood in this broader sense, then the deliberative process will make room for women’s skills and styles as effective forms of political action.

So, the substantive model of equality and the deliberative model of representation provide responses to many of the standard objections to electoral gender quotas.³⁹ In particular, they explain why women’s experiences, skills, and styles are, in fact, important qualifications for political office. They also explain why positive action to ensure a certain level of representation for women is not unfair to men. And, they offer a vision of democratic representation in which the existence of differences among women is not an argument against the need for women in politics, although it may well be an argument for including many different types of women in politics.

III. THE UNANSWERED OBJECTION

In fact, the only argument that is not addressed directly by either of these models is the fourth objection: electoral quotas fix the result without actually addressing the underlying causes of women’s underrepresentation in politics. This argument is, of course, one that is made against all affirmative or positive action policies that try to ensure that a certain percentage of a disadvantaged group ends up with a certain benefit, whether that benefit is a job, a place in college, or a seat in the legislature.

One response to this argument is to point out that a seat in the legislature is not a benefit just like any other; it is not the same as an educational opportunity or a job.⁴⁰ The important difference between electoral quotas and quotas for other benefits is that legislators have the right and the responsibility to address the underlying conditions that generate inequality. In other words, although making sure that there are more women in medical school may not directly

³⁸ See Young, *Intersecting Voices*, *supra* note 31, at 60–74.

³⁹ For an interesting argument proposing that an understanding of postliberal democracy requires parity, rather than quotas at a lower level, see Blanca Rodriguez Ruiz & Ruth Rubio-Marin, *The Gender of Representation: On Democracy, Equality and Parity*, 6 *Int'l J. Comp. Const. L.* (ICON) 282 (2008).

⁴⁰ See Phillips, *supra* note 27, at 62, 64 (pointing out that no one has a “right” to political office comparable to their right to an educational opportunity or job).

affect the general social and economic status of women, making sure that there are more women in political office should have that effect. And, this argument does not rely on some essentialist notion that all women share certain interests, it simply asserts that, whatever women's various concerns are, those concerns will receive more attention and redress if there are more women in the legislature.

There is a difficulty with this simple response. The empirical evidence about the impact of greater numbers of women legislators on "woman-friendly" policies is mixed and controversial.⁴¹ Certainly, there is evidence to support the claim that women legislators will be systematically more likely than their male colleagues to support and spend political capital on policies that benefit women.⁴² But, there is also evidence that the barriers to women's effectiveness in legislatures are real and substantial and some observers suggest that, at least under some circumstances, substantial numbers of women in the legislature have failed to make meaningful changes in the status of women in general.⁴³ If the impact of women legislators on the outcome of policy is not guaranteed, as I think most reasonable observers would have to acknowledge, then the question arises: why fight so hard for women politicians? Why not work instead to change the specific policies on family law, land reform, education, and so on, that would directly improve the status of women? As Nancy Fraser has put it, the demand for recognition should not be allowed to displace the demand for redistribution.⁴⁴

IV. THE IDEA OF CHALLENGE AS AN ELEMENT OF DEMOCRACY AND EQUALITY

I want to suggest an answer to this question that grows out of a particular modification of the models of equality and democratic representation discussed

⁴¹ See Sawyer, *supra* note 22, at 363 ("It is easier to raise doubts about the ability of men to represent women than to put the positive case concerning whether women's interests will be better represented by women").

⁴² See Debra Dodson, *Acting For Women, in The Impact of Women in Public Office* 225, 236 (Susan J. Carroll, ed., 2001) ("If the choice is between a feminist woman and a feminist man who share equally high levels of attitudinal support for feminist policy goals, the chances are better that the woman rather than the man will act for women."); Gray, *supra* note 3, at 57 ("Cross national research has shown that although party ideology is often better than gender as a predictor of legislative preferences, women are still more likely to vote for women's issues bills than their male counterparts. . . . Women are also significantly more likely than male legislators to propose bills on women's rights or family or children issues.").

⁴³ See, e.g., Chappell, *supra* note 23, at 53 (describing Australia), 73 (describing Canada), 77-81 (describing partisanship and regionalism as barriers to women's effectiveness); Nikki Craske, *Women and Politics in Latin America* 190 (1999) (describing Argentina).

⁴⁴ See Fraser, *supra* note 11, at 9, 66 ("no recognition without redistribution.").

earlier. A number of democracy theorists, including Bonnie Honig, Jane Mansbridge, and Nancy Fraser, have recognized the dangers of a dialogic or deliberative model of democracy that does not reckon seriously enough with the ineradicability of power.⁴⁵ Difference is inevitable, and there is a constant pressure for people with power to use that difference to generate or reinforce hierarchy. The risk of a deliberative model of democracy is that we will too quickly assume that our deliberative processes are free of coercion (when they are not), or that our dialogue has resulted in a good that is common (when it is not). The ideal of a politics free of power and domination is an ideal worth embracing, but, if we think that any actual politics can achieve that ideal, then we are allowing ourselves to be led astray by the dream.

Some theorists have seen the inevitability of conflict as a reason for abandoning the dialogic ideal in favor of a more agonistic model of democracy.⁴⁶ In this alternative, the focus is on struggle rather than dialogue, and the goal is not a common good or a just and equal relation of dialogue, but, simply, the reduction of oppression. I understand this impulse, but I believe that it gives up too easily on a dream that is both valuable and endemic to politics. If we give up the dream of dialogue and the common good, then we lose much of what moves us in politics. Moreover, if feminists abandon these goals, these ideas will not disappear from our politics; instead, these powerful motivators will simply be monopolized by our political opponents. Just as the idea of “family” has been monopolized by the religious right in political discourse in the United States, so too, the idea of the “common good” can be used to shore up a politics of exclusion and oppression. We should not hand over such powerful tools to those who will use them so badly; we must lay claim to these ideals for a politics of equality and democratic inclusion.

What is necessary, then, is not that we abandon the ideals, but that we supplement them with elements specifically designed to keep our eyes open to the dangers in these valuable goals. We must build in mechanisms for calling our attention to the ways in which our efforts at deliberation have resulted in or relied on coercion, or our efforts to build commonality have succeeded only in denying or suppressing difference. Our theory must include strong and explicit attention to the processes through which our ideals fail or are subverted.

⁴⁵ Bonnie Honig, *Difference, Dilemmas, and the Politics of Home*, in *Democracy and Difference*, *supra* note 26, at 257–77; Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in *Democracy and Difference*, *supra* note 26, at 46–66; Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *Habermas and the Public Sphere* 123 (Craig Calhoun, ed. 1992).

⁴⁶ See generally, Bonnie Honig, *Political Theory and the Displacement of Politics* (1993).

There is a parallel deficit in equality theory as well. Just as deliberative democracy must be vigilant against coercion and cannot ever completely vanquish the impulse to suppress difference, so too, substantive equality must be vigilant against the impulse to hierarchy that will never be completely eliminated. We must constantly remind ourselves that our efforts to achieve equality through law will always be subject to the insidious reassertion of hierarchy. Substantive equality posits an end point or goal: a society in which all are equal in terms of respect and in terms of certain basic entitlements that flow from citizenship or from common humanity. This is a worthy goal. But, if we look only at whether a particular legal reform will lead us toward this goal, we may lose sight of a different, but important, question: how will we know if this reform is being undermined or diverted to serve the interests of hierarchy rather than to promote equality? This risk of diversion is amply demonstrated by evidence from many legal systems, in which legal regimes of substantive equality frequently deteriorate into the reintroduction or reinforcement of existing hierarchies.

For example, in the United States, Congress passed the Americans With Disabilities Act in 1990. This landmark legislation was one of the most powerful civil rights laws in our history, because it explicitly required not just neutrality, but active accommodation of people with disabilities. In other words, employers, governments, and public accommodations had to change themselves – their physical layout or their customary practices – if that was necessary to make them accessible to people with disabilities. This powerful statute, however, has been systematically gutted by the decisions of the federal courts interpreting and limiting it. At every stage – from the identification of who is disabled,⁴⁷ to the ability to use the statutory remedies against the states,⁴⁸ to the nature of the required accommodation⁴⁹ – the courts have weakened this statute. What began as a bold experiment in substantive equality for a historically excluded group, has become little more than a judicial rubber stamp for continuing hierarchy.⁵⁰

Similarly, the Canadian Supreme Court's decision in *Regina v. Butler*,⁵¹ which was initially seen as a victory for a feminist understanding of equality, has raised serious concerns about the insidious nature of heterosexism. This case held that, because certain pornography contributes to the oppression of

⁴⁷ See *Sutton v. United Airlines*, 527 U.S. 471 (1999).

⁴⁸ See *University of Alabama v. Garrett*, 531 U.S. 356 (2001).

⁴⁹ See *U.S. Airways v. Barnett*, 535 U.S. 391 (2002).

⁵⁰ See Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 *Ind. L.J.* 181, 209 (2008).

⁵¹ 1 S.C.R. 452 (1992).

women, the Charter allows the government to prohibit such pornography, even though those regulations place a limit on the right to freedom of speech. The Canadian Supreme Court opinion explaining the ways in which this pornography contributes to the oppression of women is an eloquent statement of the ideal of substantive equality and the right and power of the government to take action to achieve it. But, some observers have charged that this holding was subverted by police and prosecutors, who used their discretion to punish homosexual and lesbian pornography disproportionately under this law.⁵² In other words, our reforms are always subject to failure or subversion.

Think about an analogy to efforts to cure a particular endemic disease. The primary concern, of course, is to initiate the public health reforms needed to eliminate the disease, perhaps cleaning up water supplies or providing inoculations. But, it is also essential to ensure that you have good mechanisms for detecting the reemergence of the disease. And, it is necessary to be vigilant about the possibility that your public health efforts may themselves be generating problems, such as antibiotic resistance or damaging side effects. Moreover, the two projects here may not necessarily overlap: the programs necessary to eliminate the disease may not by themselves provide you with adequate warning about the risks of reemergence or side effects.

I want to suggest that both substantive equality and deliberative democracy are like the goals in a disease-eradication plan. They are pictures of the sort of society we hope to create, and models of the legal and political institutions that might help to get us there. I am arguing that we need to add to both a strong element analogous to the watchdog function of the disease-detection program: a part of the model devoted to recognizing and calling attention to the reemergence of the problems these models are designed to address, whether in the same old form or in a new guise generated by our reform efforts themselves. In the equality context, this element is challenging the reassertion of hierarchy. In the democracy context, it is challenging the reemergence of coercion or oppression. The focus here is on the act of recognizing and resisting evil, rather than on constructing something good.

The evil can come through many different mechanisms. Sometimes, hierarchy and oppression reemerge simply because we have failed to implement our ideals effectively. We know what we are trying to do, but the plan we adopt is ineffective. To continue the disease metaphor, the plan may be ineffective either because it fails to eradicate the disease or because it causes new problems, such as side effects. Such failures can be the result of ignorance,

⁵² See, e.g. Bret Boyce, *Obscenity and Community Standards*, 33 *Yale J. Int'l L.* 299, 333–334 (2008).

laziness, or an unwillingness to bear the costs that real change requires. Here, the remedy is more information, expertise, or commitment.

Sometimes, hierarchy and domination are generated because we don't really understand our goals. We have a mistaken idea about what substantive equality or deliberative democracy would look like in a particular context, and we are aiming for the wrong goal. Again, this failure can lead to our program being ineffective in both of the ways described above: it may fail to eradicate existing problems and it may cause new or additional problems. Such misunderstandings of the ideal are deeper problems and can require long-term education to correct.

And sometimes, the evil sneaks back in because people with power are (consciously or unconsciously) resisting the loss of that power. All too often, such people are able to cripple the reforms intended to challenge their power or even to pervert the reforms into a mechanism for reinforcing their power. So, again, both sorts of failure are possible: this resistance can make the reform ineffective and it can also lead to new or different problems. The important point here is that even our best efforts – when we have understood the ideal well and implemented it effectively – will always contain the possibility that they will be undermined in this way. The insidiousness of power is such that we can never guarantee that our reform efforts will not become the vehicles for the very inequality and oppression they were designed to combat.

In fact, I believe that we must accept that our reform efforts will always be subject to all three of these failings, although the degree of each may vary. The means we choose will never be perfectly effective. Our understanding of our ideals will always be incomplete and imperfect. And, power will always sneak back in through whatever mechanisms we adopt to try to restrain it. Because we will always fail in all of these ways, to one degree or another, we must build into our theory explicit attention to and warning signals for these dangers.

V. APPLICATION TO ELECTORAL GENDER QUOTAS

The element of challenge requires us to be vigilant for all of these different means through which hierarchy and oppression can be reintroduced. It requires us to direct our attention to mechanisms for detecting and resisting this reintroduction. And, this element of challenge helps to explain why it is so important that – along with the substantive changes in the law that directly address the status of women – we must have women in the legislature, indeed in all positions of power, both public and private. Of course, access to such power will help women achieve the important substantive changes that are necessary to promote equality. But, even when other barriers prevent such

policy successes, the presence of women at the table during the formulation of policy is a necessary condition for adequately recognizing and challenging the reassertion of hierarchy that is an inevitable part of the process.

It is not that men cannot challenge and resist patriarchy – they can and do. But, our detection system would be woefully inadequate if it did not include the people most likely to experience the harms of the disease or the side effects of our attempted cure. Thus, this argument relies again on the assertion that women's life positions and experiences are different from men's, without making any claim that all women experience the same things or understand them in the same ways. And, one of the ways in which women's experiences are different from men's, is that women are more likely to experience any reassertion of gender hierarchy and any unanticipated fallout from our efforts to eliminate gender hierarchy. We need to remember that, even with the best of intentions and the strongest of institutional protections, inequality and oppression will always reemerge. Because of that constant danger, women must be present where power is exercised, ready and able to raise their voices.

Obviously, the mere presence of women in positions of power, although necessary, is not sufficient. The women who are present must have the resources to be effective. One of the necessary resources is, of course, their own understanding of the experiences that they bring to the dialogue. As with arguments from experience generally, the experiences of women legislators must be mediated by a collective process of reflection to generate insights that will be useful in identifying the reemergence of hierarchy.⁵³ Women's caucuses can provide an important venue for the necessary collective reflection.⁵⁴ And, close connections between the women in the legislature and grass roots women's movements are extremely important as well, both for giving women legislators a broader information base and for facilitating the process of critical reflection.

But, there are other resources that might also be helpful to women legislators in playing this role. Indeed, adding this element of challenge might suggest some interesting things about some of the practical issues of quota design discussed in the previous chapter. Women in the legislature might need very specific kinds of resources, training, and institutional support to carry out this task of resistance. For example, it is very likely that women will need access to the power structure in the legislature itself, for example, through

⁵³ See Sandra Harding, *Whose Science? Whose Knowledge?* 127 (1991); cf. Phillips, *supra* note 27, at 70 (describing the importance of collective reflection for understanding the interests of women).

⁵⁴ See Sawyer, *supra* note 22, at 372–374 (on the importance of building separate institutions).

chairs committees.⁵⁵ It is likely that they will need access to the power structure in parties as well, perhaps through internal quotas for party positions or through support for fundraising that can gain them influence in the party.⁵⁶ A requirement for a “gender impact” statement for proposed legislation or a “gender budget,” and the development of a legislative agency with the expertise necessary to craft such reports, could be an enormous boost to the effectiveness of female legislators in recognizing and resisting the reassertion of hierarchy.⁵⁷ These are just a few examples of the sorts of issues that would be raised to our attention if the challenge function were more central to our model of equality.

VI. THE EMOTIONAL STANCE IMPLICIT IN THE FOCUS ON CHALLENGE

I suggest the element of challenge, not as an alternative to substantive equality or deliberative democracy, but as a supplement to them. In one sense, then, this is a relatively small point, a modification of a current direction in theory that I believe to be fundamentally correct. But, I think that the element of resistance rests on a larger and more significant shift in emotional stance that carries great importance for feminism as both an intellectual project and a political movement.

The stance required is a difficult one. We must recognize that, whatever we do, we will always fall short of our ideals. Indeed, the process of seeking those ideals – whether substantive equality or deliberative democracy – is always fraught with risk and inherently flawed. Every iteration of the ideal,

⁵⁵ See Alda Facio, Rodrigo Jimenez Sandova, & Martha I. Morgan, *Gender Equality and International Human Rights in Costa Rican Constitutional Jurisprudence*, in *The Gender of Constitutional Jurisprudence*, *supra* note 18, at 99, 109 (describing a 2003 Constitutional Chamber case holding that the President of the legislative assembly violated the constitution by failing to name male and female legislators to important committees in proportion to their membership in the legislature).

⁵⁶ Finally, taking the idea of challenge seriously might lead us to consider more generally the role of political parties in blocking women’s access to parliament. “The major political parties are the main barrier to women’s parliamentary representation in the older democracies, ahead even of the electoral system or the nature of parliamentary institutions. It is they who are responsible for what has been termed the ‘gender gerrymander,’ the fact that women are far less likely than men to be preselected for the safe seats controlled by such parties.” Sawyer, *supra* note 22, at 371.

⁵⁷ See, e.g., Susan Himmelweit, *Making Visible the Hidden Economy: The Case for Gender-Impact Analysis of Economic Policy*, 8 *Feminist Econ.* 49, 57 (2002); Chartered Institute of Public Finance and Accountancy, *Gender and Participatory Budgeting* (November 2004) (providing an international review of gender budgeting initiatives), available at <http://www.gender-budgets.org/content/view/504/153/>; Letty Chiwara & Maria Karadenizli, *Mapping Aid Effectiveness and Gender Equality, EC/UN Partnership on Gender Equality for Development and Peace* (2008), available at <http://www.unifem.org/attachments/products/MappingAidEffectivenessAndGenderEquality.pdf>.

every attempt to make it a reality, will contain all of the flaws discussed before: the failures of implementation and understanding, and the possibility of subversion. As a result, there is always a risk that our reform efforts will cause us to be complicit in the very evils we are trying to address. Our attempts at equality will always include the seeds of hierarchy and our attempts at democracy will always include the seeds of domination.

It is tempting, when faced with this inherent and inescapable risk, to simply abandon the ideals. But, we cannot give up on these ideals. Indeed, I would suggest that the great and difficult lesson we need to learn is how to go on believing in an ideal even after we realize that all of our efforts to pursue it contain these risks – and to continue to believe without denying or ignoring the risks. We must, in other words, strive to see our pursuit of these ideals as simultaneously inherently compromised and morally required. And, we must do our best in that struggle, while remaining vigilant about the risks inherent in it.

I believe that this stance, this emotional balancing act, is crucial both to the intellectual honesty of feminism as a theoretical position and to the ultimate effectiveness of feminism as a political movement. What is called for here is a delicate balance against the twin threats of too much faith and too little faith. If we have too much faith, we will be unable to see these failures, unwilling to adapt and reform, and unable to recognize our own complicity in these evils. If we have too little faith, then we will be unable to commit the effort and desire necessary to struggle for an ideal that will never be realized, never fully within our grasp. We need a kind of balance that allows us to be both committed and flexible, both passionate and open, if feminism is to be successful both theoretically and politically. This sort of balance, like many others, is a matter of practice. And, the political representation of women in legislatures around the world is a good place for us to begin to practice.

SECTION TWO

RIGHTS

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3

More than Rights

Helen Irving

INTRODUCTION

If asked what should be done to constitutionalize gender equality, most people are likely to propose a constitutional provision for gender equality. Undoubtedly, there would be variations in the form suggested for this provision. It might be expressed “negatively;” that is, as a prohibition on laws that discriminate with respect to “sex” and/or “gender.” Or, it might be positive, asserting the right of women and men to equality. It might be broad and generalized, prohibiting arbitrary or unreasonable discrimination across a range of classifications, or alternatively, more closely tailored, with specific reference to women.

Some people might want to qualify a simple prohibition on laws that discriminate with respect to gender, to include other related bases for discrimination: sexuality, marital status, and pregnancy, among others. Still others, anxious about the prospect that formal equality provisions may be drawn on by the courts to invalidate laws or programs for substantive equality, will seek to add a provision quarantining affirmative action from the prohibition on gender discriminatory laws. However, whether or not with qualifications, it is reasonable to assume that most people would begin with a constitutional equality rights provision, and some would also end with it.

Feminists should question this approach. Before relying on a constitutional rights provision for achieving equality, or campaigning to amend a constitution to incorporate such a provision, they should proceed with eyes wide open. They should understand the “downside” of constitutional rights strategies. They should also examine other constitutional provisions, and understand how these, and preexisting institutional structures, operate either to promote or obstruct gender equality. A strategy for constitutional entrenchment of rights provisions should come later (if at all).

In this chapter I set out, first, what other considerations should be taken into account in “constituting equality.” I follow this with a discussion of the downside of rights from several perspectives. These include: the hegemonic effect of an equality rights discourse, freezing the constitutional imagination, and the costs of litigation for those already at a disadvantage.

My conclusion will be that “rights” must be conceptualized with great care and sensitivity, as openly and inclusively as possible, and strategies for constitutionalizing equality must not rely exclusively or predominantly on justiciable rights. None of this suggests that rights could seriously be excluded from discussions about the content of constitutions and the goal of gender equality. To begin with, the rights discourse is so widespread and so integral to western legal systems that its inclusion in new constitutions or in proposals for constitutional amendment must virtually be taken for granted. It would be unrealistic to argue for a “ban” on constitutional entrenchment.

But, I do intend to make a stronger claim than the common view that rights are not sufficient, or even the somewhat more cautionary view that hopes and expectations attached to an equal rights provision should not be exaggerated, and disappointment must be anticipated. There is a downside to rights, a negative impact that needs to be understood and taken seriously. Ultimately, whether to adopt an equality rights provision in a constitution must depend upon the cultural, political, and legal context of the relevant jurisdiction. Where a culture of constitutionalism is weak and institutions of democracy or civil society are undeveloped, a legal strategy may be the only hope. The paradox is that, in such circumstances, the courts are unlikely to act independently or progressively in promoting gender equality where it is poorly recognized in the rest of the country. This interdependence between politics, sociology, and jurisprudence, must be kept in mind. Putting all of one’s eggs in the same basket will prove doubly disastrous in a country with no hens.

I. CONSTITUTIONAL OPPORTUNITY STRUCTURES

When a constitution includes an equality rights provision, an expectation arises that legislation breaching that provision will be challenged in the courts, and (all else being equal) struck down. When this happens, the process will be complete. The provision will have served its purpose. It will have “worked.”

Let us ignore for the moment that many challenges will fail. A successful challenge may be the finish, but it is far from the start. Long before a statute comes before the court, many prior steps will have been taken. These go well beyond the legal steps of identifying an alleged breach, filing an action, satisfying the tests for *locus standi*, hiring counsel, briefing counsel, watching

him or her make an appearance before the bench, and so on. The legislation must have been proposed and then drafted as a bill. The members of government who proposed it must have been chosen for office. The machinery of their election or appointment must have operated, following a system that was selected at some prior point in time, and made operational. Candidates must have been identified or pre-selected, and must have been approached for appointment, or run for office.

The bill that became the challenged legislation must have been passed by the members of the legislature. Those members must also once have been candidates, subject to election under a particular electoral system. When the bill is finally challenged, it will come before a court composed of judges who were appointed at some time according to a preexisting process. That process was itself once chosen from a range of alternatives. Only at the point where all of these steps have already been taken will the enforcement of constitutional rights come into play.

If the constitutional rights provision does not yet exist, but is proposed as an amendment to an existing constitution (as with the Equal Rights Amendment (ERA) in the United States), the institutions and processes of amendment will need to be completed before the question of whether there is a legislative breach can even be contemplated in litigation. In short, numerous steps, through numerous institutions, will take place prior to the application of a rights provision in a constitution. A multilevel, multilayered process occurs before litigation is even feasible. Challenges for gender equality arise at each point in this process.

These observations may seem trite, but the point is this: Constitutionalizing gender equality involves a lot more than *constitutional rights*, or even rights as such. As other essays in this book suggest, the institutions of representation and the processes for selecting members of those institutions may be fundamentally important to the hopes for gender equality. Electoral systems or processes of appointment may be designed or operate along non-egalitarian lines; they may even be antithetical to principles of gender equity. To give one example, a legislature composed of representatives chosen to represent single member districts will be likely, all else being equal, to result in the election of a disproportionate number of male members. This occurs, among other reasons, because major political parties (which are more likely to be successful in an election) have traditionally been male dominated. For this and other reasons, they are more likely to pre-select male political candidates. Electoral systems in which more than one candidate is chosen for each electorate or district are known to increase women's chances of being elected and serving in the legislature. Thus a "constitutional" solution to gender inequalities in the

legislature may involve, for example, gender quotas. Quotas, however, have only an indirect connection with *rights*.

The processes of choosing members of the executive government, whether from within the legislature (as in systems of parliamentary government) or from outside the legislature (as in presidential systems such as the United States) is also likely to involve constraints on or, alternatively, opportunities for constitutionalizing equality. So, in turn, will the processes by which members of the judiciary are chosen and appointed.

In my work on gender and constitutional design, I have adapted an expression from political science literature, to describe what is at stake here as “constitutional opportunity structures.”¹ The term, as I use it, refers to institutions, processes, structured relationships, and offices that create opportunities or openings for women to take part in collective decision making or government. Many institutions are structurally inhibiting or obstructive of women’s membership and effective participation. Equality strategies should identify means for their amendment or restructuring, so as to improve existing, or create new, constitutional opportunity structures.

When the goal of constitutionalizing equality is approached specifically from the perspective of rights, the institutions and structures that operate prior to the enforcement (even prior to the conceptualization) of rights are often overlooked. To pay attention to such matters before turning to rights is not to reject or disparage rights as such. Nothing *a priori* prevents a campaign for gender equality from targeting both.

Indeed, constitutional opportunity structures and constitutional rights are not necessarily independent of each other. To include a statement of gender equality rights in a constitution may have the effect not merely of creating an opening for ultimate judicial review and rights enforcement, but may also stimulate, or reinforce, a culture of egalitarianism that will itself contribute toward creating opportunities within structurally prior institutions, or reforming existing institutions or structures. Indeed, in some existing constitutions, one finds the two not merely indirectly related, but constitutionally and formally linked by a constitutional provision for enforcing principles of gender equality in positions of public office.²

¹ See Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* Chapter 1 (2008). For the political science definition, see Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* 77 (2d ed., 1998).

² See Martha I. Morgan & Mónica María Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 *Yale J. L. & Feminism* 353 (1991), at 381–382 (noting, for example, that Article 40 of the Colombian Constitution states that “[t]he authorities will guarantee the adequate and effective participation of women in the decision making ranks of the public administration.”).

Conversely, however, there is a risk (probably greater) that equality rights in constitutional provisions will distract from other structural or procedural obstacles to gender equality. An overriding commitment to securing gender equality through a constitutional provision, or to persuading the relevant constitutional court to extend already-existing “neutral” rights provisions to encompass gender equality (such as occurred with the Fourteenth Amendment “equal protection of the laws” clause in 1971)³ may distract from the effort of securing equality in other ways, or other spheres, through the reform of institutions or the adoption of government programs.

But, again, if close attention is paid to subtle effects such as these, the conclusion may simply be that a multi-layered strategy is required. This will mean attention to all stages in which institutions of governance are formed and processes of decision making and administration take place. It will include not merely a commitment to increasing women’s participation and representation in government (broadly understood), but also to understanding the structural obstacles facing women who might otherwise want to participate. These obstacles may be overt and blatant, but, in western democratic societies, it is less likely (these days at least), for express gender discrimination to be found in the institutional and procedural rules of government. Most often, obstacles are indirect or passive, taking the form of absences, or disincentives. Attention will be needed, for example, to the house rules or standing orders that govern the schedules, procedures, and timetables of a legislature. These may be antithetical to family life, requiring long absences from home, or making it impossible for a representative to take part in anything but the occasional family routine.⁴ Campaigns to recognize that these processes and institutions are not gender neutral, and then to reform them, may supplement a rights litigation strategy. Combined with a commitment to constitutionalizing gender equality through constitutional provisions that both prohibit discrimination on the grounds of gender, and permit affirmative action and substantive equality, this may produce the optimum outcome.

However, even a multilayered strategy could not avoid the downside of constitutional rights provisions. Before we consider this, we need to think further about rights, as such. In seeking to constitutionalize equality, much more than gender equality provisions are implicated.

II. MORE THAN EQUALITY RIGHTS

The idea that gender equality may be advanced through the inclusion in a country’s constitution of a provision expressly ruling out discrimination on the

³ Reed v. Reed, 404 U.S. 71 (1971).

⁴ See Irving, *supra* note 1, chapter 5.

grounds of sex or gender has a long history. From the mid-nineteenth century onward, feminists in the United States recognized the limits of attempting to bring women under a general equality provision. Campaigns to extend the Fourteenth Amendment protection of the “privileges and immunities” of citizenship to include women’s rights (to vote, or to practice a profession) were unsuccessful and relatively short-lived. It was quickly recognized that the courts would only apply traditional, gender-stereotyped tests to defining “privileges and immunities” in the first place.⁵ In other words, the very historical disadvantages and exclusions against which women sought judicial protection were employed as the grounds for its denial. Although this result was dismaying for feminists at the time, and is historically regrettable, it is unsurprising. It remains, indeed, characteristic of the judicial process. Except in rare and controversial moments, the judiciary is not prepared to be “activist.” It will rarely declare that decades, even centuries, of precedent and settled interpretation are legally invalid.

For these reasons, the feminists who failed to harness general, facially-neutral constitutional equality or “privileges and immunities” provisions to gender equality claims, now turned their attention to the inclusion of an express gender equality provision. The forerunner to the ERA (passed by Congress in 1972, but subsequently unratified) was proposed in 1923. Its introduction signaled a recognition that, in the absence of favorable approaches to constitutional interpretation (through which broad rights and freedoms might be interpreted specifically to incorporate gender equality), an express provision was the obvious (and many thought, the only) alternative.

Historically, the campaign for such a provision was central to thinking about constitutionalizing equality. But, such a provision should not distract attention from the range of other provisions with particular relevance for, or impact upon, women. Inequality and disadvantage lie in much more than gender discriminatory classifications in legislation.

Even in the richer parts of the world, women remain disproportionately represented among the poor, in particular, as heads of single parent households (of which they are far more likely to be the responsible parent). Programs for social welfare are, thus, of disproportionate relevance to women’s lives. Although every person needs housing, housing rights are also of special significance to women, given their relative poverty and their predominant responsibility for child care.

The South African Constitution recognizes housing as a justiciable right. It includes a provision stating that everyone has “the right to have access

⁵ Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 *Yale L.J.* 1153 (1988).

to adequate housing,” and enjoining the state to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of this right.⁶ The celebrated *Grootboom* case, in 2000, starkly illustrated the relationship between gender and housing, as well as the difficulties in meeting demands for substantive rights.⁷ This case concerned the failure of a provincial government to provide adequate housing for a large group of people, most of whom were women and children, who had lived as squatters in appalling conditions for many years while waiting for low-income housing. Following their eviction, attempts were made by the authorities to prevent their subsequent occupation of public land. Irene Grootboom and others began an action alleging breach of the South African Bill of Rights. The case reached the South African Constitutional Court, which handed down a judgment emphasizing the interconnectedness of discrimination and socio-economic rights. It concluded that governments have a constitutional duty to meet a minimal standard in provision of housing, but also placed this duty within *available resources*, balancing a substantive right against competing financial and program demands.

The outcome in this case was positive for the squatters. But, substantive rights will always create tensions between needs and resources, and they place courts in a difficult position. Where a constitution includes, for example, health rights, housing rights, and education rights, it is invidious for the courts to make a decision favoring or prioritizing one, merely because a dispute has arisen concerning its provision. Equally deserving claims may be made in the name of the other rights. The courts, however, being reactive, can only rule on disputes that come before them. In contrast, governments can initiate programs, and balance individual budget allocations against a total budget. Where one program is prioritized, this can occur against an assessment of its impact on other areas of need and interest.

It is important, nevertheless, to recognize that express equality rights are only a small part of the equation for constitutionalizing equality. The social context in which practices of inequality and discrimination are experienced and perpetuated is just as significant as, and often more significant than, laws that discriminate arbitrarily as to gender. Certainly, the context and the discriminatory laws are interrelated. A discriminatory, oppressive culture gives rise to or tolerates openly discriminatory laws. But, in modern liberal democracies where laws that include gender discriminatory classifications are now relatively rare, it is the social and cultural context that becomes especially important. Poverty, inadequate housing, poorer health, lower levels of literacy,

⁶ S. Afr. Const. § 26 (1990).

⁷ *Government of the Republic of South Africa & Ors v. Grootboom & Ors*, 2000 CC 11 (S. Afr.).

and restricted access to skilled employment are all indicators of disadvantage. All are suffered disproportionately by women. This disadvantage must be recognized if substantive constitutional rights are to be meaningful.

Substantive rights are not the only concern from the perspective of gender equality. Many negative rights, although facially gender neutral, also have special significance for and a disproportionate impact on women. Rights relating to freedom from violence, especially domestic violence, speak to women's common experience as objects of gender-motivated violence.⁸ Rights to be free from human trafficking and modern forms of "slavery" have a particular resonance for women.⁹

Rights such as these – with special relevance to women, but without a substantive character – have the advantage not to be implicated in problems arising from limited resources or invidious choices about priorities in resource distribution. They are freedoms, rather than rights, "shields" rather than "swords." They may serve a valuable purpose in preventing gender discriminatory laws from operating, and they may also have an important normative or aspirational function. They may affirm that a social commitment to preventing gender discrimination and disadvantage is serious enough to take legal form. They may simply make a statement affirming women's equal worth, both collective and individual.

Certain other rights or freedoms that appear gender neutral may, on the other hand, work as a *disadvantage* for women, particularly if these rights are not limited or qualified. The right to "privacy," for example, is a double-edged sword. It may protect women's freedom to make choices about intimate relationships or matters of bodily integrity concerning sexuality and reproduction. It may also mask a policy of official reluctance, even refusal, to look behind the closed doors of domestic life where women most commonly experience violence and coercion. Constitutional provisions that protect privacy in the home should be considered very carefully, and should be worded to make it expressly clear that this form of privacy does not prohibit state intervention with respect to domestic violence.

Such gender-neutral rights provisions raise issues about legitimate limitations, abrogations, or exceptions from the protection offered by constitutional rights, and about workable and just means of balancing competing rights. These issues must also be of concern to proponents of gender equality. So, to give a typical example, a blanket protection of freedom of speech and of

⁸ http://www.unifem.org/gender_issues/violence_against_women/facts_figures.php (last visited Mar. 10, 2008).

⁹ http://www.unescobkk.org/fileadmin/user_upload/culture/Trafficking/project/Graph_Worldwide_Sept_2004.pdf (last visited Mar. 10, 2008).

the press may create obstacles for governments attempting to regulate material demeaning or exploitation of women. Where a constitution (such as in the United States) includes rights (or freedoms from legislative intrusion), but does not set out the tests for legitimate restriction on those rights, courts will need to invent such tests. Courts may need expressly to be reminded that gender equality should be included among the grounds on which an otherwise unqualified, facially gender-neutral right might be limited. This was recognized by the framers of the South African Constitution who included a general formula for legitimate limitations,¹⁰ plus a specific provision exempting the freedom of expression that is otherwise protected by its Bill of Rights from “advocacy of hatred based on . . . [among other things] gender . . . that constitutes incitement to cause harm.”¹¹

There are other examples. If a generalized “right to life” provision is found in a constitution, the goal of gender equality demands it be subject to legitimate limitations, and balanced against women’s rights to reproductive autonomy. Unqualified, the provision may lend support to laws preventing women from having access to safe abortions.¹² Again, the South African Constitution seeks to do this, with a provision affirming that “[e]veryone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction,” notwithstanding its constitutional “right to life.”¹³

Despite these difficulties, a sweeping constitutional statement of rights – direct or indirect, substantive or intangible, compensatory or transformative – is attractive. Nonetheless, the very choice to constitutionalize rights should not be made without a full understanding of the potential drawbacks, or at least an awareness of the feminist criticisms that have been directed at the rights paradigm. I set these out in the following section, not to disparage rights, but to caution against an overreliance on, or naïve faith in, rights in conceptualizing the goal of gender equality.

III. HEGEMONIC UNIVERSALISM

The value of constitutional rights for addressing gender disadvantage has been much debated. The debates have many strands and cover large and complex issues, and can only be touched upon here. Objections have been raised against

¹⁰ *S. Afr. Const.* 1996 § 36.

¹¹ *Id.* § 16(2)(c).

¹² This was the experience in Ireland before constitutional amendment. See Ailbhe Smyth, *The ‘X’ Case: Women and Abortion in the Republic of Ireland, 1992*, 1 *Feminist Legal Stud.* 163 (1993). See also Noel Whitty, *Law and the Regulation of Reproduction in Ireland: 1922–1992*, 43 *U. Toronto L.J.* 851 (1993).

¹³ *S. Afr. Const.* § 12(2)(a); § 11 (“Everyone has the right to life.”).

both the rights paradigm and the associated goal of gender equality. Among the most common is the claim that these are hegemonic or imperialistic, as well as “assimilationist.” The very goal of gender equality, some critics argue, assumes a false commonality among women, *as women*.

Critics argue that universal equality rights mask a claim on the part of white, middle class women to be the standard against which inequality is measured.¹⁴ The assumption that women are a group or “class” of person is, Elizabeth Kingdom argues, flawed and imperialistic. It ignores the fact that categories of disadvantage or discrimination – race, ethnicity, sexuality, and economic class – distinguish women with different disadvantages from women whose only disadvantage is their gender. In the words of Kimberlé Crenshaw, the “focus on the most privileged group members marginalizes those who are multiply burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.”¹⁵

Others object that the feminist understanding of inequality takes the (white, middle class) *male* norm as the standard against which women’s recognition of inequality is measured; that is, as the appropriate standard for which constitutional and legal reform should aim. This standard, some argue, is inherent specifically in liberal individualism and reflected in the feminist idea of equality based upon it. In the words of Catherine Mackinnon, “[l]iberal legalism is . . . a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.”¹⁶

Critics speak of “assimilationism,” “reductionism,” or “exclusionism” in describing gender equality rights. Diana Majury argues that tests for breach of those constitutional rights that rely on the identification of certain attributes or features as “irrelevant” or “inessential” to a legitimate governmental purpose, and, therefore, as constituting impermissible grounds for discrimination, have the paradoxical effect of reinforcing the experience of exclusion. For Majury, to determine that legal distinctions or classification involve “irrelevant” features trivializes differences that are, in fact, relevant to a person’s identity. In her words, this effect reflects “the oversimplification involved in legal approaches to equality.”¹⁷

¹⁴ Elizabeth Kingdom, *What’s Wrong with Rights?: Problems for Feminist Politics of Law* (1991).

¹⁵ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139, 140 (1989).

¹⁶ Catherine Mackinnon, *Toward Feminist Jurisprudence*, in *Feminist Jurisprudence* 610 (Patricia Smith ed., 1993).

¹⁷ Diana Majury, *Women’s (In)Equality before and after the Charter*, in *Women’s Legal Strategies in Canada* 101 (Radha Jhappan ed., 2002).

These criticisms are relevant to an understanding of the discourse of rights in general, and gender equality rights in particular, but, I do not see them as insuperable hurdles to constitutionalizing equality. Rather, they counsel a more complex and nuanced approach toward the means by which equality is imagined and the strategies for its achievement are identified. As Ronalda Murphy points out with respect to the South African experience, an emphasis on race or class disadvantage can also marginalize. Where women's voices have been silenced, because racial and class equality has been prioritized within an overriding discourse of race and/or class oppression, a strategy of commonality among women is necessary.¹⁸

Furthermore, a rejection of commonality may cause its own difficulties. A refusal to acknowledge commonality may obscure the shared experience of gender oppression. It may discourage privileged women from employing their advantages and privileges to assist other women. Challenging separatism is thus partly a question of promoting empathy, and partly a simple matter of strategy. Again, as Murphy emphasizes, in different locations, women need to "use different theories depending on what works to make room for their voices."¹⁹

Gender equality rights, it is also claimed, drive a hegemonic epistemology, lying specifically in the legal division between the public and the private sphere. Susan Millns, for example, notes that legal rights do not provide remedies for the oppression or disadvantage that arise in the social context, or in the non-legal "private" sphere. Yet, it is here, rather than in discriminatory legislation, she argues, that the greater experience of gender inequality lies.²⁰

Legally, however, this should not be an insuperable barrier. The law has increasingly reached into areas traditionally considered "private," and governmental policy has attempted in many instances to address social disadvantage through programs that are not themselves justiciable or susceptible to legal claims. However, Millns's point is valuable. It draws attention to a further downside of the constitutional rights discourse. This relates to the epistemological *effect* of prioritizing rights.

IV. FREEZING THE CONCEPTUAL IMAGINATION

When rights are entrenched in a constitution, they assume a character unlike rights that reside either in legislation or in abstract discourse. This is not

¹⁸ Ronalda Murphy, *Constitutional Rights Discourse: Canadian and South African Feminist Engagements*, in Alexandra Dobrowolsky & Vivien Hart, *Women Making Constitutions* (2003).

¹⁹ *Id.* at 23.

²⁰ Susan Millns, *Women's Rights After the Human Rights Act 1998*, in *Women Making Constitutions*, *supra* note 18.

simply because of their role in judicial review. They also “harden,” even reify. When people contemplate or assert their “rights” in a jurisdiction with a constitutional bill of rights, it is likely that the list in the bill is what they have in mind. With this assumption comes the risk of thinking of the list as rights, and failing to imagine anything outside the list as entitled to the name. It is the epistemological version of the legal principle *expressio unius est exclusio alterius* (to express one thing, excludes the thing not expressed). The focus on enumerated rights inhibits the recognition or conceptualization of non-enumerated rights.

This risk has long been recognized. Indeed, it was raised in the early debates surrounding the framing of the United States Constitution. When a Bill of Rights was introduced in Congress in 1788, James Madison acknowledged the objection (which he considered to be “one of the most plausible”) that, by “enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were . . . consequently insecure.”²¹

In response, the Ninth Amendment was included. It states: “The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.” The meaning of this provision and its relationship to the enumerated rights, however, has not been transparent, and its jurisprudence has consequently been limited. It is generally agreed that it is not a source of rights, nor does it refer to any particular or concrete rights; in other words, there is no such thing as a “Ninth Amendment right.” Although it may be possible to address the problem of “silent” or unnamed rights by a strategy of constitutional preemption, the reference to things unsaid or unnamed can never have the clarity or “hardness” that identifying and naming something attracts.

The conceptual imagination may be frozen at the time at which the constitution is written. Permanence is, of course, what framers of a constitution (and most particularly, it seems, advocates of entrenched rights) are seeking. But the historical experience of emerging new rights should caution against this. Many rights that are recognised today would have been not merely unenforceable a century (or less) ago, but not even recognizable as rights. Environmental rights, sexuality rights, even cultural rights, may be readily familiar in 2008, but these would have sounded alien, unrecognizable or untranslatable in the past. The historical development of rights has partly followed from struggles to articulate the experience of disadvantage in terms of rights; in other words, to “name” new rights, or at least to attach the vocabulary of rights to new claims.

²¹ http://press-pubs.uchicago.edu/founders/documents/bill_of_rights11.html.

To secure these rights in a constitution may be the goal, but it may prove self-defeating for the longer-term goal of achieving equality. The more flexible alternative, where new rights are claimed, is to seek expression of these rights in legislation, rather than constitutional entrenchment.

History should alert feminists who believe that entrenching the rights they support is the best strategy for securing equality. The United States Bill of Rights, coupled with the post Civil War Reconstruction Amendments, appear capacious and inclusive. Yet, as already noted, when women first attempted to bring claims for gender equality within the Constitution's framework, they met with rejection. It is scarcely a coincidence of history that the later extension of the Fourteenth Amendment's "equal protection" clause to *women's* equal protection came at a time (1971) when the second-wave women's movement was well-advanced after many years of political struggle.

This experience tells us several things. Rights change and develop. Their entrenchment may have an inhibiting or chilling effect upon progress. However, rights are most likely to be recognised or applied when the political and social environment supports them, and judicial recognition follows. In countries where the courts are weak or corrupt, legal strategies will not be successful in any case. The best approach is to put pressure on the political branches of government, in particular through media campaigns, joined by international pressure, with the aim of changing policies and implementing reforms.

A further epistemological effect of rights entrenchment is to alter the political discourse. Disputes or grievances heard by the courts must be framed in legally precise ways. The words used to describe and condemn discrimination must be expressed in the language of statutes and constitutional provisions, rather than by reference to the social, legal, and cultural forces that have a discriminatory impact. The need to "judicialize" inequality and to frame it in preexisting legal language may inhibit, even silence, the expression of indirect, nonjusticiable grievances. As Judy Fudge writes with respect to the *Canadian Charter of Rights and Freedoms*, inequality becomes conceptualized in terms of abstract, justiciable rights, rather than a concrete analysis involving social conditions, relations of power, and proactive programs, based on a broad-ranging analysis of the best means of promoting equality:

[F]eminists who invoke the Charter must couch their arguments in terms of the rhetoric of equality rights. Whilst it is true that social conditions will figure in their argument, they will figure only indirectly and to the extent that it is necessary to establish the rights claim. In this way the feminist discourse about power is translated into a discourse of rights.²²

²² Judy Fudge, *The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada*, 17 *Int'l J. Sociology L.* 445, 458 (1989).

These claims for equality rights, furthermore, are constrained within a framework of *response* to discriminatory laws. Governments set the agenda, and the courts respond to claims shaped by and within this agenda. Not only are the courts institutionally and directly constrained so that their role is, at the best, one of a corrective, but they are also indirectly constrained in most cases by what is “permitted” by the public culture. Courts will rarely defy or depart from public opinion. Richard Fallon has observed with respect to the United States, that “[t]he Supreme Court seldom diverges too far from the central values of popular political majorities. . . . Indeed, only twice in American history does the Court appear to have veered seriously out of line with generally prevailing views.”²³ A similar principle applies to prospects for constitutional amendment. Cynthia Harrison notes that, in the United States, “[w]ith the possible exception of the civil war amendments, constitutional amendments are lagging indicators of change, not propellants.”²⁴ As Judy Fudge succinctly puts it, “rights are not inherently progressive, but rather depend upon the politics informing them.”²⁵

This does not suggest that constitutional entrenchment leads inevitably to a negative outcome, but rather that the effort to mobilize and promote change works best in the political and cultural sphere, the judicial being far more likely to follow than to initiate. This is affirmed by the experience in Australia, where the Constitution (although it is in many other respects similar to the U. S. Constitution) lacks a bill of rights. Legislation supporting gender equality began to appear in the 1960s and 1970s, at virtually the same time as the expanded interpretation of the Fourteenth Amendment in the United States. The abolition of the rule requiring women to resign from public sector employment after marriage, and the amendment of industrial awards to give women equal pay to men, were followed by liberalization of abortion laws, and then a range of state and federal equal opportunity legislation. In 1984, the Australian federal parliament passed the *Sex Discrimination Act*, which incorporated into Australian law the obligations of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women*. These initiatives were the result, not of litigation (there were no pre-existing constitutional equality rights), but of political activism, and the electoral success of political parties that offered progressive policies.

Care should thus be taken by feminists that the concentration on amending a constitution or persuading the relevant constitutional court to bring gender equality under a pre-existing right, should not distract or deplete effort from the

²³ Richard H. Fallon, Jr., *The Dynamic Constitution* 274 (2004) (emphasis in original).

²⁴ Cynthia Harrison, ‘Heightened Scrutiny’: A Judicial Route to Constitutional Equality for U.S. Women, in *Dobrowolsky & Hart*, *supra* note 18, at 169.

²⁵ Fudge, *supra* note 22, at 460.

political realm where greater likelihood of success lies. This is not just a matter of cause and effect, but also of enlargement of the political imagination. In this realm, a collectivity of voices can be expressed, with at least an institutional presumption of equality. As Judy Fudge writes, “social transformation depends upon the expansion of political discourse, rather than upon its legislation.”²⁶ It is unrealistic, however, to suggest that a constitutional rights strategy should be abandoned in place of political strategy. Bills of rights exist. The rights paradigm is powerful. But, care must be taken not to imagine that the Constitution is the only, or even the best, path to equality.

V. COSTS OF LITIGATION

There are problems, thus, in treating constitutional rights as exhaustive or sufficient. A rights strategy should not take the place of campaigns for social and political change. But, so long as a multilayered, multipronged approach is followed, there might appear to be no *a priori* downside in constitutionalizing equality by entrenching justiciable rights. The epistemological straightjacket may be regarded as either irrelevant or a price worth paying for the legal enforcement of rights.

There is, however, a further shortcoming. Litigation is expensive, and the fact that litigation is most commonly initiated and borne by individuals who have been adversely affected by discriminatory laws compounds the problem. Court filing fees, legal advice, and the employment of legal counsel are often prohibitively costly, and whereas some countries (like the United States) guarantee state-provided legal counsel or legal aid to indigent defendants in criminal cases, this is rarely of advantage to persons wishing to initiate a constitutional challenge.

It is possible, of course, to establish systems of financial support for such challenges. In many countries, public interest advocacy groups, and pro bono attorneys provide free or subsidized assistance. Groups like the Canadian Legal Education Action Fund (LEAF) formed as civil society initiatives to support challenges to breaches of constitutional rights and have been of particular value to women.²⁷ Such programs are important. However, they depend upon private good will, private philanthropy, and a community of donors and supporters that remains favorable to the party alleging a breach of constitutional rights. The defense of gender equality should not rely upon the good will of individuals. This reliance is inherently unstable and potentially undependable. Collective political action, on the other hand, minimizes the costs to individuals, as well

²⁶ *Id.*

²⁷ See Beverley Baines, *Using the Canadian Charter of Rights and Freedoms, in The Gender of Constitutional Jurisprudence* (Beverley Baines & Ruth Rubio-Marín eds., 2005).

as avoiding a simply win-or-lose scenario. Because legislation may include provisions that deal with separate issues, complex circumstances, exceptions, and avenues of compromise, it is able to diminish the loss that is always experienced by one party in litigation. It is able to do so, furthermore, by spreading the cost across the community, as governments draw on taxes and other fiscal revenue to establish and run social programs.

Because constitutional litigation commonly involves a challenge to legislation (or executive action), the party opposing the individual who alleges a breach is commonly the government, typically powerful and well funded. Those at a disadvantage can have no guarantee of winning.

Governments are not necessarily hostile to the progressive interpretation of their country's constitution or to enforcement of equality rights provisions. There are examples of proactive official initiatives. In Canada, the "Court Challenges" program, a government initiative, was expanded in 1985, following the adoption of the *Canadian Charter of Rights and Freedoms*.²⁸ Its purpose was to support persons alleging breaches of the Charter in existing and new laws. It offered funding to alleviate the cost of litigation, normally borne by private parties. However, as has been proved with this program, such initiatives are also unstable; the program has been withdrawn, reinstated, and withdrawn again with the changing electoral fortunes of political parties.

"Relator" actions, where the Attorney-General (or equivalent) grants standing to an individual or group to bring an action on his or her behalf in the public interest (where the individual would not otherwise have standing) will also involve government in what is otherwise a privatized enforcement of the constitution. The frequency and value of relator actions will also wax and wane depending on the sympathies of government. Nothing should disparage such contributions to the pursuit of equality, but, the fact that these are exceptions to the rule – in which private initiative and private resources are required – should not be overlooked. But, the asymmetry in resources is not merely a matter of funding; it is also of time, knowledge, resilience, and endurance, qualities commonly strained among the very parties who are at a disadvantage, and less easily compensated than lack of funds.

In short, litigation has the effect of privatizing the enforcement of rights. Because courts must wait for disputes to come before them, discriminatory laws may operate for years before they are struck down, or may only be struck down when their impact becomes egregious. Of course, without an avenue of challenge at all, egregious laws will continue. But, to rely on litigation as the single or primary "corrective" is to relieve governments of the public

²⁸ Court Challenges Program of Canada, <http://www.ccpccj.ca/e/ccp.shtml>.

responsibility for law reform, a responsibility that, when exercised, costs nothing or little to the individual, but benefits the public broadly.

CONCLUSION

Constitutionalized rights are commonly regarded as the best, or even the only avenue for achieving gender equality. This assumption reflects the dominance of a belief in enforcement, backed up with legal remedies or sanctions, as the main avenue for achieving reform and progressive change. The legal rights paradigm is particularly prominent in the United States and Canada, but is growing in influence in other comparable countries. In Britain and New Zealand, statutory bills of rights were adopted in the 1990s, and although these do not give the courts the power of judicial review, they have increasingly taken on a full constitutional persona. In Australia, where there is no federal bill of rights, either in the Constitution or in a statute, there is significant pressure on the Australian government to come in line with other countries and adopt one. In this climate, it is unrealistic to dismiss constitutional rights as irrelevant or undesirable. In some circumstances, such as South Africa, the entrenchment of a range of rights was both inevitable and desirable as that country emerged into democratic constitutionalism from a history of profound inequality.

It is worthwhile, in this conclusion, to turn briefly to the South African experience, to get a sense of how the emphasis on constitutional rights has worked in practice. A decade after the democratic transformation of South Africa began, Saras Jagwanth and Christina Murray surveyed the country's record with respect to gender equality.²⁹ The South African Constitution expresses a commitment to equality, including gender equality, in its opening provision.³⁰ It provides for both formal and substantive equality, and includes provisions for social and economic rights. In some provisions, rights are expressed as obligations on government, and government is enjoined to take "reasonable," progressive measures for their realization. Its equality principles apply to both the public and private ("natural or juristic") persons.³¹ It includes numerous other provisions, including those that assert the priority of gender equality over other rights, such as customary rights.³² It requires the courts to take account,

²⁹ Saras Jagwanth & Christina Murray, *Ten Years of Transformation: How Has Gender Equality in South Africa Fared?*, 14 *Canadian J. Women & L.* 255 (2002).

³⁰ *S. Afr. Const.* § 1 (1996) (stating the foundational values of the Republic of South Africa, including "Human dignity, the achievement of equality and the advancement of human rights and freedoms" and "Non-racialism and non-sexism.").

³¹ *S. Afr. Const.* § 8(2) (1996).

³² *Id.* §§ 30, 31.

not only of the Bill of Rights in the interpretation of the law, but also of international law.³³

The experience of a decade of case law arising from its operation has been both encouraging and disappointing. As Jagwanth and Murray conclude, “South African feminists put enormous effort into securing a strong right to gender equality in the Constitution, and in important ways, it has borne fruit.”³⁴ Important advances have been made through litigation. However, the experience also “demands recognition of the limited role the courts and litigation play in this regard and the importance of a multi-pronged strategy to achieve equality.”³⁵ All sectors of society, they emphasize, must share a commitment to equality. Legislation, and not merely constitutional litigation, must play a major role, but civil society will be critical in promoting gender equality, putting pressure on governments and courts, and encouraging a widespread commitment to the principle.

In the words of Susan Millns, “formal legal rights do not necessarily deliver on their promise to end the oppression of marginalized groups.”³⁶ Combined with strategies that target “opportunity structures” as well as social and cultural relations, a discourse of rights can be part of a broad social program of equality. It may not be possible to avoid the hegemonic effect in constitutionalizing rights, whereby those identified and named come to represent *the* authorized or exclusive version of rights. If so, other discourses of equality must be developed. Campaigns for decent housing, or better education, or women’s health programs, can be supported by evidence that women (and thereby children) are at a particular disadvantage in these spheres, without engaging the language of rights. Principles of human decency, or respect, or belief in human progress, or, if nothing better, even opportunistic concerns about electoral fortunes, can drive campaigns for equality, without, or alongside “rights.”

Feminists in some countries will nevertheless need to rely on a constitutional rights strategy; others will face circumstances where legal enforcement or constitutional reform are simply unrealistic. In each case, however, the achievement of gender equality will require more than rights. The vision of equality must always involve social and political change. The feminist eye must always be on the opportunity structures in the political process as well as in the Constitution.

³³ *Id.* § 39(1)(b).

³⁴ Jagwanth & Murray, *supra* note 29, at 299.

³⁵ *Id.*

³⁶ Millns, *supra* note 20, at 142.

4

Perfectionism and Fundamentalism in the Application of the German Abortion Laws

Mary Anne Case*

When I arrived in Germany a few years ago to look more closely at the application of the German abortion laws, I did so with a feminist chip on my shoulder. I was convinced that the application of the laws was disrespectful of women's dignity and autonomy, in ways that should be equally troubling to supporters and opponents of abortion rights. I was also, as a constitutional lawyer, convinced that the compromise the German legislature and Constitutional Court had reached after the reunification of East and West Germany was hopelessly incoherent and rife with contradictions, such that it made no logical sense from any jurisprudential perspective. What I heard from the Germans I talked to gave me pause, however. No matter what their ideology or level of engagement with abortion questions, all sorts of people, from government officials, scholars, and activists to ordinary citizens, old friends, and relatives, had the same reaction when I told them of my project. "Abortion?" they said.

* This chapter sets out in abbreviated form portions of my broader work on feminist fundamentalism and on the viability of the German abortion compromise, which I have presented at venues too numerous to list here and on which I have received help from more people than I now have space to thank by name. I can mention only my particular gratitude to the American Academy in Berlin's Bosch Public Policy Fellowship for funding my research in Germany; to the many participants in the shaping and application of the German abortion laws who took time to speak with me about them, most especially officials of *Donum Vitae*, including Maria Geiss-Wittmann and Beatrix Frank-Bauer; but also officials in *Pro Familia*, the Bundesministerium der Justiz, the Bundesministerium fuer Familie, Senioren, Frauen und Jugend; the Bavarian Staatsministerium fur Gesundheit, Ernaehrung und Verbraucherschutz; the Bavarian Staatsministerium fur Arbeit und Socialordnung, Familie und Frauen; Ernst-Wolfgang Boeckenfoerde, and Rita Suessmuth; to Sabine Berghahn and Kari Robinson for sharing with me their ongoing work on abortion in Germany; to Susan H. Williams as organizer and to the other participants in the March 2007 Constituting Equality conference from which the book in which this chapter appears grew; and to Lyonette Louis-Jacques, Deborah Megdal, and Margaret Schilt for research assistance. I remain solely responsible for any remaining errors in the chapter.

“Why are you looking into abortion? That used to be an interesting question. It’s not interesting anymore.”

This put my project in a whole new light. When it comes to abortion, the United States throughout my lifetime has been a victim of the proverbial Chinese curse, “May you live in interesting times.” If the Germans, who through much of the twentieth century debated abortion questions as fiercely as the Americans did, had found a way to lift the curse, perhaps there was something to be said in favor of the German approach.

This chapter examines aspects of the current German approach and of the politics surrounding abortion in Germany from the 1990s to the present from the perspective of a distinction between “perfectionist” and “fundamentalist” approaches.¹ As I define them herein, a fundamentalist approach is one in which no compromise on the commitment to principle is acceptable, but the fundamentalist does not necessarily insist on imposing his or her principles on others. A perfectionist approach has as its goal compliance by all with the perfectionist’s principles, but the perfectionist may be willing to engage in some compromise to come closer to achieving this goal. The chapter suggests that with respect to abortion, the German legal system advances its perfectionist goals by repudiating fundamentalism, because it compromises on the condemnation of abortions in favor of measures to more effectively reduce their number.

I then set forth some of my own concerns about the German approach, from a perspective I call feminist fundamentalism, by which I mean an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles.² The chapter ends with an examination of implications for efforts to move abortion questions past a clash of absolutes³ to be found in the Vatican’s decade long struggle to reassert Catholic fundamentalist opposition to abortion in the face of efforts by a majority of German Catholic bishops and laity to continue their cooperation in the German compromise.

¹ I am using the words “fundamentalist” and “perfectionist” here in ways I will try to define precisely, which have a family resemblance, but not perfect identity with, the way the terms are used by others or in other contexts. I realize this may cause some confusion, but I have been unable to find other established or better words for the distinction I’m trying to draw, nor have I found a single, consistently used alternate definition of either of the terms I’m using.

² See Mary Anne Case, *Feminist Fundamentalism and Constitutional Citizenship*, in *Dimensions of Women’s Equal Citizenship* (Joanna Grossman & Linda McClain, eds., forthcoming 2009).

³ See generally, Laurence H. Tribe, *Abortion: The Clash of Absolutes* (1990).

I. GERMAN ABORTION LAW FROM THE 1970S UNTIL GERMAN REUNIFICATION

The German and American constitutional laws of abortion have been interesting mirror images of one another for the last several decades. In both the Federal Republic of Germany and the United States in the 1970s, courts overturned on constitutional grounds legislative schemes governing abortion. In the United States, beginning with *Roe v. Wade*, in 1973,⁴ the Supreme Court struck down restrictive criminal laws on abortion as incompatible with the pregnant woman's constitutional rights. By contrast, in its Judgment of February 25, 1975, the German Federal Constitutional Court ("Bundesverfassungsgericht") struck down a proposed decriminalization of most abortions performed within the first twelve weeks of pregnancy as incompatible with the fetus's constitutionally guaranteed right to life and human dignity.⁵ According to the Bundesverfassungsgericht, the German state was under an affirmative obligation to protect the fetus "even against the mother." The Bundesverfassungsgericht majority acknowledged that other Western constitutional democracies, such as the United States, had reached a different result, but insisted that, given the particular history of Germany, the need thoroughly to repudiate the National Socialist policy of "destruction of life unworthy of life"⁶ obliged the Federal Republic to be even more protective than other nations of human life and dignity. (According to the dissenting opinion, Germany's need to repudiate its Nazi heritage should instead, when it comes to abortion, lead to "the reverse conclusion, that is, restraint in employing criminal punishment.")⁷

Like the United States Supreme Court with its trimester framework, the Bundesverfassungsgericht did not stop at striking down abortion legislation, but went on to propose a constitutionally acceptable framework for regulating abortion. Under what was known as the Indications Model outlined by the Bundesverfassungsgericht in its 1975 opinion and enacted into federal legislation in 1976, abortion remained a criminal offense except in those enumerated circumstances where expecting the woman to carry the pregnancy to term would be "too much to expect" ("unzumutbar"). These circumstances, or indications, included threats to the life or health of the pregnant woman ("medical indication"), a pregnancy that was the result of a criminal act such as

⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵ (1975) 39 BverfGE 1 (F.R.G.). For an English translation of this decision, see *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *J. Marshall J. Prac. & Proc.* 605 (Robert E. Jonas & John D. Gorby trans., 1976).

⁶ *Id.* at § C (I) (1) (a).

⁷ *Id.* (Rupp-von Bruenneck and Simon, JJ., dissenting) at § A (II).

rape or incest (“criminological indication”), a fetus suffering from severe birth defects (“embryopathic indication”), and a more general “social indication” or “situation of need” intended to cover circumstances in which continuing the pregnancy would impose on the pregnant woman exceptional hardships comparable in severity to those encompassed by the other three enumerated indications. It was left to physicians to determine whether any of the indications were present.

Like *Roe v. Wade*, the 1975 Bundesverfassungsgericht abortion decision resulted in considerable controversy and political agitation. Statistics indicating that over 80 percent of reported abortions performed under the indications regime fell under the so-called social indication, led opponents of abortion to claim that the law was being applied too liberally. As in the United States, abortions were as a practical matter easier to obtain in some regions of the country than in others. Particularly in the more conservative, Catholic regions of Germany, women had more difficulty obtaining abortions and doctors who accommodated them risked prosecution. Abortion rights advocates described as a witch hunt the widely publicized 1988 criminal trial of a doctor from the small Bavarian town of Memmingen charged with more than 150 instances of unwarranted use of the social indication.⁸ Women, too, risked prosecution, among them not only the Memmingen doctor’s patients, but also West German women who traveled for their abortions to the less-restrictive Netherlands and were met at the border on their return by police searching for evidence they had had an abortion while abroad.⁹

Nevertheless, it took the reunification of East and West Germany to prompt the German legislature and court systematically to revisit the abortion question. In the period from 1972 until unification, women in the German Democratic Republic had available to them, not only what amounted to abortion on request in the first trimester, but also free contraception and a much more extensive and readily available system of state-sponsored child care than was available to women in the Federal Republic of Germany. So attached were the East Germans to this aspect of their laws that, even though at the moment of unification in 1990 virtually all other East German laws vanished in an instant to be replaced by their West German counterparts, the East German abortion laws remained temporarily in place, applicable only to women from the former East Germany for a two-year moratorium period during which the united German legislature was to seek a compromise solution. Of course,

⁸ See, e.g., Joel Connelly, *German Women’s Dilemma; New Nation Confronts Abortion, Other Issues*, *Seattle-Post Intelligencer*, Oct. 5, 1990, at A1.

⁹ See, e.g., Tamara Jones, *Social Policy; Wall Still Divides Germany on the Abortion Question*, *Los Angeles Times*, October 19, 1991, at A4.

anyone who took constitutional law seriously had to wonder exactly what sort of compromise could be possible, given that the Bundesverfassungsgericht's 1975 decision rested in part on the Basic Law's Article 1 guarantee of the inviolability of human dignity, which, as a reaction against Nazi violations of human dignity, had explicitly been declared in Article 79 (3) of the Basic Law to be unamendable.¹⁰

II. THE POST-UNIFICATION COMPROMISE

As it had been in the 1970s, the German federal legislature, now augmented by representatives from the former East Germany, was more willing than the Bundesverfassungsgericht to liberalize access to abortion. It also insisted, however, that its 1992 Act for the Protection of Prenatal/Developing Life, Promotion of a More Child-Friendly Society, Assistance in Pregnancy Conflicts, and Regulation of Pregnancy Terminations, colloquially known as the Pregnant Women's and Family Assistance Act,¹¹ would be more effective at preventing abortion than the prior legislative framework had been. At the center of the new framework was a retooled version of a counseling requirement for pregnant women, which had also formed part of the legislation rejected by the Bundesverfassungsgericht in 1975. The Act also included a congeries of provisions designed to reduce the need for abortion, including mandated increases (at least as compared to what was previously available in West Germany, although not East Germany) in the availability of day care and social assistance, such as vocational training and greater protection in housing and employment for pregnant women and the mothers of young children.

In its Judgment of May 28, 1993, the Bundesverfassungsgericht upheld central features of the proposed counseling scheme, but insisted on the revision of other features to make them more unambiguously pro-life.¹² By the terms of the Pregnant Women's and Family Assistance Act, a woman who wished to obtain an abortion within the first twelve weeks of pregnancy was required to present herself at a government approved and government funded counseling center for counseling to resolve what was described as her "situation of conflict." At the Bundesverfassungsgericht's insistence, the counseling could

¹⁰ Grundgesetz [GG] [Basic Law], May 23, 1949, as amended, art. 1 (1), 79 (3).

¹¹ Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Foerderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz) (Pregnant Women's and Family Assistance Act) 1992 BGBl. I 1398.

¹² 88 BverfGE 203 (F.R.G.). An official English translation is available at http://www.bundesverfassungsgericht.de/en/decisions/fs19930528_2bvfo0029oen.html. Further citations from this opinion in this chapter will be to this official translation.

not be merely informational; rather “the counselors must try to encourage the woman to continue her pregnancy and show her opportunities for a life with the child.”¹³ The court contemplated that the counseling, and that legislation more broadly, should take into account all of the pressures that might bear on a woman, including external pressures from family members, sexual partners, landlords, employers, and creditors. Upon completion of the counseling, the woman would receive a certificate in effect permitting her to obtain a first trimester abortion without risk of criminal sanctions. She no longer had to obtain third-party certification of the existence of one of the four approved indications; the ultimate decision was in her hands. However, because she could not be judge in her own case, in the absence of third-party certification, her abortion, although not punishable, could also not be justified; the Bundesverfassungsgericht insisted it would remain a wrongful act. Consequentially, the court majority determined that the comprehensive public medical insurance scheme could no longer pay for abortions that were not medically necessary. If, however, the woman herself were too poor to pay for the abortion, the court majority held that the state itself was authorized to pay the cost. The Bundesverfassungsgericht also insisted that comprehensive abortion statistics be maintained, because its approval of the substitution of counseling for criminal sanctions was conditioned on counseling being indeed more effective than the threat of punishment in inducing women to carry their fetuses to term. The compromise as amended by the court and eventually embodied in federal legislation in 1995¹⁴ had many other features as well, a full explication of which would exceed the scope of this paper.¹⁵

Like the U.S. Supreme Court’s *Casey* decision,¹⁶ the Bundesverfassungsgericht’s decision of May 28, 1993, was intended to offer the possibility of a stable compromise. Although starting from opposite positions concerning the constitutionality, in principle, of first trimester abortions, the results reached by the two courts are not as different as their starting points might suggest – the result in both cases is in effect to preclude the state from imposing an undue burden on a pregnant woman through the restrictions it imposes on her termination of her pregnancy,¹⁷ although in the United States the principal

¹³ *Id.* at 217.

¹⁴ Schwangeren- und Familienhilfeänderungsgesetz (SFHÄndG) of 21 August 1995.

¹⁵ It is particularly important to note that this chapter’s focus is the legal treatment of first trimester abortions only, not late term abortions. For a more detailed examination of the 1993 decision in comparative perspective, see, e.g., Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse, and the Right to Protection in the United States and Germany*, 43 *Am. J. Comp. L.* 273 (1995).

¹⁶ *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

¹⁷ Although the German court’s goal is unequivocally to discourage abortions, it nevertheless manifests a concern about the undue burden on women contemplating abortion in setting forth detailed mandates about, for example, the provision of a sufficient number of counseling

reason for doing so is to protect the woman's rights, whereas in Germany, the emphasis is on more effective protection for the fetus. The legal details of both decisions, like those of their predecessor decisions from the 1970s, were readily susceptible to criticism. The German decision in particular was extremely lengthy, complex, and full of apparent tensions and contradictions. Not all of the forms of assistance for pregnant women have been implemented as contemplated in Germany. But, the German decision seems to have accomplished what the American *Casey* decision did not – a compromise many of the leading participants in the abortion debates found attractive enough to be worth trying to preserve, even at the expense of ignoring or underplaying any tensions or contradictions.¹⁸

III. PERFECTIONIST AND FUNDAMENTALIST CHARACTERISTICS DEFINED

The remainder of this chapter will use an analysis of the salient features of the German abortion compromise to highlight distinctions between what I am calling “perfectionist” and “fundamentalist” approaches to a problem such as the legal regulation of abortion. As I am defining these terms, which I acknowledge others define in somewhat different ways, the hallmark of fundamentalism is an unwillingness to compromise and that of perfectionism is a willingness to impose. Another way of formulating the distinction is that perfectionism speaks in the second or third person – it is about what “you” or “they” should or must do, not just about what “I” or “We” (as in “We, the people of the United States. . .”) must do. With respect to any deeply held commitment, it is possible to be both fundamentalist and perfectionist, neither perfectionist nor fundamentalist, fundamentalist without being perfectionist, or perfectionist, but not fundamentalist. With respect to any commitment or set of commitments, individual actors within a legal system, as well as the legal system itself, can decide not to compromise without wishing to impose or can decide to impose and perhaps in the interests of that imposition, compromise. In other work, I have explored the distinctions between fundamentalism and perfectionism in ongoing debates on issues including the legal regulation of marriage, veiling and sex segregation, and the teaching of values in public schools.¹⁹

centers within easy reach of all women in Germany, requirements that counseling not be dragged out until it is too late for a woman to abort, and the availability of state funds for the abortions of poor women.

¹⁸ As will become clear later, I do not mean to suggest that the current state of the law in Germany raises no objections or that all abortion questions are deemed settled.

¹⁹ Case, *supra* note 2; see also Mary Anne Case, *Feminist Fundamentalism on the Frontier between Government and Family Responsibility for Children*, in *What is Right for Children?* (Martha Fineman, ed., forthcoming 2009) and in Utah L. Rev. Symposium Issue, *New Frontiers in*

Before applying these distinctions to the German abortion context, let me offer an illustration from yet another context to help make my rubric clear. Consider a vegan invited to a meal at which the host serves paella, a rice dish made with meat and shellfish. The host's proposed solution is that the vegan guest can just scoop out the pieces of meat and shellfish from the dish. A fundamentalist vegan is someone for whom just scooping them out is not an acceptable option. Some fundamentalist vegans are perfectly comfortable sitting down to a meal at which others are eating meat, so long as their own portion is completely untainted. But, one who is also a perfectionist might insist that only vegan food be served to everyone at the table. And one with perfectionist, but not fundamentalist, tendencies might consider it an acceptable compromise if everyone's portion of rice were flavored with shellfish stock, but no other meat or fish were included in the meal.

As I see it, the German abortion compromise as crafted by the legislature and amended by the court is in important ways perfectionist without being fundamentalist. It began from the premise that the most important thing about abortions is not that they be condemned, but that they be prevented. Given that the threat of criminal punishment had not worked to prevent abortions, it was possible that counseling, whose purpose was to protect the fetus, not "against the mother" but with her cooperation, could be more effective. Substituting counseling for the threat of punishment was thus worth trying, even though the somewhat paradoxical result was to allow a woman to engage with impunity in a wrongful act contravening constitutional norms provided that she allow government authorized counselors to try to talk her out of it first.

The simultaneous denial of insurance coverage for most abortions and insistence on authorization of government payments for the abortions of poor women is similarly paradoxical from a fundamentalist perspective. Under this scheme, the government will not only be permitting, but paying for, wrongful acts contravening constitutional norms. This introduces a new element into the division of acts along one axis into protected, permitted, and condemned and along another into subsidized, unsubsidized, and taxed. Whereas abortion in the United States is famously protected, but unsubsidized,²⁰ abortion in Germany can be paradoxically at once condemned and subsidized. One way to account for this difference is as an instantiation of the broader contrast

Family Law (forthcoming 2009); Mary Anne Case, *Feminist Fundamentalism and the Baby Markets*, in *Baby Markets: Money, Morals and the Neopolitics of Choice* (Michele Goodwin, ed., forthcoming 2009).

²⁰ See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (upholding prohibition on the use of Medicaid funds to perform abortions except in cases of rape, incest, or danger to the life of the pregnant woman).

between an American commitment to individual rights and responsibilities and a German constitutional commitment that the state be a social state.

Some might be tempted to see a heritage of eugenics in the German government's willingness to pay for the abortions of poor women, a disproportionate number of whom can be predicted to be of other than ethnic German origin. But, a closer look at the regulations on abortion payments and their application reveals the following: It was left to the legislatures, still in general more liberal than the court on abortion issues, to determine what qualified a woman as needy enough to have her abortion paid for by the state. The adopted income thresholds were not only quite generous, but also count only a woman's own income, not that of her spouse or other family members, or her illiquid assets. The result, not until recently widely publicized, is that the state, under a constitutional obligation to prevent abortions, nevertheless pays for more than 80 percent of them.²¹ Again, the court's explanation is one that privileges a perfectionist attempt to prevent abortions over a fundamentalist insistence that the state keep its hands clean: payments for poor women's abortions were necessary to the success of the counseling scheme because without them women might bypass counseling and the services of a licensed physician entirely, risking their health and foreclosing the possibility of effective influence being brought to bear on them.

The Bundesverfassungsgericht's Judgment of May 28, 1993, was not greeted with universal acclaim, with some feminists calling it a "return to the Middle Ages"²² and some abortion opponents calling it an unprincipled abdication of the state's duty to protect fetal life.

IV. MY FEMINIST FUNDAMENTALIST CONCERNS ABOUT THE GERMAN COMPROMISE

My own initial reaction to the 1993 decision, from my feminist fundamentalist perspective,²³ was not enthusiastic. I was particularly troubled that the

²¹ The percentage of state financed abortions varies by region, from approximately 65% in conservative Catholic Bavaria to approximately 95% in more liberal Nordrhein-Westfalen. *Manfred Spieker, Kirche und Abtreibung in Deutschland: Ursachen und Verlauf eines Konflikts* 105 (2d ed. 2008).

²² Regine Hildebrandt, minister for social affairs in the state of Brandenburg, as quoted in Stephen Kinzer, *German Court Restricts Abortion, Angering Feminists and the East*, *NY Times*, May 29, 1993, at 1.

²³ Not all feminists, even those who by my terms would be feminist fundamentalists, would agree with me. Like the religious commitments to which I am pressing an analogy in my use of the term "fundamentalist," feminist commitments can vary in content as well as in character. Feminists, like those within a faith tradition, diverge somewhat in their beliefs and in their views of what their beliefs require of them. Moreover, many committed feminists, like

counseling scheme encourages a view of women as uniquely unable to make responsible decisions without aid. My concerns intensified when I looked at abortion counseling in light of the history of the regulation of women as mothers under German law: until the 1970s, for example, a guardian, with decision-making authority from the state, was required to be appointed for every child of any unmarried mother, regardless of the mother's age, fitness as a parent, economic, or educational level.²⁴ My concerns would be abated if the counseling scheme were not so anomalous in present-day German law. If, for example, counseling were a well-established, frequently encountered practice under present-day German law, if persons seeking to engage in a wide variety of acts were required to undergo counseling beforehand, my concerns would not be as strong. As things stand, however, pregnant women are uniquely seen as in need of counseling, uniquely requiring guidance in making decisions.

Let me stress three things: First, the response of feminist supporters of the German abortion compromise would be that, in the end, the compromise puts the ultimate decision of whether or not to abort in the hands of the pregnant woman; it can thus be seen as more respectful of a woman's decision-making ability than prior schemes, in both Germany and the pre-*Roe v. Wade* United States, that put the ultimate decision of whether a woman was in a condition of sufficient distress that she should be allowed to proceed with an abortion in the hands of third parties such as doctors. Second, my concerns apply only to mandatory, not to voluntary counseling. Third, these concerns about mandatory counseling are, in my view, independent of any underlying commitment on abortion. Thus, those who favor abortion rights may see counseling as an acceptable price to pay for the ultimate opportunity to abort, whereas those who oppose abortion may see counseling as a useful tool for discouraging abortion. On the other hand, an uncompromising focus on sex equality under law might perhaps lead some to the conclusion that it better befits women's dignity as independent responsible legal actors to send them to jail for aborting, rather than to mandatory counseling before they do so.

My own inclination was to compare mandatory abortion counseling to the West German procedure for conscientious objection by young men to mandatory military service ("Kriegsdienstverweigerung"), which traditionally had been more of an adversarial examination than a counseling session.²⁵

many devout religious believers, would not embrace nor be accurately described by the term fundamentalist as I define it.

²⁴ See, e.g., Elizabeth D. Heineman, *What Difference Does a Husband Make? Women and Marital Status in Nazi and Postwar Germany* 151–5 (1989).

²⁵ This procedure is no longer in effect, given that in the united German population at present there are far more young men eligible for potential military service than the German military currently has need to draft.

Unlike pregnant women, young men who sought to qualify for alternative service were not treated as necessarily in need of advice or guidance, but were instead presumed to know their own mind. One could, however, readily imagine how a counseling approach might work. ("Listen, son, it's not really so bad in the army, and the country needs defending, doesn't it? You want to do your part, don't you? Think it over. . ."). To what extent do intractable differences between the two situations and to what extent do norms of masculinity and femininity help account for the differences in approach? One question worth posing is whether increased and broader applicability of a counseling approach might be beneficial.

A second set of feminist concerns arises for me from the abortion financing regulations put in place after the May 1993 decision. As noted above, regulations implementing the decision interpreted the mother's straitened financial circumstances very broadly, such that, in theory, even the non-wage earning wife of a rich man, because she earns no income and may have no liquid assets in her own name, can qualify for state aid. One under-publicized consequence of these generous regulations is that, in the aftermath of a decision reaffirming abortion's wrongfulness and loudly trumpeting constitutional restrictions on payments for abortions, the overwhelming majority of abortions are paid for by the state. This fact alone is worthy of attention. But, in addition, it is worth noting that the group of women most directly at a disadvantage because of the 1993 decision are those who could have justified their abortions and had them paid for by insurance under the old scheme but, because they are wage-earners in their own right, must now pay for abortions without being given the same opportunities previously available to justify themselves.

Once again, it seems to me that having concerns from a feminist fundamentalist perspective about this aspect of the abortion decision can be independent of one's underlying views on the abortion question. Supporting evidence for my supposition can be found in the partial dissent of constitutional court judge Ernst-Wolfgang Boeckenfoerde. Abortion rights supporters had urged unsuccessfully that Boeckenfoerde be recused from participating in the Bundesverfassungsgericht's 1993 abortion case because of his prominent support for Catholic anti-abortion organizations. Nevertheless, in his opinion dissenting in part, Boeckenfoerde objected that the majority had unnecessarily denied to women the opportunity previously available to them to justify their abortions:

If women who are considering pregnancy termination are called upon to show responsibility in this way and if they are expected to act according to the requirements of the law, it is then contradictory to demand at the same time

a constitutional prohibition whereby in all legal areas, other than penal law, women who have had a termination are to be treated without distinction as having acting [sic] wrongly and are to have no chance to defend themselves. Women are supposed to use the legal system's requirements for the protection of unborn life as orientation, nonetheless even when they do their actions are and remain – by virtue of the constitutional order – wrong. That is not only contradictory – it also affects the woman's person, her honor and legal status.²⁶

In addition to sharing Boeckenfoerde's concerns, I fear that the way this aspect of the decision was ultimately worked out in the abortion funding regime may fit with a broader tendency in German law and society to privilege the interests of housewives more generally over those of independent professional women.

V. PERFECTIONISM AND FUNDAMENTALISM IN THE RESPONSE OF THE CATHOLIC CHURCH²⁷

That legislators and judges on various sides of the abortion question in Germany were prepared to compromise in hopes of achieving a stable equilibrium may not seem remarkable. More surprising, perhaps, was the response of a significant majority of the bishops and laity of the German Catholic Church to the substitution of a counseling regime for a regime focusing on criminal punishment as a means of discouraging abortions in the first trimester, as authorized by the Bundesverfassungsgericht. Like the Vatican and the American Catholic Church, the Catholic Church in Germany was strongly opposed to abortion. Nevertheless, the head of the German Catholic Bishops' Conference, Bishop Karl Lehmann, reacted enthusiastically to the counseling scheme outlined in the Bundesverfassungsgericht's 1993 decision, saying, "the real winner [in this case] is the human being."²⁸ Bishop Lehman said he was particularly pleased to see that the new scheme contemplated that the responsibility to protect life would extend beyond the pregnant woman herself into her family and social circle and the society at large.

The court's majority opinion and subsequent legislation set forth in detail the requirement for government-funded counseling centers to be set up in all parts of Germany. Initially, some were authorized to be run by the regional

²⁶ 88 BverfGE 203 (F.R.G.) at 427 (Boeckenfoerde, J., concurring in part and dissenting in part).

²⁷ Among the most detailed historical and analytical accounts of the interactions of the German Catholic hierarchy and laity and the Vatican concerning the application of the German abortion laws are two books written from perspectives generally supportive of the Vatican position, *Spieker, supra* note 21, and *Rainer Beckmann, Der Streit um den Beratungsschein*, (2000) (including full text of relevant documents from 1995–1999).

²⁸ *Beckmann, supra* note 27 at 81.

governments themselves, others by physicians, and many by Pro Familia (the German equivalent of Planned Parenthood). Remarkably, however, many were also authorized to be run by the Catholic Church (typically through Caritas, the German equivalent of Catholic Charities).

From the beginning, a small minority of German Catholic clergy and laity resisted the involvement of their Church in the new abortion counseling regime, taking a position that was uncompromising, or, in my terminology, fundamentalist, to wit that given that at the end of state-sponsored counseling pregnant women were issued a certificate that they could use to obtain an abortion without risk of criminal punishment, the counseling centers were essentially providing these women a license to kill, something the Church and its members ought not to facilitate in any way.

The overwhelming majority of the German Catholic bishops, however, supported the full participation of the Catholic Church in the state-sponsored counseling scheme. Even more remarkably, they continued to do so over a period of many years in the face of repeated, increasingly unambiguous and insistent directives from the Vatican and from the Pope himself to stop. The bishops' tenacious but, ultimately, unsuccessful efforts to dissuade the Vatican from its fundamentalist insistence on keeping the Church from any involvement whatsoever with the German abortion compromise centered on an argument that Catholic counseling centers had an opportunity to dissuade women from aborting and thereby could save the lives of their unborn children. Thousands of children, said the bishops, owed their lives to the Church's counseling centers, and it would be its withdrawal from counseling, rather than its continued participation, that would implicate the Church in the deaths of the innocent.

After evading for five years Vatican-imposed deadlines for ceasing to issue certificates of abortion counseling that could be used to obtain abortions, in the end, the German Catholic bishops were indeed forced to withdraw from participation in state-sponsored counseling, but the place of the Church itself was taken by organizations of committed pro-life Catholic laity, notably *Donum Vitae* (Latin for "gift of life"), founded for this purpose in September 1999. The Pope and the Vatican then turned their attention to condemning and trying to stop the participation of these organizations of Catholics in abortion counseling. After the elevation to the papacy of German-born Joseph Cardinal Ratzinger, who, while head of the Congregation for the Doctrine of the Faith, had, himself, communicated with the German Bishops directing them to cease and desist offering counseling certificates, his successor as head of what used to be known as the Congregation of the Roman and Universal Inquisition, American William Cardinal Levada, directed the German Bishops to

stop Catholics from supporting *Donum Vitae*. Like the bishops before them, however, the women and men of *Donum Vitae* resisted the Vatican directives and continued, not only in their counseling, but in their conviction that it was consistent with, if not required by, their Catholic faith.

What lessons can be drawn from the ongoing battle between *Donum Vitae* and the Vatican over participation in the abortion counseling regime? Well, a pessimist might see evidence that the issue of abortion can never get beyond a clash of absolutes, with fundamentalists ever ready to upset any hope of stable compromise. But, having spent some time with the women of *Donum Vitae* in Bavaria, I think there might be more optimistic lessons as well, especially when I contrast their approach with that more prevalent among abortion rights opponents in the United States. Unlike so many of the counselors who lie in wait for women at the entrances of abortion clinics in the United States or the legislators who seek to mandate counseling for American women seeking abortions, the women of *Donum Vitae*, in the spirit of the German constitutional compromise itself, appear to have an approach that is at its root not finger-wagging, but supportive, whose aim is, as the *Bundesverfassungsgericht* required, to “show [the pregnant woman] opportunities for a life with the child,” not to threaten her with regret or cancer should she abort.

Also, in the spirit of the German compromise, the *Donum Vitae* counselors repudiate fundamentalism in the interests of perfectionism. The rules governing abortion counseling require state-sponsored counseling centers also to provide sex education, including the use of contraceptives. Wasn't this difficult for them as Catholics, I asked some of the women of *Donum Vitae*, given that their Church forbade artificial means of contraception, as well as abortion? Of course not, they responded with some puzzlement: every successful contraception is an abortion that does not need to happen; contraception may be bad, but abortion is much, much worse. Like much about the German compromise, this attitude on the part of Catholic activists is worthy of further study at a time when religious opponents of abortion in the United States are likely to let fundamentalism dictate their agenda, and, in recent years, the agenda of the federal government, opposing not only abortion funding, but also access to and information about contraception.

5

Moral Authority in English and American Abortion Law

Joanna N. Erdman*

In *R. (on the application of Axon) v. Secretary of State for Health & Another*,¹ the English High Court affirmed that “*the duty of confidentiality owed to a person under 16, in any setting, is the same as that owed to any other person.*”² Young women are entitled to seek and receive sexual health care, including abortion care, without parental notification.

The Court resolved the case primarily by reference to the “mature minor” rule, first developed in *Gillick v. West Norfolk and Wisbech AHA and another*.³ The rule states that a young person can give consent valid in law provided he or she has sufficient maturity and intelligence to understand the nature and implications of the proposed care.⁴ The Court reasoned that a logical relationship exists between the capacity to consent and the right to do so in privacy.⁵ Parental notification contradicted the mature minor rule and was inconsistent with *Gillick*. Evidence that without the guarantee of confidentiality young persons may be deterred from seeking care confirmed the rule as good public policy.⁶

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¹ *R. (on the application of Axon) v. Secretary of State for Health & Another*, [2006] E.W.H.C. 37 (Admin).

² The case was initiated shortly after the Department of Health issued a Best Practice Guidance advising medical professionals that “*the duty of confidentiality owed to a person under 16, in any setting, is the same as that owed to any other person.*” Eng. Dep’t of Health. Best practice guidance for doctors and other health professionals on the provision of advice and treatment to young people under 16 on contraception and sexual and reproductive health. (2004). Although the age of majority in England is 18 years, the *Family Law Reform Act 1968*, authorizes persons aged 16 and 17 years old to consent to medical care. See *Axon*, at para. 22.

³ *Gillick v. West Norfolk and Wisbech AHA and another*, [1985] 3 All ER 402.

⁴ *Axon*, at para. 9.

⁵ *Axon*, at paras. 56–59.

⁶ *Axon*, at para. 66–73.

Axon is also a constitutional case, reflecting a legal landscape that has changed drastically since *Gillick* was decided more than twenty years ago. Most significant is the introduction of the European *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*,⁷ which strengthened the language of competing rights and state interests in the English legal system.⁸ In *Axon*, the claim for parental notification was based on the parental right to family life, and the duty of confidentiality defended by reference to the privacy rights of young persons and health protection as a state interest.⁹

This rights-based framing is significant from a comparative constitutional perspective. By resolving the case through a set of competing rights and state interests, the Court adopted a conventional constitutional framing of abortion. *Axon* appeared by its nature similar to abortion cases in other constitutional systems and thus well-suited to comparative analysis. It is, therefore, unsurprising that one section of the judgment addressed overseas authorities on parental involvement.¹⁰ It is interesting, however, that the section is dedicated in near entirety to a rejection of American authorities. Under the U.S. Constitution, states may, but are not required, to enact laws that require parental consent and/or notification in abortion care.¹¹ These laws are collectively referred to as parental involvement laws.

The comparative constitutional section in *Axon* is *obiter dictum*, but not insignificant. The forceful rejection of American case law suggests more than irrelevance – it rises to aversion. *Aversive constitutionalism*, as termed by Kim Scheppele, calls attention to negative models prominent in the minds of constitutional institutions.¹² Courts “may have only the vaguest sense of where they are going and how they should get there; more often, they have a clearer sense of what it is that they want to avoid.”¹³ The *Axon* Court clearly wished to avoid American-style abortion controversy in England.¹⁴ Many scholars note with relief that abortion in the United Kingdom generates less conflict and controversy than in the United States.¹⁵

⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221.

⁸ See *Human Rights Act, 1998*, c. 42 (Eng.).

⁹ *Axon*, at paras. 118–152.

¹⁰ *Axon*, at paras. 30–38.

¹¹ *Axon*, at para. 32, citing *Planned Parenthood of South East Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹² Kim Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 *Int'l J. Con.L.* 296, 300 (2003).

¹³ *Id.*

¹⁴ *Axon*, at para. 37.

¹⁵ See e.g. J.K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* 14 (2007).

Aversive constitutionalism identifies more than a rejected approach. As Scheppele suggests, the “rejected alternative might be . . . only the beginning of a more complicated process of defining a nation through that rejection.”¹⁶ Contrast and rejection can be an exercise in self-reflection, revealing how a court understands its own constitutional approach.

Sujit Choudhry isolates this value of comparative interpretation in his theory of dialogical interpretation, the goal of which is to “use comparative materials as an interpretive foil, to expose the factual and normative assumptions underlying the court’s own constitutional order.”¹⁷ He explains that by “articulating the assumptions underlying foreign jurisprudence, a court will inevitably uncover its own. By asking why foreign courts have reasoned a certain way, a court . . . asks itself why it reasons the way it does.”¹⁸ Aversive constitutionalism thus presents an opportunity to deconstruct claimed similarities and differences in constitutional approaches, to uncover and contest characteristics and assumptions otherwise unexamined.

The objective of this chapter is to use the aversive move in *Axon*, the contrast and rejection of American authorities on parental involvement, to expose a fundamental characteristic underlying the English constitutional approach to young women’s abortion care. This characteristic and its related assumptions are shared rather than contrasted in American and English law.

The shared characteristic is that of moral authority, defined as the legal authority to protect a state interest in prenatal life through *moral* abortion decision-making. Both American and English abortion law seek to protect a state interest in prenatal life by entrusting decision-making about young women’s abortion care to third parties: the family, the court, and the medical profession. Neither constitutional approach vests moral authority in young women themselves.

Third-party moral authority is supported by two related assumptions. The first assumption is that the involvement of third parties necessarily improves the moral quality of abortion decision-making. The second assumption is that such improvement is required. The capacity of young women to engage in moral decision-making is presumed to be underdeveloped, thereby creating the need for greater state regulation of their abortion care. This greater state regulation assumes the form of mandated third-party involvement.

Part I of this chapter deconstructs the aversive constitutional move in *Axon* in an effort to expose the shared characteristic of third-party moral authority and

¹⁶ Scheppele, *supra* note 12 at 298.

¹⁷ Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *The Migration of Constitutional Ideas* 1, 22 (Sujit Choudhry, ed. 2007).

¹⁸ *Id.*

the supporting set of assumptions underlying American and English abortion law.

Part II turns to the assumptions themselves. It examines the widespread empirical evidence that refutes the assumptions of the need for and necessary benefit of mandated third-party involvement. The strength of the assumptions despite this empirical rebuttal suggests that some other factor is at work. This factor, it is argued, is the conventional gender hierarchy between the masculine and the feminine.

Third-party moral authority is demonstrated to rest on a set of gender-based assumptions. Young women are denied moral authority on a feminine-gendered and not simply age-based assumption of their underdeveloped capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their masculine-gendered identity. Given that third-party moral authority is constitutionally justified on these assumptions, their gendered nature renders this shared fundamental characteristic of American and English law problematic from a gender equality perspective, and, thus, in need of constitutional reform.

Part III seeks to develop a reformed vision of moral authority in abortion law from the perspective of gender equality. It offers a constitutional approach that protects the state interest in prenatal life by entrusting and supporting the decision-making of young women, privileging the unique moral insight of their individual experience.

I. ENGLISH AND AMERICAN LAW IN CONTRAST AND COMPARISON

“Contrast” refers to setting in opposition to emphasize differences or unlikeness. “Comparison” refers to consideration of some shared characteristic. The aversive move in *Axon* is based on three contrasts in American and English constitutional law: abortion rights, state interests, and the autonomy rights of young persons.¹⁹

The first contrast concerns abortion rights. The American authorities, the English High Court asserted, are “intimately bound up with the question of the extent to which women may have any *prima facie* right to seek an abortion at all.”²⁰ In England, “the right to an abortion is clearly established in certain prescribed circumstances.”²¹

¹⁹ This chapter does not address the *Axon* Court’s claimed structural differences between the U.S. Constitution and the ECHR, namely the difference between absolute and limited rights, see e.g. *Axon*, at para. 36.

²⁰ *Axon*, at para. 33.

²¹ *Id.*

The second contrast relates to state interests. The American authorities, the *Axon* Court explained, are “concerned with . . . the State’s ‘*interest in the potentiality of human life*,’” which arises under the American Constitution and reflects the cultural values of American society.²² This interest is without an equivalent in the United Kingdom. The constitutional conflict in *Axon*, the Court stated, concerns only “the rights of young people and the interests of their parents . . . [with] no third, potentially overriding, state interest in preserving unborn life.”²³

The third contrast concerns the different autonomy rights of young persons in American and English law. The American authorities on parental involvement, the *Axon* Court reasoned, reflect that “the principle of autonomy is far less well-developed in the United States in the case of young people than it is under our domestic law or under the ECHR.”²⁴

These contrasts cannot be sustained. The English High Court’s rejection of the American authorities cannot be justified by the claimed differences in abortion rights, state interests, or the autonomy rights of young persons.

Although false, these contrasts are not without value. By distinguishing the American authorities, the *Axon* Court exposes a fundamental characteristic and supporting set of assumptions underlying its own constitutional approach. This characteristic is one of comparison rather than contrast between American and English law.

It is the shared characteristic of moral authority, defined as the legal authority to protect a state interest in prenatal life through *moral* abortion decision-making. Both American and English abortion law seek to protect a state interest in prenatal life by entrusting decision-making about young women’s abortion care to third-party authorities: the family, the court, and the medical profession. Neither constitutional approach vests in young women the legal authority to protect this state interest.

A. Abortion Rights and State Interests in Contrast and Comparison

Inverse to the claimed contrasts in *Axon*, English and American law reflect a shared state interest in prenatal life, but protect distinct abortion rights.

First articulated in *Roe v. Wade*, the American right is founded in the concept of personal liberty under the U.S. Constitution.²⁵ The American abortion right is not, however, absolute. The right “must be considered against

²² *Axon*, at para. 34.

²³ *Id.*

²⁴ *Axon*, at para. 35.

²⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

important state interests.”²⁶ The protection of prenatal life is one such interest. As elaborated by the U.S. Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, although the abortion decision is central to a woman’s personal dignity and autonomy, “[a]bortion is a unique act. It is an act fraught with consequences for others . . . [including] depending on one’s beliefs, for the life or potential life that is aborted.”²⁷

The *Axon* Court rightly identified prenatal life as a state interest, but wrongly asserted that the interest is unique to the United States, without equivalent in the United Kingdom. A state interest in prenatal life is reflected in abortion laws worldwide.²⁸ Its legal protection, however, assumes different forms. In the terminology of Ronald Dworkin, the law may protect prenatal life as a derivative or a detached interest.²⁹ As a derivative interest, prenatal life is protected under the right to life. Legal protection derives from the status of the unborn as a bearer of this right. As a detached interest, prenatal life is protected not as a right, but “as an objective or intrinsic good, a value in itself.”³⁰

The *Axon* Court mistakenly characterized the American state interest as a derivative interest. The United Kingdom, the Court explained, has no equivalent state interest because “[u]nder the ECHR, the unborn are not covered by the right to life,”³¹ implying that the right to life under the U.S. Constitution extends to the unborn. This misunderstanding allowed the Court to characterize the American authorities in the traditional conflict terms of abortion discourse: abortion rights versus the right to life, and to distinguish *Axon* as concerned solely with the rights of young persons and their parents.³² Under the U.S. Constitution, however, prenatal life is not protected under the right to life. The guarantee against the deprivation of life without due process of law does not extend to the unborn.³³ English and American law are similar, not different, in this regard.

Under the U.S. Constitution, prenatal life is protected as a detached interest. The state may constitutionally protect prenatal life as an intrinsic good or value by ensuring that women who exercise their abortion rights and make the decision to terminate a pregnancy, do so in a manner respectful

²⁶ *Id.*

²⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992).

²⁸ *Albin Eser & Hans-Georg Koch, Abortion and the Law: From International Comparison to Legal Policy* 32 (2005).

²⁹ Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 *U Chi. L. Rev.* 381, 396 (1992).

³⁰ *Id.*

³¹ *Axon*, at para. 34, citing *Vo v. France*, 40 Eur. Ct. H.R. 12 (2005).

³² *Id.*

³³ *Roe v. Wade*, at 159.

of the consequences for the life or potential life that is aborted. The state may enact measures to ensure that women engage in serious, reflective, and thus morally responsible decision-making.³⁴ These measures, which cannot impose an undue burden on women seeking abortion care, may include mandated parental involvement. The American authorities, in other words, are premised on a state interest in fostering such third-party involvement “as will assist the minor in making her decision as wisely as possible.”³⁵

An equivalent detached state interest in prenatal life is recognized under the *ECHR*.³⁶ Legal measures intended to protect prenatal life directly or respect for prenatal life as a moral value are permissible. State protection under English law is reflected in the unique criminal restrictions on abortion care.

The *Offences against the Person Act* renders it a criminal offence punishable by imprisonment to procure or perform an abortion in the United Kingdom.³⁷ The *Abortion Act 1967 (1967 Act)* authorizes lawful abortions under a set of prescribed indications, including health-related risks, the risk to life, and the risk of fetal abnormality.³⁸ An abortion is legal under the *1967 Act* when two medical practitioners acting in good faith certify that the conditions of pregnancy satisfy one of the prescribed indications.³⁹ English abortion law is generically referred to as an indications-based law with third-party approval.

The protection of prenatal life is one objective of the *1967 Act*.⁴⁰ Similar to American parental involvement laws, an indication-based abortion law seeks to ensure that women terminate their pregnancies in a manner respectful of the intrinsic value in prenatal life. American and English law are similar, not different, in this regard. The *1967 Act* does so, however, primarily by restricting the scope of decision making to morally acceptable outcomes.⁴¹

This aspect of the *1967 Act* allows for a contrast to be drawn between American and English abortion rights, but not the contrast claimed by the *Axon* Court. The claimed contrast concerns stability and scope: unlike the controversial status of the American right, the English right “is clearly established

³⁴ See *Casey*, at 872: “Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [women considering abortion] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy.”

³⁵ *H.L. v. Matheson*, 450 U.S. 398, 420 (1981).

³⁶ *Vo v. France*, 40 Eur. Ct. H.R. 12, at para. 80 (2005).

³⁷ *Offences against the Person Act 1861*, (24 and 25 Vict. C. 100) (Eng.).

³⁸ *Abortion Act 1967*, c. 87 (Eng.)

³⁹ *Id.*

⁴⁰ UK. Science and Technology Committee, House of Commons. *Scientific Developments Relating to the Abortion Act 1967* 32 (2007).

⁴¹ *Id.* See also *Mason*, *supra* note 15 at 18, 21.

in certain prescribed circumstances.”⁴² The *Axon* Court failed to understand that the differences in stability and scope are a consequence of the American and English abortion rights being fundamentally different rights.

The American abortion right is a constitutional right of personal liberty, which renders the right a greater threat to the state interest in prenatal life and, thus, more controversial. The legality and morality of abortion are not coterminous in American law. The English indication-based law, in contrast, constrains women’s abortion decision-making to a set of prescribed and morally acceptable indications. English law confers no equivalent right of personal liberty. “The notion of a right attaches to abortion only in the sense of a more general right to health care as judged by medical authority.”⁴³ The English abortion right, for this reason, is a weaker threat to the state interest, and thus, less controversial.

English law does not thereby strip abortion decision-making of its moral character. The law situates the moral aspects of abortion care within a medical context.⁴⁴ The *Axon* Court, for example, distinguished abortion from other sexual health care as representing a stronger claim for a limited duty of confidentiality.⁴⁵ In language similar to the American authorities, the Court explained that “a decision on whether to have an abortion raises potentially difficult non-medical issues such as moral, ethical, religious and cultural issues.”⁴⁶ These issues are to be addressed in the clinical context under medical authority.

Mandated third-party involvement to ensure moral abortion decision-making plays a significant role in protecting the state interest under English law. Third-party authority is thus a shared characteristic of American and English law. It is a characteristic, moreover, based on a common assumption, namely that the involvement of third parties necessarily improves the moral quality of young women’s abortion decision-making. The third parties legally designated to fulfill this role differ under American and English law. Under American law, the family and the court are granted moral authority. Under English law, it is the medical profession.

The American authorities privilege parental involvement on the assumption that parents “act in the minor’s best interest and thereby assure[] that the minor’s decision to terminate her pregnancy is knowing, intelligent, and

⁴² *Id.*

⁴³ Sheila Shaver, *Body rights, social rights, and the liberal welfare state*, 13 *Crit. Soc. Pol.* 66, 72 (1994).

⁴⁴ See Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (1997)

⁴⁵ *Axon*, at paras. 28, 83.

⁴⁶ *Id.* at para. 83.

deliberate.”⁴⁷ In *Bellotti v. Baird*, the U.S. Supreme Court reasoned that the state “may determine, as a general proposition, that . . . [parental] consultation is particularly desirable with respect to the abortion decision – one that for some people raises profound moral and religious concerns . . .”⁴⁸

A similar claim was advanced in *Axon*, namely that “a parent, rather than any third party, is responsible for the welfare of the young person . . . and so . . . it follows that a parent is the best person for guiding and advising a young person.”⁴⁹ The *Axon* Court accepted that “in the overwhelming majority of cases, the best judges of a young person’s welfare are his or her parents,”⁵⁰ but also recognized as an increasingly important and accepted feature of family life, “[t]he right of young people to make decisions about their own lives by themselves at the expense of the views of their parents.”⁵¹

The American authorities do not ignore this feature of family life, but resolve parent and child discord through courts of law under the judicial bypass. In *Bellotti*, the U.S. Supreme Court recognized that “young pregnant minors . . . are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court.”⁵² States are, therefore, constitutionally required to provide a young woman with “the opportunity – if she so desires – to go directly to a court without first consulting her parents.”⁵³ The Court is entrusted as the alternative moral authority.

The American authorities reject the medical profession as institutionally reliable to protect the state interest.⁵⁴ This contrasts with an earlier position in *Roe v. Wade*, wherein the U.S. Supreme Court assured that the moral issues of abortion care “are factors the woman and her responsible physician necessarily will consider in consultation.”⁵⁵ More recent American authorities express a distrust of the medical profession. In *H.L. v. Matheson*, for example, the U.S. Supreme Court reasoned that “[w]hile the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician’s interest in the overall welfare of a minor can be equated with that of most parents.”⁵⁶ In *Planned Parenthood of*

⁴⁷ *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990).

⁴⁸ *Bellotti v. Baird*, 443 U.S. 622, 642 (1979).

⁴⁹ *Axon*, at para. 44.

⁵⁰ *Id.* at para. 2; *see also* para. 153, citing *Gillick*.

⁵¹ *Id.* at para. 79.

⁵² *Bellotti*, at 647.

⁵³ *Id.* at 630.

⁵⁴ Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 *Brook. L. Rev.* 147, 193 (2006).

⁵⁵ *Roe v. Wade*, at 154.

⁵⁶ *H.L. v. Matheson*, at 421, n. 8.

Central Missouri v. Danforth, the Court found it unlikely that a young woman “will obtain adequate counsel and support from the attending physician at an abortion clinic.”⁵⁷

The claim for parental notification in *Axon* is similarly premised on the questionable capacity and trustworthiness of the medical professional, who does not owe the same duties to a young woman as a parent and “might perhaps be unqualified or not be in a position to advise about . . . particular non-medical matters.”⁵⁸ The *Axon* Court, however, rejected this claim.

Under English law, the medical profession is entrusted to ensure moral decision-making through the application of the mature minor rule. Under the rule, as established in *Gillick*, a medical professional may lawfully provide abortion care to a young woman, if satisfied that she has sufficient maturity and intelligence to understand the nature and implications of the care.⁵⁹ The *Axon* Court characterized the rule as setting “judicially accepted conditions and safeguards” for the provision of abortion care without parental involvement.⁶⁰ The rule requires that young women understand properly all aspects of abortion care, including its complex and difficult moral aspects. The *Axon* Court repeated the emphasis in the following passage from *Gillick*:

. . . it has to be borne in mind that there is **much** to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given; she must also have a sufficient maturity to **understand what is involved**. There are **moral** and family questions. . . . It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed upon the basis that she has at law capacity to consent to [care].⁶¹

The Court emphasized that a young woman must appreciate all aspects of the care. To understand properly “*what is involved*” in abortion care, the *Axon* Court concluded, “constitute[s] a high threshold” that many young women will be unable to satisfy.⁶² This standard reflects the claim that it is in the realm of moral decision-making that important differences in the capacities of young and adult women are likely to be found.

Moral decision-making under English law is thus ensured through the medical profession’s strict enforcement of the mature minor rule. The *Axon*

⁵⁷ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 92 (1976).

⁵⁸ *Axon*, at para. 83.

⁵⁹ *Id.* at para. 9.

⁶⁰ *Id.* at para. 105.

⁶¹ *Id.* at para. 89.

⁶² *Id.* at para. 90.

Court's trust in the medical profession as moral authority can be expected in a legal system in which all abortion care is subject to medical authorization. "Medicalization" is arguably the defining characteristic of the English criminal abortion law, constraining all abortion decision-making within a set of prescribed indications and subjecting all decisions to the approval of the medical profession.

B. *Minors, Autonomy Rights, and Abortion in Contrast and Comparison*

The third contrast in *Axon* concerns the different autonomy rights of young persons. The American authorities, the Court explained, reflect that "the principle of autonomy is far less well-developed in the United States in the case of young people than it is under our domestic law or under the ECHR."⁶³ This contrast is again difficult to sustain.

Contrary to the claims of the *Axon* Court, many U.S. state courts have adopted the mature minor rule as expressed in *Gillick*, and many U.S. states have statutory equivalents to the English *Family Law Reform Act 1968*, which confers upon young persons below the age of majority a general right to consent to medical care.⁶⁴ Many U.S. state laws expressly authorize young persons to consent to sexual health care and protect the confidential delivery of those health care services.⁶⁵ These statutes are grounded in the same public health concerns cited in *Axon*.⁶⁶ In this respect, parental involvement in abortion care reflects not a trend, but an anomaly in American law.

The American authorities, moreover, do not deny, but emphasize, the constitutional rights of young persons. In *Danforth*, the U.S. Supreme Court affirmed that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."⁶⁷ The American abortion right extends to both young and adult women. The "state does not have the constitutional authority to give a third-party an absolute, and possibly arbitrary, veto over the decision" of a young woman to terminate her pregnancy.⁶⁸ Under both American and English law, therefore, autonomy rights are recognized to inhere in persons of all ages. In *Axon*, the Court

⁶³ *Id.*, at para. 35.

⁶⁴ Cynthia Dailard & Chinué Turner Richardson, *Teenagers' Access to Confidential Reproductive Health Services*, 8 *Guttmacher Rep. Pub. Pol.* 6 (2005).

⁶⁵ *Id.*

⁶⁶ See text at footnote 6.

⁶⁷ *Danforth*, at 76.

⁶⁸ *Id.*

reasoned that the mere status of being a child “is not a distinction of decisive or any great importance” in the enjoyment of human rights.⁶⁹

The American authorities on parental involvement also reflect the mature minor rule, recognizing the evolving decision-making capacities of young women. As affirmed by the U.S. Supreme Court in *Bellotti*, the state cannot “disregard . . . the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.”⁷⁰ This is reflected in the constitutional requirement that parental consent laws include a judicial bypass, allowing courts to authorize an abortion without parental involvement if the young woman possesses the maturity for informed consent or the abortion is deemed in her best interests.⁷¹

Both American and English constitutional law deny the state authority to impose a third-party veto over the decision-making of young persons based on age alone. Each embraces a form of the mature minor rule. In *Axon*, the rule is reflected in the Court’s reference to the evolving capacities principle of the *United Nations Convention on the Rights of the Child*, a human rights treaty ratified by the United Kingdom. This principle requires the state to “*respect the responsibilities, rights and duties of parents . . . in a manner consistent with the evolving capacities of the child.*”⁷²

American and English law share a further characteristic: despite constitutional recognition as rights-holders, young persons remain distinguishable from adults. Young and adult women may be treated differently in the abortion context despite each enjoying an autonomy right. Justification for this different treatment derives from the shared conception of abortion decision-making as uniquely implicating the state interest in prenatal life.

Underlying both American and English law is a common assumption that a young woman’s capacity to engage with the moral issues of abortion care can be distinguished from her capacity to understand the nature and implications of abortion as medical care. The standard informed consent model, focused on cognition and comprehension, is deemed too narrow a standard against which to assess decision-making capacity in the abortion context.⁷³ Young women with sufficient maturity to understand the medical aspects of abortion care are

⁶⁹ *Axon*, at para. 65.

⁷⁰ *Bellotti*, at 651.

⁷¹ *Id.* at 643 and 644. The U.S. Supreme Court has never explicitly ruled on whether parental notification laws also require a judicial bypass.

⁷² *Axon*, at para. 76, citing *Convention on the Rights of the Child*, 20 Nov. 1989, 1577 U.N.T.S. 3, Art. 5.

⁷³ Elizabeth S. Scott, Dickon Reppucci & Jennifer L. Woolard, *Evaluating adolescent decision making in legal contexts*, 19 *L. & Hum. Behav.* 221, 223 (1995).

assumed incapable of moral judgment subject to evidence of the contrary.⁷⁴ In *Bellotti*, for example, the U.S. Supreme Court justified parental involvement laws based on young women's lack of "experience, perspective and judgment" leading to their "inability to make critical decisions in an informed, mature manner."⁷⁵ In *Axon*, the Court concluded that for a young woman to understand properly "what is involved" in abortion care sufficient to provide legal consent without parental involvement constitutes a high threshold that many young women will be unable to satisfy.⁷⁶

Given that responsible decision-making is one means to protect prenatal life, the assumption of young women's underdeveloped capacity to engage in moral decision-making creates the need for greater state regulation of their abortion care. This state regulation is mandated third-party involvement.

C. Third-Party Moral Authority in English and American Abortion Law

American and English constitutional approaches to young women's abortion care, in summary, share a fundamental characteristic supported by a common set of assumptions.

The shared characteristic is moral authority, defined as the legal authority to protect a state interest in prenatal life through moral abortion decision-making. Contrary to the claimed contrast in *Axon*, both American and English abortion law reflect prenatal life as a state interest. Both, moreover, seek to protect this state interest by ensuring that abortion decision-making is serious and reflective, respectful of prenatal life as an intrinsic good or value. In young women's abortion care, moral decision-making is secured through the mandated involvement of third parties.

Third-party moral authority is constitutionally justified by two related assumptions. The first assumption is that the involvement of third parties necessarily improves the moral quality of young women's abortion decision-making. American and English law differ, however, in the third party considered best suited to and thus entrusted with this task. Under American law, the family and the court are granted moral authority. Under English law, it is the medical profession. The second assumption is that improvement in the moral quality of young women's abortion decision-making is required. Contrary to the claimed contrast in *Axon*, American and English law both recognize the constitutional autonomy rights of young persons. The different treatment of young and adult women is nevertheless justified on the assumption that young women's

⁷⁴ *Id.*

⁷⁵ *Bellotti*, at 633–635.

⁷⁶ *Axon*, para. 90.

capacity to engage with the moral issues of abortion care is underdeveloped, creating the need for third-party involvement.

II. INVESTIGATING THE EVIDENCE AND GENDERED BASIS OF THIRD-PARTY MORAL AUTHORITY

This part of the chapter investigates the assumptions underlying third-party moral authority. It reveals that the assumptions of the need for and necessary benefit of mandated third-party involvement are strongly refuted by widespread empirical evidence. The strength of the assumptions despite this empirical rebuttal suggests that some other factor is at work. This factor, it is argued, is the masculine-feminine gender hierarchy.

A. *The Moral Authorities: An Evidenced-Based Approach*

The striking aspect of third-party moral authority in both American and English law is its basis in assumption rather than evidence. The American authorities, for example, acknowledge that parental involvement laws are based on the “quite reasonable assumption that minors *will* benefit from consultation with their parents.”⁷⁷ It is assumed that *mandated* third-party involvement *necessarily* improves the moral quality of abortion decision-making. Empirical evidence suggests otherwise. This evidence not only fails to support the assumptions underlying third-party moral authority, but also reveals its broader dysfunction.

Empirical evidence strongly refutes any meaningful difference between mature young women and their adult counterparts in capacity for moral decision-making.⁷⁸ Research on pregnancy-related decision-making suggests that by middle adolescence (ages 14 and 15 years), most young women have developed adult-like capacities respecting experience, perspective, and judgment.⁷⁹ No meaningful age-related differences are evident in the thoroughness of considered consequences, the number of reasons considered, and the content of the reasoning.⁸⁰

The assumed benefit of mandated third-party involvement further derives from an artificial conceptualization of young women as otherwise isolated in

⁷⁷ *Casey*, at 896.

⁷⁸ See Nancy Adler, Emily Ozer, and Jeanne Tschann, *Abortion among adolescents*, 58 *Am. Psych.* 217 (2003).

⁷⁹ Bruce Ambuel, *Adolescents, Unintended Pregnancy, and Abortion: The Struggle for a Compassionate Social Policy*, 4 *Curr. Dir. Psych. Sci.* 1, 3 (1995).

⁸⁰ See e.g. Bruce Ambuel and Julian Rappaport, *Developmental trends in adolescents' psychological and legal competence to consent to abortion*, 16 *L. & Hum. Behav.* 129 (1992).

their decision-making.⁸¹ Empirical evidence reveals that the vast majority of young women in both the United States and England voluntarily consults with and seeks the advice of third parties, including at least one parent.⁸² Studies also confirm that most young women who do not involve a parent voluntarily consult and seek advice from a trusted adult, their sexual partners, and friends.⁸³ Assuming then that third-party involvement improves the decision-making process, there is no need for a legal mandate because young women voluntarily seek third-party involvement.

There is also little empirical support for the assumption that third-party involvement necessarily yields such benefits, that the addition of more voices always improves the process or outcome of decision-making.⁸⁴ This assumption derives ironically from observed behavior, namely that most young women voluntarily involve third parties. This behavior, however, may be explained by benefits other than the improved quality of decision-making, such as compassion and support.

With respect to parental involvement, for example, there is little research on how pregnancy and its termination are discussed in family contexts.⁸⁵ It is assumed that parents possess what their children lack in maturity, experience, and judgment. It is assumed that parents will engage with their children on serious and reflective terms. Parental involvement laws in general demand “neither conversation nor informed counseling. . . . The legal requirement . . . is a signature.”⁸⁶

The nature of parent-child interactions also varies greatly among families. For some young women, the parental paradigm of the American approach is a legal fiction. In extreme but documented cases, parental involvement laws force young women to negotiate with parents at considerable risk to their safety and well-being.⁸⁷ For these young women, mandated involvement is not redundant, but carries equally no benefit, only a risk of harm.

⁸¹ Laura Finken, *The Role of Consultants in Adolescents' Decision-Making: A Focus on Abortion Decisions, in The Development of Judgement and Decision Making in Children and Adolescents* 255, 272 (Janis E. Jacobs & Paul A. Klaczynski, eds. 2005).

⁸² *Id.* at 265. See also *Ellie Lee et al., A Matter of Choice? Explaining National Variation in Teenage Abortion and Motherhood* 41–42 (2004). The Axon Court also notes that two-thirds of abortions involving young women under the age of 16 years are carried out with parental knowledge. *Axon*, at para. 83.

⁸³ See Finken, *supra* note 81 at 257, 267 and *Lee*, *supra* note 82 at 39, 45.

⁸⁴ Finken, *supra* note 81 at 257.

⁸⁵ *Lee*, *supra* note 82 at 5.

⁸⁶ Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 *Int'l. J. L. Pol. & Fam.* 305, 314 (2004).

⁸⁷ Michelle Fine & Sara McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 *Emory L.J.* 993, 1020 (2007).

Empirical evidence similarly refutes any constructive benefit of court involvement under the judicial bypass requirement. Research indicates that evidentiary hearings to confirm the maturity of young women are often cursory in nature, with courts almost uniformly granting bypasses to all young women.⁸⁸ Judges have described how “ill-equipped they feel themselves to be in assessing a pregnant minor’s maturity or her best interests with regard to the question of abortion.”⁸⁹ Young women’s experience confirms the mere formality of judicial involvement and its limited role in enhancing the quality of abortion decision-making. Most young women report having made the decision to terminate a pregnancy prior to seeking court approval,⁹⁰ and experienced the hearing as a “hurdle” or “high stakes test” to be passed.⁹¹ In the hearing, the young women focused not on their decision-making, but “on avoiding mistakes or not giving the wrong impression to the judge.”⁹² The law thus arguably obstructs serious decision-making, promoting strategic behavior intended to secure judicial approval.

Legally mandated parental and judicial involvement may not achieve its intended benefits, but it is not without effect. Widespread evidence demonstrates its deterring effect on young women’s access to abortion care.⁹³ The American authorities, however, are little concerned with this dysfunction. As claimed by the U.S. Supreme Court in *H.L. v. Matheson*, “The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions.”⁹⁴ These adverse effects function differently in *Axon*. Evidence that young persons may be deterred from seeking abortion care confirmed the legal duty of confidentiality as good public policy.⁹⁵

Without mandated parental or judicial involvement, English law offers the benefit of confidential decision-making, and, in this respect, facilitates young women’s access to abortion care. There is little evidence, however, that the mandated involvement of a medical professional in abortion decision-making, either through the authorization requirement of the criminal law or strict enforcement of the mature minor rule, serves the state interest.

⁸⁸ *Id.* at 1024.

⁸⁹ Sanger, *supra* note 86 at 309.

⁹⁰ J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decisions without Involving Their Parents*, 18 *Berkeley Women’s L. J.* 61, 144 (2003).

⁹¹ *Id.* at 145

⁹² *Id.*

⁹³ Diane Reddy et al., *Effect of mandatory parental notification on adolescent girls’ use of sexual health care services*, 288 *JAMA* 710, 712 (2002).

⁹⁴ *H.L. v. Matheson*, at 450.

⁹⁵ *Axon*, at para. 66–73.

The criminal abortion law is widely regarded as “virtually meaningless as a measure of control.”⁹⁶ The law is intended to protect prenatal life by constraining women’s abortion decision-making to a set of state-authorized indications under medical authorization. A parliamentary committee recently reported that the law plays no meaningful role in abortion care because one indication is satisfied in all normal first trimester pregnancies.⁹⁷ Most abortions in the United Kingdom are certified under the indication that permits legal abortion prior to 24 weeks where “the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman.”⁹⁸ Given the safety of abortion care, the potential risks of full-term pregnancy are always greater than early termination.⁹⁹ It is thus arguably impossible for a medical professional to perform an early abortion outside the prescribed indications.¹⁰⁰ Akin to authorizations under the judicial bypass requirement, “requests for abortions are being ‘rubber stamped’.”¹⁰¹ Medical professionals are now allowed to authorize an abortion “without seeing the patient, so long as they believe, in good faith, that the woman meets the legal grounds for abortion on the basis of the clinical notes.”¹⁰²

Strict enforcement of the mature minor rule also proves of little value in improving the quality of abortion decision-making. Most young women report having made their decision prior to visiting a medical professional.¹⁰³ Decision-making was undertaken in non-clinical settings, and the medical professional was positioned as relatively distant to this process.¹⁰⁴ The purpose of professional consultation, as experienced by the young women, is not to discuss decision-making, but to obtain a referral for abortion care.¹⁰⁵

Mandated third-party involvement under English law is not, however, without benefit. Many young women view medical authorization as “important for the reassurance and confidence it can provide and in allowing abortion to be *perceived* as a legitimate choice.”¹⁰⁶ Mandated professional involvement benefits young women, but not in the intended way. An indications-based law

⁹⁶ Mason, *supra* note 15 at 27.

⁹⁷ UK. Science and Technology Committee, *supra* note 40 at 34–35.

⁹⁸ *Abortion Act 1967*, c. 87 (Eng.)

⁹⁹ Mason, *supra* note 15 at 28.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 33.

¹⁰² UK. Science and Technology Committee, *supra* note 40 at 32.

¹⁰³ Lee *et al.*, *supra* note 82 at 48.

¹⁰⁴ Ellie Lee, *Young Women, Pregnancy, and Abortion in Britain: A Discussion of Law ‘In Practice,’* 18 *Int’l. J. L. Pol. & Fam.* 283, 289 (2004).

¹⁰⁵ Lee *et al.*, *supra* note 82 at 30.

¹⁰⁶ *Id.*

signals to women acceptable outcomes in abortion decision-making. Women can then formulate their requests for abortion care in the language of the law, allowing their decision-making to be perceived as morally responsible. Rather than engaging in reflective decision-making, young women simply parrot state-sanctioned reasons for terminating a pregnancy. Emphasis is placed on the health risks of pregnancy for the woman or future child, perpetuating the view that abortion is acceptable only when there is an *actual reason*, apart from the decision of the woman herself.¹⁰⁷ In the United States, public support for abortion is similarly strongest in cases where abortion is perceived as not resulting from the exercise of choice, but as beyond the woman's control.¹⁰⁸ The law again functions to obstruct reflective decision-making, and to promote strategic behavior.

B. *The Moral Authorities: A Gendered Approach*

The strength of the assumptions underlying third-party moral authority, despite their widespread empirical rebuttal, suggests that some other factor is at work. This factor, it is argued, is the masculine-feminine gender hierarchy.

Moral decision-making has long been situated within a gendered framework, two hierarchically arranged standards of moral reasoning invariably associated with gender: the masculine glorified, the feminine denigrated.¹⁰⁹ Masculine moral reasoning is associated with the impartial analytical resolution of abstract principles, feminine moral reasoning with individualized and contextual decision-making. The assumption that the moral capacity of young women is underdeveloped may reflect not a deficiency of assessment, but a deficiency in the standard by which moral capacity is assessed. Empirical studies reveal that most women do not make or justify their abortion decisions through the impartial analytical resolution of abstract principles. Both young and adult women tend to describe their abortion decision-making in individualized and context-specific terms.

In a U.K. study, young women described ambivalence in their abortion decision-making, often reflecting a tension between abstract moral principles

¹⁰⁷ *Id.* at 16.

¹⁰⁸ Melody Rose, *Safe, Legal and Unavailable: Abortion Politics in the United States* 42 (2007).

¹⁰⁹ See e.g., Kohlberg-Gilligan Debate: Carol Gilligan criticized Lawrence Kohlberg's scale of moral development, which privileged the universal, abstract, and impersonal as androcentric, neglecting, and thus devaluing an alternative moral approach of contextual reasoning and care for others empirically associated with women. Lawrence Kohlberg, *The Philosophy of Moral Development* (1981). Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

and the context-specific demands of real life.¹¹⁰ “In the abstract, abortion might be viewed as ‘wrong’ but, when a pregnancy occurred abortion emerged as a practical solution.”¹¹¹ In a U.S. study, young women described their decision-making as intuitive rather than analytical.¹¹² The young women experienced difficulty articulating the reasons to support their decisions, which were simply described as having “come to mind,” “feeling” intuitively right, “being the best option,” or the “right thing to do.”¹¹³ When young women did articulate reasons, they tended to be highly individualized and context specific. The U.S. study characterized the reasons provided by young women as “articulated from their own perspective” or “from a ‘self-oriented perspective.’”¹¹⁴ Concern for the life or potential life aborted, for example, was incorporated into decision-making, but from the perspective of the young woman’s incapacity to care for the child if born.¹¹⁵ Young women explained that they were not mature enough, not emotionally ready, too irresponsible or too young to care for a child.¹¹⁶ The young women also articulated an acute awareness of the situational nature of their decision (“not right for me at this time”), citing the impact a child would have on their current circumstances and future plans.¹¹⁷ As the title of the U.S. study suggests, abortion decision-making was “grounded in the reality of their lives.”

The individualized and context-specific nature of the decision-making, and the fact that all young persons engaged in abortion decision-making are women, strengthens the identification of these young women with the denigrated *feminine* standard of moral reasoning. This identification is further strengthened by their departure from the glorified *masculine* standard. Their ambivalence, for example, may be interpreted as a failure to adequately engage with or analytically resolve abstract moral principles. It is the practice of most courts under the judicial bypass to approve petitions unless the young woman is *ambivalent* about her decision.¹¹⁸ A young woman’s difficulty in articulating reasons may be interpreted as evidence that she lacks a valid reason to support her decision, suggestive of its superficial rather than intuitive nature. Expressly self-oriented reasons cannot be rationally assessed as objectively valid, and may thus be deemed irrelevant to moral reasoning. The

¹¹⁰ *Lee et al.*, *supra* note 82.

¹¹¹ *Id.* at 17.

¹¹² Ehrlich, *supra* note 90.

¹¹³ *Id.* at 97, 107, 108.

¹¹⁴ *Id.* at 109, 118.

¹¹⁵ *Id.* at 159.

¹¹⁶ *Id.* at 97 and 109.

¹¹⁷ *Id.*

¹¹⁸ Sanger, *supra* note 86 at 310.

masculine standard demands a detached universal perspective, the abstraction from rather than attention to individuality and context. The reasons offered by young women – that they are too immature, irresponsible, and too young to care for a child – may further be interpreted to support the assumption of broader incapacity, and thus the need for third-party involvement.

The identification of young women with the denigrated feminine rather than glorified masculine standard of moral reasoning strengthens the assumption of their underdeveloped moral capacity. The assumption, in other words, is sustained through gender congruence, the fact that young women engage in feminine moral reasoning. Their underdeveloped moral capacity derives not from age, but from gender.

This claim is supported by the fact that the feminine identifying traits are not age specific. Both young and adult women describe their abortion decision-making in individualized and context-specific terms. All persons seeking abortion care are women. The factor of age, however, is constitutionally exploited to permit an assessment of moral capacity in young women that would be impermissible for adult women. It is only young women who bear the burden of third-party involvement for failing to satisfy a moral standard that most adult women would themselves fail.¹¹⁹ Regardless, therefore, of the fact that adult women are not directly subject to the moral standard, its denigration of feminine moral reasoning in effect devalues the moral quality of abortion decision-making as engaged in by many women, both young and adult. Borrowing from the insights of Carol Gilligan, the moral standard defines individualized and contextual decision-making in the abortion context as underdeveloped or otherwise inadequate rather than seeing it as a valid alternative moral perspective.¹²⁰

The second assumption underlying third-party moral authority, namely that third-party involvement necessarily improves the quality of abortion decision-making, is also supported by the gendered framework of moral reasoning. For both American and English law not only mandate third-party involvement, but also specify the third party involved. The three designated third parties – the parent or head of family, the court of law, and the medical profession – are all traditional institutions of male authority. If gender operates as a cue to moral capacity, traditional institutions of male authority may be accepted as morally trustworthy and capable of protecting the state interest simply by virtue of their masculinity, their identification with masculine moral reasoning. Their authority, in the true sense of the term, is a power that needs neither to be

¹¹⁹ Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *Hofstra L. Rev.* 547, 575 (2000).

¹²⁰ Gilligan, *supra* note 109 at 1–2.

explained nor defended.¹²¹ It is accepted based on the gender congruence between institution and the glorified standard of moral reasoning.

The medical profession, for example, has long been entrusted as a profession to make sound decisions, whether of a medical or moral nature, with its legal authority extending “well beyond what would accrue purely on the basis of technical competence, training, and knowledge.”¹²² Under American law, the family is accepted as a moral authority based on its traditional value as the “institution through which ‘we inculcate and pass down many of our most cherished values, moral and cultural.’”¹²³ Parental involvement laws are, on occasion, constitutionally justified by reference to a state interest in protecting the traditional family as a valued state institution, rather than as means to ensure moral decision-making. In *Hodgson v. Minnesota*, for example, the U.S. Supreme Court upheld a law requiring notification of both *biological* parents, with no exception for divorced parents or unmarried couples.¹²⁴ Parental involvement is conditioned not on the existence of real family ties supportive of constructive engagement between parent and child, but on biological markers of kinship.¹²⁵ Where the family is demonstrated to depart from the idealized norm, moral authority is vested in courts of law, the cultural bastion of masculine reasoning.

To qualify as moral, abortion decision-making requires nothing more than the involvement of a third party identified with the masculine standard of moral reasoning. The trustworthiness of these parties to protect the state interest derives not from any demonstrated effect on abortion decision-making, but merely from their masculine identity. Mandated third-party involvement thus serves as a kind of “contemporary laying on of hands . . . the ritual may do no more than . . . a vague and comforting feeling that something useful has been done.”¹²⁶

Third-party moral authority, the characteristic shared in American and English law, is premised on gendered assumptions. Young women are denied moral authority on a feminine-gendered assumption of their underdeveloped

¹²¹ Laurie Rudman and Stephen Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26(11) *Person & Soc. Psych. Bull.* 1315 (2000).

¹²² *Sheldon*, *supra* note 44 at 72.

¹²³ *H.L. v. Matheson*, at 420.

¹²⁴ See e.g. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

¹²⁵ This strongly contrasts with the approach of the Axon Court, which cautions that whether “there is family life and hence a right to family life in a particular family is a question of fact . . . [It depends] upon the real existence in practice of close family ties.” *Axon*, at para. 131, citing *K. v United Kingdom*, 50 DR 199, 207 (1986).

¹²⁶ Ellie Lee, *Tensions in the Regulation of Abortion in Britain*, 30 *J. Law. Soc.* 532, 550 (2003), citing C. Brewer, *Who Should Counsel?* in *Meeting on Abortion Counseling* at 29 (Birth Control Trust, ed. 1978).

capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their masculine-gendered identity. Given that third-party moral authority is constitutionally justified by these assumptions, their hierarchical gendered nature renders this shared fundamental characteristic of American and English law problematic from a gender equality perspective. The denigration of the feminine and privileging of the masculine – and the subjection of young women to this gendered system – renders both the American and English laws on abortion in need of constitutional reform.

III. A NEW MORAL AUTHORITY IN ABORTION LAW

This part of the chapter seeks to develop a reformed vision of moral authority in abortion law from a perspective of gender equality. It offers a constitutional approach that protects the state interest in prenatal life by entrusting and supporting the decision-making of young women, privileging the unique moral insight of their individual experiences.

Following in the tradition of Carol Gilligan and scholars of feminist moral theory, the reform of moral authority requires a disassociation of gender, both the denigrated feminine and the glorified masculine, from the standard of moral decision-making. This disassociation creates an opportunity to revalue the moral capacity of women who make and articulate their decisions to terminate a pregnancy in terms traditionally identified as feminine. By divesting masculine moral reasoning of its privileged status, women need not make or justify their abortion decisions in detached abstract analytical terms to be recognized as capable and trustworthy to engage in moral decision-making. Individualized and contextual decision-making, the traditional feminine standard, is positioned as an alternative rather than deficient mode of moral reasoning.

A. *The Moral Authority of Experience*

With the elimination of gender as a cue for moral authority, some other credential is required. What marks women as capable and trustworthy to engage in moral abortion decision-making?

Feminist theory has long sought to displace the privileged *detached perspective* of masculine moral reasoning with the *involved perspective* of those who experience pregnancy and its termination, recognized as central to the individualized and contextual decision-making of traditional feminine moral reasoning. By virtue of her experience, it may be argued, a woman has a unique and critical perspective on the moral issues of abortion care. Precisely because it cannot be universalized, her experience is more, rather than less,

relevant to moral decision-making. It is valued as a source of moral insight that improves the quality of decision-making. Experience, in other words, can be a credential for moral authority.

Under this conception of moral authority, the experience of the millions of women worldwide who decide each year to terminate their pregnancies comes to matter from a moral point of view. The experience itself, the fact of their decision-making, carries moral weight. It is problematic, however, to derive moral authority from the simple fact that a woman decides to terminate her pregnancy. Women's abortion decision-making is the subject to be legitimated by moral authority. It cannot, therefore, also function as the standard.

Attention to the content rather than fact of women's abortion decision-making serves moreover an important function. It is crucial to bringing about the true reform of abortion laws that subject women not only to the involvement of third parties, but to the masculine moral standard those parties represent. If women are simply substituted for third parties under a new moral authority, continuing to adhere to and act on a masculine moral standard, women may become enlisted in their own subordination, upholding the standard as their own. Even when engaged in individualized and contextual reasoning, for which they are currently discredited, young women reflect in their decision-making traits of masculine moral reasoning. Their ambivalence, for example, has been explained as reflecting a tension between abstract principles and the demands of real life, the former an integrated part of their decision-making. Regardless, therefore, of legal mandate, women may continue to articulate their decision-making in ways that would allow others to perceive their decisions as moral according to the masculine standard.¹²⁷

Women may also articulate their decisions in terms traditionally identified as feminine, citing to individual and contextual reasons, but without revaluing its degrading tone. The tendency of young women, for example, to focus on their being too immature, or too irresponsible to care for a child may reflect an internalization of the gendered assumption of their underdeveloped capacities more generally. It is difficult to forge a positive moral identity from such narratives.

As recognized by Virginia Held, moral authority "cannot simply absorb the 'gender' that has been left behind, even if both genders would want it to. . . . There are very good reasons for women not to want simply to be accorded

¹²⁷ A study documenting abortion decision-making in Canada following the repeal of medical authorization requirements revealed that women experienced a kind of self-discipline "demonstrating how, at an ideological (and experiential) level, the construction of women needing permission for abortion effectively outlasted decriminalization in Canada." Eileen V. Fegan, *Recovering Women: Intimate Images and Legal Strategy*, 11 *Soc. & Legal Stud.* 155, 167 (2002).

entry as equals into the enterprise of morality as so far developed.”¹²⁸ Moral authority must extend to the transformation of moral standards. True moral authority requires more than granting women the legal authority to protect prenatal life through existing moral standards. Women must be entrusted with the legal authority to transform the standard of moral decision-making and develop a modern interpersonal standard reflective of women’s individual experiences in pregnancy and its termination.

This emphasis on individual experience recognizes that moral decision-making is necessarily related to if not dependent on the individual woman concerned. Her experience provides a relativistic assessment of what, with all moral values considered, she has *reason* to do in her particular circumstance. Empirical evidence supports the claim that experience matters. A U.K. study, for example, reported that young women’s views about abortion frequently change once pregnancy is experienced.¹²⁹ Once pregnant, many of the young women interviewed viewed abortion as no longer “wrong” or “like murder,” but the “right thing to do.”¹³⁰ Others came to accept abortion as “wrong but the right thing to do.” The fluidity and contradiction of these positions may be understood as reflecting the fact that experience, which cannot always be articulated in the language of abstract principles or neatly integrated into analytical reasoning, nevertheless provides some insight that shifts the moral perspective.

The priority of individual experience also suggests that moral decision-making may be without universal validity. One woman’s abortion decision cannot be taken to either validate or refute the moral quality of any other woman’s decision. Although contradicting the universalist tradition of masculine moral reasoning, this specificity is not a deficiency. To the contrary, acknowledging the relevance of individual experience reflects a new standard of moral decision-making.

This standard is not, however, one of strict moral relativism. The point rather, as articulated by Seyla Benhabib, “is to recognize the ideological limitations and biases that arise in the discourse of a universalist morality.”¹³¹ The discarding of a universal standard of moral decision-making is not to deny the relevance of existing moral resources, including the abstract principles and

¹²⁸ Virginia Held, *Feminist Transformations of Moral Theory*, 50 *Phil. & Phen. Res.* 321, 327 (1990).

¹²⁹ Lee et al., *supra* note 82 at 17, 21.

¹³⁰ *Id.*

¹³¹ Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 148, 156 (Seyla Benhabib ed., 1992).

analytical reasoning of masculine moral reasoning. An individualistic interpersonal moral standard “does not deny us grounds, reasons, intelligibles or the like. Rather, it situates them.”¹³² It recognizes the deficiency of decision-making premised on the detached analytical reasoning of third parties. It recognizes that the woman herself, by virtue of her experience, is uniquely qualified not only to engage with, and resolve, the moral issues of abortion care, but to identify and conceptualize the moral issues differently. An individualistic interpersonal standard thus reflects trust in women’s moral judgment – a true conception of moral authority. That a woman knows “the right thing to do” in her circumstance becomes a reason itself to accept her decision-making as moral, in addition to any abstract reasons that she may provide. By virtue of being “hers,” the decision acquires intrinsic moral weight.

Women’s moral authority in abortion law thus carries the potential to transform the standard of moral decision-making in abortion care and create a new way of thinking about the morality of abortion by validating the perspective of those who experience pregnancy and its termination.

B. *Young Women’s Moral Authority*

An individualistic, interpersonal, moral standard should not be understood as an aspiration to self-sufficiency, independence, or indifference to others. To recognize the moral authority of young women is not to deny the value of third-party involvement in abortion decision-making, but to assign it a new objective. Third-party involvement may legitimately serve to improve the quality of abortion decision-making, and thus protect the state interest in prenatal life, by *supporting* young women as moral decision-makers. This constitutional approach recognizes that young women and their experience matter from a moral point of view, that young women can contribute in important ways to the reform of moral standards in abortion decision-making. Mandated third-party involvement should thus be constitutionally assessed on its capacity to support young women in the exercise of moral decision-making as they mature. Supportive third-party involvement includes opportunities for young women to obtain information, to discuss their decision-making, to seek non-judgmental compassionate advice and care, and to feel validated in their decision-making.

The value of supportive third-party involvement is reflected in empirical evidence. In the U.K. study, the young women reported positive experiences of seeking and receiving abortion care in strikingly uniform terms. They valued

¹³² Steven Winter, *Human Values in a Postmodern World*, 6 *Yale J.L. & Hum.* 233, 246 (1994).

being “treated in a non-judgemental, caring or helpful way, where having an abortion was viewed as normal, and being given plenty of information about what was happening.”¹³³ Third-party involvement was seen as positive when young women perceived the medical professional as “on [their] side.”¹³⁴ What mattered most was not endorsement of their decision, but that the medical professional respected “their right to make a choice” and was “prepared to act on their behalf.”¹³⁵ The main constructive role of professional involvement was allowing these young women to feel supported and confident in their decision-making, to feel that they were not being judged.¹³⁶ Third-party involvement was seen as negative when intrusive or demanding, when the young women were “asked to justify a decision they had already very clearly made.”¹³⁷ The provision of information about obtaining and undergoing an abortion was also emphasized, and was deemed of “psychological significance, in that it legitimized and normalized requesting abortion.”¹³⁸ Young women, most importantly, emphasized being treated as capable decision-makers. Although many had expected to be treated poorly because of their age, young women responded positively to being “treated like an adult” and “not looked down on for being young.”¹³⁹

CONCLUSION

The purpose of this chapter is to examine the gendered nature of moral authority in abortion law. Both American and English constitutional approaches to young women’s abortion care share the fundamental characteristic of third-party moral authority. Each seeks to protect a state interest in prenatal life by entrusting decision-making about young women’s abortion care to third parties: the family, the court, and the medical profession. Neither constitutional approach vests moral authority in the young women themselves.

The chapter demonstrates that third-party moral authority is premised on gendered assumptions. Young women are denied moral authority on a feminine-gendered and not simply an age-based assumption of their underdeveloped capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their

¹³³ Lee, *supra* note 104 at 299.

¹³⁴ Lee *et al.*, *supra* note 82 at 28.

¹³⁵ *Id.* at 29.

¹³⁶ Lee, *supra* note 104 at 298.

¹³⁷ *Id.* at 298.

¹³⁸ *Id.* at 296.

¹³⁹ Lee *et al.*, *supra* note 82 at 34.

masculine-gendered identity. Given that third-party moral authority is constitutionally justified by these assumptions, their hierarchical gendered nature renders this shared characteristic of American and English abortion law problematic from a gender equality perspective, and in need of constitutional reform.

In an effort to guide this reform, the chapter offers a vision of moral authority in abortion law that is rooted in gender equality. This approach seeks to protect the state interest in prenatal life by entrusting and supporting young women in their abortion decision-making, privileging the unique moral insight of their individual experiences.

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SECTION THREE

CULTURE/RELIGION AND GENDER EQUALITY

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6

Must Feminists Support Entrenchment of Sex Equality? Lessons from Quebec

Beverley Baines*

INTRODUCTION

Must feminists support entrenchment of sex equality? Although an affirmative response might appear self-evident, recent events in the Canadian province of Quebec might give feminists pause. The issue was not whether the province should entrench its first sex equality provision; the Quebec Charter of Human Rights and Freedoms (“Quebec Charter”) prohibited sex discrimination from its inception in 1975.¹ Tensions arose among Quebec feminists over the proposal to add a second sex equality provision to the Quebec Charter. They did not articulate their tensions in terms of competing visions of sex equality: discrimination versus equality.² Instead, the dominant theme was conflicting constitutional rights: sex equality versus religious freedom. Accordingly, an analysis of Quebec’s experience may be instructive for feminists who are interested in issues of constitutional design in other jurisdictions.

In what follows I describe the constitutional setting, the origins of the proposed amendment to the Quebec Charter, and the tensions it exposed among feminists in Quebec. Although they disagreed over the all-or-nothing question of whether to entrench the second sex equality provision, I approach

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¹ Quebec Charter of Human Rights and Freedoms, R.S.Q., C-12 § 10 (2008):

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap [hereinafter Quebec Charter].

² Beverley Baines, *Equality, Comparison, Discrimination, Status*, in *The Law Project: Reinvigorating Substantive Equality* 73–98 (Fay Faraday, M. Kate Stephenson, and Margaret Denike, eds. 2006).

the issue of constitutional design from a different perspective, namely that sex equality provisions serve multiple functions. I argue that Ayelet Shachar's theory of joint governance³ illuminates the identity of feminists who are not served by Quebec's proposal, because they require a sex equality provision that protects intersectionality. After reviewing how such a provision might be designed,⁴ I suggest nevertheless that this second function could be performed by Quebec's amendment. Thus, I conclude that Quebec designed a second sex equality provision with the potential to guarantee constitutional citizenship to intersectional feminists as well as to secular feminists.

Before proceeding, I must explain the terminology that I use to denote feminist groups. I develop three analytical categories that focus on distinctive relationships between the right to sex equality and the right to religious freedom. These categories are: (1) secular feminists (these feminists give sex equality rights priority over religious freedom); (2) religious feminists (these feminists give the right to religious freedom priority over sex equality); and (3) intersectional feminists (these feminists give the same priority to both rights, refusing to choose between them). These categories are not intended to constrain (or liberate) individuals who identify in real life as secular, religious, and/or intersectional feminists. Rather, they are analytical tools adopted to facilitate discussion of rights-based differences among feminists.

I. CONSTITUTIONAL SETTING

Quebec is a province unlike the other nine provinces and three territories that make up the federation known as Canada. Many Quebecers view themselves as a distinct "nation," and insist on recognition as such in Canada. This view was nurtured when Quebec became the only province not to sign on to the November 1981 Constitutional Accord that resulted in the patriation of the Constitution Act 1982 and the adoption of the Canadian Charter of Rights and Freedoms ("Canadian Charter").⁵ Constitutionally speaking, the absence of Quebec's signature does not prevent Quebecers from invoking their rights under the Canadian Charter, although some will not do so for political reasons. They prefer to rely on the Quebec Charter.

³ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001).

⁴ Beverley Baines, *Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation*, 17 *Canadian J. Women & L.* 45 (2005).

⁵ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) c. 11 (1982) [hereinafter Canadian Charter].

Like bills of rights in several other Canadian provinces, the Quebec Charter serves two functions. On the one hand, it proscribes discrimination on grounds and in contexts similar to what obtains in other statutory human rights laws across Canada. In this respect, it resembles Title VII and Title IX laws in the United States. On the other hand, the first thirty-eight sections of the Quebec Charter set out fundamental rights and freedoms. Thus, the Quebec Charter also resembles the Canadian Charter and the American Bill of Rights.

Of course, the other provinces with hybrid bills of rights/statutory human rights laws also include fundamental rights and freedoms. However, they do not ascribe primacy to them. In contrast, Quebecers can invoke sections 1 to 38 of the Quebec Charter to challenge provincial legislation. These thirty-eight sections are said to possess “quasi-constitutional status” because they take precedence over other laws.⁶ Like the Canadian Charter and the American Bill of Rights, in other words, these sections of the Quebec Charter sustain judicial review of legislation. Under these circumstances, the language of “entrenchment” seems apposite to describe sections 1 to 38 of the Quebec Charter, even though no super majority or special legislative process is required to amend its provisions.

The proposal to add the second sex equality provision to the Quebec Charter arose under inauspicious circumstances. In February 2007, the Premier established a Consultation Commission on Accommodation Practices Related to Cultural Differences with a mandate to make recommendations that ensure accommodation practices related to cultural differences conformed to Quebec’s six core values.⁷ The Order in Council identified “the equality of women and men” as a core value along with “the separation of church and State, the primacy of the French language, the protection of rights and freedoms, justice and the rule of law, the protection of minorities, and the rejection of discrimination and racism.”⁸

Notwithstanding its inclusion, initially sex equality was not taken seriously. The Premier appointed two men – historian and sociologist Gérard Bouchard and political philosopher Charles M. Taylor – as the joint Commissioners. They adverted to sex equality only twice in their initial forty-four page Consultation Document that was released in August 2007 to orient the hearings

⁶ Lucie Lemonde, *The Quebec Charter of Human Rights and Freedoms*, in *The Canadian Encyclopedia* (Historica Foundation of Canada 2002), available at: <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0009340>.

⁷ Quebec, Order in Council No. 95-2007, (Feb. 8, 2007).

⁸ *Id.*

they proposed to hold.⁹ The neglect of sex equality¹⁰ and rendering of women invisible¹¹ did not go unremarked by feminists.

By October 2007, however, the equality of women and men became more important. The Premier singled it out along with the primacy of French and the separation of state and religion, characterizing these three values as “fundamental” and maintaining that they “come with Quebec” and “cannot be subject to reasonable accommodations.”¹² The other three values disappeared from the Premier’s lexicon.

Nor was sex equality’s meteoric rise over; by December 2007, it had become the sole surviving value when Christine St-Pierre, the Minister of Culture, Communications and the Status of Women, introduced Bill 63 in the Quebec National Assembly.¹³ This Bill had only one objective: adding a second sex equality provision to the Quebec Charter. The Social Affairs Committee held five days of hearings on Bill 63 in February.¹⁴ When tabling the Committee’s report in the National Assembly on March 11, 2008, Minister St-Pierre noted that the hearings had confirmed a “consensus” about adding the second sex equality provision to the Quebec Charter.¹⁵ The Minister’s use of the term “consensus” appears carefully chosen to avoid any inconsistency with the fact that several groups were very critical of the amendment during the hearings.¹⁶

Since the National Assembly passed Bill 63 on June 10, 2008,¹⁷ its constitutional status merits comment. The explanatory note states: “This Act amends the Charter of human rights and freedoms to expressly state that Charter rights

⁹ Gérard Bouchard and Charles Taylor, *Accommodation and Differences. Seeking Common Ground: Quebecers Speak Out*, Consultation Document, at 18 and 31 (Aug. 2007), <http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf>. [hereinafter Bouchard-Taylor Consultation].

¹⁰ Bouchard-Taylor Commission, *Documentation*, <http://www.accommodements.qc.ca/documentation/memoires-en.html>. [hereinafter Bouchard-Taylor Documentation]. See Professeures et chercheuses de l’Université Laval.

¹¹ *Id.* See Fédération des femmes du Québec.

¹² Letter from Jean Charest, *Let’s talk reason and respect* (Oct. 30, 1997), <http://www.premier-ministre.gouv.qc.ca/billets-du-premier-ministre/2007/octobre-2007-en.asp>.

¹³ Quebec Nat’l Assembly, Bill 63, 38th Legislature 1st session, 2007-12-12 [hereinafter Bill 63].

¹⁴ Quebec Social Affairs Committee, *Hearings on Bill 63* (38th Legislature, 1st Session, 12–14, 19, 20 Feb. 2008, <http://www.assnat.qc.ca/fra/38legislature1/commissions/cas/index.shtml> [hereinafter Committee Hearings].

¹⁵ Quebec Nat’l Assembly, *Debates* (38th Legislature, 1st Session, 11 Mar. 2008), vol. 40, no. 58, at 74.

¹⁶ Marianne White, *Proposed Amendments to Quebec Charter of Rights Criticized*, *canwest news serv.*, Feb. 19, 2008, <http://www.canada.com/topics/news/politics/story.html?id=5ac5a766-d028-4b93-8296-e256836defe5> (naming as critics: Quebec Civil Liberties Association, Quebec Bar Association, and Center for Research-Action on Race Relations).

¹⁷ An Act to amend the Charter of human rights and freedoms, S.Q. 2008, c. 15.

and freedoms are guaranteed equally to women and men.”¹⁸ Consistent with this statement, its four sections all pertain to sex equality. The first section amends the preamble to the Quebec Charter to include the phrase “equality of women and men;” the second section is the sex equality provision that is to be inserted into the Quebec Charter as section 50.1; the third section amends the preamble of another statute (the Act to combat poverty and social exclusion) by updating its reference to the preamble of the Quebec Charter; and the fourth section declares the new Act in force on June 12, 2008.¹⁹

To elaborate, the second section of the new Act provides: “The rights and freedoms set forth in this Charter are guaranteed equally to women and men.”²⁰ This wording is virtually identical to section 28 of the Canadian Charter, which states: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”²¹ The language of section 28 is very similar to provisions in several international instruments²² including Article 3 of the International Covenant on Civil and Political Rights,²³ Article 3 of the International Covenant on Economic, Social and Political Rights,²⁴ and Article 15(1) of the Convention on the Elimination of All Forms of Discrimination against Women.²⁵

Section 28 is an important precursor to the sex equality provision in the new Act because it was adopted without controversy among feminists in Canada. Unquestionably, there were aboriginal and Quebec women who not only objected to, but also opted out of, the political processes surrounding the enactment of the Canadian Charter and the patriation of the Canadian Constitution. However, they did not focus on or oppose the addition of section 28 to the Canadian Charter. In fact, when the ten first ministers who signed the November 1981 Constitutional Accord thoughtlessly included section 28 within the reach of the override (or derogation) clause, women from across

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* § 2.

²¹ Canadian Charter, *supra* note 5.

²² Anne F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* 46-47 (1992).

²³ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 art. 3 (1976) (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”).

²⁴ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 art. 3 (1976) (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”).

²⁵ Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 art. 15(1) (1981) (“States Parties shall accord to women equality with men before the law.”).

Canada including Quebec rallied once again to lobby all eleven first ministers successfully for its exclusion.²⁶ In the prescient words of one of these lobbyists, “Section 28 was a helluva lot to lose . . . because to put it under the override would have been to entrench inequality. But it was not a helluva lot to win.”²⁷

The constitutional status of aboriginal women changed within a year of the adoption of the Canadian Charter. They not only participated in the constitutional conference that culminated in amending the Constitution Act 1982 to include a section, section 35, recognizing and affirming existing aboriginal and treaty rights.²⁸ As well, they ensured that section 35 contains a guarantee of sex equality. Accordingly, section 35(4) provides: “Notwithstanding any other provision of the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”²⁹ Clearly, the wording of section 35(4) was adapted from section 28. Therefore, aboriginal women can rely on the specific right to aboriginal sex equality under the former and the general right to sex equality under the latter.

Even though Quebec did not sign the 1981 Constitutional Accord, without question women in this province can avail themselves of section 28 of the Canadian Charter and if they are aboriginal, they can also turn to section 35(4) of the Constitution Act 1982. However, doing so poses a political dilemma that the new Act would resolve. What is more debatable is how the new Act, which amends not the entrenched sections (1 to 38) of the Quebec Charter, but rather section 50, could entrench the second sex equality provision. I would argue that we should construe this provision as entrenched, ironically because (and not in spite of the fact that) its guarantee of sex equality is not freestanding. In other words, because this guarantee becomes operative only when it applies to the existing rights and freedoms set forth in sections 1 to 38 of the Quebec Charter, it is entrenched by virtue of the company that it must keep.

Before we laud the Quebec government for proposing to bring the Quebec Charter into line with section 28 of the Canadian Charter and with the aboriginal sex equality provision in the Constitution Act 1982, however, we must ask whether it matters that twenty-five years have elapsed since the earlier provisions came into force. I suggest it does, for two reasons. First, the experience

²⁶ Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* 83-95 (1983).

²⁷ *Id.* at 95.

²⁸ Constitution Act 1982, *supra* note 5, § 35 (“The existing aboriginal and treaty rights of the aboriginal peoples are hereby recognized and affirmed.”). Section 35 is not part of the Canadian Charter.

²⁹ *Id.* § 35(4).

of this quarter century is that a second equality provision is not very important: section 28 has gone all but unnoticed by members of feminist, legal, and judicial communities in Canada.³⁰ We are accustomed to litigating sex equality issues under section 10 of the Quebec Charter³¹ or section 15(1) of the Canadian Charter.³² Second, Canada became a multicultural country, prompting constitutional claims for recognition of cultural and religious diversity. Such claims were all but unknown twenty-five years ago; now we are on new terrain. In the next part, I describe how Quebec's venture onto this terrain via the sex equality proposal in Bill 63 exposed tensions among Quebec feminists.

II. FEMINIST TENSIONS

In the months before Bill 63 appeared, the Council on the Status of Women played a leading role, presenting a brief to the Bouchard-Taylor Commission that explicitly recommended the Quebec Charter be amended to include a provision analogous to section 28 of the Canadian Charter.³³ The Council's role is not diminished by the fact that it is funded by the government and led by a former member of the National Assembly. Nor does it matter that the Council presented its brief on the same day that Bill 63 was introduced in the National Assembly. Their written brief was available some months earlier. In addition, the Council was supported by other feminist groups that lobbied for stronger equality rights for women, including the Fédération des femmes du Québec and Professeurs et des chercheuses de l'Université Laval.³⁴

The tensions among feminists in Quebec surfaced during the hearings of the Bouchard-Taylor Commission. The Commission held twenty-two regional and four province-wide hearings, although these tensions were manifested mainly in Montreal. Interestingly, the controversy did not appear to implicate religious feminists, that is, feminists who insist that religious freedom must trump sex equality. Rather the debate generated by these hearings was between

³⁰ Baines, *supra* note 4.

³¹ Quebec Charter, *supra* note 1.

³² Canadian Charter, *supra* note 5, § 15(1) ("Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.").

³³ Quebec Council on the Status of Women, *On the Right to Equality Between Women and Men and Freedom of Religion*, at 21, http://www.csf.gouv.qc.ca/fr/english/#pubresume_droit_liberte_religieuse_anglais.pdf [hereinafter Quebec CSW]. This version is the English summary of *Droit à l'égalité entres les femmes et les hommes et liberté religieuse* (Quebec, Sept. 2007), <http://www.csf.gouv.qc.ca/fr/publications/?F=affichage&ma=208choix=18s=10>.

³⁴ Bouchard-Taylor Documentation, *supra* note 10.

groups representing secular feminists and those speaking for intersectional feminists.

In contrast to what happened at the Bouchard-Taylor hearings, two months later only secular feminists made submissions to the Social Affairs Committee during its five days of hearings in Quebec City. Although sex equality did serve as one of the grounds advanced by groups opposing Bill 63 at the Committee hearings, this opposition was not voiced by groups representing intersectional feminists. They did not appear at these hearings. Still, there is no evidence that intersectional feminist groups had changed their position. Rather, it is more likely that they could ill afford the time and expense required to travel from Montreal to Quebec City to present briefs yet again to a government that appeared unreceptive to their concerns.

Why did the proposal to entrench sex equality in the Quebec Charter evoke tensions among feminists? The answer is straightforward. The problem is not with the content of the provision which, as I have already observed, resembles its uncontroversial precursors. Rather the difficulty arises from its twenty-first century context, which is nowhere mentioned in Bill 63.

For Quebecers, this context is all too well-known. Quebec has a population of 7.6 million,³⁵ of whom 80 percent speak French as their mother tongue and 70 percent are of French or French-Canadian ethnic origin.³⁶ Although Canada recognizes both English and French as official languages, Quebec recognizes only French.³⁷ Religion is another distinctive feature of Quebec's population. Since the early 1960s, successive governments have maintained Quebec is a secular society.³⁸ However, 80 percent of Quebec's population identifies as Catholic. Thus, French-speaking (or francophone) Catholics – often depicted simply as French Canadians – constitute an overwhelming majority of the population of Quebec. In contrast, the remainder fragments into ethnic/religious/linguistic minority groups representing over 200 religions,³⁹ drawn from more than 180 countries and speaking more than 150 mother tongues.⁴⁰

The more immediate context that led to the creation of the Bouchard-Taylor Commission and subsequently to Bill 63 consists of two major court decisions and a series of disparate incidents, all involving cultural minorities in Quebec. The cases and incidents were given much media hype in which they were characterized as examples of “accommodations” of cultural beliefs.

³⁵ Bouchard-Taylor Documentation, *supra* note 10 at 9.

³⁶ *Id.* at 10.

³⁷ *Id.* at 13.

³⁸ *Id.* at 25.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 10.

First, the two cases: both were appealed to the Supreme Court of Canada, which reversed the decisions of Quebec's appellate court. Neither case involved sex equality. Rather, at the Supreme Court both sets of appellants successfully invoked their right to freedom of religion under the Quebec Charter, citing the Canadian Charter as well. The first was a property rights case in which the successful appellants were four Orthodox Jews who, contrary to the terms of their cooperatively owned property units, had set up succahs on their balconies. The League for Human Rights of B'nai Brith Canada was also a party. In addition, three other minority religious organizations – the Evangelical Fellowship, the Seventh-day Adventist Church in Canada, and the World Sikh Organization of Canada – were among the interveners.⁴¹ The successful appellants in the second case were orthodox Sikhs who challenged the constitutionality of a school board's decision to prohibit their twelve-year-old son from wearing a kirpan while at school. The World Sikh Organization of Canada participated again as one of the interveners.⁴²

Second, despite their differences, the disparate incidents shared two important features in common: all involved the accommodation of religious beliefs and all were iterated frequently in the media. The Brief submitted to the Social Affairs Committee by the Center for Research-Action on Race Relations offers a succinct summary of some of the incidents:

- The decision of the Outrement YMCA to frost its windows so that orthodox Jews from the neighbouring school would not be able to see women exercising from the sidewalk;
- The refusal of an eleven-year-old girl to remove her *hijab* at a soccer tournament;
- The willingness of the owner of a “cabane à sucre” to not serve pork to his Muslim clients;
- The internal suggestion of the Montreal Police Service to send male police officers, subject to availability, to handle calls from the Orthodox Jewish community in the Outrement district of the city;
- The willingness of a Boisbriand CLSC to serve its Orthodox Jewish community with medical practitioners compatible with their gender; and
- The preparedness of neonatal clinics to accommodate their classes and thereby enable Muslim women to participate without the presence of men.⁴³

In response to these cases and incidents of accommodation of religious practices, the municipal council of Hérouxville, a small rural Quebec town of

⁴¹ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

⁴² *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256.

⁴³ Committee Hearings, *supra* note 14.

1,300 people, passed a “code of conduct” aimed at newcomers.⁴⁴ This code sets standards of acceptable and unacceptable social behavior.⁴⁵ The document containing the standards opens with a paragraph headed “Our Women,” which includes a prohibition on “killing women by lapidation or burning them alive in public places, burning them with acid, excising them, infibulating them or treating them as slaves.”⁴⁶ Some of the other standards are: “community residents are not allowed to hide their face (except on Halloween); employers are not required to provide a place to pray or time off to pray; children may not bring weapons to school including ceremonial weapons; and a girl may choose her own spouse.”⁴⁷ Upon adopting this code of conduct in January 2007, Hérouxville achieved international notoriety.

Groups such as the Canadian Islamic Congress and the Canadian Muslim Forum proposed to complain to the Quebec Human Rights Commission. They claimed that the Hérouxville code discriminates on religious grounds by targeting “specific faith groups (particularly Muslims, Jews, and Sikhs) as oppressive towards women and prone to violence.”⁴⁸ However, their response did not stop some towns situated in rural Quebec from threatening to adopt similar codes. Still, others tried to distance themselves by signing petitions denouncing Hérouxville’s code.⁴⁹

Given this context, it is not surprising that Bouchard and Taylor described their Commission as a “response to public discontent concerning reasonable accommodation.”⁵⁰ They acknowledged the prevailing perception that reasonable accommodation is the problem, not the solution. In his Letter of October 30, 2007, Premier Charest not only subscribed to this perception but also displayed no reluctance about targeting Islam, as exemplified by his assertion that “the right to vote can be exercised only with the face uncovered.”⁵¹ Moreover, with his solution – entrenching the equality of women and men as a fundamental value that “cannot be subject to reasonable accommodation”⁵² –

⁴⁴ Graham Darling, *Quebec Town Adopts Controversial Social Code of Conduct for Newcomers*, Centre for Constitutional Studies, University of Alberta, <http://www.law.ualberta.ca/centres/ccs/Current-Constitutional-Issues/Quebec-town-adopts-controversial-social-code-of-conduct-for-newcomers.php>.

⁴⁵ Municipality of Hérouxville, *Publication of Standards and The Standards*, <http://municipalite.herouville.qc.ca/Standards.pdf>.

⁴⁶ *Id.*

⁴⁷ Darling, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ CBC News, *Quebec Towns Reject Hérouxville Immigrant Code*, (Feb. 7, 2007), <http://www.cbc.ca/canada/montreal/story/2007/02/07/qc-herouville20070207.html>.

⁵⁰ Bouchard-Taylor Consultation, *supra* note 9, at v.

⁵¹ Charest, *supra* note 12.

⁵² *Id.*

the Premier thrust sex equality into the state's arsenal of laws available to control religious and cultural differences. With contextualization, therefore, sex equality morphs from an inherent value to one that is instrumental.

The responsibility for proposing the solution adopted by the Premier rests with the Council on the Status of Women. Two months before the Premier's Letter, the Council released its study *Droit à l'égalité entre les femmes et les hommes et liberté religieuse*.⁵³ In this study, the Council not only recommended including a second sex equality provision in the Quebec Charter, but also emphasized the importance of "clearly affirming that equality between women and men may not be jeopardized, in particular, in the name of freedom of religion."⁵⁴ The Council submitted this recommendation to the Bouchard-Taylor Commission hearing on December 12, 2007 and to the Social Affairs Committee hearing on February 14, 2008.

In its study and briefs, the Council offered two examples of accommodation in the name of religious freedom that "should not be afforded since they would jeopardize the right to equality between the sexes."⁵⁵ The first example was: "A teacher in an elementary school in the public system converts to the Muslim faith and wishes to wear the nikab, the veil which covers her face in its entirety except for the eyes."⁵⁶ According to the Council, the school should prohibit the nikab because it "quite obviously, sends a message of the submission of a woman, which should not be conveyed to young children."⁵⁷ This view differs from the one expressed by the Council twelve years earlier in a study that portrayed the veil as a "complex symbol," sometimes expressing "religious significance," sometimes "cultural identity," and only sometimes a "symbol of women's inequality."⁵⁸ It also fails to account for another Council study referring to cases in which "women seem to be infatuated with the new religions because, unlike the Catholic Church, these groups give women the chance to exercise administrative and spiritual leadership."⁵⁹

The second example of unacceptable accommodation offered by the Council was: "As part of the services provided by the State, a recipient may not refuse,

⁵³ Quebec CSW, *supra* note 33.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* at 16.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Marie Moisan, *Analysis of the Issue of Wearing Veils in School* (English synthesis of Conseil du statut de la femme, *Réflexion sur la question du port du voile à l'école*) (Quebec, 1995), <http://www.csf.gouv.qc.ca/fr/publications/?F=affichage&ma=20&choix=1&s=10>.

⁵⁹ Conseil du statut de la femme, *Cultural and Religious Diversity: A Study of the Stakes for Women 4* (English synthesis of *Diversité culturelle et religieuse: recherche sur les enjeux pour les femmes*) (Quebec, Nov. 1997), http://www.csf.gouv.qc.ca/telechargement/pdf/synthese_Cultural_religious_diversity.pdf.

on religious grounds, to be served by a woman to the extent that his refusal would jeopardize the right to equality of the public official.”⁶⁰ The study elaborated by referring to the Quebec Motor Vehicle authorities who accommodate Hassidic Jews by ensuring only male examiners accompany them in their cars to test their driving skills when applying for their driver’s licenses.⁶¹ The Council asserted that this accommodation discriminates against women who work as driving test examiners.⁶² Another version of this concern, one even more troubling to intersectional feminists, surfaced in a brief submitted to the Social Affairs Committee by the Quebec Federation of Medical Specialists. They demanded that hospitals stop accommodating Muslim women who refuse to have male obstetricians or gynecologists present when they are giving birth.⁶³ In this latter scenario, obviously no benefit accrues to women.

Like its counterparts in other jurisdictions, the Council has the difficult task of speaking for all women in Quebec. Indeed, the Council held two focus group discussions with Muslim women.⁶⁴ This approach did not preclude opposition. A group of faculty, students, researchers, and staff at the Concordia University’s Simone de Beauvoir Institute challenged the Council’s use of “feminism” and “women’s equality” to legitimize what they saw as a “racist, sexist, and xenophobic position.”⁶⁵ They objected to changing the Quebec Charter to accord “gender equality relative priority over the right to religious expression and banning the wearing of ‘ostentatious’ religious symbols in public institutions by public employees,” claiming the Council’s proposal would restrict rather than enhance the rights of women.⁶⁶ They maintained that using secularism to guarantee sex equality effectively functions “to promote Christian culture as the norm and to scapegoat Muslims as inherently sexist, erasing secular forms of sexism.”⁶⁷ And, they argued that regulating women’s public religious expression constitutes gender discrimination, explaining that “it takes away women’s freedom and inhibits their civic participation.”⁶⁸

Other groups used less inflammatory language to express a similar theme, namely that giving sex equality priority over religious freedom and banning the veil deprived women of the opportunity to support both sex equality and

⁶⁰ Quebec CSW, *supra* note 33, at 16.

⁶¹ *Id.*, French version, at 101.

⁶² *Id.*

⁶³ Committee Hearings, *supra* note 14.

⁶⁴ Quebec CSW, *supra* note 33, French version, Annexe II.

⁶⁵ Cover Letter (email) from Anna Carastathis, ‘Reasonable accommodation’: a Feminist Response (Montreal: Simone de Beauvoir Institute, Nov. 2007) (on file with author).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

religious freedom by, for example, choosing to or not to wear the veil. The Muslim Women of Quebec asserted that wearing the hijab “in no way should be interpreted as a symbol of inequality between women and men.”⁶⁹ It signifies modesty, not oppression because in Canada, “Muslim women dress according to their personal choice.”⁷⁰ Their brief concluded with the plea that Quebec respect the “different cultural flavours that immigrants bring in.”⁷¹ Similarly, the brief submitted by the South Asian Women’s Community Centre characterized the hijab as “the very visible headdress some women have chosen to wear” and argued for a “future where diversity is nurtured.”⁷²

The Sikh Community of Montreal opposed the Council’s proposal that sex equality should trump religious freedom on the ground that the “Council is generalizing by bundling all religions into the same mold.”⁷³ They explained “Sikh women play an equal role in our religious and social spheres,” elaborating on the leadership roles women had played recently in their organizations, houses of worship, and boards of directors.⁷⁴ A somewhat different approach was taken in the brief by the Muslim Community Centre of Montreal (Al Hidaya Association), which noted that imposing a dress code on women “makes her unequal not only to men, but also to her fellow women.”⁷⁵ It would create two classes of women in society, discriminating against Muslim women and stripping them of “their right to equal opportunities to education, work, and thus self-determination.”⁷⁶

No group specifically representing Jewish women spoke out. However, two major Jewish groups – B’nai Brith Canada and the Canadian Jewish Congress Quebec Region – did appear before the Bouchard-Taylor Commission, although neither of their briefs made any reference to women.⁷⁷ They referred instead to problems of religious discrimination and racism. Moreover, they invoked current jurisprudence, maintaining it revealed these problems to be adequately addressed by the existing charters of rights.⁷⁸ Nevertheless, both Jewish groups expressly rejected the notion of a hierarchy of rights.⁷⁹ Their rejection implies that they were aware of and opposed to the proposal

⁶⁹ Bouchard-Taylor Documentation, *supra* note 10.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

to amend the Quebec Charter by adding a sex equality provision that would trump religious freedom.

The foregoing illustrates significant tensions among Quebec feminists. Leaving aside religious feminists, clearly secular and intersectional feminists disagreed about the entrenchment of the second sex equality provision. Led by the Council on the Status of Women, secular feminists supported entrenchment on the understanding that it meant sex equality would trump religious freedom. In contrast, as exemplified in the positions taken by Muslims, Sikhs, and South Asians, intersectional feminists opposed entrenchment because they rejected this particular hierarchy of rights. My objective is to explore the constitutional implications of this tension. More specifically, what does Quebec's experience teach us about designing constitutions to protect the rights of women who identify as intersectional feminists?

III. CONSTITUTIONAL DESIGN

I suggest Quebec's experience offers feminists three lessons about constitutional design. The first lesson is about the importance of identifying the function to be served by the proposed provision. The next lesson is that this provision may serve more than one function. The third lesson is about exploring the implications of multiple functions for multiple sex equality provisions. In what follows, I elaborate on each of these lessons.

A. *First Lesson*

Quebec's experience teaches us that the issue of entrenching sex equality may easily become contentious among feminists. There is very little likelihood of resolving contentiousness if the argument remains focused on the all-or-nothing question of entrenchment. Instead, a more constructive approach is to begin by identifying the function the proposed sex equality provision is expected to serve. This function is not self-evident when, as in Quebec, the existing charter of rights already includes a sex equality provision. Assuming that a declaration of redundancy is not an option, the second provision must serve a distinctive function.

The Council on the Status of Women endeavored to distinguish the proposed provision from the existing one by drawing on two Quebec sex equality cases.⁸⁰ Both raised the issue of religious freedom. The earlier decision drew the ire of the Council because it failed to advert to the existing sex equality

⁸⁰ Committee Hearings, *supra* note 14.

provision in the Quebec Charter. However, the second decision did little to reassure the Council, even though the existing provision was successfully invoked. Despite approving of its outcome, the Council was critical of the legal reasoning that the judges used to decide this second case. A brief synopsis of each case reveals the inadequacies of the existing provision from the perspective of the Council and its secular feminist supporters.

The earlier case involved the application of a married woman who wanted to change her surname to that of her husband.⁸¹ Since 1981, the *Civil Code of Quebec* has prohibited women from changing their surname on marriage; a married woman must exercise all of her legal rights under her birth name.⁸² The wife challenged this provision on the grounds of her Christian religious conviction, contending that as a Baptist she had to take her husband's surname to publicly demonstrate family unity. The Quebec Superior Court judge, a woman, decided in her favor.

The Council on the Status of Women condemned this decision, maintaining the judge had failed to consider the sex equality provision in the Quebec Charter.⁸³ In one sense, their contention was accurate; there was no reference to the provision in the decision. On the other hand, the judge did not ignore the issue of sex equality. She observed that one of the objectives of the 1981 law was "to promote the equality of the sexes." Thus, this decision could be seen as one in which the existing sex equality provision in the Quebec Charter was ineffective in the face of a challenge on the ground of religious freedom. Indeed, the Council subscribes to this critique. They view the decision as further evidence of the necessity for a provision that not only promises sex equality (the existing provision), but also could be relied upon to trump religious freedom (the proposed provision).

To reinforce the importance of performing this function, the Council also examined a decision released by the Supreme Court of Canada two days after Bill 63 was introduced in the Quebec National Assembly.⁸⁴ This case involves a Jewish husband who had agreed during civil divorce proceedings to provide a *get* or Jewish divorce. For the next fifteen years, however, he consistently refused to fulfill his agreement. Finally his ex-wife, who was prohibited from remarrying under Jewish law, sought damages for breach of the agreement. The husband claimed freedom of religion protected him from having to pay

⁸¹ *Gabriel v. Directeur de l'état civil*, [2005] Q.J. no. 145.

⁸² Act to Establish a New Civil Code and to Reform Family Law, S.Q., c. 39 § 1 (1980), now Article 442 of the Civil Code of Quebec: "In marriage, each spouse retains his surname and given names, and exercises his civil rights under this surname and these given names."

⁸³ Committee Hearings, *supra* note 14.

⁸⁴ *Bruker v. Marcovitz*, 2007 SCC 54 (Abella J.).

damages for breaching his agreement. The ex-wife won at trial, but the Quebec Court of Appeal ruled the contract was religious and hence unenforceable in a civil court. The Supreme Court of Canada disagreed; in a majority ruling authored by the first Jewish woman judge, the Court decided that enforcing the agreement would recognize the gender discrimination that religious barriers to remarriage represent. The husband's claim to freedom of religion was balanced against and outweighed by the wife's equality rights under the Quebec Charter.

In its criticism, the Council focused on the Court's legal reasoning.⁸⁵ The Council disapproved of the Court balancing the ex-wife's sex equality against the husband's religious freedom even though the outcome was that sex equality prevailed. In the opinion of the Council and its secular feminist supporters, religious freedom should always be conditioned upon the religion's respect for the equality of women and men. To ensure that sex equality always trumps religious freedom, something other than the existing provision is required. The existing provision permits the balancing of rights, but nothing more is guaranteed. The distinctive function of the proposed provision, then, is to preclude any ambiguity about the entitlement to sex equality for women who must confront claims by men to freedom of religion. Thus, the function of the proposed provision is not to protect religious feminists. Rather it is to ensure that the constitutional citizenship of secular feminists will outweigh that of religious freedom seekers.

B. *Second Lesson*

The next lesson is that the proposed sex equality provision may serve more than one function. To sustain this contention, I invoke Shachar's theory of joint governance⁸⁶ because it not only illuminates the function of Quebec's proposal but also reveals its limits. More specifically, I apply her theory to the two scenarios that the Council used to justify the proposed sex equality provision: the veiled public school teacher and the excluded driver's license examiner. Because Shachar's objective is to reduce the tensions between religious accommodation and gender equality, and because that tension is played out in both scenarios, her theory should make the interests served by the proposed provision transparent.

Like Quebec feminists, Shachar puts women at the centre of her theory. In *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, she critiques the liberal theories of multicultural citizenship that Will Kymlicka⁸⁷

⁸⁵ Committee Hearings, *supra* note 14.

⁸⁶ Shachar, *supra* note 3.

⁸⁷ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1993).

and Charles Taylor⁸⁸ propound, contending they fail to recognize that women experience the “paradox of multicultural vulnerability.”⁸⁹ This paradox calls “attention to the ironic fact that individuals inside the group can be injured by the very reforms that are designed to promote their status as group members in the accommodating, multicultural state.”⁹⁰ For example, to the extent that the state permits religious and cultural groups to use their own rules to resolve family disputes, the paradox of multicultural vulnerability is that women are harmed by the patriarchal elements in their own religious and cultural communities.⁹¹ To address this paradox, Shachar proposes a theory of “joint governance,”⁹² and in a subsequent article she applies it to the debate about students wearing the hijab in schools in Quebec.⁹³

Joint governance is a legal–institutional approach that “ties the mechanisms for reducing sanctioned in-group rights violations to the very same accommodation structure that enhances the jurisdictional autonomy of [minority religious] groups.”⁹⁴ Put differently, joint governance “seeks to avoid an either-or choice between culture and rights”⁹⁵ by creating “overlapping or shared jurisdictions”⁹⁶ between the minority group and the state. The notion of sharing and dividing authority “allows vulnerable group members greater flexibility and room for negotiation with both entities.”⁹⁷

Joint governance has three core principles. The first is shared jurisdiction, which is similar to the principle of federalism insofar as it allocates subject matters between the state and the minority group. It means “identifying the unique interrelated functions involved in the specific social arena.”⁹⁸ In the educational context, these functions could be citizenship and identity,⁹⁹ and in the context of public service they could be qualifications and representation. The second is a “no monopoly” or separation of powers principle that holds neither the state nor the minority group “can ever acquire exclusive control over a contested social area.”¹⁰⁰ Shachar depicts the role of her third principle

⁸⁸ Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition* 25 (Amy Gutmann, ed., 1994).

⁸⁹ Shachar, *supra* note 3, at 3.

⁹⁰ *Id.*

⁹¹ *Id.* at 6.

⁹² *Id.* at 5.

⁹³ Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 *McGill L.J.* 49 (2005).

⁹⁴ *Id.* at 71.

⁹⁵ *Id.*

⁹⁶ *Id.* at 72.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 83.

¹⁰⁰ *Id.* at 72.

as the “establishment of clearly delineated reversal points.”¹⁰¹ These points enable “an individual to discipline the relevant jurisdictional powerholder by turning to the competing jurisdiction when the original powerholder has failed to provide an adequate remedy.”¹⁰²

In the theory of joint governance, reversal points are pivotal to feminist agency. In the two scenarios, they would provide public school teachers who do not want to wear the veil and female driver’s license examiners with the protection of the state’s sex equality rule when they perceive religious rules as inappropriate or too harsh. Thus, the idea of reversal points serves secular feminists well because it allows a woman unhappy with the decision of the religious community to turn to the state for relief.

In contrast, reversal points do not serve the interests of teachers who choose to wear the veil or female driver’s license applicants who cannot be alone with male examiners for religious reasons. Remaining true to their beliefs means they will be denied state benefits, namely teaching posts and drivers’ licenses. Well, you might say, this choice is theirs; they are religious feminists who by definition choose religious freedom over sex equality. Moreover, they could seek the protection of the religious freedom provision in the Quebec Charter.

What about intersectional feminists who contend that rules about veiling and intimacy in public service contexts should conform not only to religious freedom, but also to sex equality? The theory of reversal points not only forces them to choose between sex equality and religious freedom, but also works in only one direction forcing them to choose sex equality if they want to work or drive. In sum, joint governance crystallizes the function of Quebec’s proposed sex equality provision as protecting the interests of the state.

Yet, the position of intersectional feminists who seek to be governed not only by their religious beliefs, but also by egalitarianism is consistent with the general objective of Shachar’s theory, which is to resolve the tensions between religious accommodation and sex equality. Unlike religious feminists, they do not reject sex equality even as they differ from secular feminists because they refuse to give it priority over religious freedom. Intersectional feminists want both rights, equally; they refuse place their bodies in the position of having to choose between state and religious regimes. Put differently, because they never disavow sex equality, it behooves us to consider whether the proposed sex equality provision could and should serve the function they seek, that is, sustaining the intersectional right to live religiously and equally.

¹⁰¹ *Id.*

¹⁰² *Id.*

C. Third Lesson

Can the proposed sex equality provision serve this additional function of intersectionality? Using section 28 of the Canadian Charter, I have argued elsewhere that it could.¹⁰³ Thus, the third lesson is that multiple sex equality provisions have the potential to serve multiple functions.

Why do we need multiple sex equality provisions to protect intersectional claims? In Canada, the answer is simple. The Supreme Court of Canada has never acknowledged that the general equality provision in the Canadian Charter, section 15(1), serves intersectional equality rights claimants. The Court has not lacked for opportunity to recognize this possibility, for example, in cases involving aboriginal, visible minority, and national/ethnic origin women as parties.¹⁰⁴ Unfortunately however, the Court is mired in categorical analysis, forcing litigants to choose among the personal characteristics that have led to their unequal treatment.¹⁰⁵ Two provincial appellate courts, Nova Scotia in 1993 and Ontario in 2002,¹⁰⁶ tried to illuminate the way to use intersectional analysis, but the final court of appeal has not taken up the challenge.

It would appear that the only hope for intersectional rights analysis is to claim them under the rubric of section 28 and another Canadian Charter provision. When I examined the jurisprudence pertaining to section 28 (there is very little to date), I concluded that the only way to avoid redundancy with section 15(1) would be to interpret section 28 as the guarantor of intersectional rights. Section 28 could then work in tandem with religious freedom in section 2(a) to sustain a claim for sex and religious intersectionality. Similarly section 28 could work in tandem with section 15(1) to sustain an intersectional claim for sex and, for example, race respectively.

The same arguments apply to the Quebec Charter.

CONCLUSION

Secular feminists in Quebec want the second sex equality provision to have priority over all claims of religious freedom under the Quebec Charter.¹⁰⁷

¹⁰³ Baines, *supra* note 4.

¹⁰⁴ *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627; *Vancouver Society of Immigrant and Visible Minority Women v. Canada*, [1999] 1 S.C.R. 10; *Lavoie v. Canada* [2002] 1 S.C.R. 769.

¹⁰⁵ Baines, *supra* note 4 at 65.

¹⁰⁶ *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] 101 D.L.R. (4th) 224 (N.S.C.A.); *Falkiner v. Ontario*, [2002] O.J. No. 1771 (OCA).

¹⁰⁷ Cf. *G rard Bouchard and Charles Taylor, Building the Future: A Time for Reconciliation* 176 (2008), (supporting Bill 63 because it appears not to impose a hierarchy of rights, and because the Quebec Charter already prohibits sex discrimination in § 10).

Religious feminists not only oppose the claim for priority, they have no interest in claiming sex equality; religious freedom is their standard. Intersectional feminists refuse to choose between their right to sex equality and their right to religious freedom; they embody both and they ask for a constitution designed to include them as citizens with rights. Whose interests will the new provision really serve?

It could be interpreted to support the interests of the state, as secular feminists contend. Conservative Jews could be forced to accept opposite sex driver's license examiners or go without a license. Public school teachers (and students) could be forced to remove their veils in the classroom, or leave the public school system. On the other hand, the new sex equality provision could be interpreted differently without any change of language. It could be construed not as reinforcing state policies, but rather as addressing the interests of citizens who challenge state policies. In other words, courts might interpret Quebec's proposed provision as entrenched to protect the interests of feminist citizens who believe the state has an obligation to enact policies protective of intersectional rights.

On the larger issue of constitutional design, therefore, I conclude that feminists should support the entrenchment of initial sex equality provisions because they legitimate constitutional litigation. Without a sex equality provision, policies do not need to take account of women's existence. With a sex equality provision, argument becomes possible.

However, whether feminists must support the entrenchment of second sex equality provisions depends on the context. Where the context is clear, as in Quebec, and sex is being used to thwart other constitutional rights, then feminists must ascertain whether some women require intersectional rights protection. In short, is there contested terrain among feminists? If so, the proposed second sex equality provision may not serve all feminists. The proposal in Quebec protects secular feminists, but not religious and intersectional feminists. Under these circumstances, the final lesson from Quebec is that feminists must support entrenchment of sex equality only if it guarantees their own constitutional citizenship.

Deconstructing the East/West Binary: Substantive Equality and Islamic Marriage in a Comparative Dialogue

Pascale Fournier*

INTRODUCTION

In the scholarship dedicated to legal transplants, the binary East/West permeates the images and understanding of the ways in which Islamic legal rules travel, penetrate, and get received by the West in a comparative law dialogue. Differences are thus being assigned *between* the legal regimes of the East and the West, two entities considered as sharply divided. This chapter seeks to understand the politics of transnational Islamic family law in Canada, the United States, France, and Germany, through the migration of one particular Islamic legal institution: Mahr, “the gift which the bridegroom has to give to the bride when the contract of marriage is made and which becomes the property of the wife.”¹ The issue of Mahr typically presents itself in a crisis: a married Muslim woman, engaged in a religiously structured marriage, and living in a Western liberal state, reaches out to the secular court upon the dissolution of her marriage to claim the enforcement of Mahr, presumably because her husband has previously refused to give her the amount of deferred Mahr.²

Through an analysis of the case law, I explore the ways in which substantive equality is being used by courts to accept or root out Islamic law from the family of institutions that are deemed appropriate in Western countries. What influences the selection and imposition of Mahr as a gendered institution?

* This chapter is based in part on the doctoral thesis I submitted at Harvard Law School in 2007. I wish to express my appreciation to Janet Halley and Duncan Kennedy for their active and warm participation to this project. I could not have completed this chapter without the love, support, and generosity of my mother, Monique Fournier, and my husband, Xavier M. Milton. Thanks to them, I can now dedicate this chapter also to my son, Charles L. Fournier-Milton.

¹ *The Encyclopaedia of Islam* (Vol. 6)(New edition, Bosworth, Donzel, Lewis, & Pellat, eds., 1991).

² *Mahr* is usually divided into two parts: that which is paid at the time of marriage is called *prompt Mahr (muajjal)*, and that which is paid only on the dissolution of the marriage by death or divorce or other agreed events is called *deferred Mahr (muwajjal)*.

How does law shape substantive equality in a comparative religious framework? Does the way Mahr travels affect gender equality, in both productive and reactive terms? In addressing these questions, I draw on Edward Saïd's³ and Barbara Johnson's⁴ innovative perspectives on comparative law to deconstruct the discursive effects of the East/West binary and further assess the repression of differences *within* the entities of Western and Islamic law. I argue that the existence of a "State–Church / Western–Islamic contradiction" makes it difficult for courts "to turn the gaze back upon itself"⁵ and embark on the exercise of tracing back the analogy between Mahr and other Western legal institutions that share some of Mahr's characteristics or functions. In fact, to effectively preserve the binary opposition suggested by the East/West discourse, the (non-localized) Western judge must deny the differences *within* the West.

I. A SUBSTANTIVE EQUALITY APPROACH TO ISLAMIC FAMILY LAW: GENDER AND THE INDETERMINACY OF LEGAL DOCTRINE

The substantive equality approach is concerned with power differentials – how subjects are constituted through structural and hierarchical systems of inequality, and how the law specifically (re)produces systemic conditions of oppression. In such a context, treating everyone the same cannot lead to equality. Because the real world is marked by domination, the state can only deliver outcomes that are substantively equal if it examines the *effects* of legal policies. The purpose of the substantive equality approach is thus to name, expose, and ultimately eradicate the socially and economically inferior position of oppressed groups in society. To do so, it must start from the perspective of the oppressed, and critique existing doctrines, practices, and structures through the lens of subordination theory. In applying substantive equality, the judge embraces a general fairness policy in enforcing contracts: because, in intimate relationships, men and women are not considered at arm's length nor as equals in bargaining power, especially with regard to issues related to the family, the state intervenes to police the outcomes. How has this policy of equity worked in the translation of Mahr in Canada, the United States, France, and Germany?

³ Edward W. Saïd, *Orientalism* (1978).

⁴ Barbara Johnson, *The Critical Difference: Essays in the Contemporary Rhetoric of Reading* (1981).

⁵ I borrow the expression and methodology from Brenda Cossman, *Returning the Gaze? Comparative Law, Feminist Legal Studies and the Postcolonial Project*, 1997 *Utah L. Rev.* 525, 525 (1997). Cossman provides a way of differently inhabiting the ethnocentric gaze of comparison where "the geopolitical location of the author becomes the unstated norm against which the exotic 'other' is viewed."

A. The Enforcement of Mahr According to Gender Equity Standards

In the cases below, the substantive equality approach causes the courts to see Mahr from the “public” and highly interventionist standpoint of the state. In the German and Canadian cases (Québec) discussed in the following sections, courts have embraced the legitimacy of Mahr but have intervened to regulate its enforcement, an intervention that carries with it the mark of substantive equality. Whereas Germany has modified the initial amount of Mahr to meet equitable considerations, Québec has rejected the Islamic family law logic of *Khul Mahr* to welcome the enforcement of Mahr in a context where the Muslim wife is the one asking for divorce. According to Islamic law, *Khul* divorce can be initiated by the wife with the husband’s prior consent; however, divorce by this method dissolves the husband’s duty to pay the deferred Mahr.⁶

i. The Enforcement and Readjustment of Mahr as Alimony: The Case of Germany

In *OLG Koeln*⁷, a 1983 Court of Appeal decision from Cologne, the notarized marital contract between an Iranian wife and a German husband specified as Mahr, a Qur’an worth 1000 rials, jewelry worth 88,000 rials, plus four million rials (42,000 DM [21,000 Euros]). Christina Jones-Pauly notes that “[t]he four million rials were specifically referred to as a “debt” on the husband, payable at any time the wife wanted it.”⁸ The wife asked and obtained a divorce before the German Family Law Chamber and separately claimed the enforcement of Mahr plus interest as a legal debt before the Civil Law Chamber.

At the trial court level, the husband had convinced the court that the enforcement of Mahr constituted an unjust enrichment for the wife, one that would violate German public order. On appeal from the Civil Law Chamber, the appellate court viewed Mahr as an Islamic institution that serves as post-marital maintenance, but only insofar as its enforcement meets the German

⁶ As pointed out by Judith E. Tucker, *Khul* divorce is the exchange of Mahr for “freedom,” a form of divorce that has “often proved very costly indeed.” *Judith E. Tucker, Women in Nineteenth-Century Egypt* 54 (1985). See *Dawoud Sudqi El Alami & Doreen Hinchcliffe, Islamic Marriage and Divorce Laws of the Arab World* 3, 27–28 (1996). See also Abdal-Rehim Abdal-Rahman Abdal-Rahim, *The Family and Gender Laws in Egypt during the Ottoman Period, in Women, the Family, and Divorce Laws in Islamic History* 105 (Amira El Azhary Sonbol, ed., 1996).

⁷ *OLG Koeln IPRax* 1983, 73 (Cologne).

⁸ See Christina Jones-Pauly, *Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law*, in *The Islamic Marriage Contract: Case Studies in Islamic Family Law* 10 (Asifa Quraishi and Frank E. Vogel, eds., 2008). (On file with the author).

standards of equity. It held that enforcing its full amount in this case – (42,000 DM [21,000 Euros]) – would be repugnant to German principles of justice. Consequently, the amount would have to be counted against any maintenance that the husband might be ordered to pay. To establish exactly how much of the 21,000 Euro Mahr would be awarded to the wife, the court decided to send the matter back to the Family Law Chamber. Mahr was thus translated as alimony and its amount fluctuated to adapt to fairness considerations.⁹

ii. The Enforcement of Mahr Even Though the Wife Initiated Divorce:
The Case of Québec

In *M.H.D. v. E.A.*,¹⁰ a family law trial court decision from Québec, the marriage contract provided for a prompt Mahr of 10 Syrian pounds and a deferred Mahr of 25,000 Syrian pounds.¹¹ The marriage was performed in Syria in April 1985, and the parties moved to Canada seven months later. In 1991, the wife filed for divorce in Montreal and claimed the enforcement of deferred Mahr. The Québec trial court concluded that Syrian Islamic law could not apply in Canada through private international law rules¹² because its application would create a negative effect on Muslim wives availing themselves of the Divorce Act. Had the court correctly applied Syrian Islamic law, it would have refused to enforce Mahr according to the logic of the Khul divorce. The trial court¹³ considered this outcome contrary to the Canadian Charter¹⁴:

⁹ It is worth noting that this analogy with alimony does not stand up to any analytical rigor as the wife was able to claim payment at any point, even prior to divorce, according to the agreement, which is clearly not the case for alimony.

¹⁰ *M.H.D. v. E.A.*, [1991] J.Q. no 1687; J.E. 91-1560; 42 Q.A.C. 144; [1991] R.D.F. 492; 29 A.C.W.S. (3d) 70 (Court of Appeal of Québec).

¹¹ *Id.* at 6.

¹² “Through the application of Article 6 C.C., the Québec law at the time, the matrimonial regime of the domicile of the parties at the moment of their marriage is applicable and the Québec courts have competence to decide matters regarding the existence and breadth of the rights derived from the legislation of their domicile, which in this particular situation was Syria.” *Id.* at 7, 8.

¹³ It should be noted that the analysis here does not take into account the Court of Appeal’s decision, which concludes that the Canadian Charter does not apply to Mahr because it is a donation between spouses derived from the law of obligations and, thus, constitutes an economic contractual relationship that escapes Charter protection.

¹⁴ Canadian Charter of Rights and Freedoms, constituting Schedule B of the Constitution Act, 1982 (R.-U.), 1982, c. 11. Textual support for substantive equality in Canada is found in s. 15 of the Canadian Charter of Rights and Freedoms, which guarantees “equal benefit of the law.” Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) 1982 c 11. Section 15(1) reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

However, this court believes that the legislation cannot be in conflict with sections of the Canadian Charter whereby fundamental rights and freedoms are guaranteed. The Canadian Charter is the supreme law of Canada. All must abide by it, including the legislator. The *Divorce Act* gives the opportunity to both spouses to initiate divorce proceedings, and punishing a spouse on the basis that she exercises her rights according to the *Act* is a violation of her freedom. In cases of conflict between spouses, each has the right to the equal protection and equal benefit of the law (s. 7 and 15(1)). Also, to deny the wife her right to equality by asking her to give back her wedding presents or gifts received or agreed upon in the marriage contract on the basis that she exercised rights recognized by the law, constitutes a form of discrimination.¹⁵

The key to understanding the performance of the Muslim woman in this case is to measure the *predicted* economic gains and losses of advocating the enforcement or the non-enforcement of Mahr, in relation to both Islamic family law and Western law. In response to the “waiver rule” of *Khul Mahr*, the Muslim woman has two options: either pretend that the waiver rule is not part of Islamic family law (the religious route); or suggest that the waiver rule is so discriminatory that it should be regarded as inherently contrary to public order in relation to international private law rules (the secular route). In *M.H.D. v. E.A.*, the Muslim wife embarked on a secular argumentation and convinced the court that *Khul Mahr* as a legal institution violates gender equality, which conflict of laws holds at the heart of the principle of *l'ordre public* (public order). Hence, such discriminatory Islamic traditions should be formally and rigidly rejected by the host legal system, despite rules of international private law incorporating Syrian Islamic law:

Finally, the respondent invoked the principle of international and Quebecois public order as a motive for the non-application of the Syrian law and regulations. In her written factum (p.21): “How can one claim that we are not confronted by questions of public order, as much Quebecois as Canadian and international, when faced with a regime where the husband may marry more than one wife and the wife cannot have a number of husbands at once, where the wife is obliged to request a divorce to be remarried whereas that is not the case for the husband, where all donations, whether foreseen in the marriage contract or not, are revoked for the sole reason that the husband does not accept the motive for divorce of the wife even if the Court concludes that the reason is well founded? We are dealing with a religion and matrimonial regime that flagrantly discriminate not only against women but against all people who, in this country or elsewhere, desire to exercise the

¹⁵ *M.H.D. v. E.A.*, *supra* note 10 at para. 26. (translated from the original French). This is an excerpt from the court of appeal, quoting the trial court decision.

recognised fundamental right to ask for divorce. How can one claim not to be confronted by questions of public order when the respondent asks for a divorce in Canada, on the basis of the Canadian Divorce Act, and finds herself stripped of all her rights due to the application of a foreign matrimonial regime which is, in and of itself, clearly discriminatory in all its aspects. We leave it to the Court to appreciate this question.¹⁶

Embracing egalitarian considerations in the interpretation of contract law, the trial court intervened in family/religious matters to police the outcomes. If *Khul Mahr* is seen as violating substantive equality, then the court should reject this religious institution: “With all due respect to the beliefs of the religious authority as well as to those of the husband, the court believes that such traditions, customs and doctrine put before us are not applicable to the wife, and that the court must consider the wedding present discussed above only with respect to the Quebec Civil Code.”¹⁷ The legal transplantation offered the following outcome: the non-enforcement of Mahr as a religious institution, but its enforcement as a secular institution despite the *Khul* divorce.

In contradiction with the cases just noted, the performative gesture of substantive equality produces, in the cases that follow, the *inexecution* of Mahr, as much in Québec, Canada, and the United States, as in France.

B. *The Unenforceability of Mahr According to Fairness Principles*

In this section, the unenforceability of Mahr is attached to the application of fairness principles: sometimes equity towards the Muslim *man* dictates the non-enforcement of Mahr, sometimes equity towards the Muslim *woman* dictates such outcome. I review cases from the United States, Canada, France, and Québec that have all attempted to bring about an egalitarian outcome through the non-enforcement of Mahr.

i. The Unenforceability of Mahr On the Basis of Equity: The Case of Québec

In *M. F. c. MA. A.*,¹⁸ a 2002 trial court decision from Québec, the substantive equality approach judged and ultimately rejected Mahr on the basis of equity towards the Muslim husband. In 1997, Mrs. Ajabi married in Montreal at the age of 23 years, and gave birth to a son the following year. The Muslim contract

¹⁶ *Id.* at 34, extract from the judgment at first instance (translated from the original French).

¹⁷ *Id.* at 27 (translated from the original French).

¹⁸ *M. F. c. MA. A.*, [2002] J.Q. no 2690 (A, Cour supérieure, March 11, 2002), No. 500-12-254264-009.

of marriage reads: “There is a Mahr of Holy QURAN Book, one piece Sugar Candy, one Kilo of Gold payable by the groom to the bride.”¹⁹ The marriage lasted a little less than three years and during these years Mrs. Ajabi stayed at home to raise her son.²⁰ The court refused to enforce Mahr,²¹ an amount that would have been worth 15,960\$.²² Justice Hurtubise concluded:

It is true that Imam Salek Sebouweh wrote a letter dated January 7, 2002, to this Court, but he did not testify despite the efforts of defence counsel. Since, as a consequence, it was impossible to cross-examine him, we disregard his opinion.

The only proof regarding the interpretation to be given to Islamic Mahr is cited above (a particular type of dowry according to the expert witness) consists of the transcript of an examination of Mr. Nabil Abbas, a Muslim minister of worship who also holds a PhD. The examination took place and was completed on January 25, 2002.

The message is clear: given what the husband has already given to the wife, he is not obliged to offer more. He has satisfied his commitment.

Given the uncontradicted testimony of the Imam, expert on this topic, this request is denied.²³

In applying the family law rules of the Quebec Civil Code, Justice Hurtubise divided equally the family patrimony²⁴ (which resulted in the wife taking 7,304.85\$) and determined that the alimony granted to the wife shall be 150\$/week.²⁵

ii. The Unenforceability of Mahr on the Basis of Substantial Justice: The Case of Canada

In *Vladi v. Vladi*,²⁶ a 1987 decision from Nova Scotia (Canada), the court refused to enforce Mahr on the basis of “substantial justice.” In 1973, Mr. and Mrs. Vladi, who were Iranian nationals residing in West Germany, married religiously and civilly in Germany. In 1978, the parties began visiting

¹⁹ *Id.* at 7.

²⁰ *Id.* at 23.

²¹ *Id.* at 8.

²² *Id.* at 32.

²³ *Id.* at 32 (translated from the original French).

²⁴ *Id.* at 7.

²⁵ *Id.* at 7.

²⁶ *Vladi v. Vladi*, Nova Scotia Supreme Court, Trial Division, 1987 Carswell, NS, 72, 7 R.F.L. (3d) 337, 79 N.S.R. (2d) 356, 196 A.P.R. 356, 39 D.L.R. (4th) 563.

the province of Nova Scotia in Canada and subsequently became Canadian citizens. *Vladi* is an application under the Matrimonial Property Act²⁷ of Nova Scotia, made by Mrs. Vladi subsequent to a divorce granted to her husband by a West German court in September 1985. At separation, the parties had assets in Nova Scotia and elsewhere in the world. Although the wife and child had taken up residence in Nova Scotia, the parties were found to have had their last common residence in West Germany.

Pursuant to section 22(1) of the Matrimonial Property Act,²⁸ the division of matrimonial assets in Nova Scotia is governed by the law of the place where the parties had their last common habitual residence, in this case West Germany. Because West German law would have applied Iranian law, the law of citizenship, application of the doctrine of *renvoi* would result in the case being decided according to Iranian Islamic family law. Justice Burchell thus considered that Mahr was attached to Iranian Islamic family law, and that, under such a legal regime, women could not benefit from the principle of equal sharing: "In Iran, a wife in the position of Mrs. Vladi would be entitled to minimal support and a nominal award in relation to a so-called 'mahr' or 'morning-gift.' Otherwise she would have no direct claim against assets standing in the name of her husband."²⁹ Justice Burchell further wrote: "To put it simply, I will not give effect to Iranian matrimonial law because it is archaic and repugnant to ideas of substantial justice in this province."³⁰ Having found Iranian law inapplicable, Justice Burchell returned the matter to German domestic law instead of to the Nova Scotia internal rule. In applying West German law, Mrs. Vladi was entitled to an equal division of matrimonial assets.³¹

iii. The Unenforceability of Mahr on Grounds of Public Policy: The Case of France and the United States

In 1976, a French Court of Appeal³² refused to enforce Mahr in conformity with French public order provisions. In applying international private law

²⁷ Matrimonial Property Act, R.S.N.S. 1989, c. 275.

²⁸ *Id.* art. 22(1):

Conflict of laws 22 (1) The division of matrimonial assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the Province.

²⁹ *Vladi*, *supra* note 26 at par. 11.

³⁰ *Id.* at par. 30.

³¹ *Id.* at par. 46.

³² Arrêt de la Cour d'appel de Douai, January 8, 1976: N. 76–11–613.

principles, the court concluded that marriage contracts requiring the existence of Mahr for forming a valid marriage contradict French public order because they reduce marriage to a financial “purchase.” Mahr itself is, therefore, contrary to “public order and French morals.”³³ Public policy was similarly used in *In re Marriage of Dajani*,³⁴ a 1988 Court of Appeal decision from California, which understood Mahr to be facilitating divorce, and as such, void as it is against public policy.

In *In re Marriage of Dajani*, Awatef argued on appeal that the trial court decision not to enforce Mahr because she had initiated the divorce proceedings was an unjust result and against public policy.³⁵ The court agreed that a public policy argument was appropriate, but not the one urged by Awatef. Justice Crosby’s opening remarks are very telling: “Will a California court enforce a foreign dowry agreement which benefits a party who initiates dissolution of the marriage? No.”³⁶ The court in *Dajani* held that the Jordanian marriage contract must be considered as one designed to facilitate divorce, because “with the exception of the token payment of one Jordanian dinar . . . the wife was not entitled to receive any of the agreed upon sum unless the marriage was dissolved or her husband died. The contract clearly provided for the wife to profit by divorce, and it cannot be enforced by a California court.”³⁷

In *In re Marriage of Dajani*, we are left with the impression that Mahr is no longer an individual, private matter incorporating Islamic family law rules: it is regulated by a public law doctrine; its unenforceability is the direct result of a violation of a collective notion of “public morals.”³⁸ The decision welcomed substantive equality in its internal understanding of contract law and explicitly closed the door to a battle of expert witnesses on the meaning and enforceability of Mahr according to Islamic family law: “Wife devotes a considerable portion of her brief to a challenge of the qualifications of husband’s expert. It is not necessary for us to enter that fray, however.”³⁹

³³ *Id.* at 110.

³⁴ *In re Marriage of Dajani*, 204 Cal.App.3d 1387 (1988).

³⁵ *Id.* at 1389.

³⁶ *Id.* at 1388.

³⁷ *Id.* at 1390.

³⁸ An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and is in conflict with public morals.

Odatalla v. Odatalla, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002). See also *Garlinger v. Garlinger*, 322 A.2d 190 (N.J. Super. Ct. Ch. Div. 1974).

³⁹ *In re Marriage of Dajani*, *supra* note 34 at 1389.

II. THE STATE—CHURCH / WESTERN—ISLAMIC CONTRADICTION

In his book *Orientalism*, a key text on colonial and post-colonial discourse, Edward Saïd suggested that the West codifies and discursively produces knowledge about the East through the paradigm of colonial/imperial structures.⁴⁰ Borrowing from Saïd's methodology, I consider in this section the existence of a State—Church / Western—Islamic contradiction in the reception of Mahr: the Western state, by obsessively “looking when the gaze is not returned,”⁴¹ conveniently registers the differences *between* the East and the West and fails to see the differences *within* the two legal orders in a comparative law context. I explore the construction of both Western and Islamic law as revealed in cases adjudicating Mahr and ask whether the rhetorical emphasis on the Orient as the outside of the West has created a monolithic vision of both systems of law. I also use Barbara Johnson's approach to highlight the differences and similarities that exist within the West and the East as entities. Johnson brilliantly proposed, in *The Critical Difference: Essays in the Contemporary Rhetoric of Reading*, that the production of binary relations suppose, on each part of the dualist difference, the existence of several elements and their opposite, which it hides.⁴²

A. *The Production of Western Law*

In most of the cases analyzed in the previous section, the production of Western law posits itself as the outside of Mahr: courts project the Western legal system as having no history of dowry or dower practices. In *M.H.D. v. E.A.*⁴³ and *M. F. c. MA. A.*,⁴⁴ two trial court decisions from Québec, Mahr is represented as the religious and cultural expression of the Muslim minority group. In *M.H.D. v. E.A.*, the court attempted to penetrate the logic of the *Khul* divorce under Syrian Islamic law: “If it is the husband that starts divorce proceedings, he owes the dowry; however, if it is the wife who takes the initiative to start proceedings, she loses her right to the dowry; unless of course the husband agrees to pay it, which I repeat, and for the reasons mentioned above, is not the situation before us.”⁴⁵ In refusing to enforce Mahr, the court concluded that this foreign institution was contrary to gender equality as expressed in the Canadian Charter. In *M. F. c. MA. A.*, the court attempted to translate

⁴⁰ Saïd, *supra* note 3, at 41.

⁴¹ Cossman, *supra* note 5, at 525.

⁴² Johnson, *supra* note 4, at x.

⁴³ *M.H.D. v. E.A.*, *supra* note 10.

⁴⁴ *M. F. c. MA. A.*, *supra* note 18.

⁴⁵ *M.H.D. v. E.A.*, *supra* note 10 at 22 (translated from the original French).

Mahr through the lens of a religious expert witness, but considered, “given the uncontradicted testimony of the Imam, expert on this topic,” that the enforcement of Mahr would unjustly profit the wife and should, therefore, not be enforced. Similarly in *OLG Koeln*,⁴⁶ *Vladi v. Vladi*,⁴⁷ and *Arrêt de la Cour d’appel de Douai*,⁴⁸ three cases respectively from Germany, Canada, and France, courts have embarked on the exercise of translating the foreign nature of Mahr, based on the application of international private law rules.

Of all the cases that have adjudicated Mahr, only *In re Marriage of Dajani*, a 1988 California court of appeal decision, has embarked on this concrete exercise of comparing Mahr to dower/dowry practices in American law. The court thus stated:

Black’s Law Dictionary explains, “‘Dower,’ in modern use, is distinguished from ‘dowry.’ The former is a provision for a widow on her husband’s death; the latter is a bride’s portion on her marriage. *Wendler v. Lambeth* [1901] 163 Mo. 428, 63 S.W. 684.” (Black’s Law Dict. (4th ed. 1951) p. 581, col. 1.) (. . .) The estate of dower is not recognized in California, pursuant to *Cal. Prob. Code* § 6412, but parties to a premarital agreement may contract with respect to the disposition of property upon death, pursuant to *Cal. Civ. Code* § 5312(a)(3).⁴⁹

As this passage suggests, the deconstruction of the Western/Islamic binary renders explicit what otherwise would remain hidden, that is, that there exists a *similarity* of legal rules between Western law and Islamic law. Although the court refused to enforce Mahr based on public policy in *In re Marriage of Dajani*, it nevertheless moved away from painting Mahr as an “exotic other,” a recurring narrative under the other cases. Allowing for the existence of hybridity, this methodological difference reverses the relation between the West and the East and facilitates the emergence of another story, one which creates a space where Muslim men and women might be able to negotiate their claims outside the recognition/non-recognition binary.

B. *The Production of Islamic Law*

In this section, I explore how the dominant legal discourse around Islamic law in the adjudication of Mahr has created, perpetuated, or regulated prevailing conceptions of personal identity and group affiliation along the West/East

⁴⁶ *OLG Koeln* IPRax 1983, 73 (Cologne).

⁴⁷ *Vladi*, *supra* note 26 at par.28.

⁴⁸ *Arrêt de la Cour d’appel de Douai*, January 8, 1976: N. 76–11–613.

⁴⁹ *In re Marriage of Dajani*, *supra* note 34 at 1388.

binary. In most of the cases analyzed in the previous section, courts have conceptualized Muslim identity to be derivative of an already circumscribed subjectivity, equated in many ways to truth claims about subordinated Muslim groups living in dominant Western states. Yet, not only is law itself predicated on the very process of making subjects that it purports merely to regulate,⁵⁰ but the production of Islamic law from the location of the Western judge constructs Mahr as a purely religious and non-civil law institution, a conclusion that is questionable from a legal perspective. Indeed, the Mahr that *preexists* the road to Western liberal states is strongly contractual in form – in Islamic law, marriage is a civil contract that, unlike Christian marriages, is not sacramental in nature.⁵¹ As such, parties may insert a variety of clauses as long as they do not contradict the purpose of marriage itself.⁵² However, by insisting on the differences between the secular/religious, the civil/Islamic, the Us/Them, the national/foreign *within* Western states, *none* of the cases on the adjudication of Mahr have noticed the civil character and the significant importance of contract *within* Islamic law.

Moreover, even when Islamic law does present itself as divinely made, many contradictory and conflicting interpretations dispute its content – schools of interpretation that are defined as traditionalist,⁵³ liberal,⁵⁴ utilitarian,⁵⁵ feminist, and so forth. In fact, an interesting debate takes place among Islamic feminist scholars over the symbolic nature of Mahr for Muslim women: Mahr is seen as a complex and controversial institution structured by a series of

⁵⁰ See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 5 (1990).

⁵¹ Islamic law stipulates that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage. One is not required to have an official position in a religious institution such as a mosque (masjid) to be qualified to perform such ceremonies. See Mohamad Afifi, *Reflections on the Personal Laws of Egyptian Copts, in Women, the Family, and Divorce Laws in Islamic History* 202, 214 (Amira El Azhary Sonbol, ed., 1996) (where Afifi argues that Christian copts in Egypt, who regard marriage as a sacrament, have always advocated for a very strong personal law regime in Egypt so that they could stay out of the more permissive Islamic rules).

⁵² Commonly used stipulations include agreements related to Mahr, polygamy, the wife's financial independence, her right to work, her right to education, etc.

⁵³ The “traditionalist approach” deals with the Qur'an verse by verse, follows the Qur'anic text and expounds it in a piecemeal fashion, employing those instruments of exegesis that it believes to be effective.

⁵⁴ The liberal tradition in Islam is traced back to leaders and writers in the 19th century like Jamal al-Din al-Afghani, Sayyid Ahmad Khan, and Muhammad Abduh who emphasized the ideas of freedom from *taqlid* (tradition) and expansion of the right to practice *ijtihad* (independent interpretation).

⁵⁵ This is a type of exegesis that emphasizes the philological and literary aspects of the Qur'anic text and thus concentrates on meaning and content.

characteristics that can be described as paired opposites. On the one hand stand the vivid proponents of Mahr, the “Islamic feminists” who claim through a historical and emancipating narrative that Mahr came into Islam as the first symbol of women’s empowerment.⁵⁶ Mahr is thus conceptualized in this literature as marking the shift from the “wife as an object of sale,”⁵⁷ under the pre-Islamic era, to the “wife as a contracting party in her own right,”⁵⁸ under Islam. Indeed, one of the greatest empowerments given to women by Islam lies in her right to property.⁵⁹ Woman’s independent legal status in the eyes of the law,⁶⁰ and deserving of dignity, love, and respect in the eyes of men, is “symbolized by making Mahr obligatory for her and binding upon men.”⁶¹ Expressions such as “mark of respect for the wife,”⁶² “honour to the bride,”⁶³ “free gift by the husband,”⁶⁴ or symbol of the “prestige of the marriage contract”⁶⁵ are indistinctly being used to describe the very *raison d’être* of Mahr: the recognition of the dignity of Muslim women.

Opposing them, however, are the “liberal secular feminists”⁶⁶ who condemn Mahr as the expression, at the time of marriage, of the sale of the Muslim woman’s vagina. The main thrust of the liberal secular feminists consists of understanding “revelation as both text and context,”⁶⁷ that is, as

⁵⁶ The “Islamic feminists” claim not only that Islam provides a liberating worldview for women, but also that the “the Qur’an’s epistemology is inherently antipatriarchal.” *Asma Barlas, Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur’an* 2 (2002). With the revelation of Islam through the Prophet Mohamed, the Qur’anic scripture is presented as offering a radical departure from the patriarchal customs of pre-Islamic Arabia and ensuring an authoritative basis for the emancipation of all Muslim women.

⁵⁷ Zainab Chaudhry, *What is Our Share? A Look at Women’s Inheritance in Islamic Law*, 3 *Azizah Atlanta* 14 (August 2004).

⁵⁸ See David Pearl & Werner Menski, *Muslim Family Law* 4 (3rd ed., 1998).

⁵⁹ *Sabiq al-Sayyid, Fiqh al-sunnah* 155 (Beirut, Dār al-Kitāb al-‘Arabī, 1969).

⁶⁰ M. Afzal Wani, *The Islamic Law on Maintenance of Women, Children, Parents & Other Relatives: Classical Principles and Modern Legislations in India and Muslim Countries* 194 (1995).

⁶¹ *Sabiq al-Sayyid, supra* note 59, at 155.

⁶² See Pearl & Menski, *supra* note 58, at 179.

⁶³ M. Afzal Wani, *supra* note 60, at 193.

⁶⁴ *Abdur Rahmān I. Doi, Shari’ah: the Islamic Law* 159 (1984), (emphasizing Mahr’s character as a “free gift by the husband to the wife, at the time of contracting the marriage”).

⁶⁵ *Jamal J. Nasir, The Islamic Law of Personal Status* 43 (3d ed., 2002) (suggesting in the words of a Hanafi jurist that “dower has been ordered to underline the prestige of the marriage contract and to stress its importance”).

⁶⁶ For a general view of the secularization movement of Islamic law, see Aharon Layish, *Contributions of the Modernists to the Secularization of Islamic Law*, 14 *Middle Eastern Studies* 263 (1978).

⁶⁷ *Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunni Usul al-fiqh* 231 (1997).

“an interpretation of the spirit and broad intention behind the specific language of the texts.”⁶⁸ The liberal secular conception of Mahr is accompanied by images of the family, sexuality, and the significance of marriage that seek to distinguish between Islam as a pure religion and religious doctrine as a socially constructed phenomenon subject to human context.⁶⁹ Here, marriage is often portrayed as a “fundamentally unequal social institution.”⁷⁰ This feminist literature further suggests that Mahr, in valuing the existence of virginity, perpetuates the “patriarchal domination [which] remained most entrenched in the family.”⁷¹ In fact, “it was usual that the dowry of a virgin be higher than that of a divorced woman.”⁷² On this view, not only is Mahr intended to serve male interest and desire; it also reflects “the social position of the bride’s father’s family as well as her own qualifications, such as those cited in the *Hedaya*: age, beauty, fortune, understanding, and virtue.”⁷³ Hence, Mahr is not, as claimed by classical Islamic law and Islamic feminists, a universal and equal symbol of dignity, love, and respect for *all* women despite differences of income and status: it is rather determined *as a marketplace value*, for *that* woman, daughter of *that* man, at this *particular* moment of *her* history. Moreover, if no Mahr has been agreed or expressly stipulated by the parties, the marriage contract is still valid but “proper Mahr” (*mahr al-mithl*) will be determined by comparing “the *mahr* paid to other female members of the wife’s family, for instance sisters, paternal aunts and female cousins.”⁷⁴

An understanding of this complex, hybrid character of Islamic law surely has not traveled to Western liberal courts. Rather, what the case law has demonstrated is that Mahr is equated to Islam, to the religious, to the non-Western, and ultimately to the non-civil law. What would we gain from considering this historical knowledge in the interpretation of Mahr? Is the relationship between the family and the state in the case of Western dower, “premised

⁶⁸ *Id.*

⁶⁹ See generally Yvonne Yazbeck Haddad, *Islam and Gender: Dilemmas in the Changing Arab World, in Islam, Gender and Social Change* (Yvonne Yazbeck Haddad & John Esposito, eds., 1988).

⁷⁰ Homa Hoodfar, *Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities, in Shifting boundaries in marriage and divorce in Muslim communities, Women Living Under Muslim Laws, Special dossier no. 1* at 124 (Homa Hoodfar, ed., 1996).

⁷¹ Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* 124 (1995).

⁷² Abdal-Rehim Abdal-Rahman Abdal-Rahim, *supra* note 6, at 103.

⁷³ John L. Esposito with Natana J. DeLong-Bas, *Women in Muslim Family Law* 24 (2nd ed., 2001).

⁷⁴ See Pearl & Menski, *supra* note 58, at 180.

on marriage's ability to privatize women's material needs,"⁷⁵ similar to the relationship between the Muslim family and the state in the case of Mahr? If so, how does the provider function of both legal institutions resonate with feminist activism? Can this history of Western dower provide a new framework within which to analyze the contemporary legal and political dimensions of the adjudication of Mahr in Western liberal states, by ultimately stepping out of the liberal parameters of "religious difference," on the one hand, and "gender equality/fairness," on the other?

CONCLUSION

The migration of Mahr to Western liberal courts unfolds at the crossroads of several doctrinal fields and disciplinary boundaries – contract and family law, constitutional and Islamic law, public policy and private ordering, and (majoritarian) public order and (minority-based) identity politics. Through an analysis of the case law in Canada, the United States, France, and Germany, I suggest that once Mahr departs from Islamic family law to land in a Western chamber of law, it can never go back home. In fact, as soon as Mahr penetrates the Canadian, American, French, or German forum, it is animated by a diverse and often unpredictable set of legal constructs grouped under the general banner of substantive equality (concepts of substantial justice, fairness, public policy, gender equity, etc). Far from producing a homogeneous and predictable Mahr, substantive equality has revealed its indeterminate nature when brought into contact with comparative religious law: in the decisions being examined, the process of legal translation quite logically produced both the recognition *and* the non-recognition of Mahr, that is, its execution *and* its inexecution.

Through the use of what I have called the State–Church / Western–Islamic contradiction, this chapter specifically dealt with the secular/religious dichotomy and addressed the blind spots created, in the process of applying substantive equality, by the overemphasis on Mahr as religious, Islamic, and divinely made. In using the strategy of "turning the gaze back upon itself," my hope was to approach the hybridity⁷⁶ of both the East and the West to shed light on the fact that legal doctrines and institutions very similar to Mahr have been central elements of Western marriage law. Hence, Islamic and Western

⁷⁵ In *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *Yale L.J.* 1641, 1652 (2003), Ariela R. Dubler argued that "Dower, like coverture, sought to ensure a woman's economic reliance on a particular man. In so doing, it bolstered the assumption that the state had no responsibility for her financial needs."

⁷⁶ See generally Homi K. Bhabha, *The Location of Culture* (1994).

law cannot so easily be marked as “opposites,” reflecting the complete incommensurability of these legal worlds. It might be useful to view the opposition between the West and the East, *not* as a binary relation between traditionalists and modernists, Islam and secularism, gender inequality and gender equality, and so forth, but rather quite simply as “two conceptions of language, or between two types of reading.”⁷⁷

⁷⁷ *Johnson, supra* note 4, at 84.

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8

Conflicting Agendas? Women's Rights and Customary Law in African Constitutional Reform

Aili Mari Tripp*

INTRODUCTION

Since the 1990s, women's organizations in Africa have been advocating for constitutional reforms and legislative changes to protect their rights and increasingly, they have been successful in these efforts. Most notably, there has been the increasing introduction of clauses, which allow the constitutional guarantees of equality to prevail in the event that there is a clash between women's rights and customary laws and practices that violate women's rights, discriminate against women, or infringe on bill of rights provisions regarding gender equality. These are extremely profound challenges. They are, in principle, attempts to legitimize new law-based sources of authority for rights governing relations between men and women, family relations, and relationships between women and traditional, clan, and religious leaders. In the past, even when laws existed to regulate marriage, inheritance, custody, and other such practices, customary laws and practices co-existed and generally took precedence when it came to family and clan concerns. Even though in practice these customary norms may still prevail today, women's movements are now challenging them through constitutional and legislative changes in ways that we have not seen in the past.

This chapter examines the role women's movements have played in introducing new gender related provisions within African constitutions and legislation. In particular, it shows how customary law pertaining to marriage, inheritance, land rights, and other such laws affecting women's rights have been far more challenging to pass than provisions pertaining to state and

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market related institutions, for example, employment practices, taxation of women, and maternity leave.

I. BACKGROUND

In the 1990s, twenty-eight sub-Saharan African constitutions were rewritten and, after 2000, another ten were rewritten and six had major revisions. Only the Botswanan and Liberian constitutions remained unchanged in this period. The Eritrean and Kenyan constitutions were rewritten, but the changes were not adopted, provoking extensive wrangling in Kenya and a situation that eventually led to violence after the 2007 elections. Although the nature of the democratic government was at the heart of the struggle, women's rights became one of the key points of contention and women's rights activists were among the key protagonists in the constitutional crisis.

Five key factors animated debates and inspired constitutional reforms regarding women in sub-Saharan Africa during this period. The first development was the aforementioned democratizing trends, which framed the general impetus for women's rights reforms. These trends included transitions to multipartyism and the demise of the one-party state, efforts to decrease the relative power of the executive by instituting term limits, measures to better protect basic individual rights and liberties, and initiatives to enhance the role of local government through decentralization. In many countries, the press experienced more freedom even if constrained; there was a shift from military to civilian rule; and civil society found new political spaces within which to operate. New debates also emerged regarding the role of traditional authorities, the protection of customary rights, and issues of land rights as they related to the status of women. Although these changes were halting and problematic, most sub-Saharan African countries were affected by political liberalization to one degree or another.

Second, autonomous women's movements emerged in the 1990s, which served as catalysts for many of the constitutional and legal challenges. These movements had new priorities, new leaders, and new sources of funding independent of state patronage networks, which older women's organizations had depended on to a greater extent. The democratizing trends allowed women's organizations greater room to maneuver. As these new women's rights organizations became more visible, they increasingly began to clash with advocates of customary laws and practices.

A third factor relates to changing international norms, the influences of global and regional women's movements, and the diffusion of female-friendly policies through multilateral entities like United Nations (UN) agencies or

regional bodies like the Southern African Development Community. The women's rights discourses in Africa that are reflected in the new constitutional and legislative changes can be seen as part of rights-based approaches that are not only prevalent in civil society,¹ but have been adopted by UN agencies, bilateral donors, and even international financial institutions involved in the development enterprise. Women's rights and African discourses on rights both informed and were informed by these changing international norms and debates around rights.

Fourth, these changing international norms were accompanied by changing international donor strategies, which in the 1990s shifted from a sole emphasis on funding activities related to economic development, education, health, and welfare concerns to an added interest in advocacy around women's rights, as well as promoting women's political leadership and political participation. This shift was especially apparent in the case of bilateral donors, international non-governmental organizations (NGOs) like Oxfam and ActionAid, and foundations like the Ford Foundation. They began to fund organizations involved in constitutional and legislative advocacy regarding women's land ownership, family law, female genital cutting, violence against women, and many other such issues. Some donors helped support women's caucuses of parliamentarians or members of constituent assemblies. Funding for national and regional networking around such concerns also increased. In South Africa, for example, most cases brought to the Constitutional Court on behalf of disadvantaged groups were brought by public interest firms or NGOs who relied heavily on donor funds.²

Finally, the end of a significant number of conflicts after the mid-1980s created important political opportunities for women's movements. One finds that many of the countries most open to constitutional and legislative changes are countries that have come out of conflict in recent years. For example, many sub-Saharan countries have recently introduced constitutions and legislation in which customary law is overridden by the constitution and by statutory law, with important implications for women's rights. Ten of fourteen post-conflict countries have such clauses whereas only eleven of thirty-two non-post-conflict countries have such a provision. Similarly, thirteen of fourteen post-conflict countries have provisions barring discrimination based on sex, whereas only twenty-five of thirty-two non-post-conflict countries have this

¹ Aili Mari Tripp, *In Pursuit of Authority: Civil Society and Rights-Based Discourses in Africa, in Africa in World Politics* (J. Harbeson & D. Rothchild, eds., 2008).

² Saras Jagwanth & Christina Murray, "No Nation Can Be Free When One Half of It Is Enslaved": *Constitutional Equality for Women in South Africa, in The Gender of Constitutional Jurisprudence* 254 (Beverly Baines and Ruth Rubio-Marín, eds., 2005).

provision. Some of the most explicit wording regarding women's rights can be found in post-conflict constitutions. The conjuncture of all these developments laid the basis for much of the legislation and constitutional changes mentioned in this chapter.

II. AFRICAN WOMEN'S MOVEMENT CONTRIBUTIONS TO GLOBAL RIGHTS DISCOURSES

Many of the new constitutional reforms relating to gender have put African women activists at the forefront of global efforts to redefine women's rights as human rights and to advance rights-based approaches that combine development and human rights concerns.

A. *Political Rights*

African women's movements are leading many of the efforts to promote political representation of women. For example, half the countries in Africa have adopted quotas to increase the numbers of women in legislatures with the result that Africa has some of the highest representation of women in parliaments in the world. In Rwanda, over 56 percent of parliamentary seats are held by women, the highest rate in the world. Moreover, women hold over thirty percent of legislative seats in Angola, Burundi, Mozambique, South Africa, Tanzania, and Uganda. Women's movements are demanding fifty percent representation of women in legislatures in countries like Kenya, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia. In fact, the majority of these 50-50 campaigns in the world are found in Africa. Organizations have also formed to support women running for office and to engage in civic education, leadership skills training, and other such activities that strengthen women as political actors and leaders.

Gaining political power is seen as a major way for women to take control of their lives and exert control over other arenas as well. The 2005 Ethiopian Constitution is fairly explicit about taking action to increase women's representation as an affirmative action measure: "Considering that women have traditionally been viewed with inferiority and are discriminated against, they have the right to the benefit of affirmative actions undertaken for the purpose of introducing corrective changes to such heritage. The aim of such measures is to ensure that special attention is given to enabling women to participate and compete equally with men in the political, economic, and social fields both within public and private organisations."³ As a result of this provision,

³ *Ethiopian Const.* art. 34.3 (2005).

Ethiopia tripled its women representatives to 22 percent of seats in the House and more than doubled female representation to 18 percent of seats in the Senate.⁴

Most quotas in Africa are voluntarily adopted by political parties. The constitutionally mandated quotas in Africa usually provide for reserved seat systems, which guarantee that a minimum number of women will be represented in the parliament (see Table 8.1). These reserved seat systems tend to have higher rates of female representation when compared with legislatively mandated candidate list quota systems or the voluntary party systems. Five of the African countries that have adopted such reserved seats are non-democratic and the other four are semi-democratic. Voluntary party quotas are more often found in democratic countries in Africa.

⁴ See Inter-Parliamentary Union web site, available at <http://www.ipu.org/wmn-e/classif.htm>.

TABLE 8.1. *Constitutional provisions for legislative quotas in Africa*

Country	Women in legislature (%)	Constitutional provision for quota for women	Quota (%)	Year quota introduced
Burundi	30.5 House 34.7 Senate	Art. 164: Le Gouvernement "... Il est assuré un minimum de 30% de femmes." The government ensures a 30% quota for women in parliament. If the quota is not reached, the Electoral Administration will take steps to meet the quota.	30	2005
Kenya	9.8	President appoints 12 nominated seats in parliament. Six of these seats have been reserved for women.	6 women or 3%	1997
Malawi	13	Art. 68.4: "... so far as it is possible, that one-half of the members of the Senate are women."	50	1994
Rwanda	56.3 House 34.6 Senate	Art. 9.4: State ensures "that women are granted at least thirty per cent of posts in decision making organs."	30	2003
Somalia Transitional	7.8	Art. 29 of Transitional Federal Charter: "The Transitional	12	2004

(continued)

TABLE 8.1 (cont.)

Country	Women in legislature (%)	Constitutional provision for quota for women	Quota (%)	Year quota introduced
National Government		Federal Parliament of the Somali Republic shall consist of Two Hundred and Seventy Five (275) Members of which at least Twelve Percent (12%) shall be women."		
Sudan	18.1 House 6 Senate	Art. 67: "Twenty-five percent of its [the National Assembly] members are elected by special elections or indirect election from among women, and the scientific and professional communities, in either states or nationally, as is determined by law."	25	2000
Swaziland	13.8 House 40 Senate	Art. 8.1: "Where . . . it appears that female members of Parliament will not constitute at least thirty percentum of the total membership of Parliament, then, and only then . . . the House shall form itself into an electoral college and elect not more than four women on a regional basis to the House. . . ."	30	2005
Tanzania	30.4	The constitution was amended to raise the number of special seats for women in parliament to be not less than 20% but no more than 30%. The special seats are distributed among the political parties in proportion to the number of seats awarded in Parliament.	30	2000
Uganda	30.7	Art.78.1.b: "Parliament shall consist of— . . . one woman representative for every district."	23	1989

B. *Violence against Women*

Gender-based violence has become one of the most important areas of new legislation and constitutional provisions, especially in countries coming out of civil war like Rwanda and Uganda. We are also seeing more legislation around domestic violence in Malawi, Madagascar, Mauritius, Sierra Leone, South Africa, and Zimbabwe. Although many constitutions mention violence, we are seeing more specific references to violence against women. Malawi's 1994 Constitution, for example, promises legislation to eliminate "sexual abuse, harassment and violence" against women.⁵ The 2004 Central African Republic Constitution authorizes the state and public institutions to protect women against violence, insecurity and exploitation, and rape. The 2006 Democratic Republic of Congo Constitution mentions all forms of violence against women, including domestic violence: "Les pouvoirs publics . . . Ils prennent de mesures pour lutter contre toute forme de violences faites a la femme dans la vie publique et dans la vie privée."

C. *Positive Rights*

One of the most striking elements in the African constitutions that are responsive to women's movements is the extent to which they seek to guarantee positive rights for women (see Table 8.2). Nevertheless, these are the most elusive of rights to guarantee in resource-poor countries, regardless of whether or not there is political will. The Malawian and Ugandan constitutions go the furthest in elaborating the positive rights of women.

III. LEAST CHALLENGING REFORMS

The least challenging constitutional reforms from a women's rights perspective in Africa have been the provisions having to do with terms and conditions of employment, legislative quotas, citizenship rights, and the positive rights that often ask more of the state than it can generally deliver. These provisions make demands on the state or employers, but do not touch on the more controversial matters that pertain to the family, clan, and custom.

A. *Employment-Related Rights*

For example, there has been virtually no controversy over constitutional provisions regarding labor. Most African constitutions have general provisions that

⁵ *Malawi Const.* art. 24.2(a) (1994).

TABLE 8.2. *Positive rights for women*

Country/year	Constitutional provisions regarding positive rights for women
Ethiopia 1994	Art. 89. 6. The State shall have the responsibility to promote the equal participation of women with men in all economic and social development activities.
Ghana 1992	Art. 36.6. The State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana.
Malawi 1994	Art. 13. The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals – <ol style="list-style-type: none"> (a) Gender Equality To obtain gender equality for women with men through – <ol style="list-style-type: none"> (i) full participation of women in all spheres of Malawian society on the basis of equality with men; (ii) the implementation of the principles of non-discrimination and such other measures as may be required; and (iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation, and rights to property.
Mozambique 1990	Art. 122: <ol style="list-style-type: none"> 1. The State shall promote, support, and value the development of women, and shall encourage their growing role in society, in all spheres of political, economic, social, and cultural life of the country. 2. The State shall recognise and hold in high esteem the participation of women in the national liberation struggle and in the defence of sovereignty and democracy.
Namibia 1990	Art. 23: In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal, and effective role in the political, social, economic, and cultural life of the nation.
Uganda 1995	Art. 33.2: The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.

could be interpreted to apply to both genders, but many countries are specific in their wording to ensure equitable hiring and work conditions and terms of employment along gender lines. Many of the countries adopting such provisions have not necessarily had active women's movements nor have they incorporated these provisions as a result of pressure from women's rights activists, suggesting that these are not highly controversial provisions. Some prohibit sexual harassment⁶ and discrimination based on gender at the workplace.⁷ Others call for equal pay and benefits for women,⁸ equal opportunity for promotion⁹ and training,¹⁰ protection of working conditions of women during and after pregnancy,¹¹ the provision of child care facilities for children under school-going age "to enable women, who have the traditional care for children, to realise their full potential,"¹² and paid maternity leave.¹³

B. Citizenship

Similarly, citizenship laws and constitutional provisions have also undergone changes, even though they have sometimes been contentious. In Botswana, women activists challenged the 1984 Citizenship Act, which did not allow Botswanan women married to foreign men to pass their citizenship to their children. The premise of limiting the right to pass on citizenship only to men was the customary law assumption that women were minors. It was not until Unity Dow took her case to the High Court in 1991 that the Act was overturned and the constitutional provisions regarding citizenship were repealed as a result. It was the first court ruling in southern Africa that was based on the unconstitutionality of sex discrimination.¹⁴ The government appealed the decision, but the holding was affirmed by the Court of Appeals. Dow based her arguments on the UN Convention on the Elimination of Discrimination against Women (CEDAW), of which Botswana was a signatory, setting an important precedent not only in Botswana, but worldwide. Related battles over citizenship took place subsequently in legislatures in Zimbabwe and Mozambique, resulting in similar amendments.

⁶ *Guinean Const.* art. 18.

⁷ *Madagascar Const.* art. 28.

⁸ *Lesotho Const.* art. 30(a)(i); *Cape Verde Const.* art. 5; *Liberian Const.* art. 18; *Ethiopian Const.* art. 42(b).

⁹ *Lesotho Const.* art. 30.i.c.; *Ghanaian Const.* art. 5:27.3.

¹⁰ *Ghanaian Const.* art. 5:27.3.

¹¹ *Ghanaian Const.* art. 5:27.1; *Cape Verde Const.* art. 6.

¹² *Ghanaian Const.* art. 5:27.2.

¹³ *Ethiopian Const.* art. 35.5.

¹⁴ Clara Olsen, *Botswana: Fighting Second-Class Citizenship*, *Ms. Magazine* 12-4 (1993).

Today only a handful of African constitutions specify that citizenship is determined by the nationality of the father only (e.g., Nigeria, Zambia, Ghana, and Swaziland) and some countries, like Tanzania, have legislation to this effect. A few, for example, Mozambique and Eritrea, explicitly mention that citizenship can be passed to children by either the mother or father; the Malawian constitution mentions the acquisition and retention of citizenship and nationality in the context of women's rights; and the Namibian constitution does not permit gender discrimination with respect to the right to pass citizenship to one's children.

Thus, legislation promoting women's rights within institutions of the state and of the market that are more distant from primary affiliations (i.e., the sphere of the family, clan, and ethnic group, or religious institutions) appear to be much less subject to controversy. This is not to say they are free of such resistance, but they are much easier to achieve than reforms that promote women's rights and equality within the closer relationships of family, clan, and religion.¹⁵

IV. COLONIAL LEGAL LEGACIES

Contemporary struggles in Africa regarding women's rights have focused primarily around customary law. These struggles need to be seen as part of the ongoing contestation over the nature of the legal system in Africa. Colonialism set certain dynamics in motion, the consequences of which are still being felt to this day. Independence reinforced colonial legal systems and practices and it has only been since the 1990s, when a little political space has opened up, that women's movements have had a chance to challenge some of the inequalities that became reified under colonial law.

African legal systems are the product of a mix of legal traditions. These systems built on colonial common law traditions (e.g., in former British colonies) and civil law traditions (e.g., in former French, Portuguese, Belgian, German, Italian, and Spanish colonies). Both legal traditions have co-existed at different levels of comfort with customary law. These legal legacies, as we will see, have had important implications for the efforts of contemporary women's rights movements.

The French, for example, had three sets of laws: laws and regulations like the Code Napoléon (civil code) that applied to France and its colonies, laws that were specific to the colonies, and decrees enacted by the colonial

¹⁵ Shireen Hassim, *Terms of Engagement: South African Challenges*, 4 *Feminist Africa* 10, 22 (2005).

administration in Africa. Africans could adopt either customary or civil status when it came to family law, however, most chose to be governed by local customary laws rather than French civil law. Thus, laws pertaining to the family, inheritance, and land generally remained under customary jurisdiction, although the French introduced some marriage laws to replace customary laws and practices they found objectionable, such as the minimum age of marriage. For example, the Mandel Decree (1939) required the consent of both marriage partners and set the minimum age of marriage for girls at 14 years and 16 years for boys. The Jacquinet Decree (1951) allowed a 21-year-old woman, or one who had been legally divorced, to choose her own spouse; it stipulated that the chief of a territory would regulate bride wealth; and authorized the registration of marriages. After World War II, France adopted the Lamine Gueye Law that granted citizenship to all French subjects. The 1946 French Constitution allowed all citizens to retain their personal status, which allowed Africans to continue to be governed by customary law through a dual court system.

In British colonies, common and customary law existed side by side, operating through separate institutions. In some countries, the British resisted codifying customary law, believing that because of its fluidity, it could evolve with changing conditions. Its impermanence also allowed them greater possibilities for using customary law to shape society and to legitimize the colonial state. Thus, in Kenya it was not until the 1960s that codification occurred.¹⁶ In other countries, like former Northern Rhodesia (today known as Zambia), the government employed anthropologists in the 1940s to retrieve and codify laws. Male elders, often with vested interests in a particular version of customary law, were able to enshrine their personal interpretation of customary law into new legal systems. In the process, the older legal systems lost much of their flexibility and mutability and women acquired the status of legal minors, under the guardianship of their fathers and husbands for life. Whereas in the past, elders and chiefs had interpreted customary law according to the circumstances, these codifications often melded customary practices into a single rule applicable to a variety of disputes. Women's claims began to be dismissed from the courts on grounds that they were not in accordance with "tradition."¹⁷

¹⁶ Brett L. Shadle, *Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60*, 40 *J. of African Hist.* 411, 411–12 (1999).

¹⁷ Martin Chanock, *Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia*, in *African Women and the Law: Historical Perspectives* (M. J. Hay & M. Wright, eds., Boston: Boston University, African Studies Center, Papers on Africa No. 7, 1982); Elizabeth Schmidt, *Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890–1939*, 16 *J. of Southern African Stud.* 622, 626 (1990).

After independence, countries dealt with customary laws in different ways. Some sought to integrate civil and customary law. Countries like Burkina Faso, Mali, and Senegal sought to combine civil and customary laws into more comprehensive family codes, however, the result has been a mixture of measures that both protect and discriminate against women. Nevertheless there is often a considerable gap between the law on the books and what is practiced on the ground.¹⁸ Similarly, the former Portuguese colonies absorbed customary law into general law.¹⁹ Tanzania also created an integrated legal system, but one in which customary law was applied to civil cases and general law to other cases.

Other countries abolished customary law altogether to create their own civil code. Ethiopia, for example, eliminated customary law to create the Ethiopian Civil Code because it was felt that there was too much variance in customary law from region to region and that it was too unstable to codify.²⁰ Côte d'Ivoire similarly abandoned customary law entirely to adopt a civil code that resembled the French one.

And, finally, others like Madagascar, in contrast, codified customary law and used it as the basis for its legal system by combining it with civil law. Underlying this was the belief that customary law best reflected the needs of people. Malawi's traditional courts were to deal with both customary and criminal law, as did the courts in Swaziland.

Thus, there was considerable variance in how customary and common/civil law was treated in different parts of Africa, although in general the legal systems remained plural.

V. CUSTOMARY LAW

Challenges to customary law have been particularly difficult because there can be strong feelings of ownership of the family and clan institutions that govern them. Therefore, it has been much harder to pass legislation affecting these institutions, such as laws ensuring women's rights to property and land through inheritance.

Women's rights movements in Africa have found it especially difficult to pass laws that challenge the notion of women and children as property, which became embedded in customary practices relating to the family and clan,

¹⁸ Abd-el K. Boye, Kathleen Hill, Stephen Isaacs, and Deborah Gordis, *Marriage Law and Practice in the Sahel*, 22 *Stud. in Family Planning* 343, 344-45 (1991).

¹⁹ Fareda Banda, *Women, Law and Human Rights: An African Perspective* 20-21 (2005).

²⁰ T.W. Bennett & T. Vermeulen, *Codification of Customary Law*, 24 *J. African L.* 206, 208 (1980).

such as bride wealth, child custody, and levirate (claims on the widow and/or her property and children by the eldest brother of the deceased husband and in-laws). Only nine sub-Saharan African countries ban polygamy, although increasingly the new family codes are discouraging the practice; four countries prohibit levirate; and only three countries prohibit bride price. Thirteen countries have set a minimum age of marriage at 18 years, whereas twenty-six countries require women's consent to marriage. Laws pertaining to women's reproductive rights, which are also indirectly related to claims on offspring and women's reproductive capacities to produce children, are also potentially problematic.

Much of the active and organized resistance to improving women's legal status has come from religious leaders, chiefs, elders, clan leaders, and individuals who are wedded to older norms and cultural practices. Many of these persons also stand to benefit politically and even economically from older practices and beliefs.

Given the resistance to efforts to curtail customary law, it is, therefore, significant that today twenty-one of forty-five African constitutions have provisions making customary law subordinate to statutory law and the constitution. Only three constitutions make specific mention of women or gender in this regard. Nonetheless, such clauses, theoretically, make customary law subordinate to any constitutional guarantee of gender equality.²¹

In practice, however, the constitutional legitimization of customary rights and traditional authorities, often within the context of promoting cultural rights, sometimes results in conflicts with the constitutional provisions protecting women's rights and gender equality. These constitutional protections for customary law, and perhaps more critically, activism on the part of customary law advocates, often pose obstacles to enacting legislative reforms that protect women's bodily integrity (reforms having to do with reproductive rights, age of and consent to marriage, domestic violence, bans on female genital cutting), women's access to property (land rights, inheritance, or polygamy), and the related unequal treatment of women as property (bride wealth, levirate).

Constitutional provisions regarding women's rights implicitly and sometimes explicitly (see [Table 8.3](#)) have challenged customary rights and have in this way been placed on a collision course with prevalent customary values and practices, which also may be protected within the constitution. For example,

²¹ Thirty-two countries have anti-discrimination clauses in their constitutions with particular reference to women, another eight mention discrimination in general without reference to women, and six make no mention of discrimination. Gender equality is specifically mentioned in all, but five sub-Saharan Africa constitutions of forty-six constitutions.

Section 27 of the Sierra Leone Constitution provides that “No law shall make any provision which is discriminatory either of itself or in its effect.”²² Yet, Section 27(4) contradicts this provision by making exceptions for adoption, marriage, divorce, burial, sharing and distribution of property on death, or other interest of personal law and customary law.²³ These exceptions can in effect permit discrimination against women.

In some countries like South Africa, the constitution explicitly recognizes both women’s and customary rights, opening the door to potential legislation and court cases challenging the rights of women. On the one hand, the constitution prohibits discrimination by the state and others “directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Reference to pregnancy, marital status, and sexual orientation take this anti-discrimination provision further than most constitutions in the world.

Yet, at the same time, “[t]he 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 [of rights].”²⁴ The constitution does not prevent legislation recognizing “(i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.”²⁵ Customary law in South Africa relegates wives to the status of minors under the guardianship of their husbands. This means they cannot own property, hold public office, file for divorce, or claim child custody. Husbands are required to pay bride wealth and can marry multiple wives.²⁶ Even though traditional authorities and customary law are subject to the constitution, the fact that the constitution empowers both women and traditional authorities has led to diverse interpretations of rights in the courts.

However, even countries that have tried to harmonize these contradictory impulses by directly addressing the tension within the constitution have run into problems in practice. For example, Uganda’s 1995 Constitution states: “Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may

²² *Sierra Leone Const.* § 27.

²³ *Id.* § 27(4).

²⁴ *South African Const.* art. 2.39.3.

²⁵ *Id.* art. 15.3.a.

²⁶ Jagwanth & Murray, *supra* note 2, at 251; Helen Irving, *Gender and the Constitution* (2008).

be developed and incorporated in aspects of Ugandan life.”²⁷ And “[l]aws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group . . . or which undermine their status, are prohibited by this Constitution.”²⁸ Moreover, women have the right “to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.”²⁹

However, the limits to these provisions emerged with the debate over the amendments to the 1998 Land Act. When the women's movement started to demand a co-ownership (common property) clause so women could inherit land or keep their share of land if they were divorced or thrown out by their husbands, there was immediate pushback in defense of the clan and customary practices, suggesting that the practice of customary law is more powerful than any written law or constitution.

Some examples from a variety of countries of struggles around particular legislation that derive from this tension between customary and women's rights are provided in [Table 8.3](#).

A. Women Treated as Minors

Initially in Zimbabwe, women's rights advocates were dealt a major setback in a 1999 Supreme Court ruling that gave precedence to customary law in a land inheritance dispute between a brother and sister, and took the extraordinary step of rejecting the Court's only previous rulings to the contrary. The ruling deemed that women were minors and that women could not be considered equal to men before the law because of African cultural norms and “the nature of African society.” In this suit, Venia Magaya, a 58-year-old seamstress, the eldest child of the deceased by a first marriage was denied inheritance by a Community Court, which awarded the estate to a second son by a second marriage. When he evicted her from her father's land and home, she took her claim to the Supreme Court, which ruled against her on the grounds that it was upholding customary law. Although the constitution provides for protection against discrimination based on race, tribe, place of origin, religion, or political opinion, it does not ban discrimination based on sex.³⁰ However, finally in 2006, Zimbabwe passed legislation allowing women to inherit property from their husbands and fathers.

²⁷ *Ugandan Const.* art. 24 (1995).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Simon Coldham, *The Status of Women in Zimbabwe: Veneria Magaya v. Nakayi Shomhiwa Magaya* (SC 210/98), 43 *J. of African L.* 248 (1999).

TABLE 8.3. *Constitutional provisions regarding customary law and women*

Country	Constitutional provisions
Ethiopia	<p>Art. 35.4: The State has the duty to guarantee the right of women to be free from the influence of harmful customary practices. All laws, stereotyped ideas and customs which oppress women or otherwise adversely affect their physical and mental well-being are prohibited.</p> <p>Art. 35.7. Women shall have the right to acquire, administer, control, enjoy and dispose of property. They shall, in particular, have equal rights with men regarding the use, transfer, administration and control of land. They shall enjoy the same rights with men with respect to inheritance.</p>
Ghana	<p>Chapter 6, Art.39 (1) Subject to clause (2) of this article, the State shall take steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning.</p> <p>(2) The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the person are abolished.</p> <p>Chapter 5, Art. 22 (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.</p> <p>(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.</p> <p>(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this article – (a) spouses shall have equal access to property jointly acquired during marriage; (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.</p>
Liberia	<p>Art. 23</p> <p>a. The property which a person possesses at the time of marriage or which may afterwards be acquired as a result of one's own labors shall not be held for or otherwise applied to the liquidation of the debts or other obligations of the spouse, whether contracted before or after marriage; 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.</p> <p>b. The Legislature shall enact laws to govern the devolution of estates and establish rights of inheritance and descent for spouses of both statutory and customary marriages so as to give adequate protection to surviving spouses and children of such marriages.</p>

Country	Constitutional provisions
Malawi	<p>Chapter 4, Art. 24</p> <p>2: Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as –</p> <p>(a) sexual abuse, harassment and violence;</p> <p>(b) discrimination in work, business and public affairs; and</p> <p>(c) deprivation of property, including property obtained by inheritance.</p> <p>Chapter 4, Art. 22</p> <p>(3) All men and women have the right to marry and found a family.</p> <p>(4) No person shall be forced to enter into marriage.</p> <p>(5) Sub-sections (3) and (4) shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation.</p> <p>(6) No person over the age of eighteen years shall be prevented from entering into marriage.</p> <p>(7) For persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians.</p> <p>(8) The State shall actually discourage marriage between persons where either of them is under the age of fifteen years.</p>
Swaziland	<p>Art. 28.</p> <p>(3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.</p>
Uganda	<p>Art. 33</p> <p>(5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.</p> <p>(6) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.</p>
Zimbabwe	<p>Art. 23 (3a) Notwithstanding subsection (3)(b), in implementing any programme of land reform the Government shall treat men and women on an equal basis with respect to the allocation or distribution of land or any right or interest therein under that programme.</p>

i. Girl Child

African women activists have been especially involved in global and regional arenas has been in defending the rights of the girl child. They have been concerned with issues having to do with female genital cutting, the education of girls, age of marriage, and consensual marriage.

There have been growing efforts to increase the age of marriage for a variety of reasons. Child rights advocates see child marriage as harming girls and preventing them from going to school and gaining economic independence. There is the prevalence of fistula among girls who give birth too young, not to mention other physical, mental, and emotional health impacts of early marriage on girls. In Nigeria, for example, there are tensions between advocates for child rights, who want to raise the age of marriage under the Child Rights Act of 2003, and the Supreme Council for Shar'ia in Nigeria that appeals to Islamic law for its authority. The Supreme Council claims that if the state assemblies pass the act it will destroy the very basis and essence of the Shar'ia and Islamic culture. Federal laws that are passed at the national level are required to be passed within the State Houses of Assembly. By 2007, ten state assemblies had adopted the act.

The controversial sections of the act include the provisions that make it illegal for parents to marry off their daughter if she is younger than 18 years, and illegal to consummate a marriage with a child less than 18 years of age. The law also gives both boys and girls equal inheritance rights. Complicating the enactment of the Child Rights Act is the fact that the legal system in Nigeria recognizes three forms of law: English common law, Islamic Shar'ia law, and customary law, all of which have claims to authority.³¹

ii. Female Genital Cutting

Women activists have also sought to eradicate female genital cutting (FGC) through a variety of strategies, ranging from the passage of laws to the adoption of educational, health, and income generation campaigns. Even though FGC pertains to family relations and clan and community influences, it is an area where there has been considerable progress even in countries where other legislation regarding women has been slow in coming. The issue is gaining increasing attention at the national and regional level. The 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women is the

³¹ N. Toyo, *Revisiting Equality as a Right: The Minimum Age of Marriage Clause in the Nigerian Child Rights Act, 2003*, 27 *Third World Q.* 1299, 1301–1305 (2006).

first international treaty to mention FGC. More recently, in 2005, an African Parliamentary Conference held in Dakar focused on FGC and speakers and members of twenty African national parliamentary assemblies unanimously adopted a declaration calling for an end to the practice arguing that “culture is not immutable and that it is subject to perpetual change, adaptations and reforms.”³² They pledged to work with civil society, traditional chiefs, and religious leaders, women’s and youth movements, and governments to adopt strategies to end the practice, drawing on a human rights framework by taking into consideration the education, health, development, and poverty dimensions of the problem.

B. Inheritance Rights

Inheritance rights for women are particularly controversial in much of sub-Saharan Africa. The Malawi Chapter of the advocacy group Women and Law in Southern Africa Research Trust (WLSA) is engaged in advocacy around women’s inheritance rights because most widows, upon the death of their husbands, cannot provide the necessary evidence of joint ownership, which would allow them to inherit their own land, resulting in the woman’s dispossession of her property by her husband’s family. Although women’s organizations have been successful in passing legislation to prevent domestic violence (2006), they have faced an uphill battle with the Will and Inheritance and Marriage Laws, and which WLSA national coordinator Seode White argues are all “highly discriminatory and highly oppressive. So the challenges are the slowness of the process and lack of commitment and we are very concerned about the government’s position on this issue at this time.”³³

C. Land Rights

One of the areas where women’s movements in Africa are facing the most resistance with respect to customary authorities and practices is in the area of land ownership. New land laws were enacted in Uganda, Tanzania, Zanzibar, Mozambique, Zambia, Eritrea, Namibia, and South Africa after the 1990s. Women were active and in leadership of a variety of land alliances and

³² *Final Declaration*, (Paper Read at African Parliamentary Conference: Violence Against Women, Abandoning Female Genital Mutilation: The Role of National Parliaments) (Dec. 4-5, 2005, Dakar, Senegal).

³³ Lameck Masina, *Malawi Women Fight for Rights Amid Challenges in Blantyre, Malawi: Voice of America* (2008).

coalitions – from Uganda, Zambia, South Africa, Kenya, Rwanda, Mozambique, and Tanzania to Namibia – which have fought for the land rights of women, pastoralists, the landless, and other marginalized people.

Laws that challenge customary authority and resources in the area of land rights have been particularly contentious. The bases of customary ownership have been eroded since the time of colonialism, making women's access to land significantly more precarious as the protections traditionally ensured by the clan system have been peeled away. With increased commercialization of land and problems of land scarcity, local leaders have felt mounting pressures to protect the clan system, and in so doing have placed even greater constraints on women's access to land.³⁴ However, the clan system they are seeking to preserve is no longer one that affords women the supports it is once said to have guaranteed.

Land is of critical importance to women because they depend on it for cultivation and, therefore, their livelihoods. Unequal access to land is one of the most important forms of economic inequality between men and women and has consequences for women as social and political actors. Women provide a large percentage of all agricultural labor and especially labor involving food production, yet they own only a fraction of the land in most African countries. Women are often responsible for providing for the household, therefore their access to land for food production is critical to the welfare of the entire household. Even women who want to get into business need land as collateral to obtain bank loans. Because women are almost completely dependent on men to access land in patrilineal societies, women who are childless, single, widowed, disabled, separated/divorced, or with only female children often have little or no recourse because they may have no access to land through a male relative.

In patrilineal societies, women generally do not inherit land from either their fathers or their husbands. Their fathers may not bequeath land to their daughters because daughters marry outside the clan, and will therefore take the land with them to another clan. Husbands often do not bequeath land to their wives for the same reason: They need to ensure that the land remains in the clan because they worry that the widow might sell the land to non-clan members. Unlike men, women move to the home of their husband and his husband's clan and may be suspected of being less loyal to clan interests. In some societies, if the husband dies, the wife and children are inherited by the husband's brother or another family member so that he may provide for them.

³⁴ L. Gray & M. Kevane, *Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa*, 42 *African Stud. Rev.* 15 (1999).

This practice is dying out in many parts of Africa, raising fears that if a widow remarries outside the clan, the clan land she has acquired is lost. Thus, under customary law in many countries, a woman may have jointly acquired land with her husband and may have spent her entire adult life cultivating the land, but she cannot claim ownership of the property. If the husband dies, the land may go to the sons, and even to the daughters. Nevertheless, he may still leave the wife with no land and, therefore, no source of livelihood.

In this context, women's movements in Africa have increasingly been adopting rights-based approaches that challenge customary land tenure arrangements. Feminist lawyers working with these movements have argued that customary law in the present day context has been used to selectively preserve practices that subordinate women. Women's attempts to assert their rights in ways that challenge customary land tenure systems are often perceived as an attempt to disrupt gender relations and society, more generally. This explains why so much is at stake in these battles over women's rights to land, and why women's gains in this area have been so slow.

CONCLUSIONS

Since the 1990s, new constitutions throughout Africa have often included non-discrimination or equality provisions, whereas prohibiting customary practices if they undermined the dignity, welfare, or status of women. These were new developments in African constitution-making and can be contrasted with constitutions passed prior to 1990, in which customary law generally was not subject to any gender-related restrictions. Women's movements played an important role in ensuring that these clauses were included.

The fact that women's movements in the 1990s started tackling some of the most intransigent and difficult societal issues within constitutional and legislative reform is an indication of how far the debates have come and how much has changed. Some of issues being taken up could not even be mentioned in public and were considered taboo well into the 1990s (e.g., domestic violence and female genital cutting).

Nevertheless, the tensions between customary law and women's rights remain an important constraint on advancing women's status in society. Even in countries where customary law is subordinate to a constitution that bans gender discrimination, there is still the danger that laws will interpret constitutional provisions supporting customary laws and practices in ways that are detrimental to the welfare of women. The issue of customary law and the arbitrariness of rulings by traditional authorities remain a major source of concern for women's rights activists.

At the same time, the very fact that there is resistance to many efforts at constitutional and legislative reform regarding women's rights suggests that laws matter, and that laws are not merely passed to satisfy changing international norms. Their passage is a mark of changing societal norms, expectations, and sensibilities regarding the rights of women and girls. This legal change is evidence of the fact that culture is not static, but is evolving in ways that require changes in the laws. These examples from Africa also show the extent to which African women are in the forefront of efforts to redefine women's rights as human rights as well as the extent to which they are redefining their own cultures and the meaning of culture and custom.

9

Gender Equality and the Rule of Law in Liberia:
Statutory Law, Customary Law, and the Status of Women

Felicia V. Coleman*

INTRODUCTION

Women have suffered a wide range of discriminatory practices and abuses that have given rise to the global concern about the gross inequality and inequity existing between the genders. Gender inequality is indeed a global phenomenon, and the need to address this inequality has become urgent and compelling. Women all over the world have been deprived in one way or another of their rights to education, reproductive health, property, employment, economic opportunities, and most importantly, their rights to participate in the making of laws that directly affect them. These inequalities have subjected women to the whims of the male gender and have resulted in a huge disparity between the genders with respect to illiteracy and poverty. It has been reported that an estimated 60 to 80 percent of teenage girls in Liberia sell their bodies to fund their educations.¹ Women's impoverishment and lack of education, in turn, contribute to their lower status in terms of health, property and economic development, employment, and politics. Thus, a circle is formed in which inequality breeds more inequality.

Gender inequality is not, however, limited to inequalities between the male and female genders. Intra-gender inequalities are also very significant issues that exacerbate the inequality of women by leaving some women in a particularly disadvantaged position. Laws sometimes draw distinctions between different groups of women, as was evident in the Liberian laws that classified and categorized women in Liberia into two groups, "civilized," referring to urban and/or statutorily married women, and "native," referring to rural

* I would like to thank Attorney Jallah Barbu, who found time to do some editing of the chapter, and Jonathan Enriquez, who assisted with research.

¹ IRIN-Humanitarian News and Analysis, UN Office for Coordination of Humanitarian Affairs (2005).

and/or customarily married women. In Liberia, different laws governed each of these two groups of women. Although the laws have recently been modified to reduce the differences between the rights enjoyed by each group, civilized women today continue to enjoy some rights that are practically denied native women who were, until this decade, regarded as properties of their husbands.²

To adequately address the problem of gender inequality in Liberia, one of the first priorities for law reform³ should be to repeal all laws that discriminate against women on the basis of gender and/or status as native or civilized, denying them full participation in decision making in rural and urban communities, as well as full enjoyment of their rights. The corrections of such laws can be properly done when those involved in the process, either directly or indirectly, have a full understanding of the problems that the system continues to create and thereby appreciate the particular need and urgency to make the corrections. This essay has the following two objectives: (1) to explain customary law in practical terms, that is, “the living customary law,” and its adverse effects on the rights of its subjects; and (2) to affirm the necessity to analyze and reform customary law and those statutory laws that deal with customary rights (including the 2003 inheritance law) with the aim of bringing them into conformity with the Constitution of Liberia.

I. BACKGROUND: CUSTOMARY LAW AND ITS ADVERSE EFFECTS ON WOMEN

Liberia is a West African Country with a population of approximately three million.⁴ Since the last national population census was conducted over twenty years ago in 1984, this number is the best guess currently available. Although there are more women than men in Liberia – about 52 percent of the population is female – a majority of these women live in a continuous state of inequality, and they are pressured by the system to regard their situation as an acceptable part of their customs and traditions. This pressure is pervasive in rural areas where women (including very young girls) have very little or no access to formal education or vocational skills training. Instead, they are mostly trained in traditional and very secretive “Bush Schools” to fulfill the traditional role of women in the home. These Bush schools, formally called “Sande Societies,” are unique to certain tribal groups, specifically the Mel and Mande. The schools are meant to teach girls to be good and faithful servants

² “A husband has complete personal rights (rights in personam) over his wife.” *Peoples of Liberia* 211 (James L. Gibbs, Jr., ed., 1965).

³ Liberia is engaged in a holistic reform of its laws to address problems that caused its 14 years of civil war (1989–2003).

⁴ Report of the Statistical Division, Ministry of Planning, and Economic Affairs of Liberia (1984).

of their husbands, to bear and rear children, and to act as caretakers of their homes and families.⁵ Graduates of such schools do not, however, receive the basic recognition that is awarded to those with formal education. In fact, the schools are sometimes resented by other members of the tribal groups involved in this practice (usually women), as being abusive of the rights of women and counterproductive. Thus, it is apparent that women are conscious of their deprivation but are incapacitated by the laws and practices that govern Liberia's pluralistic society.

Liberia is a multiethnic society with each ethnic group subscribing to its own traditions and customs.⁶ Despite this diversity, these groups share many gender-based practices, especially the expectation that women will care for the home, raise the children, be the principal actors in farming, harvest and sell produce from the farms, and surrender the proceeds to their husbands and/or fathers for the support of their sons pursuing formal education, or in some instances, to pay the dowries for those sons who are about to take their wives.⁷ Because of these expectations, few women have the opportunity or resources to hold positions of power in politics or rural community groups, or to assert themselves in the national economy. The minute portion of the decision-making positions occupied today by women in Liberia is a result of the sacrifices, persistent demands, and resolute efforts of the few educated women in Liberia, sometimes buttressed by the cooperation of some less fortunate women who now understand the need to achieve gender equality. Despite all of these efforts and some participation of women in law making and governance, the laws still do not adequately protect women's rights because of the way they are crafted.

In addition to the common gender-based customs among the various ethnic groups in Liberia, some of the groups also maintain and enforce some extreme discriminatory practices that further tend to enslave women or deprive them of their natural rights. A few of the tribal groups practice female genital mutilation and they hold this practice as proof of full womanhood and the basis upon which a woman belonging to that group may appreciably participate in tribal affairs. This practice devastates the humanity of its victims, both in terms of their health and their sexuality. The fact that the government through its interior ministry⁸ licenses this practice is itself a clear indication of the

⁵ Gibbs, *supra* note 2 at 208.

⁶ *Joseph Saye Guannu, Liberian Civics* 1 (1st ed., 1999).

⁷ Gibbs, *supra* note 2 at 208.

⁸ Section 25.3 of the Executive Law provides for a Liaison officer for Liberian Tribal Societies in the Bureau of Tribal Affairs of the Ministry of Internal Affairs and the duties of this official include licensing practitioners of this traditional practice. See Executive Law, Title 12, sec. 725.3 (app. 1972) at III *Lib. Code Rev.* 351 (1998).

government's full support for the discriminatory practices against women in certain categories, under the guise of upholding tradition.

II. THE CONSTITUTIONAL FRAMEWORK

Liberia's legal system rests on a deep tension between its formal commitment to equality, on the one hand, and its protection of customary law, on the other hand. Until April 12, 1980, when the military forcibly assumed state power through a coup d'état, Liberia was governed by its 1847 Constitution, as amended in 1955. That Constitution, suspended by the People's Redemption Council military government via its Decree Number 2, and later abrogated by the new 1986 Constitution, which superseded it, provided that "all men are born free. . . ."⁹ Perhaps the framers of the 1847 Constitution used the word "men" to refer to all persons, but it was often wrongly interpreted to exclude women. Indeed, Liberian courts sometimes enforced certain customary laws that effectively enslaved women. The case of *Jartu v. Konneh*, discussed later, exemplifies this misinterpretation.

Because of the difficulty imposed by courts' application of customary law, Liberian women cried out for equality, and the 1986 Constitution made equality one of its core values. This Constitution replaced the word "men" with the gender-neutral word "persons." Thus, Article 11 (a), (b), and (c) provide: "all persons are born equally free and independent, . . . are entitled to the fundamental rights and freedoms of the individual, . . . [and] are equal before the law."

Consequently, the constitutional guarantee of gender equality in Liberia is a non-negotiable and uncompromising provision that mandates equal treatment and prohibits discrimination on the basis of gender. In this respect, Liberian law conforms to international law on the subject of gender equality. The Universal Declaration of Human Rights, for example, to which Liberia is a signatory, protects gender equality, clearly stating that "all human beings are born free and equal in dignity and rights."¹⁰ Liberia has also ratified the United Nation's Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention's equality guarantee states that discrimination against women is "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human

⁹ *Liberian Constitution*, Article I, section 1st [sic] (1847).

¹⁰ *Universal Declaration of Human Rights*, Article 1.

rights and fundamental freedoms in the political, economic, social, cultural, civil and other field.” In ratifying the Convention in 1981, the National Legislature said, “The Government of Liberia hereby ratifies the Protocol relating to the Convention on the Elimination of all Forms of Discrimination Against Women.”¹¹ It therefore can be seen that theoretically, Liberia is committed to the principles of equality, but the application of those principles remains to be achieved in some of its laws and most of its practices, a situation deeply rooted in Liberian society.

The deep-rooted system of gender discrimination still finds its way into the perception of Liberians. Some Liberians resist equality claiming that it is a Western concept, foreign and inappropriate to the context of Liberia. They specifically denounce gender equality as a foreign implant, but at the same time, happily embrace what they themselves consider Western ideas of equality in other contexts, such as democratic politics and equal respect for different subcultures within society.

It is true that gender equality is vigorously pursued in the Western world, but it is also true that the idea of gender equality is not a new phenomenon to Liberia; the difference is that in Liberia, a systemic effort has been made to widen the gap that existed in prior years. For example, in the early days of Liberia, women had the right to alternate with men in the rule of the forest, to carry on activities of the separate cultural societies.¹² Although only very few women enjoyed this privilege, even this limited gesture toward equality has been eliminated in current practice. Thus, gender equality has some roots in indigenous traditions that have often been ignored or rejected. Moreover, whatever its origin, equality is now firmly entrenched in the Liberian Constitution and is as deserving of respect as any other constitutional value, and ought to be approached in a wider scope as a fundamental right.

III. GENDER EQUALITY: INEQUALITY AMONG WOMEN

Gender equality is generally perceived on the basis of identifying the sharp differences between males and females that cause disadvantages for women. However, in Liberia, as in many other countries, equality problems are not limited to male dominance over female. There are also substantial problems with inequality within a gender, particularly inequality among different groups of women. Unfortunately, some of these problems are rooted in the laws that were intended to promote equality; laws that, because of this effect, are contrary to the Liberian Constitution.

¹¹ Acts of the National Legislature of Liberia, 1981.

¹² Gibbs, *supra* note 2, at 221.

The Liberian Constitution, under Article 5, guarantees the protection and maintenance of customary law and practices, and the rights of people under both the customary and civil laws of the country. Integration and unification of the “people of Liberia into one body politic” (Art.5(a)) and “adoption and development of traditional values compatible with public policy and national progress” (Art.5(b)) are two of its core “principles of national policy.” In addition, rights of inheritance and devolution of estates in favor of spouses in both customary and statutory marriages are fundamental rights guaranteed by the Constitution.¹³ Thus, the Constitution’s support for unconditional equality under customary law and practices is as firm as the support it gives to equality in statutory law and practices. Nonetheless, there remain laws and practices that sustain intra-gender inequality, particularly among women, based on the distinction between customary and statutory law.

A. Customary versus Civil Law: The Statutory Background

Notwithstanding the constitutional guarantee for inter- and intra-gender equality, it has been difficult to translate this theoretical protection into practice, and real gender equality has remained elusive. One of the primary causes of this continuing inequality is the difference between the laws that govern the statutory legal community and those that govern the customary legal community. Turning Liberia’s theoretical commitment to gender equality into practice is overdue.

The continuous enforcement of customary law creates many of Liberia’s problems regarding gender equality. Under customary law, native women – that is, women who are subjects of the Aborigines Law and Hinterland Regulations – were regarded as properties of their husbands and, therefore, were deprived of their basic rights. In particular, they had no right to marital property after the death of their husbands. Those properties, including the woman herself, belonged solely to the husband and devolved on his family members and relatives. Women were, in other words, deprived of the right to dower interests, the right to administer the properties of their dead husbands, or the right to have custody of their children, who also were considered as part of the husband’s properties. In fact, a native widow was expected to become the wife of one of her husband’s family members, sometimes even the oldest son of her husband provided she was not his mother.¹⁴

By contrast, civilized women, that is, women who subscribe to or are married under the statutory legal system, enjoy meaningful rights. By contracting

¹³ *Liberian Constitution*, Article 23(b)(1986).

¹⁴ Gibbs, *supra* note 2, at 212. See also Liberian cases discussed *infra* in text.

marriage under statutory law, a woman has the automatic right to inherit a portion of her husband's property upon his death, is entitled to custody of the children from said marriage, and is free to marry anyone thereafter.¹⁵ In addition, it is an established practice that the widow of such marriage has the right to determine all matters regarding interment of her husband's remains.

Discrimination among women was also prevalent in divorce cases. In particular, a woman married according to customary law was compelled to return the dowry paid by her husband as the major condition to terminate the relationship. Moreover, if the divorce was completed, she was not entitled to any of the properties they owned during the marriage.¹⁶ Failure to return the dowry meant that the divorce would not be granted, especially if the woman was the one seeking it.

Under statutory law however, the rule has been quite different. The husband of a wife in a divorce proceeding has always been responsible to pay both alimony (means of living) to his wife¹⁷ and her attorney's fees. Additionally, she is entitled as a matter of right to a portion of the marital property upon termination of the marriage.¹⁸

The rationale behind the dichotomy of these laws is difficult to explain or understand because Liberian law guarantees that "... all Aborigines residing in the Republic of Liberia shall have full protection for their persons and property, and shall enjoy all the rights, privileges and immunities granted to all other citizens of the Republic."¹⁹ There has been some modification in customary law regarding the rights of married women. The Association of Female Lawyers of Liberia (AFELL) has strongly advocated the repeal of laws that breed discriminatory practices in Liberia. In 2003, the Legislature, convinced by AFELL's advocacy of the existence of acute intra-gender inequality problems, enacted a new law entitled "An Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages," (the Act), which granted rights of inheritance and devolution of estates to wives of customary marriages.²⁰ However, the Act still has not completely solved intra-gender problems because of complications caused by

¹⁵ Decedents' Estate Law, Title 8, sec. 3.2 (app. 1972) at III *Lib. Code Rev.* 576 (1998); Domestic Relations Law, Title 9, sec. 4.1 (app. 1972) at III *Lib. Code Rev.* 84 (1998).

¹⁶ Gibbs, *supra* note 2 at 213.

¹⁷ "Alimony is allowance required by law to be made to a wife by a husband out of his estate for her support and maintenance, either during a matrimonial suit or its termination." Opinion of the Supreme Court of Liberia in the case *Anderson v. Anderson*, 9 LLR 301, 302-303 (1947).

¹⁸ Domestic Relations Law, Title 9, sec. 8.7 (app. 1973) at III *Lib. Code Rev.* 137 (1998).

¹⁹ Aborigines Law, Title 1, sec. 370 (app. 1956) at I *Lib. Code of Laws* 66 (1957).

²⁰ An Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages (2003).

the practice of polygamy. Under customary law, a man may marry more than one wife whereas under statutory law, polygamy is banned. The statutory right to dower, which entitles a wife to one-third of her husband's property at his death, becomes highly problematic when applied to polygamous marriages with multiple wives. On this subject, the Act states that "immediately upon marriage, the customary wife shall be entitled to one-third of her husband's property, personal or real and vice versa regardless of whether or not she helped him to acquire said property,"²¹ but then in section 3.2, it makes a sharp modification by providing that "upon the husband's death, the widow or multiple widows shall be entitled to only one-third of their husband's property."

There are at least two difficulties with the way the Act attempts to handle this problem. First, the Act recognizes and reinforces the right of men to marry more than one wife under customary marriage, thus perpetuating intra-gender inequality. Second, the Act is seen as unfair by long-married wives who will now have to share their one-third dower equally with much more recently married wives. In short, there is much more that will need to be done to achieve statutory reform leading to real equality among women, as well as between women and men.

B. *The Supreme Court Rulings on Women and Customary Law*

Prior to the recent customary law reform, the Supreme Court of Liberia on three occasions had the opportunity to address the role of traditional women. In a 1950 case, *Jartu v. The Estate of the Late Famble Konneh*,²² the Court, although deciding in favor of the wife on technical grounds, nonetheless affirmed that customary wives were not entitled to dower. The substantial facts of the case and the ruling are discussed below.

Famble Konneh, a Mohammedian, died, seized of both real and personal properties, which were administered by the curator of Intestate Estates of Montserrado County. Upon the curator's recommendation, Commissioner of Probate S. Raymond Horace ordered the admeasurements of dower for the four widows on a pro rata basis of both the personal and real properties of the deceased. Although the curator completed the admeasurement of the portion of the real estate in favor of Jartu, Commissioner M. Dukuly, who succeeded Commissioner Horace, refused to issue and execute the curator's deed to Jartu. Instead, he reversed his predecessor's decision on the ground that the deceased had married his wives under customary law and, therefore, they had

²¹ Section 2.3.

²² 10 LLR 318 (1950).

no property rights in his estate in the Anglo-Saxon sense. In that ruling, the new Commissioner stated, “The custom in this matter is that the wives are permanent members of their deceased husband’s household, and as long as they remained in the family, the next head of the family is bound to look after their welfare.”²³

Upon Jartu’s appeal to the Supreme Court, the Court said, “While we are in accord with the position taken by Commissioner Dukuly in denying admeasurement of dower under native customary law, yet in the particular case we are unable to support him because of the fact that he could not legally review and reverse a ruling of his colleague or predecessor, although apparently this was done inadvertently.”²⁴ Thus, a decision that was, on its face, a victory for the wife was actually a serious defeat for the equality of women in customary marriages.

In a 1963 opinion, the Court affirmed its position that women married according to tribal customary law did not have the right to dower, and went on to deny them the right to administer their deceased husband’s estate as well. In the case *Harmon v. Tompo*,²⁵ Mary Harmon, the customary wife of the late John Harmon, was one of two petitioners who were appointed by the Probate Court to administer her deceased husband’s estate. But, the same Probate Judge, upon the request from other relatives of the deceased, ordered the revocation of the letters of administration he had granted to the deceased’s widow on the basis that, under customary law, a widow could not administer her husband’s property, and such marriage confers no right of dower on the widow.

In its decision on Madam Harmon’s appeal, the Supreme Court relied on its position in the *Jartu* case on the subject and held, “We are of the opinion that our law does not permit the admeasurement of dower to women married according to our tribal customary law; and it is our opinion that the reason for the rule is that, under tribal customary law, a husband can wed two or more wives. Our courts, however, are required to take notice of the circumstances and to administer the native customary laws in a manner that may be applicable to the particular tribe or tribes interested in the dispute.”²⁶ The Supreme Court went on to uphold the Probate Court’s decision not to allow Madam Harmon to serve as an administrator of her husband’s estate because that, too, was inconsistent with customary law.

²³ *Id.* at 322.

²⁴ *Id.* at 324.

²⁵ 15 LLR 272 (1963).

²⁶ *Id.* at 276.

The Court reaffirmed this judgment about administration of estates in its opinion in 1964, in the case *Brown v. Bormor*.²⁷ In this case, the Court reversed the decision of a Probate Judge granting letters of administration to Madam Yelle Bormor, customary wife of the late Moses Brown. It said, “The act of the probate commissioner in appointing Mme. Yelle Bormor administratrix of this estate seems to be in deliberate and direct defiance of an opinion handed down by this Honorable Court at its October term, 1963, in which the Court said: ‘We are of the opinion that our law does not permit the admeasurement of dower to women married according to our tribal customary law . . .’.”²⁸

There are no other recorded cases where the issues of dower rights and the administration of a husband’s estate by a customary wife have been brought before the Supreme Court of Liberia since 1964, hence, one cannot be certain how the Court would have ruled in later years. I believe that up to 2003, the Supreme Court would still have maintained its stance on these matters as in these earlier cases. The statutory reform of the 2003 Act as it relates to the rights of customary spouses should lead the Court to different conclusions in future cases, but there are many issues yet to be resolved.

The legal treatment of customary law marriage is a crucial issue for the equality of women in Liberia. Most marriages in Liberia are contracted under customary law, and a majority of the married and unmarried women reside in rural areas where customary law is generally the authoritative legal instrument. As a result, there is an urgent need for harmonization of the statutory and customary legal systems and balancing the impact they have on their subjects.

C. *The Necessity for Reform*

I have reviewed the tensions and the nature of the problems women in Liberia face in terms of gender inequality as well as the strides that have been taken to curb the problems. Can we now say with certainty that, as a practical matter, a woman under customary law will never be considered a chattel of her husband regardless of how much he pays as dowry, and that the payment of dowry will be a mere formality and not the purchase price of his wife? Can such a wife acquire her own properties without cultural interference, enjoy unhindered dower right, have full right to custody of her children in the event her husband dies, freely choose another husband, be supported fully as is a statutorily married woman in cases of divorce, and even have a say in what happens to the remains of her husband? Will equality among women

²⁷ 16 LLR 227 (1964).

²⁸ *Id.* at 239.

be a reality and not remain an illusion? These questions and concerns, and many more, necessitate urgent reformation of the entire dual legal system to ensure that laws are actually crafted so that they dictate equal treatment “for everyone” in all spheres of life, provide transparent and rigid enforcement of laws on equality by providing adequate penalties for violations, and engage in a programmatic elimination of such duality. This should be the essence of the reform process, because the realities in Liberia are different from the values the nation claims to embrace.

IV. GENDER INEQUALITY: INEQUALITY BETWEEN MEN AND WOMEN

In addition to the intra-gender problems described in the previous section of this chapter, Liberian women also suffer from great inequality with respect to men. Most of our laws proscribe gender discriminations, but under-enforcement of those laws has allowed serious inequalities to continue. One major cause for such inequities is the fact that this world has been a male-dominated society in which women have been considered and treated as second-class citizens, with their rights and privileges subordinated to those of men. In every area of life, women suffer from inequality. In this section, I will discuss education and politics as areas in which reform is urgently needed.

Liberian women have not been given the equal opportunity for education that would enable them to compete with men. Only 18 percent of females in Liberia had acquired elementary education and 47 percent were without any formal education by 1988.²⁹ As a consequence, the role of Liberian women has been to bear and raise children, till the soil to feed their families, and serve as caretakers of their homes.³⁰ Because most of them are illiterate, few other options are open to them. On the other hand, it is estimated that at least 50 percent of the male population in Liberia is literate.³¹ This dramatic difference in literacy rates results from the fact that while females were maintaining the household, their male counterparts were given the opportunity to obtain formal education. These disparities are at their greatest in rural areas where customary law enshrines the subordination of women to men.

Politically, Liberia enjoys an appreciable degree of stability after more than a decade of brutal civil war. It is nourishing a very young democracy under the leadership of the first elected female president in Africa. However, there

²⁹ See Report of the Statistical Division, *supra* note 4.

³⁰ “A wife is the cook, housekeeper and caretaker of the children; her formal status in the home is low but her tasks are crucial as those in the fields”; Gibbs, *supra* note 2 at 208.

³¹ See Report of the Statistical Division, *supra* note 4.

remains a huge gap in the representation of males and females in the government. The National Legislature comprises two Houses; the House of Representatives includes sixty-four members of which only nine are women, accounting for less than 14 percent of the total. The Upper House, the Senate, consists of thirty Senators of which only five are women, making up seventeen percent of the total. Members of both Houses are elected by the voters in single-member, winner-takes-all districts. Research has demonstrated that this form of electoral system leads to substantially lower levels of representation for women than a proportional representation system.³² But even in the Executive branch, where appointments are made by the President, there exists a similar (albeit somewhat smaller) gap. Of the eighteen Ministers, only five are women, making up twenty-eight percent of the total.

In many instances, men in Liberia have considered women as a source of wealth, prestige, and political power. This practice runs through every sector of Liberian society. In traditional marriages, men wed more than one wife so that they would have more women farming for them. Some who have several wives even allow other men (clients) to cohabit with some of their wives, but maintain control as patron, over both the client and the woman.³³ That way, the client works for the patron while at the same time, the patron retains the right to collect damages from other men for adulterous acts with such women.³⁴

There continue to be problems in addressing gender issues and solving gender problems objectively. Why are gender experts overwhelmingly women? One of the reasons that men have resisted gender equality is that the concept of gender equality has been portrayed negatively or misrepresented as a fight by women to politically unseat men. As a result, the quest for gender equality is frequently misinterpreted as advocating for women to be literally equal to men, and women's empowerment is misinterpreted as women replacing men and taking over all power.

Actualizing gender equality – which is certainly a basic human rights issue – requires tremendous efforts by proponents of this principle. The apprehensions by most men that women will undo them should there be an elimination of the gender gap mentioned earlier has to be removed through some form of cooperation and confidence building. This confidence building may take many forms, including in such trivial matters as the practice of “ladies first”

³² See Drude Dahlerup & Lenita Freidenvall, *Gender Quotas in Politics – A Constitutional Challenge*, *supra* chapter 1.

³³ Gibbs, *supra* note 2 at 211.

³⁴ *Id.*

in fetching water at public fountains or collecting meals at parties or dinner. Women must begin to reject such unwarranted courtesies to reassure both themselves and men that women are conscious of the need to maintain order and recognize the rights of men, even in social settings. In addition, women must ensure that they lead the campaign to eliminate completely the gaps that exist within the female gender itself, thereby making a proper case for the elimination of gender inequality in all aspects of life.

V. LAW AND CULTURE: CHANGING LAWS, HEARTS, AND MINDS

Many people believe that the laws must be changed for gender equality to be realized in Liberia. But, the question that needs to be considered and answered is: “will changing the laws that breed gender inequality completely solve Liberia’s gender problems?” Certainly not; more has to be done, especially in terms of the perception of the actors and proponents of gender equality.

There are many ways to promote gender equality, but central to all of them is changing the hearts and minds of the people. The mindset of most Liberians must be redirected toward a society where the basic rights of all persons are protected and equality is considered a necessary mechanism to attain this condition. The entire population must be sensitized to the idea that gender equality means giving both genders equal opportunities for self-realization and advancement. Active participation by women in the decision-making process will enhance a positive change in people’s attitude toward the pursuit of gender equality. That means remaining resolute that the roles of women in Liberia’s socio-political practices must be changed. Women must be regarded as equals, and a partnership between women and men respecting gender equality is the key to achieving this objective.

Actors in this process should include both women and men, especially men whose influence will enhance this change. However, women must actively and more forcefully participate in this struggle because they are the sex whose right to be fully involved in national decision making and governance is ignored. Moreover, it is essential that both educated and uneducated women participate actively in this reform process to give assurances that equality is being pursued as a holistic objective, and not to benefit a particular class of women.

A. *AFELL and the Inheritance and Rape Laws: A Case Study in Reform*

Law reform in Liberia requires patience, dedication, and a commitment to dialogue. There is often substantial resistance to change in the status of women.

To overcome that resistance, reformers must work diligently to educate those who are opposed and build support among both men and women. The successful efforts of AFELL to pass the 2003 inheritance reform law, and the organization's continuing efforts to pass rape reform, provide an illuminating example of the process of reform.

When the Inheritance law was first drafted and the information was disseminated, its passage was rejected by some Liberians. Among those who expressed opposition, not surprisingly, were women married under customary law, in whose favor the Act was drafted. Understandably, those women rejected the law largely because they were accustomed to being regarded as chattels without any right to own property and, therefore, were not prepared for this sudden change or challenge to their husbands. Similarly, some men were not prepared to part with all of the dominance and control that they had over women, and were afraid that those privileges they enjoyed were being taken away from them.

Because of the resistance of these groups, it took five years of hectic lobbying and frantic efforts before a male-dominated legislature reluctantly passed the Act. The lobbying and effort, under the auspices of AFELL, took several different forms. First, there were one-on-one engagements by wives whose husbands were members of the legislature. Second, there were visits by women and members of AFELL to their home counties and villages to explain the purpose of the law and educate the women whose rights would be protected. Third, there were negotiations with influential men in positions of authority. And, finally, there was collaboration with the press to inform and educate the public about the current problems and the reform proposals. This approach involved much give-and-take with the opposition and resulted in some modification of the Act. As a result, the reform effort, although successful, is not complete. More work remains to be done to assure that women in customary marriages enjoy equal rights.

AFELL next turned its attention to amendment of the Rape Law, which provided that a man could not legally rape his wife. Under the existing law, a woman, by being a wife, was deemed to give unconditional consent to her husband for sexual intercourse at his pleasure. This result stems from explicit marital exemptions in the rape statutes. Sections 14.70 of the Penal Law, captioned, "Rape" and 14.71, captioned, "Gross Sexual Imposition" read respectively, "a male who has sexual intercourse with a female not his wife has committed rape if . . .," and "a male who has sexual intercourse with a female not his wife has committed a third degree felony if . . ."³⁵

³⁵ Title 26, sec. 14.70 (app. 1976), IV *Lib. Code Rev.* 802–803 (1999); Title 26, sec. 14.71 (app. 1976), IV *Lib. Code Rev.* 803 (1999).

This law expressly affected all classes of women. Thus, it was apparent that it would be even more difficult for the male-dominated legislature to pass a law that would reverse this situation. Indeed, the legislature rejected outright the idea that a man could be charged for raping his wife, as this was never heard of in Liberia. Although AFELL succeeded in persuading the legislature to pass other amendments to the rape laws, this amendment concerning marital rape has not yet been made. Nonetheless, the present reforms have helped people to see and accept the idea that a woman must be given the right to consent before any man can engage in sexual intercourse with her. AFELL continues to work on increasing women's and men's awareness of women's rights issues. And, AFELL has not abandoned its struggle to have the marital rape amendment passed and has continued to engage relevant actors, including young women and both female and male students, to provide an understanding of the benefits of this amendment.

B. Future Projects

The continuous struggle to amend the rape law and the fact that people are culturally accustomed to reducing women to a lower class status indicate the difficult tasks ahead of women and proponents of gender equality. One powerful example of the challenge posed by cultural change is the issue of genital mutilation or clitoridectomy, which is a part of the traditional practice for girls in some tribal groups.³⁶ It is a taboo to discuss the elimination of this practice or even the dangers involved in the procedure with traditional people, especially women. Although not deterred by the potential problems it may face in pursuing the passage of laws abolishing such practices, AFELL continues to develop and adjust its strategies to address these issues and to build the social consensus necessary for change. These strategies include cautiously educating the public about the dangers involved in harmful traditional practices, proposing alternative methods to uphold basic cultural and traditional values, and getting men involved in the drafting and lobbying processes.

The rationale for involving men at the initial (and every other) stage of this pursuit for women's rights is obvious. The current National Legislature is again male-dominated, as men constitute almost seventy percent of that body. To pursue the enactment of laws that advocate gender equality and women's advancement without the active involvement of men is a struggle that might never end. Thus, with the involvement of both genders, appropriate and balanced strategies can be developed that will buttress the ideas suggested in the following recommendations.

³⁶ Gibbs, *supra* note 2 at 222.

VI. RECOMMENDATIONS AND CONCLUSION

A. Recommendations

There are many paths toward gender equality. Minister Varbah Gayflor, the Minister of Gender, has suggested that the following goals would increase gender equality in Liberia:

- 1) Offer women options for their lives beyond childbearing and child rearing;
- 2) Devise strategies and practical approaches to provide women greater access to education, which will prepare them for the many challenges that this changing world poses; and
- 3) Secure the support and commitment of influential men to ensure that appropriate changes are made in the laws to provide equal opportunity for advancement of both males and females, as well as enforcement of all laws and practices in strict obedience to respect for all persons.

In addition to Minister Gayflor's suggestions, I recommend the following methods for consideration:

- 1) That a holistic and comprehensive review and reform of both statutory and customary laws be done with the view of making them completely gender sensitive;
- 2) That such review and reform be consistent with the Liberian Constitution and international laws on gender equality;
- 3) That a body be established to conduct the review, preferably under the direction or with the full involvement of AFELL and other women's advocacy groups;
- 4) That men should be encouraged to play very active roles in this review; and,
- 5) That girls' education be prioritized and supported by both the Liberian government and the international community.

B. Conclusion

Despite the enormous problems outlined here in achieving gender equality in Liberia, I believe that we can succeed in this process. We have great legal resources, both in the gender equality guarantee of the 1986 constitution and in international law. We must ensure that our laws are properly reformed to conform to these legal guarantees of gender equality. In this process, we can

draw upon the government's express commitment to gender equality, as the President, Madam Ellen Johnson-Sirleaf, has emphasized at every available opportunity.

Women – especially the women of Liberia – must get involved in this struggle. The participation of women is particularly crucial in the struggle to change unhealthy cultural practices. Traditions, customs, religious beliefs, and other ways of life may influence our behavior, but certainly they should not be allowed to serve as instruments in the denial of women's rights, property, and liberty. Let us demand and work for substantive equality between men and women, and among all women.

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SECTION FOUR

CONSTITUTIONS AND INTERNATIONAL LAW

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Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006

Verónica Undurraga and Rebecca J. Cook*

INTRODUCTION

In 2006, the Constitutional Court of Colombia declared unconstitutional a statute criminalizing abortion under all circumstances.¹ The Court ruled that abortion should be legally permitted when:

- 1) the continuation of pregnancy presents a risk to the life or physical or mental health of the woman;
- 2) there are serious malformations that make the fetus nonviable; or
- 3) the pregnancy is the result of a criminal act of rape, incest, unwanted artificial insemination or unwanted implantation of a fertilized ovum.

The Court held that banning abortion to protect fetal interests in these cases would violate women's fundamental rights, because criminalization under

* We would like to thank Mónica Roa and Daniel Bonilla for their helpful comments on this work. This final version is improved by their suggestions. Unfortunately, the introductory character of this text made it impossible to include all their insights on Colombian legal developments, which are certainly worthy of more thorough study and discussion.

¹ The Decision of C-355 of May 10, 2006, and many of the documents submitted to the Court, including the friends of the court (*amicus curiae*) briefs, are available in Spanish, and some in English, at: www.womenslinkworldwide.org. Excerpts, in both Spanish and English, are also available at the same web site. This is the fourth decision of the Colombian Constitutional Court on the constitutionality of criminal abortion legislation since the 1991 Constitution was enacted. In 1994, a divided Court ruled that the then existing law that criminalized abortion without exception was constitutional (Constitutional Court, Judgment C-133 of 1994). In 1997, the Court declared constitutional article 345 of the Penal Code that established attenuated penalties for women when the pregnancy was a result of violent or abusive carnal access or nonconsensual artificial insemination (Constitutional Court, Judgment C-013 of 1997). In 2001, the Court declared constitutional article 124 of the New Penal Code that allowed the judge to dispense with the punishment in cases the woman was "under extraordinary abnormal conditions of motivation." This requirement, which we literally translated from the Spanish wording of article 124, means that the woman should be experiencing extreme hardship. (Constitutional Court, Judgment C-647 of 2001).

such circumstances places a disproportionate burden on women's exercise of human rights protected by the 1991 Colombian Constitution and by international human rights law.

This paper analyzes how the Court protected the rights of pregnant women in the abortion context by incorporating regional and international human rights law within its judicial review of the abortion legislation, giving constitutional status to human rights treaties ratified by Colombia. It also describes the reasoning of the Court regarding the status of the unborn under Colombian and international law, the way the Court balanced the constitutionally required protection of the unborn with the rights of women, and the borrowings the Court made of comparative law and jurisprudence. It explains how the Court enriched the meaning of the dignity of women by interpreting constitutional provisions in light of international human rights sources with a feminist perspective, and laid a foundation for protecting the reproductive rights of women in countries that are parties to the treaties on which the Court relies.

This paper proceeds in four parts. Part I describes the facts of the case and the Court's decision. Part II analyzes the Court's reasoning in five sections. Section A analyzes how the Court incorporated international human rights law into domestic constitutional law by borrowing and transforming the French doctrine of the "constitutional block."² Section B addresses the Court's analysis of the status of unborn life under Colombian, comparative, and international law. Section C reviews the status of women in the Colombian Constitution and international human rights law, as described by the Court. Section D analyzes the use the Court made of the proportionality principle in the context of the legislature's discretion to criminalize abortion.³

Part III includes some reflections about how the interpretation of the Colombian Constitution in this case might or might not influence other constitutional abortion cases in Latin America. Part IV explores the originality of the Colombian decision in its use of international and comparative law and how its legal contributions might prove fundamental for the construction of arguments against the criminalization of hardship abortions in other Latin

² Sometimes "*bloc de constitutionnalité*" is translated as constitutional bundle. We prefer using constitutional block, which is most commonly used in official documents and academic journals translations. See, for example, the Colombian Fifth and Sixth Periodic Reports presented to the CEDAW Committee on its thirty seventh session, January 5 – February 15, 2007, at http://www.un.org/womenwatch/daw/cedaw/cedaw37/statements/delegations/Colombia_E_CONSEJERA.pdf [last visited December 29, 2007].

³ Following the decision's structure, we could have added here a section E describing the reading the Court made of comparative constitutional decisions on abortion. These decisions played a justificatory role allowing the Colombian Court to place itself within the global trend toward balancing women's rights and the protection of the unborn. However, to avoid repetition, we address the references to comparative decisions when discussing the arguments in sections A to D.

American jurisdictions. It concludes by describing the challenge that the current practice of incorporation of international law in domestic jurisdictions poses for feminist legal scholars to develop sounder normative foundations, which would secure the recognition of women's rights in the domestic, as well as in the international, sphere.

I. THE STRUCTURE AND SUMMARY OF THE DECISION

A. *The Facts*

A group of Colombian citizens, "the Plaintiffs,"⁴ filed an action before the Constitutional Court⁵ requesting the Court to declare unconstitutional the articles of the Colombian Penal Code that criminalized abortion. These provisions punished the pregnant woman who requested and underwent an abortion and the person who performed it with prison sentences of one to three years,⁶ or of four to ten years if the abortion was performed on a woman under the age of 14 years.⁷

The law allowed for a reduction of the prison sentence down to three-fourths of the original prison term if the pregnancy was the result of a criminally abusive non-consensual sexual act, of unwanted artificial insemination, or unwanted implantation of a fertilized ovum.⁸ Where abortion was performed under these circumstances and was carried out "under extraordinary abnormal conditions of motivation," the judge was allowed to dispense with the punishment, if he or

⁴ The plaintiffs were Mónica Roa, Program Director at Women's Link Worldwide, and students from Universidad de los Andes. The filing was part of a Women's Link's project on high impact litigation in Colombia. See <http://www.womenslinkworldwide.org>. See also, Mónica Roa, *Litigio de alto impacto en Colombia, la inconstitucionalidad del aborto, in Realidades y coyunturas del aborto. Entre el derecho y la necesidad* (Susana Checa, compiladora 2006).

⁵ Under Article 242 of the Colombian Constitution, citizens have access to the abstract judicial review procedure, which does not require them to await a concrete injury.

⁶ Article 122 states: "Abortion. The woman who causes her own abortion or permits another person performing it will be punished with imprisonment from one to three years. This same sanction will be applied to he who, with the consent of the woman, carries out the action noted in the prior sentence."

⁷ Article 123 states: "Abortion without consent. He who causes an abortion without the consent of the woman or in woman under fourteen years old will be punished with imprisonment from four to ten years." The penalties for abortion in article 122 and 123 of the 2000 Criminal Code were increased by a reform to the Procedural Code that increased the penalties for all crimes (article 14 of Law 890 of 2004). The plaintiffs and the Court used this reform as an argument to overcome the issue of *res judicata*. See Constitutional Court, Judgment C-355 of 2006, VI.4.

⁸ Article 124 states: "Mitigating circumstances. The punishment indicated for the crime of abortion will be lowered by three fourths where the pregnancy is the result of a conduct constituting abusive or non-consensual carnal or sexual access, or non-consensual artificial insemination or transfer of a fertilized ovum."

she deemed it unnecessary for that specific case.⁹ Finally, a general necessity defense could be claimed if the abortion was performed “out of the need to protect a right of the agent or of a third person from a present or imminent danger, which could not be avoided otherwise, and that the agent has not brought about intentionally or by his/her negligence and has no legal duty to assume.”¹⁰

The Plaintiffs asserted that the articles and paragraphs in question were in breach of the following constitutional rights: the right to dignity¹¹; the right to life¹²; the right to bodily integrity¹³; the right to equality and the general right to liberty¹⁴; the right to reproductive autonomy¹⁵; and the right to health.¹⁶ The Plaintiffs also asserted that those articles were in breach of various international human rights treaties that are part of the “constitutional block.”¹⁷

Furthermore, the Plaintiffs asserted that the provisions of the Penal Code criminalizing abortion were unconstitutional because they limited in a disproportionate and unreasonable manner the rights and liberties of the pregnant woman, even when she is a minor of less than 14 years of age. With regard to

⁹ Article 124 PAR states: “In the events of the prior paragraph [article 124], when the abortion is carried out under extraordinary abnormal conditions of motivation, the judge may forego the punishment when it is unnecessary in the concrete case at hand.”

¹⁰ Article 32 n°7 Absence of liability. There will be no criminal liability when . . . n°7 “acting out of the need to protect a right of the agent or of a third person from a present or imminent danger, which could not be avoided otherwise, and that the agent has not brought about intentionally or by his/her negligence and has no legal duty to assume.”

¹¹ Article 1 of the Constitution: “Colombia is a legal social state organized in the form of a unitary republic, decentralized, with the autonomy of its territorial units, democratic, participatory and pluralistic, based on respect of human dignity, on the work and solidarity of individuals who belong to it and the predominance of the general interest.”

¹² Article 11 states: “The right to life is inviolable. There will be no death penalty.”

¹³ Article 12 states: “No one will be subjected to forced imprisonment, nor submitted to torture or cruel, inhuman or degrading treatment or punishment.”

¹⁴ Article 13 states: “All individuals are born free and equal before the law and are entitled to equal protection and treatment from the authorities, and to enjoy the same rights, freedom and opportunities without discrimination on the bases of gender, race, national or family origin, language, religion, political opinion or philosophy. The state will promote the conditions necessary in order that equality may be real and effective, will adopt measures in favor of groups that are discriminated against or marginalized. The state will especially protect those individuals who on account of their economic, physical or mental condition are in obviously vulnerable circumstances and will punish any abuse or ill-treatment perpetrated against them.”

¹⁵ Article 42 establishes the constitutional protection of the family. This article includes the following provision: “[t]he couple has the right to decide freely and responsibly the number of their children and will have to support them and educate them while they are minors or non-self-supporting.”

¹⁶ Article 49 states: “Public health and environmental protection are public services for which the state is responsible. All individuals have guaranteed access to services that promote, protect and rehabilitate public health . . .”

¹⁷ Article 93 states: “International treaties and agreements ratified by Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international human rights treaties ratified by Colombia.”

the necessity defense of article 32, the Plaintiffs argued that it placed a disproportionate burden on women because to claim the defense, women would first have to resort to humiliating and potentially dangerous clandestine abortions.

B. *The Structure of the Decision*

The decision is divided into seven chapters. The first five chapters provide a description of the claim and the questioned Penal Code articles, and give a lengthy summary of arguments given by the plaintiffs, the government, the ombudsperson, and literally thousands of third-party interveners, which included national and international women's organizations, pro-life groups, churches, and medical organizations. The sixth chapter contains the reasoning of the Court. Finally, the seventh chapter states the holding of the Court.

C. *The Ruling of the Court*

In what follows, we briefly summarize the reasoning and holding of the Court, contained in Chapters VI and VII of the decision.

The Court began the review of the challenged legislation by making some general statements regarding the Constitution's stance on abortion. First, the Court explained that, according to the Constitution and to constitutionalized international human right provisions, the life of the unborn is a constitutionally protected legal good and, as such, the interruption of pregnancy cannot be considered *solely* a private matter of the pregnant woman falling within the protection of her right to the free development of her personality.

Second, the legislature may decide, although it is not obliged, to protect the unborn life by criminalizing infringing conduct.

Third, the Court envisioned the Constitution as a unified structure of values, principles, and rights. Accordingly, it affirmed the principle of proportionality, which assumes that there are no absolute values, principles, or rights. All must be harmonized with one another, and in the event of conflict, no one being right may be realized at the total expense of another.

Fourth, it is for the legislature to apply the proportionality principle in determining the cases in which it is not possible to require that the woman continue her pregnancy, because continuation would disproportionately affect her rights. The Court will only step in when it finds that the legislature has itself enacted a clearly disproportionate law that infringes fundamental rights.

Applying these principles, the Court found that the criminalization of abortion would be disproportionate when the continuation of pregnancy presents a risk to the life or physical or mental health of the woman, when there are serious malformations that make the fetus nonviable, and when the pregnancy

is the result of a criminal act of rape, incest, unwanted artificial insemination, or unwanted implantation of a fertilized ovum.

Disproportionality remains under these circumstances even if the abortion would attract only reduced penalties.

The Court applied several international human rights agreements to which Colombia is a party, including article 6 of the International Covenant on Civil and Political Rights (ICCPR)¹⁸ protecting the right to life, as interpreted by the Human Rights Committee's General Comment, number 6¹⁹; article 12.1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) protecting women's equality in accessing health care,²⁰ as interpreted by the Committee on the Elimination of Discrimination against Women's General Recommendation, number 19 on Violence against Women²¹; and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), protecting the right to the highest attainable standard of health²² as interpreted by the ICESCR Committee's General Comment, number 14.²³

¹⁸ Article 6.1 of the ICCPR states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR was ratified by Colombia on October 29, 1969.

¹⁹ General Comment N°6: The right to life (art.6): 30/04/82, declares in one of its paragraphs "[T]he Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."

²⁰ Article 12.1 of the CEDAW states: "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." The CEDAW was ratified by Colombia on January 19, 1982.

²¹ General Recommendation 19 (11th session), 2004, states regarding article 12 of the CEDAW: "States parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk," and also that "States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control. . . . States parties in their reports should state the extent of these problems and should indicate the measures that have been taken and their effect."

²² Article 12 of the ICESCR states: "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." The ICESCR was ratified by Colombia on October 29, 1969.

²³ General Comment N°14 contains explicit obligations states must respect, protect, and fulfill. Among other relevant provisions, paragraph 21, entitled "Women and the right to health,"

The Court concluded that these articles affirm a state duty to protect life and health (including mental health) and that the prohibition of abortion when the life or health of the pregnant woman is at risk may amount to a breach of this duty.

The possibility of claiming the necessity defense in article 32, number 7, of the Penal Code, still leaves criminalization in these extreme circumstances disproportionate. The Court considered that the necessity defense does not make abortion in such circumstances justified, as the Court considered it should be, but only excuses the woman for a wrongful act.²⁴ Being an excuse, the necessity defense applies only to the woman, leaving a professional who performs or assists the abortion at risk of professional discipline for a wrongful act. The necessity defense acknowledges that women cannot be required to engage in self-sacrifice or heroism by forgoing abortion in circumstances of unusual hardship.

Further, the Court found that this general defense provision is not well suited to the pregnant woman in the case of abortion, because it would unduly burden the woman to require her to comply with the strict requirements of the defense: to act out of the need to protect oneself or a third person from a present or imminent danger that could not be avoided otherwise, and to have not brought about the necessity intentionally or by one's negligence.

The Court also addressed the situation of a nonviable fetus; that is, a fetus that, once born has no chance of survival. The Court explained that in such cases the interest in preserving unborn life diminishes, and that requiring

states: "To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights." *E/C.12/2000/4. (General Comments)*.

²⁴ For an explanation of the difference between claims of justification and claims of excuse under continental criminal law, see *George P. Fletcher, Rethinking Criminal Law* 759–875 (1978). The consequences of the distinction between justification and excuse in the context of abortion regulation is clear from the 1993 German decision, which justified abortions only in cases of extreme hardship. Abortions performed during the first 12 weeks of pregnancy where no circumstances of hardship are present can only be excused, Judgment of 25 Feb. 1975, 39 BVerfGE I (1975), and Judgment of 28 May, 1993, 88 BVerfG, 203. An official English summary of this last decision can be found at http://www.bundesverfassungsgericht.de/en/decisions/fs19930528_2bvfo0029oen.html [last visited November 11, 2007].

the pregnant woman to continue her pregnancy and go through delivery of a nonviable fetus would amount to cruel and degrading treatment.²⁵

The Court held that article 122 of the Penal Code criminalizing abortion is constitutional only in so far as the legislature legalizes abortion in cases of risk to life or health of the woman, when there are serious malformations that make the fetus nonviable and when the pregnancy is the result of a criminal act of rape, incest, unwanted artificial insemination, or unwanted implantation of a fertilized ovum. The legislature may decide on additional cases that should deserve to be exempted from punishment. In consequence, article 124, stating the mitigating circumstances that would allow a reduced penalty, was also declared unconstitutional.

The Court decided that the expression “*or in women younger than 14 years old*” in article 123 of the Penal Code is unconstitutional. Article 123 criminalized abortion performed on a girl under 14 years even if she consented to it and even if the abortion was necessary to preserve the pregnant girl’s health. The Court ruled that this provision, although enacted to protect young women, is counterproductive and is unconstitutional because it affects the dignity, autonomy, and the right to free development of the personality of the pregnant girl.

²⁵ See, e.g., *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005) (In a case in which a 17-year-old Peruvian woman was denied legal abortion of an anencephalic fetus, the UN Human Rights Committee found violations to the rights to be free from cruel, inhumane, and degrading treatment, privacy, and special protection of the rights of a minor. It ordered the Peruvian government to provide KL with reparations, and to adopt the necessary regulations to guarantee access to legal abortion.) See also *Hospital Interzonal de Agudos Eva Perón de Gral. San Martín. Autorización*. Decision Ac. 85,566 of July 25, 2002 (available in Spanish at: <http://www.scba.gov.ar/home.asp>. [Last visited, December 5, 2007]), a Supreme Court decision of the Province of Buenos Aires that authorized a hospital to induce labor for Ms. C.R.O., who had been pregnant for thirty-two weeks, because the fetus had anencephaly – a pathology that consists in the absence of an important part of the brain. On the basis of a 2001 Argentine Supreme Court decision (“*T. S. c. Gobierno de la Ciudad de Buenos Aires*,” sentencia del 11-I-2001, available in Spanish at: http://www.csn.gov.ar/documentos/cfal3/toc_fallos.jsp. [Last visited December 5, 2007]), the Supreme Court of the Province of Buenos Aires argued that, in the case of a fetus with anencephaly, permitting a premature birth does not imply permitting an abortion. In the case at stake, this was so because the fetal death did not depend on a human action, but on the pathology. Postponing or advancing the birth does not change the situation of the fetus: had Ms. C.R.O given birth in the thirty-second week, the child would have died; and had Ms. C.R.O given birth in the thirty-sixth week, the child would have also died. According to the Supreme Court of the Province of Buenos Aires, the hospital was allowed to induce the birth because, had Mrs. C.R.O. continued with the pregnancy, she would have suffered serious psychological harm.

For an explanation of the Brazilian legal debate on anencephaly, see Debora Diniz, *Selective Abortion in Brazil: The Anencephaly Case*, 7(2) *Developing World Bioethics* 64–67 (2007).

Additionally, the Court was satisfied that the indications for lawful abortion would be met when a doctor certifies that there is a risk to the life or health of the pregnant woman or that the fetus is nonviable. In cases of rape and incest indications, the Court ruled that the good faith and responsibility of the pregnant woman shall be presumed and that all that is needed is that she exhibits to the doctor a copy of the criminal complaint.²⁶ It also explained that conscientious objection to participate in abortion is confined to individuals, and not available to institutions. Providers who object on grounds of conscience are required to refer pregnant women to practitioners who will perform the procedure. Finally, the Court ruled that social security or health regulations concerning abortion shall neither disproportionately burden the rights of women nor create access barriers to abortion, when legal. Consequently, no spousal or third-party consent is required. Regarding abortion for women under 14 years, the newly enacted regulations require parental authorization for the procedure, except when the urgency of the case demands an immediate abortion.²⁷ Legal abortions are covered by the social security system.²⁸

II. THE COURT'S REASONING

This part addresses the four main reasons on which the Court grounded its decision.

²⁶ Constitutional Court, Judgment C-355 of 2006, par. 10.1. In a 1993 decision, the Constitutional Court had granted an order against the enforcement of prison regulations requiring women inmates to be fitted with an IUD or take contraceptives as a condition of conjugal visits. The Court ruled that assuming that a woman inmate would try to get pregnant to escape punishment violated article 83 of the Colombian Constitution, which requires public authorities to presume the good faith of individuals in all actions that come before them. See Constitutional Court, Judgment T-273 of 1993.

²⁷ See paragraph 6.3.3. of the Colombian Technical Regulation for the Voluntary Interruption of Pregnancy (*Norma Técnica para la Interrupción Voluntaria del Embarazo IVE*), Bogotá. D.C., 2006, at <http://www.despenalizaciondelaborto.org.co/page.php?mod=noticias&idfat=3&idsec=18>. After requiring parental consent for women under 14, this paragraph adds that “in any case, the right of the patient to self-determination should be balanced against the protection of her health, avoiding to infringe the consent of the minor of less than fourteen.” The legality of this ambiguous provision could be challenged before the *Consejo de Estado*.

²⁸ See Regulation n° 4905/2006 from the Colombian Ministry of Social Protection and its annexes, at <http://www.despenalizaciondelaborto.org.co/page.php?mod=noticias&idfat=3&idsec=17> (in Spanish). This regulation adopts the World Health Organization's guidance contained in the document *Safe Abortion: Technical and Policy Guidance for Health Systems*, (Geneva: WHO, 2003) and defines the quality standards to guarantee the rights protected by Judgment C-355 of 2006. Among other provisions, it mandates the training of health providers, orders abortions to be conducted within five days after they were requested, and requires public and private health providers to report the procedures for statistical recording and allow the supervision of access and quality of services.

A. *The Incorporation of International Human Rights Law into Domestic Constitutional Law*

The enactment of the 1991 Colombian Constitution marked a turning point in the recognition of international human rights in Colombia. The Colombian constitutional process was part of a regional wave of “new constitutionalism” that took place in Latin America in the eighties and nineties. Many countries of the region were going through their political transitions to democracy after decades of dictatorships, whereas others like Colombia, were negotiating new constitutional processes with different political and social actors.²⁹ One of the distinctive features of the Latin American constitutions or constitutional reforms enacted during this period is the incorporation of international human rights into domestic constitutional law.³⁰

This general willingness to submit to international standards in human rights protection arose from the proved inability of domestic institutions to prevent or stop the massive human rights violations led by state officials in many Latin American countries in the seventies and eighties. The recognition of international bills of rights and supranational courts shows the commitment of the new democratic governments to respect their peoples’ civil and political,

²⁹ “On July 4 1991, the National Constituent Assembly issued a new Political Constitution for Colombia. No previous constitutional reform in the life of the Colombian Republic had generated so many expectations and hopes as did the constitutional process of 1991. The initial inspiration for this reform was the assassination of the liberal leader Luis Carlos Galán by hired assassins of the drug trade in August 1989, and the former student movement (known as the “movement for the seventh ballot”) that pressured the government of President Virgilio Barco to issue measures that allowed a meeting of the National Constituent Assembly. The Assembly was composed by delegates that represented the most diverse social and political sectors of Colombia; the workers, the students, the traditional political class, the academics, the indigenous (whom, for the first time, participated in the decision making process of this importance) and representatives of the recently demobilized guerrilla group M-19.” Esteban Restrepo, *Reforma Constitucional y Progreso Social: la “constitucionalización de la vida cotidiana” en Colombia*, at Seminario en Latinoamérica de Teoría Constitucional y Política (SELA) 2002 -El Derecho como Objeto e Instrumento de Transformación-, Ed. Del Puerto, año 2003, pp. 73–89. (English translation available at <http://islandia.law.yale.edu/sela/restrepoe.pdf> [last visited November 11, 2007]). However, “[d]espite the broadly proclaimed representativeness of the 1991 constituent assembly, women were vastly underrepresented – only four of the seventy-four members were women. But women and organizations advocating their causes were active outside the assembly as well. They participated in the official worktables organized, regionally and by sector, to collect citizen proposal for constitutional change. As a result of advocacy and lobbying activities, they obtained support for much of their agenda from both men and women within the assembly.” Martha I Morgan, *Emancipatory Equality. Gender Jurisprudence under the Colombian Constitution in The Gender of Constitutional Jurisprudence*, 75–98, at 75 (Beverly Baines and Ruth Rubio-Marín, eds. 2005).

³⁰ See, for example, article 52 of the Chilean Constitution; article 75 n°22 of the Argentinean Constitution; article 46 of the Nicaraguan Constitution; article 5 of the Brazilian Constitution; Article 17 of the Ecuadorian Constitution; and, article 23 of the Venezuelan Constitution.

and social and economic rights, and to become reputable members in the global community.

In the Latin American context, the commitment to human rights may be a more significant feature of democratic regimes *vis a vis* dictatorships, than the simple fact of representative government. This is in part due to the elitist character of most elective bodies in the region. For this reason, and as paradoxical as it may seem in the Latin American political discourse, disputes over the democratic deficits involved in the process of insulating constitutional and international human rights from the political process, are many times considered to be overly academic.³¹

Women's rights advocates see in this incorporation an attractive opportunity. They are making strategic use of the domestic and international fora, relying more on the broader range of women's rights recognized by international treaties, and the comparatively stronger international enforcement mechanisms.³²

The 1991 Colombian Constitution explicitly refers to the incorporation of international human right treaties into domestic legislation. Article 93 states that

“[i]nternational treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.”³³

However, this provision has to be harmonized with the apparently contradictory supremacy clause of the Colombian Constitution. Article 4 declares that “[t]he Constitution is the supreme law. In all cases of incompatibility

³¹ Another important reason for incorporating international human rights law into Latin American Constitutions was the fear of resurgence of non-democratic forces. Entering into human right treaties and giving them constitutional status increases the costs for non-democratic forces to exit those arrangements. See Mattias Kumm, *Democratic constitutionalism encounters international law: terms of engagement in The Migration of Constitutional Ideas* 256–293 (Sujit Choudhry, ed. 2006).

³² See Ruth Rubio-Marín and Martha I. Morgan, *Constitutional Domestication of International Gender Norms: categorizations, illustrations and reflections from the nearside of the bridge in Gender and Human Rights* 113–52 (Karen Knop, ed. 2004).

³³ Also, see article 53 (stating that labor law should take into account duly ratified international labor agreement as part of domestic legislation), article 94 (stating that the enunciation of rights and guarantees contained in the Constitution and international agreements in effect should not be understood as a negation of others that, being inherent to the human being, are not expressly mentioned in them), and article 214 (stating that human rights and fundamental freedom may not be suspended during the states of emergency and that a statutory law will regulate the powers of government during the states of emergency and will establish the legal controls and guarantees to protect rights, in accordance with international treaties).

between the Constitution and the law or any other legislation or regulation, the constitutional provisions will apply. . . .”

The Colombian Constitutional Court resolved the apparent contradiction by borrowing a French doctrine and technique called “*bloc de constitutionnalité*.”³⁴ The constitutional block doctrine originated in France in the late seventies³⁵ to designate all rules that are binding on the legislature. The role of the constitutional block doctrine in France can be described as the expansion of the idea of the constitution from a formal constitutional text to an idea of a constitutional fabric formed by a weaving of different sources. These include the French Constitution of 1958, the 1789 Declaration of the Rights of Man and the Citizen, the Preamble of the 1946 Constitution, and a discrete number of “fundamental principles recognized by the laws of the Republic.” All these different sources of rules are in the same constitutional hierarchy. International law has not been considered part of the French constitutional block.³⁶

In Colombia, as well as in other Latin American countries, the doctrine of the *bloque de constitucionalidad* is applied to incorporate within the ensemble of constitutionalized provisions those human rights and humanitarian laws contained in international treaties. From the first use of the doctrine in a 1995 decision,³⁷ until the present, the Colombian Constitutional Court has thoroughly refined the content of the doctrine in Colombian law.³⁸

³⁴ “How to harmonize, then, the norm of article 93 that gives priority and supremacy in the domestic order to some contents of human right treaties, with article 4 that establishes the supremacy not of treaties, but of the Constitution? The Court considers that the notion “constitutional block” that comes from French law, but that has gained ground in comparative constitutional law, makes possible the harmonization of apparently contradictory principles and rules of articles 4 and 93 of our Charter.” Constitutional Court, Judgment C-225 of 1995.

³⁵ Luis Favoreau and Francisco Rubio Llorente, *El Bloque de la Constitucionalidad*. Simposium Franco-Español de Derecho Constitucional, Civitas, Madrid, 1991, pp. 17–19.

³⁶ In the early eighties, the notion of constitutional block began to be used by the Constitutional Court in Spain, but with an altogether different meaning. In Spain, all fundamental rights are found in the formal Constitution, so it would make no sense to borrow the French “*bloc de constitutionnalité*” with its original meaning. However, Spain has an analogous need to unify its constitution with other provisions in the field of the delimitation of competence between Spain and its autonomous territories. See, for example, the following Spanish decisions, STC 137/1986, STC 27/1987, STC 163/1995 and STC 274/2000, all of them using the constitutional block doctrine in claims regarding autonomous territories. Under the Spanish meaning, international law does not enter the constitutional block, either.

³⁷ Constitutional Court, Judgment C-225 of 1995.

³⁸ See Alejandro Ramelli, *Sistema de Fuentes del Derecho Internacional Público y Bloque de Constitucionalidad en Colombia*, 11 *Cuestiones Constitucionales* 157–175 (julio-diciembre 2004), (available at <http://info.juridicas.unam.mx/publica/rev/const/cont/11/ard/ard5.htm> [last visited November 11, 2007]). See also Rodrigo Uprimny, *Bloque de Constitucionalidad, Derechos Humanos y Nuevo Procedimiento Penal*, en *Reflexiones sobre el nuevo Sistema Procesal Penal. Los grandes desafíos del Juez Penal colombiano* 25–72 (Bogotá, Escuela Judicial Rodrigo Lara Bonilla, 2004); Rodrigo Uprimny; *El bloque de constitucionalidad en Colombia: un análisis*

Generally, according to its current meaning, all human right treaties ratified by Colombia are part of the constitutional block, with some subtle variations. The Inter-American Court's case law is not part of the constitutional block, but is considered an important interpretative tool.³⁹ Recommendations and other nonbinding documents issued by treaty bodies, such as the Inter-American Commission on Human Rights, may also be taken into account in interpreting the rights contained in the Colombian Constitution, but also are not part of the constitutional block.⁴⁰

As part of the Colombian constitutional block, international human rights are expected to limit the exercise of the legal competence of domestic authorities and serve as a guide for the making and execution of public policies, in the same way that formal constitutional provisions do.

The constitutionalization of international human rights law by the Colombian Constitutional Court has given an extraordinary dynamism to Colombian constitutional jurisprudence. The incorporation of the principles of CEDAW into the new Constitution was one of the fundamental contributions of women's rights activists during the constitutional process. On the right of equality, for example, the Colombian Constitution assimilated CEDAW's dual strategy of prohibition of discrimination against women and approval of special positive measures as a means of assuring substantive rather than merely formal equality. This embodiment of CEDAW's principles into the Constitution has encouraged the region's most progressive jurisprudence on women's rights.⁴¹

Even more, victims of human rights violations know that they can petition the Inter-American Commission of Human Rights when they do not find redress in their own judicial systems. They know they can eventually reach the Inter-American Court, in a process that authors have assimilated into an "Inter-American Bill of Rights,"⁴² and obtain a decision that is enforceable

jurisprudencial y un ensayo de sistematización doctrinal, at "Compilación de Jurisprudencia y Doctrina Nacional e Internacional" en *I Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos 100* (Alejandro Valencia Villa, ed. 2002) Both articles available at http://dejusticia.org/equipo/publicaciones.php?aut_id=8.

³⁹ Constitutional Court, Judgment C-355 of 2006, par. 8.4

⁴⁰ "[I]nternational jurisprudence is a relevant guide for the interpretation of international treaties provisions that are part of the constitutional block, which is different than saying that those decisions are directly part of the constitutional block." *Id.*

⁴¹ Rubio-Marín and Morgan, *supra* note 32, 120. For an analysis of the 1991 Constitution and a review of some of the gender jurisprudence under it, see Martha Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution in The Gender of Constitutional Jurisprudence*, *supra* note 29.

⁴² Giancarlo Rolla, *La Concepción de los Derechos Fundamentales en el Constitucionalismo Latinoamericano*, Ponencia desarrollada en el VIII Congreso nacional de derecho constitucional, Arequipa, 2005, available in Spanish at <http://www.costituzionale.unige.it/>

in their countries. It is predictable that such adjudication could lead to a process of homogenization of constitutional jurisprudence regarding human rights in the region.⁴³ Increasingly, cross-fertilization of ideas is taking place in the region, and decisions like the Colombian Constitutional Court's on abortion are carefully studied and cited in domestic judicial processes in other Latin American countries,⁴⁴ and are cited by international treaty monitoring bodies.⁴⁵

However, these processes of constitutionalization of international human rights law have raised very difficult theoretical and practical questions that are not yet fully addressed in Latin America.⁴⁶

crdc/docs/articles/Rolla3.pdf, page 13 (citing authors such as Mauro Cappelletti, *Dimensiones de la Justicia en el Mundo Contemporáneo* 45ss (1992); Vicente Gimeno Sendra – L.L. José Galeni, *Los Procesos de Amparo* 237ss (1994)).

⁴³ Complaints submitted to other quasi-judicial bodies such as the Human Rights Committee, or settlements before the Inter-American Commission on Human Rights may lead to the same results. For the former, see, for example, *K.L. v. Peru* CCPR/C/85/D/1153/2003 (2005), *supra* note 25. In November 2007, a similar complaint was declared admissible by the Human Rights Committee against Argentina for denial of legal abortion to a young woman notwithstanding that the Supreme Court of the Province of Buenos Aires had ordered the procedure to be performed. See <http://www.pagina12.com.ar/diario/elpais/1-95267-2007-11-26.html>. For a landmark settlement reached with Mexico in a case where a 13-year-old girl was raped and denied a legal abortion. See Informe N° 21/07, Petición 161/02 Solución amistosa Paulina del Carmen Ramírez Jacinto – México, 7 de marzo de 2007, (available in Spanish at <http://www.cidh.org/annualrep/2007sp/Mexico161.02sp.htm> [last visited December 3, 2007].)

⁴⁴ See, for example, the case documents of the lawsuit challenging the constitutionality of Law N° 603/2006, which eliminated from the Penal Code of Nicaragua the article that allowed abortion when a woman's life or health are in danger and made abortion a felony under all circumstances (available in Spanish only at http://www.womenslinkworldwide.org/sp_proj_TA_Nicaragua.html [last visited November 11, 2007]); Erdman, J.N. & R.J. Cook. *Amici Curiae Submission to the Supreme Court of Justice of Nicaragua regarding the Interpretation of Article 4(1) of the American Convention on Human Rights Compatible with the Human Rights of Women*, 19 pp. submitted in English and Spanish, March 29, 2007; online at: <http://www.law.utoronto.ca/documents/reprohealth/BriefNicaraguaEng2007.pdf>.

See also the case documents in a lawsuit challenging the liberal abortion law of Mexico City, *Re Mexico, Federal District. Decree Reforming the Federal District Penal Code and Amending the Federal District Health Law. Official Gazette of the Federal District. No. 70. April 26, 2007, Accion de Inconstitucionalidad 146/2007.*

See also the Argentinean case Suprema Corte de Justicia de la Provincia de Buenos Aires, R.L.M., 31/07/2006 LLBA 2006 (agosto), in which the Justices concurring with the majority, cited the Colombian Court Decision and recommendations made by the Human Rights Committee to Argentina regarding access to legal abortion.

⁴⁵ See, e.g., CEDAW's Concluding Observations to Colombia's Report at CEDAW/C/COL/CO/6 (2007).

⁴⁶ See Mattias Kumm, *supra* note 31, 256–257 “One of the most pressing questions of contemporary constitutional law is how to think about the relationship between the national constitution and international law.”

The first problem refers to the status in the hierarchy that international human rights law is given when incorporated into domestic law. The Colombian Court places international human right treaties in the same constitutional hierarchy as provisions of the Colombian Constitution. The metaphor of the constitutional block is eloquent in the meaning of this assimilation. The constitutional block doctrine does not fit within the traditional understanding of the application of international law by domestic courts as a vertical process of “compliance” or “enforcement” of binding international legislation.⁴⁷ This is because international law has no precedence over Colombian domestic constitutional laws. Under the constitutional block doctrine, international and domestic laws are intermingled in their interpretations, with neither keeping its original meaning after their fusion. There is a horizontal mutual influence between the international and the domestic, a process of translation that operates both ways.

The potential for creativity and uncertainty inherent in the constitutional block doctrine, as applied by the Colombian Court, is enormous.⁴⁸ It is a double-edged sword. On the one hand, this highly interactive relationship between domestic and international law may create space for a more culturally respectful application of international law in the local scene.⁴⁹ On the other hand, the application of the constitutional block doctrine does not provide procedures to curb implausible interpretations of international law as happened, for example, when the Supreme Court of Costa Rica interpreted

⁴⁷ “The traditional model of international law in domestic courts facilitates this understanding because it revolves around binding law that applies in an all-or-nothing fashion. Once an international law is binding on a domestic judge, she has no discretion in how it applies.” Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. Int’l L. & Policy* 503 (2000). The conditions for such understanding are not present in contemporary international law in the field of human rights. Human rights law differs from the traditional conception of international law in that it is not narrowly circumscribed by the domain of foreign affairs, it has loosened its link to state consent, and has strengthened compulsory adjudication and enforcement mechanisms. See Mattias Kumm, *supra* note 31 at 256.

⁴⁸ The application of international law to rule on the constitutionality of an abortion regulation is not only an instance of enforcement of international law. It is also a moment of creation of the meaning of international law, because according to article 38.1 (d) of the Statute of the International Court of Justice, domestic jurisprudence is a secondary source of international law. Knop writes: “If the particularization of international law by one domestic court thus begins a dialogue, real or imagined, with another domestic court, it also begins a dialogue with international law as a whole. Since domestic decisions are a secondary source of international law, their multiplication of meaning complicates meaning in international law generally.” Knop, *supra* note 47 at 533.

⁴⁹ “We might value the hybridity of domestic decisions as a source of alternatives that helps other domestic courts to particularize international law in a way that makes sense to them.” Knop, *supra* note 47 at 533.

article 4.1 of the ACHR as protecting the unborn from the moment of conception, and declared unconstitutional a decree regulating in vitro fertilization techniques.⁵⁰

The problem arises when an article of a constitution is inconsistent with a human rights treaty provision, and there is no possible harmonization that may resolve the inconsistency. In that case, giving priority to the treaty looks very similar to creating an alternative procedure of constitutional reform, one that was not approved at the moment of adoption of the constitution.⁵¹ But, giving priority to the constitution might not be a safe solution. If the constitution prevails, the state may be breaching its treaty duties and incurring international liability. Article 27 of the Vienna Convention on the Law of Treaties⁵² specifies that a Party may not invoke the provisions of its internal laws as justification for its failure to perform treaty obligations. Moreover, the Inter-American Court of Human Rights, based on article 2 of the ACHR,⁵³ has ruled that State Parties oblige themselves to suppress rules and practices of any kind that entail the violation of the guarantees set forth in the Convention, and to issue rules and develop practices leading to the effective observation of the said guarantees.⁵⁴ This obligation is also applicable to constitutional provisions.⁵⁵

Additionally, it is not only the combined interpretation of domestic and international sources that create uncertainty. Rubio-Marín and Morgan warn us that “when [there are] several fundamental rights in tension and there are

⁵⁰ Judgment 02306, expediente 95-001734, March 15, 2000. A petition against this judgment was filed before the Inter-American Commission on Human Rights, and declared admissible. See Ana Victoria Sanchez Villalobos y otros v. Costa Rica, Caso 12.361, Informe No. 25/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 en 201 (2004).

⁵¹ For this reason, the Constitutional Court of Guatemala ruled that article 46 of the Constitution of Guatemala gives human rights treaties a hierarchy superior to ordinary legislation, but not superior to the Constitution. See judgment of October 19, 1990 (Expediente 18-90, Gaceta No. 18).

⁵² Article 27 “Internal Law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (. . .).”

⁵³ Article.2 “Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

⁵⁴ See Advisory Opinión OC-18/03, September 17, 2003 and cases cited therein.

⁵⁵ See, e.g., Case “The Last Temptation of Christ” (Olmedo Bustos, et al.). C. N°73, par. 87, February 5, 2001, where the Inter-American Court of Human Rights ruled that by maintaining cinematographic censorship in article 19 N°12 of the Chilean Constitution, the state failed to comply with the obligation to adapt its domestic law to the Convention to make effective the rights embodied in it, as established in Articles 2 and 1(1) of the Convention.

different human rights instruments, calling on human rights to complement constitutional rights will not by itself predetermine the result, as the court is in principle free to choose which of the international instruments it will rely upon in deciding how to interpret the relevant constitutional provision.”⁵⁶

Another problem with the constitutionalization of international human rights law is that it intensifies the counter-majoritarian tension that the recognition of constitutional rights already brings into democratic regimes. In the Latin American reality of weak democratic institutions, international human rights law has had a fundamental role in the building of conditions necessary for better democracies and the inclusion of vulnerable groups into the political community.⁵⁷ However, this empirical recognition should not make us forget that constitutionalization also has the potential of reducing the importance of legislative deliberation, and of entrusting important political decisions to non-elected judges.⁵⁸

Even though the incorporation of international human rights law into domestic law is distinctive in the new Latin American constitutionalism, its theoretical foundation needs further development. The constitutional block doctrine still is, as a Spanish author puts it, not as much the name of a clear conceptual category, as the enunciation of a complex problem.⁵⁹

B. *The Status of Prenatal Life under the Colombian Constitution and Constitutionalized Human Rights Treaties*

The Colombian Constitutional Court determined the status of prenatal life under the constitution. Drawing from the Constitution’s preamble,⁶⁰ and

⁵⁶ Ruth Rubio-Marín and Martha I. Morgan, *supra* note 32 at 143.

⁵⁷ This is reflected in the progressive jurisprudence of the Colombian Constitutional Court regarding ethnic and sexual minorities. See, for example, Constitutional Court, judgment C-075 of 2007 (extending application of law regulating domestic partnerships to same sex couples).

⁵⁸ See Mariano Fernández-Valle, *La supremacía internacional y la construcción justa de soberanía política: ¿hacia dónde vamos?* in: *Seminario Internacional Justicia y reparación para mujeres víctimas de violencia sexual en contextos de conflicto armado interno* 155–70 (2007).

⁵⁹ Francisco Rubio Llorente, *Ponencia Española en Louis Favoreau and Francisco Rubio Llorente*, *supra* note 35 at 109.

⁶⁰ Preamble: “In the exercise of their sovereign power, represented by their delegates to the National Constituent Assembly, invoking the protection of God, and in order to strengthen the unity of the nation and ensure its members’ life, peaceful coexistence, work, justice, equality, knowledge, freedom, and peace within a legal, democratic, and participatory framework that may guarantee a just political, economic, and social order and committed to promote the integration of the Latin American community, decree, sanction, and promulgate the following Political Constitution of Colombia.”

articles 2⁶¹ and 11,⁶² among other provisions, the Court concluded that life is one of the basic values of Colombian constitutional law, and that the state is under the obligation to protect it.

The Colombian Court borrowed heavily from the German⁶³ and Spanish⁶⁴ constitutional decisions on abortion. As the German and the Spanish constitutional tribunals did with regard to their own constitutions, the Colombian Court said that life under the Colombian Constitution has a double facet. On the one hand, it is the source of a subjective right to life of individual bearers. On the other hand, it is the source of an objective state duty to protect life that would not necessarily depend on the existence of a bearer.⁶⁵

To understand the reach of the state's duty to protect life in its double meaning, as a value and as an individual right, it is important to remember that Colombia's legal and constitutional tradition shares what in North America is called the "Continental" or "European" understanding of law. Under this conception, the legal system is a complete unit of principles and rules, all grounded on a set of fundamental values that may be inferred from the constitutional text and spirit. Consequently, constitutional interpretation emphasizes the purposive and systematic methods toward harmonization of all its components, including negative and affirmative rights, and other constitutional values.⁶⁶

The Court clarified that only born persons can be bearers of the subjective right to life. The life of the unborn, however, is a constitutional objective value, and, as such, is under the protection of the state.⁶⁷

The Court also said that the state's duty to protect life involves not only the provision of care to the pregnant woman,⁶⁸ but also the enactment of laws that prohibit the state's and third persons' direct interventions in developing life.

⁶¹ Article 2: "The authorities of the Republic are established in order to protect all persons residing in Colombia, their life, dignity, property, beliefs, and other rights and freedoms, and in order to ensure the fulfillment of the social duties of the state and individuals."

⁶² Article 11: "The right to life is inviolable. There will be no death penalty."

⁶³ Judgment of 25 Feb. 1975, 39 BVerfGE I (1975), and Judgment of 28 May, 1993, 88 BVerfGE 203, *supra* note 24.

⁶⁴ Judgment 53/85 of April 11, 1985.

⁶⁵ Constitutional Court, Judgment C-355 of 2006, par. 5.

⁶⁶ It is important to note, however, that contemporary Colombian constitutional law is also heavily influenced by Common Law jurisprudence, being that the Constitutional Court case law is an interesting forum where cross-fertilization between both traditions takes place. We thank Daniel Bonilla for calling our attention to this point.

⁶⁷ Constitutional Court, Judgment C-355 of 2006, par. 5.

⁶⁸ Article 43 of the Colombian Constitution states: "Women and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination. During their periods of pregnancy and following delivery, women will benefit from the special assistance and protection of the state and will receive from the latter food subsidies if they should thereafter find

Within constitutional limits, it is for the legislature to decide on the measures the state should take to effectively comply with its duty. Exceptionally, these measures may include the use of criminal law, when no other alternative provides adequate protection to unborn life.⁶⁹ However, the legislature must take into account that the intensity of the legal protection of life varies according to life stages, and that unborn life is accorded a weaker degree of protection than born life.⁷⁰

Like the German and Spanish courts, the Colombian Court found that unborn life has constitutional status. The German court did not rule on whether the fetus has a subjective right to life. This omission had no bearing in the final ruling because, for the German court, there is no difference in the degree of protection the state must give to constitutional subjective rights and objective values. For the German court, fetal development is a unitary process and no distinction can be made between individual stages of developing life, or between prenatal and postnatal life. In Spain and Colombia, on the other hand, the courts were explicit in saying that the unborn has no subjective right to life, but that the life provisions of their constitutions entailed a protection of unborn life as an objective value. However, there is a subtle difference between the Spanish and the Colombian courts. Only the latter explicitly concluded from the subjective/objective distinction that unborn life should be accorded a weaker degree of protection than born life. In Spain, the same conclusion has been implied but not made explicit.

The status of the unborn in these three countries is radically different from the status of the unborn in the United States. The U.S. Supreme Court concluded that the protection of the life of the unborn is not constitutionally required because the unborn are not bearers of constitutional rights.⁷¹ This conclusion is consistent with a conception of constitutional law that allows only for subjective constitutional rights as a source of state duties of protection. The U.S. Supreme Court acknowledged that a state may have a legitimate interest in protecting unborn life.⁷² Restrictions on abortion to protect the unborn will be upheld if they do not unduly burden the pregnant woman's rights.⁷³ However, the Supreme Court cannot *require* the state to protect unborn life as a constitutional mandate, even after viability.

themselves unemployed or abandoned. The state will support the female head of household in a special way.”

⁶⁹ Constitutional Court, Judgment C-355 of 2006, par 5.

⁷⁰ *Id.*

⁷¹ *Roe v. Wade*, 410 U.S. 113 (1973)

⁷² *Id.*

⁷³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Although access to legal abortion is broader in Germany than in Colombia, the different degree of protection that the Colombian Court grants to unborn and born life leaves the Colombian decision, from an ideological point of view, in the middle ground between the contrasting stance of the United States and Germany on abortion regulation.

The Colombian Court also reviewed the status of prenatal life under international human rights law, ruling that neither article 6 of the ICCPR⁷⁴ nor article 1 of the CRC⁷⁵ consider the unborn to be a holder of the right to life.

Considering article 4.1 of the ACHR, which states “[e]very person has the right to have his life respected. This life shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life,” the Colombian Court held that the article did not imply an absolute or unconditional duty to protect the life of the unborn fetus.⁷⁶

The Court said that constitutional provisions and international human rights, which are part of the constitutional block, must be interpreted contextually and harmoniously. That interpretation requires balancing the value of unborn life with other rights, principles, and values contained in the 1991 Constitution and human rights treaties. According to the Court, such balancing implies the recognition and weighting of the rights of the pregnant woman, which are in conflict with the duty to protect [unborn] life.⁷⁷

C. The Status of Women’s Rights under the Colombian Constitution and Constitutionalized Human Rights Treaties

The Court spoke eloquently on the status of women’s rights under the Colombian Constitution, noting the express constitutional mandate toward achieving substantive gender equality and the need to take into consideration the special needs of women.⁷⁸

⁷⁴ Article 6.1: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

⁷⁵ Article 1: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

⁷⁶ Curiously, the Court did not cite the “Baby Boy” case, decided by the Inter-American Commission of Human Rights, which reached the same conclusion. Resolution 23/81, Case 2141 (United States), March 6, 1981.

⁷⁷ Constitutional Court, Judgment C-355 of 2006 par. 6.

⁷⁸ “The 1991 Constitution expressly sets out the goal of recognizing and enhancing the rights of women, as well as of reinforcing these rights by protecting them in an effective and decisive manner. Thus, women are now entitled to special constitutional protection and their rights must be recognized and protected by government authorities, including those within the legal system, without exception. . . . It is worth noting that there are situations that affect

The Court found that the recognition and protection of women's reproductive rights are inferred from the protection of other rights contained in international treaties, such as the rights to life, health, equality, the right to be free from discrimination, the right to liberty and bodily integrity, and the right to be free from violence. One of the most noteworthy aspects of the Colombian Constitutional Court's decision is the way the Court developed a gender-sensitive analysis of the meanings these rights have for women in the context of their sexual and reproductive lives.

The Court grounded the protection of reproductive rights in the Universal Declaration of Human Rights, the ICCPR, the ICESCR, the CEDAW, and the Belem do Pará Convention. It also referred to international bodies' interpretations of these rights as applied to women, and to their recommendations to State Parties. The Court relied on the UN World Conferences on Women as "providing an essential framework for interpreting the rights contained in the international treaties themselves,"⁷⁹ and reviewed the advancement of women's rights from the 1968 Teheran Conference to the 1995 Women's Conference in Beijing.

The Court concluded that "women's sexual and reproductive rights have finally been recognized as human rights, and, as such, they have become part of constitutional rights, which are the fundamental basis of all democratic states."⁸⁰ Further, the Court explained that

[s]exual and reproductive rights also emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice.⁸¹

The Court explained that the rights of women limit the legislature's power to criminalize abortion. The protection of prenatal life must be balanced with the state's duty to ensure pregnant women's dignity, autonomy and their rights to life, health and personal integrity.

Considering the declaratory language the Court used to refer to women's equality under the Constitution, and the opportunity the Court had to apply its own case law on gender equality,⁸² and the CEDAW (especially articles 5

women differently and to a greater extent, like those that affect their lives and particularly those concerning their bodies, their sexuality and their reproduction." Constitutional Court, judgment C-355 of 2006 par. 7.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Morgan, *supra* note 29.

on stereotypes, and 12 on health), it is curious that the holding of the abortion decision did not invoke the duty of the state to eliminate all forms of discrimination against women, the right to equal treatment of men and women, or the equal treatment of subgroups of women. There seems to be no clear explanation for this omission other than the inability to discern gender bias in its criminal prohibition of abortion or formulate an appropriate equality analysis, or the lack of support for such reasoning among the Court's majority.

Had the Colombian Constitutional Court explicitly ruled that the right of women to be free from all forms of discrimination requires the government to liberalize its abortion law, the part of its decision addressing reproductive rights would have been stronger. It would have required an examination of how the causes of gender inequality in the health care system, laws, and policies are part of the problem. The development of the equality reasoning as part of its holding would have been an important way of recognizing that reform of abortion laws is necessary, not only to improve women's health, but also to transform the patriarchal nature of the Colombian abortion law, and to achieve substantive equality for women.⁸³

First, the Court missed an opportunity to explain that ignoring high rates of unsafe abortions, subjecting women to dignity-denying treatment in their various pathways to abortion, and censoring women's agency are all forms of discrimination that the government is obligated to remedy under the Constitution and under its commitments to comply with various international human rights treaties. The CEDAW General Recommendation 24, developed by the Committee on the Elimination of Discrimination against Women to elaborate on the content and meaning of article 12, states this most specifically.⁸⁴ Had the Court included such a holding in its judgment, it would have led the way in showing that permissive abortion laws are necessary to achieve substantive equality for women.

Second, restrictive legislation on abortion forces women to rear children, thus reflecting pervasive and persistent stereotypes about women's proper

⁸³ See generally Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261 (1992); Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *Emory Law Journal* 815–842 (2007); Rebecca Cook & Susannah Howard, *Accommodating Women's Differences under the Women's Anti-Discrimination Convention*, 56 *Emory Law Journal* 1039–1091 (2007); Catherine MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale Law Journal* 1281 (1991). See also *Morgentaler v. Queen*, [1988] 44 D.L.R. 419 at 491 (Justice Wilson, concurring).

⁸⁴ Comm. on the Elimination of Discrimination against Women, Gen Rec 24: Women and Health, U.N. Doc. A/54/38 Rev. 1 (1999), para 14.

roles and infringing women's right to autonomy in ways that men never experience.⁸⁵ A decision by the Constitutional Court reviewing the constitutionality of legal endorsement of such stereotypes would have recognized the gender-based injuries that such endorsement inflicts on women throughout Latin America. Had the Court ruled that stereotyping women into childbearing, service roles through restrictive abortion laws is a form of discrimination that governments are obligated to remedy,⁸⁶ it would have strengthened its equality jurisprudence.

Third, restrictive abortion regulations disproportionately affect poor, young, rural, indigenous women, and those displaced by violence.⁸⁷ Selective enforcement and disparate impact of criminal laws on abortion compromises the principles of general laws on equal treatment and reproduces social inequalities.⁸⁸ The Court's judgment could have been more powerful had it held that by reforming criminal abortion laws, the state would comply with its duty to eliminate all forms of discrimination.

D. How the Proportionality Principle Limits Legislative Power to Criminalize Abortion

The Colombian Constitutional Court gives great importance to the application of the proportionality principle in its decisions. This principle is commonly applied in other Latin American and European countries.⁸⁹ It requires that state interventions in fundamental rights comply with the requirements of adequacy, necessity, and strict proportionality. State interventions are adequate when they are suitable to achieve a legitimate constitutional objective. They

⁸⁵ *Id.*

⁸⁶ It might have usefully built on article 5 of CEDAW, requiring governments to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

⁸⁷ See generally Barbara Crane et al., *Abortion, Social Inequity and Women's Health*, 94 *Int'l J. of Gyn. and Obstet.* 310–316 (2006). See also The Center for Reproductive Law and Policy and The Open Forum on Reproductive Health and Rights, *Women Behind Bars. Chile's Abortion Laws. A Human Rights Analysis*, at http://www.reproductiverights.org/pdf/wbb_parti.pdf; The Center for Reproductive Law and Policy, *Persecuted Political Process and Abortion Legislation in El Salvador: A Human Rights Analysis*, at <http://www.reproductiverights.org/pdf/persecuted1.pdf>.

⁸⁸ For a pragmatic equal choice argument for the legalization of abortion, see Mark A. Graber, *Rethinking abortion: Equal choice, the Constitution and Reproductive Politics* (1999).

⁸⁹ For an explanation of the proportionality analysis, see Lorraine E. Weinrib, *The postwar paradigm and American exceptionalism*, in *The Migration of Constitutional Ideas* (Sujit Choudhry, ed.), *supra* note 31 at 93–98.

are necessary when they are the least intrusive measure that can be taken to reach the pursued aim, and they are proportional when the benefits obtained from the state's intervention outweigh the sacrifices imposed on the affected fundamental rights.⁹⁰

In this decision, the Court applied the proportionality principle to the criminalization of abortion. The Court followed its own precedents in this use of the principle:

Closely related to the principle of proportionality, it is clear that the State must avoid criminalizing conduct, when there are less intrusive means than the use of criminal law to protect the interest that it aims to protect. . . it is disproportionate for the legislature to choose a means, like criminal law, that is more invasive of personal freedom, when it can use less intrusive instruments to protect these same interests. Criminal law . . . is also limited by the necessity requirement, because it is the *ultima ratio*. Unnecessary criminalization is unconstitutional.⁹¹

The Court found that women's dignity and autonomy, as well as their right to life, health, and personal integrity, were disproportionately affected by the Colombian criminal legislation on abortion. Some of the Court's remarks warrant attention as they reflect a deep understanding of the content of these rights, as applied to the lives and experiences of women and girls.

Dignity is a foundational concept in Colombian Constitutional law. The Court explained its meaning:

[T]he rules which flow from the concept of human dignity – both the constitutional principle and the fundamental right to dignity – coincide in protecting the same type of conduct. This Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: (i) autonomy, or the possibility of designing one's life plan and living in accordance with it (to live life as one wishes); (ii) certain material conditions of existence (to live well); and (iii) intangible goods such as physical integrity and moral integrity (to live free of humiliation). . . .⁹²

As a result of this foundational concept of human dignity, the Court explained that

. . . when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as

⁹⁰ Carlos Bernal, *El Derecho de los Derechos. Escritos sobre la aplicación de los derechos fundamentales*, Universidad Externado de Colombia, Bogotá, 2005, p. 67.

⁹¹ Constitutional Court, Judgment C-370 of 2002.

⁹² Constitutional Court, Judgment C-355 of 2006 par. 8.1.

opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.⁹³

Women's autonomy, understood as the right to the free development of the individual, requires courts to consider maternity as an option on which the woman should freely decide.⁹⁴ A total ban on abortion does not respect women's dignity and reduces a woman to be a mere receptacle of developing life, depriving her of her rights and relevant constitutional interests.⁹⁵

Taking the duty to protect the life of the fetus in these exceptional circumstances to the extreme of criminalizing the termination of pregnancy is to give an absolute privilege to the life of the fetus over the fundamental rights of the pregnant woman, in particular, her right to choose whether or not to carry to term an unwanted pregnancy. Such an intrusion by the state on her right to the free development of the individual and her human dignity is disproportionate and arbitrary. A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.⁹⁶

The Court considered that criminalizing abortion when pregnancy is the result of a criminal act of rape, incest, unwanted artificial insemination, or unwanted implantation of a fertilized ovum, even with a reduced penalty, is unconstitutional, because it disregards the pregnant woman's dignity and autonomy. Law cannot impose perfectionist standards of conduct or require heroic behavior.⁹⁷ In the same vein, a woman cannot be required to endure unusual sacrifices, or surrender her right to physical and mental health and personal integrity, for the sake of protecting fetal life. The Court also ruled that compelling a woman to continue a pregnancy of, and give birth to, a nonviable fetus is an undue burden amounting to cruel, inhuman, and degrading treatment, and affecting her moral well-being and right to dignity.⁹⁸

Reviewing article 123 of the Criminal Code, which criminalized all abortions performed on girls less than fourteen years old, the Court concluded that the provision was disproportionate and unconstitutional because it annulled

⁹³ *Id.*

⁹⁴ Constitutional Court, Judgment C-355 of 2006 par. 8.2.

⁹⁵ Constitutional Court, Judgment C-355 of 2006 par. 10.1.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

the pregnant minor's fundamental rights to the free development of her personality, evolving autonomy, and dignity, and was inadequate to achieve its stated protective goals.

The Colombian Court modeled the application of the proportionality principle in the abortion context on the German and the Spanish constitutional courts. However, there is a different undertone in the Colombian Court's use of the proportionality argument *vis a vis* its European counterparts. The spirited recognition of reproductive rights of women that the Colombian Court gave is absent from the German and the Spanish abortion decisions. Although the Colombian Court ruled only that criminalization of abortion is not permitted in cases of hardship, its insistence on the *ultima ratio* character of criminal law suggests that its reasoning could eventually be extended to a normal pregnancy when a woman decides that she is not prepared to become a mother. This is particularly so, because there is extensive evidence showing that criminalization is not as effective as a means to reduce abortion rates.⁹⁹

Most countries in Latin America are in an early or medium phase in the process of demographic transition. People have an increasing need and expectation to have fewer children, but still have limited access to effective contraception. Consequently, in Latin America, abortion typically operates as a desperate and risky birth control method. Where fertility rates remain constant, the increasing and effective use of contraception replaces abortion and abortion rates decline.¹⁰⁰ As a result, programs that improve use of contraceptive methods are usually more effective in reducing unwanted pregnancies and consequent abortions, especially unsafe abortions,¹⁰¹ than restrictive criminal abortion laws. And, they are more consistent with women's constitutional and human rights.

Given this evidence, it could be argued that the use of criminal law to restrict availability of and access to abortion services does not respect the proportionality principle, because criminal penalties do not meet its adequacy, necessity, and proportionality requirements. It certainly does not conform to the legitimate use of criminal law as the last resource available to achieve the protection of unborn life. Probably perceiving this reality, the Court observed

⁹⁹ Gilda Sedgh et al., *Induced Abortion: estimated rates and trends worldwide*, 370 *Lancet* 1338–1345 (2007).

¹⁰⁰ C. Marston and J. Cleland, *Relationships Between Contraception and Abortion: A Review of the Evidence*, 29(1) *Int'l Family Planning Perspectives* 6–13 (2003).

¹⁰¹ Yolanda Palma, Elsa Lince & Ricardo Raya, *Unsafe Abortion in Latin America and the Caribbean: priorities for research and action in Ina Warriner and Iqbal Shah, Preventing Unsafe Abortion and its Consequences: Priorities for Research and Action* 187–207 (2006).

that the legislature, applying the proportionality principle, could decriminalize abortion in other circumstances beside the three hardship circumstances it reviewed. It is notable that the proportionality principle is applied not only by national constitutional courts, but also by international courts.¹⁰² This dual domestic and international recognition of the proportionality principle in Latin America might prove to be decisive in the context of judicial review of abortion legislation, reinforcing arguments against the criminalization of abortion, at least in hardship cases, such as danger to life or health, rape, incest, or the presence of a non-viable fetus, upon which it can be argued that the continuation of pregnancy cannot be required of the pregnant woman, and that criminalization is obviously a disproportionate state response.

III. THE COLOMBIAN DECISION AS A MODEL FOR OTHER LATIN AMERICAN COURTS

The Colombian Constitutional Court decision on abortion is the first constitutional decision that provides an international human-rights framework to review the constitutionality of abortion under domestic law. It also introduces into the Latin American context, and into the international law context, the principle of proportionality as a limit on the criminalization and punishment of abortion.

Like Colombia, many Latin American countries have constitutional provisions incorporating international human rights within their domestic constitutional frameworks. This raises the question whether the Colombian Constitutional Court's decision on abortion would be followed in other Latin American jurisdictions.

Attempting a satisfactory answer to this question would require, among other undertakings, that we enter into the speculative debate on the convenience and legitimacy of comparative analysis of law and that we address the methodological difficulties involved in such analysis. This, we do not intend to do. However, we do extend an invitation to think more thoroughly about the process of cross-fertilization that has distinguished constitutional decisions on abortion in contemporary Western law and particularly on the process we envision might be induced in other Latin American countries by the Colombian abortion decision.

¹⁰² The European Court of Human Rights decision in the Sunday Times Case, Judgment of 26 April 1979, series A, no. 30, para. 59, pp. 35–36, and the Inter-American Court of Human Rights in the Advisory Opinion OC-5/85, November 13, 1985, used the proportionality principle in deciding on the legality of restricting human rights.

Comparative analysis is challenged by the contextualized nature of law, in general, and constitutional law, in particular.¹⁰³ An abstract comparative analysis has the danger of overlooking relevant differences in normative values, and in the places those norms occupy and the functions they perform in particular domestic legal systems. The legitimacy and utility of the comparative exercise is called into question if the inquiry is not sensitive enough to context.¹⁰⁴

Latin American women's rights advocates and feminist law professors meet to compare and share their opinions on the situation of women's rights in their countries. The conclusion after these meetings is that there is cultural, legal, historical, and institutional commonality across national contexts. Although there are some relevant differences that need to be taken into account, much of what is being done in other Latin American countries is a source of inspiration for their local legal undertakings.¹⁰⁵

Dominant national values, practices, and institutions are not the only relevant contexts that are in need of analysis for comparative inquiries. Abortion makes the discussion about contexts more complex. Society's normative values on abortion usually reflect men's stance regarding abortion, and not women's.¹⁰⁶ For women, these values, practices, and institutions are perceived as unfamiliar and not responsive to their particular needs. Abortion is an extreme physical experience that only women suffer and our laws appear to be unable to grasp it properly.¹⁰⁷ Hence, if we only attend to national idiosyncrasy, we would probably fail to understand the complexity of facts and values that are common to any legal regulation of abortion.

¹⁰³ "[C]onstitutional law is deeply embedded in the institutional, doctrinal, social and cultural contexts of each nation, and we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists." Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in *The Migration of Constitutional Ideas*, *supra* note 31 at 76.

¹⁰⁴ *Id.* at 81. Also on comparative analysis of abortion, see Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987); Martha L. Fine-man, *Contexts and Comparisons* (Book Review), 55 *U. Chi. L. Rev.* 1431 (1988); Jane Maslow Cohen, *Comparison-Shopping in the Marketplace of Rights* (Book Review), 98 *Yale L.J.* 1235 (1989).

¹⁰⁵ This conclusion is always present in the evaluations made by the Latin American women's rights advocates that meet every year at the Diploma Course on Human Rights and Women: Theory and Practice, offered by the Center of Human Rights at the Universidad de Chile School of Law. This common context has also motivated the creation of Red Alas, www.red-alas.org/, a group of Latin American law professors working on gender issues in their countries and regionally. See *La Mirada de Los Jueces: Genero y Sexualidad en la Jurisprudencia Latinoamericana* [*The Judges' View: Gender and Sexuality in Latin American Case Law*] (Cristina Motta and Macarena Saez, eds. 2008).

¹⁰⁶ MacKinnon, *supra* note 83.

¹⁰⁷ *Id.*

The definition of context is also tricky. “It is a mistake to think that a nation has a single self-understanding.”¹⁰⁸ National communities are not monolithic. Trying to identify this self-understanding to “give context” to national constitutional law brings us to the reality that “[i]n virtually all human rights disputes are competing communities claiming (in effect) that they provide the appropriate framework or context for judging.”¹⁰⁹

Beyond national frontiers, there is a remarkable commonality in the way women around the world experience unplanned pregnancies and in the reasons they give to explain their decisions to abort.¹¹⁰ International human rights law has given broader recognition to gender-specific needs and rights of women than most domestic – and certainly most Latin American – legal systems. This is one reason why women’s advocates resort to international law to legitimate their demands. They are frequently “accused of betraying their community when they invoke the language and institutions of human rights to challenge practices of their communities.”¹¹¹ International human right law becomes an alternative context that can provide meaning to domestic constitutional law.

Moreover, context in current Latin American legal developments in the field of human rights is extremely variable and changing rapidly. Women’s rights advocates and feminist law professors see themselves as constructing the legal meanings of domestic constitutional and legal provisions using, among others, the conceptual and normative tools provided by international law. Their work is then, partly, to build context.

Given this background, the answer to the question of whether the Colombian Constitutional Court’s decision on abortion would be followed in other Latin American jurisdictions is not straightforward. Certainly, it will depend on the

¹⁰⁸ Tushnet, *supra* note 103 at 82.

¹⁰⁹ Jennifer Nedelsky, *Communities of Judgment and Human Rights*, 1(2) *Theoretical Inquiries in Law* 32 (2000), available at: <http://www.bepress.com/til/default/vol1/iss2/art1>. Also, “[a]ny living culture contains plurality and argument; it contains relatively powerful voices, relatively silent voices, and voices that cannot speak at all in the public space. Often some of these voices would speak differently, too, if they had more information or were less frightened – so part of a culture, too, is what its members *would* say if they were freer or more fully informed.” Martha C. Nussbaum, *Sex and Social Justice* 8 (1999).

¹¹⁰ “[W]omen decide to have an abortion because they are too young or too poor to raise a child, they are estranged from or on uneasy terms with their sexual partner, they are unemployed, they do not want a child while they are trying to finish school, they want to be able to work or they must work to help support their family. These reasons are not frivolous or unconsidered. Rather, they demonstrate many of the difficulties that beset women in all walks of life who are trying to juggle competing roles and competing responsibilities and trying to adapt to changing societal expectations.” Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide*, 18 (1999). Available at <http://www.guttmacher.org/pubs/sharing.pdf>.

¹¹¹ Nedelsky, *supra* note 109 at 32.

constitutional status of unborn life and of women's reproductive rights in their national constitutions.¹¹²

But, most importantly, it will depend on the way national constitutions resolve the issue of the incorporation of international human rights law into domestic law. Even though most Latin American constitutions incorporate international human rights into the domestic sphere, their provisions do not regulate the terms and conditions of incorporation and are open to different interpretations. As seen earlier in section II. A., the relationship between the national constitution and international law is one of the most important questions of contemporary constitutional law,¹¹³ and the speed of incorporating international law into the domestic systems together with the increasing practice of national courts of resorting to comparative constitutional law, have become major challenges for constitutional academics worldwide.¹¹⁴

Mattias Kumm offers a helpful description of what seems to be the current understanding of the relationship between international and domestic law. First, courts take a differentiated approach to international treaties. They do not always follow traditional conflict rules, and are sensitive to the specific subject matter of each treaty. Second, there is a shift from the traditional application of rules of conflict to subtle engagement that allows for graduated authority of a variety of comparative and international sources.

These rules of engagement characteristically take the form of a duty to engage, the duty to take into account as a consideration of some weight, or presumption of some sort . . . [t]he really interesting question concerns the structures of graduated authority built into doctrinal frameworks: who needs to look at what and give what kind of consideration to what is being said and done. . . .

The spread of constitutional courts and international courts and tribunals clearly is a factor that furthers the tendencies described here. But this shift is

¹¹² For example, the articles regarding the right to life in the Chilean and the El Salvador Constitutions have explicit mandates toward the protection of the fetus. Article 19 n°1 of the Chilean Constitution states:

“The Constitution guarantees to all persons:

- 1.- The right to life and to the physical and psychological integrity of the individual. The law protects the life of those about to be born . . . ”

Article 1 of the Constitution of El Salvador states: “El Salvador . . . recognizes every human being as a person from the moment of conception.”

¹¹³ Mathias Kumm, *supra* note 31 at 257.

¹¹⁴ Sujit Choudhry, *Migration as a new metaphor in comparative constitutional law in The Migration of Constitutional Ideas*, *supra* note 31 at 13.

not just about courts engaging other courts. It is about courts engaging the various institutions that generate and interpret international law.¹¹⁵

This description neatly fits the constitutional block doctrine, as applied in Colombia and other countries in Latin America. The constitutional block is the current Latin American doctrinal framework that regulates the engagement of constitutional courts with international law. Its shortcomings reveal the weakness of current constitutional theories in dealing with these dramatic changes in our approaches to international law. At this time, in Latin America, it is difficult to envision a clearer or more unitary theoretical account of the binding influence of international human rights law in domestic jurisdictions.¹¹⁶

Although this is the situation in the theoretical arena, in practice, the incorporation of international human rights law into domestic constitutional law is having an impressive impact on the protection of human rights in Latin America. The Inter-American Court of Human Rights is opening a promising avenue to make women's rights visible in the region.¹¹⁷ This process is being enthusiastically monitored and developed by women's rights advocates throughout the region. They are taking up the challenge in domestic and international legal arenas by contesting restrictive laws and regulations that violate sexual and reproductive rights of women in Latin American countries. The Colombian decision sets a standard that can be applied in these contests.

IV. THE ORIGINALITY OF THE DECISION AND CHALLENGES AHEAD

Mark Tushnet reflects that “[p]erhaps the true object of study [of comparative constitutional law] should be the way in which (. . .) constitutional ideas that do migrate are transformed as they cross the border. . . .”¹¹⁸ This interesting proposal might also apply to the migration of principles and norms across the domestic and international jurisdictions.¹¹⁹

¹¹⁵ Mathias Kumm, *supra* note 31 at 292.

¹¹⁶ Rubio Marín and Morgan, *supra* note 32 at 152.

¹¹⁷ See *Prison Castro Castro v. Peru*, Case 11.015, Report No. 43/01, OEA/Ser.L/V/II.11 Doc. 20 rev. at 356 (2000). (In a case where government forces attacked the prison using wartime weaponry causing 41 deaths and injuring 185 inmates, the Inter-American Court of Human Rights held that the fact that the naked female victims were observed at all times by armed soldiers constituted sexual violence. It also classified as sexual rape, a finger vaginal “inspection” carried out by several hooded people at the same time in a very abrupt manner. Finally, the Court awarded higher amounts of compensation to the victims that were subjected to sexual violence and rape.) See Patricia Palacios, *The Path to Gender Justice in the Inter-American Court of Human Rights*, unpublished LLM thesis, Harvard Law School, 2007.

¹¹⁸ Tushnet, *supra* note 103 at 83.

¹¹⁹ The term transnational law is used to refer to the increasing association between international and comparative law.

The Colombian abortion decision provides two examples in which migration transforms the meaning of the borrowed legal doctrines, resulting in the improved recognition of women's rights.

First, in the domestic law of Latin American countries, the incorporation of international human right treaties into the constitutional block, made it possible for women's rights – which have broader recognition in international law than in domestic law – to acquire constitutional status or strengthen their constitutional recognition. The challenge now for Latin American feminist legal scholars is to actively engage in the construction of a stronger normative framework for thinking about the relationship between national and international law. Such a framework would provide sounder foundations to current practices of incorporation and that would ensure that women's rights are properly recognized in international as well as in domestic spheres.

Second, the application of the proportionality principle in a decision regarding the constitutionality of abortion regulation, following European precedents, becomes especially interesting when the proportionality analysis takes into account not only domestic constitutional rights, but also more extensive international human rights. Moreover, the use of the proportionality principle is sanctioned by the jurisprudence of the Inter-American Court in contexts other than abortion,¹²⁰ and would probably be extended to abortion if a case comes before the Court. This combination might prove to be fundamental in the construction of legal argumentation and strategies to fight the criminalization of abortion in Latin America in cases of hardship.

There are other noteworthy aspects in the decision. The judgment does not fit easily within the communitarian/libertarian dichotomy that has been applied to the differences between the American and European treatments of abortion.¹²¹ For the Colombian Court, the communal interest is not only in unborn life, but also in the protection of the rights of the pregnant woman. The Court made clear that gender equality of women and girls promotes the dignity of all human beings, not only women, and is a step in humanity's advancement towards social justice.¹²²

The use of international and comparative law by the Colombian Constitutional Court connects Colombian women with communities of women in other countries who face and share common predicaments, experiences,

¹²⁰ Advisory Opinion O-C/85, *supra* note 102.

¹²¹ See, e.g., Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987); and Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985(3) *Brigham Young University L. Rev.* 371–409 (January 1986).

¹²² C-355/05 par. 7.

and knowledge about abortion.¹²³ Throughout its judgment, the Court dignifies women by exhibiting a deep understanding of their situations. The Court's insight enables a context-specific application of domestic and international human rights law. The Court thereby adds gender-sensitive meaning to human rights, generally, and the right of pregnant women to human dignity, in particular.

¹²³ Iris Marion Young, *Gender as Seriality: Thinking about Women as a Social Collective*, 19(31) SIGNS 713-738 (1994).

Guatemalan Transnational Feminists: How Their Search for Constitutional Equality Interplays with International Law

Christiana Ochoa*

INTRODUCTION

This chapter addresses the relationship between international law and Guatemalan women who have advocated for constitutional and legal reform on matters of gender equality. The aims are two-fold and both require attention to the complexly interwoven relationship between individuals' rights, constitutional law, and international law. The first aim is to provide an example of how transnational feminists, active in both the transnational sphere and in the domestic field, can have a profound influence on constitutional meaning, often as a result of strategic engagement with international law and institutions. The second aim is to highlight the role constitutions play, together with other relevant documents and actions, as sources in the making of customary international law (CIL). This is a case study of women's efforts to attain gender equality in Guatemala through engagement with the legal system. It illustrates the relevance of individuals in shaping domestic law and altering the content of CIL through active use of the legal system, including constitutional challenges, sometimes buttressed by international norms, treaties, and institutions. In particular, this example highlights the core concern that designating states as the sole "subjects" under international law, such that they are the only entities whose participation is legitimized in the CIL formation process, is not sound given the inherent skepticism within international legal doctrine regarding state adherence to human rights law, especially in states known for violations, such as Guatemala.¹ The role women have played in circumventing the Guatemalan state to attain greater legal protections within

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¹ The CIL formation process asks how we make determinations regarding that class of behavior that has become so commonplace and expected, that a trespass against that commonality is

Guatemala points to the exigency of including individuals in the process by which those norms that directly affect them are shaped into domestic and international law.

The constitutions of most, if not all, countries within the Americas contain provisions defining citizenship or nationality within the given country.² For many of us, it is on the national scale that we have defined ourselves and have been defined by others. Our national citizenship provides us with ready tools for categorization into our various nominal identities – as Mexican, Guatemalan, Ecuadorian, Cuban, Chilean, and so forth.

National constitutions are commonly believed to make concrete and legitimate, a state that, in turn, will rely on the constitution as a foundational document and source for the promulgation of individual rights. Constitutions regularly contain provisions setting forth the rights of the citizens of the particular state to which the constitution pertains.³ This reinforces the assumption that the national government holds the position of being the largest-scale actor empowered with defining and delineating rights, with at least some rights being contingent on citizenship. Although individual states or municipalities within a country may provide some rights and protections; in this view, the national government ostensibly stands in the position of the ultimate rights-grantor. Granting citizenship, rights, and delineating which of those rights will apply to particular groups of individuals within the territory of a state are powers thus believed to be sovereign powers of the national government, often elaborated through national constitutions.

This chapter illustrates my skepticism about the preeminence and sovereignty of the state and its power to lay exclusive claim to how we conceptualize ourselves as citizens⁴ and it argues, relatedly, that if it was ever accurate to think of rights as quantities that are granted to individuals exclusively by states, often in connection with an individual's status as a citizen, this is certainly no longer the case. Over the course of the last century, regional and international human rights bodies have taken on increasingly vital roles in defining the rights of individuals, and in protecting those rights. The emergence of a new

believed to be admonishable by law. For a more full description, See Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 *Va. J. Int'l. L.* 119, 125 (2007).

² See, e.g., *Brazilian Constitution*, Art. 22; *Mexican Constitution*, Chapter II, Art. 30; *Argentine Const.*, Art. 75; *United States Const.*, Art. 14. Some constitutions define citizenship or nationality in the text, whereas other constitutions delegate that responsibility to the legislature.

³ Examples would include, *Mexican Const. Art 1–24*, 27; *Costa Rican Const.*, Titles IV–VIII; *El Salvadoran Const.*, Titles II and IV; *Nicaraguan Const.*, Titles III and IV, etc.

⁴ See Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL*. Post *Sosa v. Alvarez-Machain*, 74 *U. Cin. L. Rev.* 127–136 (2006). (hereinafter Ochoa, *Cosmopolitan CIL*).

font of rights, located at the supra-state level, calls into question the exclusive claim of states to define citizenship, including the right to denominate who is “in” and who is “out.”⁵

Although states certainly continue to delineate an individual’s nominal and ostensible citizenship, they may no longer capture our imaginations and self-identifications regarding the entity to which our citizenship pertains. In other words, a state may still call me *its* citizen, whereas *I* may define myself in terms of the locations that effectuate my rights, create laws that protect me, and compel compliance with those laws.⁶ If, as is now the case, those locations include international bodies, international courts, and, indeed, the courts of other states, my own definition of my citizenship may well transcend the state that claims me as its citizen.

This observation arises in part from the phenomenon of individuals looking beyond their states for the creation, justification, and protection of their individual rights. This phenomenon is increasingly discussed in the literature on civil society,⁷ cosmopolitan citizenship,⁸ global feminism,⁹ and bottom-up law making,¹⁰ as well as the discourse over the subaltern.¹¹ And, this phenomenon is where my second set of questions arises, asking what role individuals have, through an engagement with international law, in altering domestic and international understandings of gender equality.

I focus here on Guatemala, and the political-equality claims of Guatemalan women, to provide a story – a data point – of women taking on multiple senses

⁵ Among the issues that have served as the impetus for transnational feminism has been the ability of women to have the same right as men to choose their nationality. See Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women’s Equality and Nationality in International Law*, 22 *Mich. J. Int’l. L.* 523 (2001) (describing the work of European women to “deal with the nationality of married women” as an inequality problem and as a conflicts of nationality law problem).

⁶ See, e.g., Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1668*, 89 (Edwin Curley, ed., 1994) (discussing the necessity of having a “Coercive Power,” to compel men to perform their Covenants, by the terror of punishment greater than the benefit they expect to obtain by the breach of their Covenants).

⁷ See, e.g., 9 *Euro L. J.* (2003) (entire issue devoted to the issue of law and transnational civil society); *Global Civil Society 2001* (Glasius, Marlies, Mary Kaldor and Helmut Anheier, eds., 2001); *Global Civil Society 2002* (Glasius, Marlies, Mary Kaldor and Helmut Anheier, eds., 2002).

⁸ See, e.g., Kwame Anthony Appiah, *The Ethics of Identity* (2005) (hereinafter *Appiah, Ethics of Identity*); *Cosmopolitan Citizenship* (Kimberly Hutchings & Ronald Dannreuther, eds., 1999).

⁹ Myra Marx Ferree and Aili Mari Tripp, *Global Feminism* (2006).

¹⁰ See, e.g., Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (2003); *Law and Globalization from Below* (Boaventura de Sousa Santos & César Rodríguez-Garavito, eds., 2005).

¹¹ See, e.g., Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *Marxism and the Interpretation of Culture* 271 (Cary Nelson & Lawrence Grossberg, eds., 1988).

of identity, belonging, and citizenship in the process of making claims for greater equality. I argue that women engaged in women's rights and gender-equality politics in Guatemala have, at various times, taken on multiple layers of affiliation and loyalty, such that they become not only Guatemalan but also members of various transnational women's networks and/or deeply local or indigenous movements.

The notion of a layered sense of affiliation and loyalty is not new but is more a reality today than in the past. The "increasingly international organization of peoples across political boundaries in order to pursue common political, economic, or ideological goals evidences the development of an increasingly imagined global community,"¹² often referred to as cosmopolitanism. Modern economic, political, and technological realities have created a globalized community. The growing ubiquity of mass media and self-produced media provides a framework to develop growing ties between the world's people, and results in the possibility that our identities are no longer tied exclusively to one nation.

However, scholars have cautioned against imperialistic, deracinating forms of cosmopolitanism.¹³ Indeed, as I have argued elsewhere, our identities are both personal *and* local, both local *and* national, both national *and* cosmopolitan: focusing on the fact that at least some small aspect of each of us is now cosmopolitan.¹⁴ This is the essence of "Rooted Cosmopolitanism."¹⁵

Anthony Appiah has argued that, although we may have thick identities based on our close relationships with others or our membership in a particular community, this does not obviate the thin identities that result from our desire and necessity for a well-ordered society. Rather, these identities impose dual loyalties that are not mutually exclusive, and often blurred.¹⁶ Appiah describes the conflict between nationalists and cosmopolitans as resting largely on the perceived incompatibility of these dual loyalties. He argues that the thick nationalist identity that recognizes and praises "special responsibilities" troubles cosmopolitanism because it apparently disrupts the development of a universal morality. At the same time, cosmopolitanism bothers nationalists because universal morality allegedly undermines the role of "special responsibilities."¹⁷ However, defenders of both cosmopolitan and nationalist

¹² See Martin Kohler, *From the National to the Cosmopolitan Public Sphere, in Re-Imagining Political Community: Studies in Cosmopolitan Democracy*, 231 (Daniele Archibugi et al., eds., 1998).

¹³ Appiah, *The Ethics of Identity*, *supra* note 8 at 214.

¹⁴ Ochoa, *Cosmopolitan CIL*, *supra* note 4 at 127–136.

¹⁵ *Id.* "Rooted Cosmopolitanism" is the title of the last chapter of Appiah, *The Ethics of Identity*, *supra* note 8.

¹⁶ *Id.* at 233–236.

¹⁷ *Id.* at 239.

ideologies have praised the duty owed to a universal humanity while simultaneously arguing that local action is the best way to further the goal of making the world a better place.¹⁸ Appiah thus endorses Michael Ignatieff's comment that "human rights has gone global by going local."¹⁹ Thus, one can be, at once, a local, national, and cosmopolitan citizen.

The emergence of cosmopolitan citizenship, rooted though it may be,²⁰ raises questions regarding the role of constitutions in defining individual rights for a given country's citizens. Using the case of Guatemala, this chapter illustrates that the emergence of a cosmopolitan sense of identity and citizenship draws the once-exclusive claims of states over definitions of citizenship and over rights granting into question. The result is that constitutions cannot alone constitute equality, regardless of how well conceived or drafted they may be. Rather, constitutions are increasingly influenced, pressured, and interpreted by 1) international human rights organizations and international institutions on one side, and 2) individuals, acting domestically and transnationally, on the other.

This chapter proceeds as follows: Part I briefly establishes that both legal and cultural discrimination against women continues in Guatemala despite very clear constitutional gender-equality provisions; Part II discusses the inter-related roles of international law, international civil society, and local activism around issues of gender equality and suggests that, as the exclusivity of state sovereignty is diminished, constitutions are only one of the many mechanisms that must play roles in providing for, and protecting, formal as well as functional equality; Part III highlights how Guatemalan women may continue to see themselves as rooted cosmopolitans in their efforts to obtain gender equality; and the chapter concludes by emphasizing the importance of individuals' active engagement in legal reform, generally, and in CIL formation.

I. GUATEMALA: FERTILE GROUND FOR ROOTED COSMOPOLITANISM

A. *Unenviable Conditions*

Approximately 37 percent of Guatemalan women are illiterate.²¹ For indigenous women, illiteracy rates are an estimated 75 to 90 percent.²² The average

¹⁸ *Id.* at 240.

¹⁹ *Id.* at 260.

²⁰ *Id.* at 214.

²¹ UNICEF, At a Glance: Guatemala. (available at http://www.unicef.org/infobycountry/guatemala_statistics.html) (last visited December 5, 2007).

²² Valerie McNabb and the Central American Analysis Group, Women's Role in Guatemala's Political Opening, *In Focus*, Vol. I, Ed. 11, Guatemala City, Guatemala: October 12,

Guatemalan woman lives 66.4 years, representing the lowest life expectancy in Central America.²³ Approximately 250 of every 100,000 Guatemalan women will die from pregnancy and birth-related complications as compared to 26 out of every 100,000 in Costa Rica.²⁴

Guatemalan women face continued gender discrimination and gender-based violence. The femicide epidemic in Guatemala is just one type of violence facing women in that country. The public nature of the violence resulting in femicide, and the rapid rise of that phenomenon, has resulted in widespread attention to this problem.²⁵ It is important to note, however, that a vast majority of all violence against women in Guatemala occurs at home.²⁶

Women are discriminated against in the political sphere as well. Women's participation in Guatemala's formal government is low. About one-sixth of the Congress is female and only 17 percent of the judges and magistrates in Guatemala are women. This holds true even at the most local level. Statistics on the gender of mayors in Guatemala estimate that approximately 98 percent of mayors are men.²⁷ These figures stand in sharp contrast to what an observer might imagine the situation in Guatemala to be if that person were to look only to the equality guarantees that have been present in the Guatemalan Constitution, in varying degrees, since 1945.

B. *Constitutional History, Gender Equality, and Human Rights: Setting the Stage for Cosmopolitanism*

i. The 1945 Constitution

As far back as the 1945 Constitution, there were provisions making gender-based discrimination illegal,²⁸ and including the right of all citizens to hold public jobs and public office without discrimination on the basis of sex.²⁹

1998. (*Reprinted in Inter-American Dialogue*, available at http://www.asylumlaw.org/docs/guatemala/GUA_4/Section%20III/Political%20opening.pdf) (last visited December 17, 2007).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (stating that UNICEF estimates that 76% of all violence occurs in the home).

²⁷ *Id.*

²⁸ "All persons enjoy the guarantees established by this Constitution without any restrictions other than those that it expresses. With the same reservation any discrimination for reasons of relationship, sex, race, color, class, religious beliefs or political ideas is declared illegal and punishable." *Constitution of the Republic of Guatemala*, Art. 21 (1945).

²⁹ The 1945 Constitution states: "All Guatemalans, without distinction of sex, are eligible for public employments and offices, according to their merit and capacity, excepting the incompatibilities which the laws indicate and the limitations established by the Constitution." *Id.*, Art. 38.

But there were significant carve-outs relevant to women. Namely, only literate women over the age of 18 years were recognized as citizens,³⁰ thus excluding most women, given the consistently low literacy rates among Guatemalan women.

Still, the 1945 Constitution laid important historical groundwork for gender equality. It introduced the idea that sex-based discrimination is illegal and it included provisions for the *amparo* action, which is employed to challenge violations of constitutional guarantees. The *amparo* action continues to play a vital role in protecting constitutional rights and human rights³¹ and has become essential in enforcing modern day gender-equality provisions.

ii. The 1965 Constitution

The 1965 Constitution provided significantly more detail regarding *amparo* actions³² and civil and political rights provisions, such as the freedom of assembly³³ and freedom of expression.³⁴ These provisions were not drafted in connection with women's rights provisions. They were likely a reaction to the 1956 Constitution, which had expressly prohibited any individual or collective communist action.³⁵ Nonetheless, these protections have quite clearly been important in women's efforts to mold the meaning of their Constitution.

The 1965 Constitution also made specific progress in its treatment of women, as it eliminated the female literacy requirement contained in the 1945 version and, instead, conferred citizenship on all men and women over the age of

³⁰ *Id.*, Art. 9 (1945).

³¹ The right to *amparo* (or sufficiently similar) actions was included as a fundamental human right in the American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Art. 25.1.a. See also, Manuel de Jesús Mejicanos Jiménez, *El Amparo Como Garantía para el Acceso a la Juticia y Protección de los Derechos Humanos en la Jurisdicción Constitucional Guatemalteca*, 32–33 *Revista IIDH* 176, 181 (2000–2001) (available at <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/32/pr/pr8.pdf>) (last visited December 5, 2007). (making the claim that the *amparo* action has been treated as a non-derogable right, even in times of emergency).

³² The *amparo* action has not always been acclaimed as wholly good. See Archana Sridhar & José Ricardo Barrientos Quezada, *Análisis de los Procesos Administrativo y Penal en Casos de Evasión Tributaria en Guatemala* 16 (2007) [Centro Internacional para investigaciones en Derechos Humanos] (arguing that *amparo* actions serve as excessive stalling tactics for individuals being prosecuted for tax evasion).

³³ *Constitution of the Republic of Guatemala*, Art. 63 (1965) (hereinafter 1965 Constitution).

³⁴ *Id.*, Art. 65 (1965).

³⁵ Organizing and Repression: in the University of San Carlos, 1944–1996, available at http://209.85.165.104/search?q=cache:-oBtkYxVonYJ:shr.aaas.org/guatemala/ciidh/org_rep/english/part2_4.html+Guatemala+1956+constitution&hl=en&ct=clnk&cd=6&gl=us (last visited December 14, 2007).

18 years,³⁶ set out provisions declaring that all human beings are free and equal in dignity and rights,³⁷ and continued to prohibit sex-based discrimination. A rough translation reads, “In Guatemala all human beings are free and equal in dignity and rights. Any discrimination because of race, color, sex, religion, birth, economic or social position or political opinions is prohibited.”³⁸

iii. The 1985 Constitution

These substantive freedom, equality, and discrimination provisions were carried over into the most recent Guatemalan Constitution, promulgated in 1985, with no significant changes. But, the 1985 Constitution also included a number of new provisions enabling the pursuit of substantive equality and freedom from discrimination. In large part, these provisions were the result of a long civil war within the country. For example, the 1985 Constitution explicitly incorporates international human rights treaties and declares that they will be privileged over domestic law. Article 46 on the Preeminence of International Law states that “[t]he general principle is established that in the field of human rights, treaties and agreements approved and ratified by Guatemala have precedence over municipal law.”³⁹ With this short provision, the Guatemalan Constitution recognizes that rights can and do derive from sources other than the Constitution, that individuals may avail themselves of those rights, and that the Guatemalan government and Constitution can be challenged before international bodies for violations of international human rights.

The 1985 Constitution also devotes an entire chapter to the creation and operation of a Human Rights Commission and Office of the Ombudsman for Human Rights, charged with promoting human rights as well as prosecuting governmental abuses of human rights.⁴⁰ The inclusion of human rights treaties in national law and the creation of human rights enforcement bodies are of monumental importance, which is only starting to be fully appreciated. This is especially the case in the context of Guatemala, given its history of military coups, abuses of power, and well-documented cases of repression and human rights violations.⁴¹

³⁶ 1965 *Constitution*, *supra* note 33, Art. 13 (1965).

³⁷ *Id.*, Art. 43 (1965).

³⁸ *Id.*, Art. 43 (1965).

³⁹ *Guatemalan Constitution 1985, Article 46* available at <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID={CB218F7C-4F10-4955-A2C3-AEFB5D07CF80}> (last visited December 18, 2007).

⁴⁰ Chapter V of the 1985 Constitution discusses the Commission and the Procurator of Human Rights.

⁴¹ See Angelica Chazaro & Jennifer Casey, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, 17 *Hastings Women's L.J.* 141, Appendix 3 (2006).

These are the core of the formal provisions of the Guatemalan Constitution providing for substantive, institutional, or infrastructural protections that bear on gender equality, political organizing, and advocacy on gender-based rights. The questions I explore here, however, require discussion beyond a description of Guatemala's constitutional provisions.

II. LEAVING GUATEMALA

A. *International Law*

The Guatemalan Constitution incorporates several international human rights treaties. It is, in part, through the rights granted women through these documents that women have taken on a “multi-layered” or rooted cosmopolitan sense of self that extends beyond Guatemalan state borders, using ratified human rights treaties to hold Guatemala accountable to the formal equality guarantees embodied in the Constitution. Because, again, with the creation of supra-governmental locations engaged in creating and enforcing individual rights, one's own definition and perception of citizenship (a traditional conduit for the vesting and enjoyment of rights), may now rest at the international or transnational level in addition to the national and local.

To understand the functional importance of these constitutional provisions, one must know what international human rights treaties Guatemala has signed. Guatemala is a signatory to every relevant human rights treaty, including the International Convention on Economic, Social and Cultural Rights (ICESCR),⁴² the International Covenant on Civil and Political Rights (ICCPR),⁴³ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁴⁴ It has also signed on to the optional protocols to the ICCPR⁴⁵ and CEDAW,⁴⁶ both of which recognize the competence of their treaty bodies to receive and consider communications from individual victims. These protocols grant to Guatemalan citizens the right to reach outside of Guatemala – beyond their own state – in seeking recognition of human rights violations and obtaining some degree of protection from those violations.⁴⁷

⁴² Guatemala acceded to the ICESCR on May 19, 1988.

⁴³ Guatemala acceded to the ICCPR on May 5, 1992.

⁴⁴ Guatemala signed CEDAW on June 8, 1981 and ratified CEDAW on August 12, 1982.

⁴⁵ Guatemala acceded to the Optional Protocol to the ICCPR on Nov. 28, 2000.

⁴⁶ Guatemala signed the Optional Protocol to CEDAW on Sep. 6, 2000 and ratified it on May 9, 2002.

⁴⁷ The Optional Protocols provide for communications from “individuals . . . claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party” to seek redress from the Committee. *See* Optional Protocol to CEDAW, Article 2. *See also* Optional Protocol to the ICCPR, Article 2.

Guatemala is also a member of the Organization of American States⁴⁸ and a signatory to the American Convention on Human Rights,⁴⁹ and allows its citizens to petition the Inter-American Commission with complaints of violations of that Convention.⁵⁰ As a result, Guatemala has had a nearly constant presence before the Inter-American Commission, defending and explaining all manner of human rights violations.⁵¹ Guatemala is also a signatory to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (the “Convention of Belém do Pará”), which is the only international treaty specifically addressing violence against women.⁵²

These treaties rarely operate formally against any state, except through the legal actions of individuals who cite them as the basis of their claims before judicial bodies or as the grounding for their petitions before international bodies to ensure adequate protection of their rights. Although states do occasionally invoke human rights treaties against other states, direct enforcement efforts are much more commonly initiated by individuals. For example, individuals within Guatemala may claim violations of Guatemala’s human rights obligations in the same manner as they claim violations of constitutional rights. Additionally, in a case in which remedies within Guatemala are not forthcoming (i.e., domestic remedies are exhausted), individuals may petition international bodies to enforce Guatemala’s human rights obligations. These inexorably internationalist exercises have been a key part of women’s search for functional equality in Guatemala.

B. *International Encounters – The Notable Role of Trans-border Feminism*

Guatemalan women have had a close relationship with the regional struggle for gender equality. In 1945, Guatemala hosted the Inter-American Congress

⁴⁸ The Organization of American States “brings together the nations of the Western Hemisphere to strengthen cooperation on democratic values, defend common interests and debate the major issues facing the region and the world.” See Key OAS Issues, available at http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=20 (last visited December 17, 2007). Guatemala has ratified the OAS charter and belongs to the Organization.

⁴⁹ Guatemala signed the American Convention on Human Rights on Nov. 22, 1969, ratified on April 27, 1978. See American Convention on Human Rights – “Pact of San Jose, Costa Rica”, available at <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited December 18, 2007).

⁵⁰ Guatemala recognized the jurisdiction of the Court on March 9, 1987. See *id.*

⁵¹ See Human Rights Library of the University of Minnesota for a compilation of Guatemalan cases in front of the Inter-American Commission on Human Rights, available at <http://www1.umn.edu/humanrts/cases/commissn.htm> (last visited December 18, 2007).

⁵² Inter-American Commission of Women, Status of Signing and Ratification of the Convention of Belém do Para, signed by Guatemala on June 24, 1994 and ratified April 4, 1995, available at <http://www.oas.org/cim/English/Laws.Rat.Belem.htm> (last visited December 18, 2007).

of Women,⁵³ initiated by the Women's International League for Peace and Freedom,⁵⁴ and including women from nineteen nations. Substantively, this was a significant step in raising awareness regarding women's issues in Guatemala. However, it was only against the current constitutional backdrop, which has integrated international human rights treaties, that Guatemalan women have seen themselves becoming more and more involved in generating a politics of equality through coordinated and interwoven participation and action, at both the domestic and international levels.

In Guatemala, as in much of the Americas, feminist and women's movements gained strength during the 1980s. According to Valerie McNabb and the Central American Analysis group,

[f]or their part, women have been the frontrunners in strengthening Guatemala's incipient civil society through protest, mobilization, negotiation, and the formation of governmental and non-governmental organizations. They have introduced, proposed, and pushed through laws and public policy guidelines to promote women's political participation, organizing the women's movement around the issues of violence against women, human rights, education, health and political participation. Like elsewhere in Central America – and as opposed to elite transitions in the Southern cone countries – women's efforts at mass mobilization have proven instrumental in Guatemala's democratization and movement toward gender equality.⁵⁵

During this period – often referred to as the Decade of Women in the Americas⁵⁶ – women's groups increasingly reached across national boundaries to share their national experiences on gender issues and to consider routes to gender equality. For Guatemalan women, this coincided with the political opening that came when its internal war and violence quieted.⁵⁷ Guatemalan women exiled to Mexico were able to return, some of them politicized from the experience of exile.⁵⁸ In fact, two of the first self-identified feminist organizations in Guatemala arose from informal discussions among “politically

⁵³ *Chronology of Guatemala, in Radical Women in Latin America: Left and Right* 38 (Victoria Gonzalez & Karen Kampwirth, eds., 2001).

⁵⁴ Women's International League for Peace and Freedom, *Highlights from the WILPF's History*, available at <http://www.wilpf.int.ch/history/highlights.htm> (last visited December 18, 2007).

⁵⁵ McNabb, *supra* note 22.

⁵⁶ See generally, Inter-American Commission of Women, *History of CIM, Decade of Women in the Americas 1976–1985*, available at <http://www.oas.org/CIM/english/History7.htm> (last visited December 18, 2007).

⁵⁷ See generally, Ilja A. Luciak, *Gender Equality, Democratization, and the Revolutionary Left in Central America: Guatemala in Comparative Context, in Radical Women in Latin America: Left and Right* 189, 205 (Victoria Gonzalez & Karen Kampwirth, eds., 2001).

⁵⁸ McNabb, *supra* note 22.

active Guatemalan women exiled in Mexico and those living in Guatemala City.”⁵⁹

Additionally, Latin American and Caribbean Feminist Encounters and Central American Women’s Encounters served as forums in which women from various countries shared their domestic experiences of civil war and the peace processes that were developing during the late 1980s and 1990s.⁶⁰ These forums served as opportunities to coordinate efforts throughout Central America to “strengthen women’s participation in public decision-making at all levels.”⁶¹ Although the first Latin American and Caribbean Feminist Encounter occurred in 1981 in Bogotá, Colombia, the Encounter in 1988, in Mexico, drew in more Guatemalan participants than the 1981 Encounter.⁶²

From this event, Central American women began to feel “the growing force of Latin American feminism,” leading them to generate a “gender perspective on the political problems and issues they faced”⁶³ as Central Americans, specifically. As a result, Central American women, Guatemalans included, organized the first Central American Women’s Encounter in 1989 to “develop a feminist position specific to their regional realities [and] undertake joint action initiatives to address issues and problems of common concern.”⁶⁴ The Permanent Assembly of Central American Women for Peace was formed by women in the Encounter. This, in turn, prompted the formation in 1989 of COAMUGUA, the Coordinator of women’s groups in Guatemala.⁶⁵

The Guatemalan participants in these events were often student leaders at the University of San Carlos – often taking the skills and knowledge they acquired at the Encounters and putting them into practice in local NGOs to fulfill university practicum requirements.⁶⁶ The feminist ideas that had been so important in the regional Feminist Encounters were thus dispersed among larger communities of women at a very local level.

This wide dissemination of information, however, initially caused the women’s movement in Guatemala to be fragmented – forming many small

⁵⁹ See Susan A. Berger, *Guatemaltecas: The Women’s Movement 1986–2003*, 30 (2006).

⁶⁰ McNabb, *supra* note 22.

⁶¹ Michael Clulow, *Building Women’s Citizenship and Governance, Central America, Women as Citizens* available at http://www.oneworldaction.org/_uploads/documents/Final_english.short.womenascitizens.pdf (last visited December 18, 2007).

⁶² Cathey Blacklock, *Democratization and Popular Women’s Political Organizations, in Journeys of Fear: Refugee Return and National Transformation in Guatemala*, 203 (1999). Also available at <http://www.yorku.ca/cerlac/documents/Blacklock.pdf> (last visited December 18, 2007).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 203–204.

separate organizations, each representative of different needs, goals, and individual projects.⁶⁷ The groups lacked a “long-term sustainable relationship between the various sectors of the women’s movement.”⁶⁸ This persisted until many of these groups united in 1994 with the creation of the “Sector de Mujeres” (Women’s Sector).⁶⁹ The Women’s Sector began demanding a role in the peace negotiations in 1996. This, in turn, strengthened the women’s movement while providing “the organizational structure to help the movement develop a multi-cultural, multi-classed gender analysis based on rights.”⁷⁰

C. Peace Agreements

Guatemalan women, through the Women’s Sector, participated forcefully in the process leading to the signing of Guatemala’s Peace Accords, which ended that country’s thirty-six-year civil war. Because “gender issues were on the forefront internationally, [it was] easier to incorporate provisions favoring women’s rights into [the Peace] accord.”⁷¹ In addition, it appeared that Guatemalan women had learned from the experience of their El Salvadoran counterparts (who had recently experienced a similar process) and resolved to ensure that women and gender-equality concerns figured in the Guatemalan peace process.⁷² The Women’s Sector was ultimately successful in ensuring women’s demands were included in the Peace Accords.⁷³

The 1996 Peace Accords were made up of a series of agreements drafted from 1994–1996.⁷⁴ These agreements establish the goals of 1) accountability for human rights violations committed during the war;⁷⁵ 2) protection of indigenous⁷⁶ and women’s rights;⁷⁷ and 3) reform of the health, education,

⁶⁷ See Berger, *supra* note 59 at 33.

⁶⁸ *Id.* at 34.

⁶⁹ *Id.*

⁷⁰ *Id.* at 35.

⁷¹ See Luciak, *supra* note 57 at 189, 200.

⁷² *Id.* (discussing Luz Mendez – a prominent member of the Peace Agreements – and her awareness of the downfalls of El Salvador’s Peace Agreement, which gave little attention to women’s issues.)

⁷³ McNabb, *supra* note 22.

⁷⁴ A listing and access to the Peace Agreements is available at http://www.usip.org/library/pa/guatemala/pa_guatemala.html (last visited December 5, 2007).

⁷⁵ Comprehensive Agreement Human Rights, Mexico City, March 29, 1994; Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, Oslo, June 23, 1994.

⁷⁶ Agreement on identity and rights of indigenous peoples, Mexico City, March 31, 1995.

⁷⁷ *Id.*; Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society, Mexico City, September 19, 1996; Agreement on Social and Economic Aspects and Agrarian Situation, Mexico City, May 6, 1996.

and social services systems.⁷⁸ Under the Agreement on Social and Economic Aspects and Agrarian Situation, for example, the government recognizes its duty to eliminate discrimination against women in political, economic, social, and cultural spheres. This Agreement took a significant step in committing the Guatemalan government to work to “ensure women have equal opportunities in education . . . equal access to housing . . . implementing nationwide comprehensive health programs . . . and revising national legislation and regulations to eliminate all forms of discrimination against women in terms of economic, social, cultural and political participation.”⁷⁹

The Peace Accords have been cited as a catalytic moment in the level of governmental attention devoted to traditionally marginalized groups, including women.⁸⁰ They are also important to the current discussion because they were the culmination of the first wave of transnational women’s networking and, thus, represent a notable change in the tenor of women’s rights discourse and gender-equality initiatives in Guatemala. The Peace Accords and the international encounters discussed herein have had additional long-term effects. For example, the Peace Accords created a rare opportunity for cooperation between indigenous and ladina women.⁸¹ In addition, the international Women’s Encounters were mirrored by Central American female parliamentarians who began gathering to exchange ideas and experiences.⁸²

D. GUATEMALAN COSMOPOLITANS

i. Acting Within

Among the active participants in the meetings of female Central American parliamentarians was the President of the Congress in Guatemala, Catalina Soberanis. She advocated for periodic encounters with Central-American parliamentarians to study the advancement and placement of women throughout

⁷⁸ *Id.*

⁷⁹ Agreement on Social and Economic Aspects and Agrarian Situation, available at http://www.usip.org/library/pa/guatemala/guat_960506.html (last visited December 18, 2007).

⁸⁰ World Bank, *Poverty in Guatemala* 36–37, Report No. 24221-GU (Feb. 20, 2003), (available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/05/000094946_03032104003172/Rendered/PDF/multiopage.pdf (last visited December 5, 2007)).

⁸¹ McNabb, *supra* note 22. (McNabb also discusses the enduring split between ladina feminists and indigenous women, noting that indigenous women do not typically see themselves as feminists and tend more toward a humanist perspective.)

⁸² See Ingrid Roldan Martinez, *Maria Eugenia de Serra: Guarde Mis Pinceles, Pero Quiero Retomarlos*, *Semanario de Prensa Libre* No 132 (January 14, 2007) available at <http://www.prensalibre.com/pl/domingo/archivo/revistad/2007/enero07/140107/frente.shtml> (last visited December 18, 2007).

Central America.⁸³ Soberanis requested that Maria Eugenia de Sierra study discrimination against women, blatant and latent, in the Guatemalan Civil Code.⁸⁴ From this position, Maria Eugenia de Sierra stepped into the Office of the Ombudsman for Human Rights and initiated a constitutional case against the Guatemalan government, arguing that a number of the family provisions of the Guatemalan Civil Code were unconstitutional.⁸⁵ The Civil Code provisions she identified as violating the ideal of gender equality ranged from the merely offensive to the tragically disempowering. Some of the most controversial are summarized below:

Civil Code Article	Prior to Case
109	Government conferred on men the power to represent the marital unit
131	Government empowered the husband to administer marital property
110	Government conferred on the wife the “special obligation” of caring for minor children and the home
113	Government permitted married women the possibility of working outside the home if it didn’t prejudice her role as mother and homemaker
114	Government conferred on the husband the right to oppose his wife’s activities outside the home if he provided for her and had justified reasons
255	Government conferred on the husband the primary responsibility for representing the children of the union
317	Government conferred on women, by virtue of gender, the special ability to be excused from exercising certain forms of guardianship ⁸⁶

In reviewing this case, the Constitutional Court cited judicial efficiency and Guatemalan cultural traditions and integrity as its reasons for upholding these provisions.⁸⁷ Further, the Court focused on the strong protection that marriage as a social institution required to grant all Guatemalans equal

⁸³ *Id.*

⁸⁴ *Id.* Maria Eugenia de Serra became the first official Guatemalan Women’s Rights Defender in 1990.

⁸⁵ Constitutional Case made available by Licenciado Fausto Garcia Delgadillo. Corte de Constitucionalidad – Guatemala – Gaceta Jurisprudencial No. 28, Expediente No. 84–92, *Maria Eugenia Morales Acuna de Sierra contra Guatemala* (1993).

⁸⁶ *Guatemalan Civil Code*, art. 109, 110, 113, 114, 115, 131, 133, 255, 317 (1963).

⁸⁷ *Maria Eugenia Morales Acuna de Sierra contra Guatemala*, 13–14 (1993), *supra* note 85.

opportunity.⁸⁸ The Court went on to emphasize the importance of matrimony, and clarified that it did not view the laws as discriminatory but, rather, protectionist, focusing on the interest and protection of children.⁸⁹ The Court explained that the provisions, viewed in context, exemplified the regulations of marriage and had no discriminatory intent, and dismissed constitutional claims against some Civil Code provisions on the ground that they merely granted favor to women.⁹⁰

Had there been no legal recourse to international bodies, the constitutional case would have ended with this ruling, subjecting Guatemalan women to a comprehensively submissive position within the family. In fact, the situation might have been worse than it had been before the case, entrenching an extremely problematic interpretation of the Constitution's equality provisions, which envisioned as legitimate men's role in prohibiting their wives from working, and viewed this gender dynamic as consistent with prohibitions on gender discrimination.

Moreover, at the international level, an adjudicatory body engaged in the process of determining CIL on questions of gender equality would have no option but to count this type of judicially approved discrimination as evidence of a fairly weak interpretation of women's rights within Guatemala under a system in which only state-based practice and *opinio juris* counts in CIL formation. Without international recourse available to individuals, an international body such as the International Court of Justice or the Inter-American Commission, attempting to ascertain the content of CIL with respect to women's rights and gender equality, would look exclusively at state sources regarding Guatemala's practices and *opinio juris*⁹¹ and would conclude that Guatemala's contribution to any emerging CIL regarding women's rights and gender equality would align in a virtual "ledger" with equally regressive states. However, as I will explain later, state practice (an essential component of state-centered CIL formation doctrine) does not always reflect the changing normative positions (or desires) of its population. Instead, states may maintain positions of power through the violation of recognized human rights provisions and/or in contravention of the desires of their people. My argument, here and elsewhere, is that, in such cases, the content of what individuals have come to believe are

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Traditional CIL doctrine states that CIL is made up of state practice and *opinio juris* as determined through consultation with, among other things, judgments and opinions of national judicial tribunals. See *Restatement (Third) Foreign Relations Law of the United States* § 103(2) 1987.

their legal rights should be recognized in front of adjudicatory bodies engaged in determining the content of CIL.

ii. Acting Out

In this case, for example, Maria Eugenia de Sierra was able to challenge the Guatemalan Court's interpretation of the Constitution by mounting a petition before the Inter-American Commission on Human Rights, arguing that the Guatemalan Civil Code was in violation of the American Convention and CEDAW, and that the Guatemalan Court's disposition of the case demonstrated that domestic remedies to this violation had been exhausted.⁹² Making use of the multitiered protection afforded by the existence of the Inter-American Commission and of the previous experience of women within Guatemala with transnational political activity, Maria Eugenia de Sierra attempted to force an interpretation of the Civil Code that would more fully align with international conventions and would more closely reflect the desires of Guatemalan women.

Maria Eugenia de Sierra's chief argument was that the Civil Code provisions "establish[ed] distinctions between men and women which are discriminatory."⁹³ Further, she stated that the articles "place[d] her in a position of juridical subordination to her husband, and prevent[ed] her from exercising control over important aspects of her life."⁹⁴ Focusing on Article 11(2) of the Convention, she further alleged "that this discrimination infring[ed] upon the private and family life of the victim."⁹⁵

Basing the case on her own experience, Maria Eugenia alleged that she was "subject to the immediate effects of this legal regime by virtue of her sex and civil status . . . prevent[ing] her from legally representing her own interests and those of her family, and requir[ing] that she depend on her husband to do so."⁹⁶ Further, Maria Eugenia challenged that the aforementioned provisions "contravene[d] articles 15 and 16 of [CEDAW]."⁹⁷

⁹² *María Eugenia Morales de Sierra v. Guatemala*, Inter-American Commission of Human Rights, Case # 11.625, Report No. 4/01* (Jan. 19, 2001) available at <http://www.cidh.org/women/Guatemala11.625eng.htm> (last visited December 19, 2007).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*, Article 15 of CEDAW states "1. States Parties shall accord to women equality with men before the law. 2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. 3. States Parties agree that all contracts

The state took a different position in respect to the Civil Code. Rather than relying on the need to protect children and the institution of marriage, the state did not “controvert the substance of the claims”⁹⁸ and did not defend the legality of the provisions. Rather, it maintained “that it [was] continuing to take steps to modify the challenged articles of the Civil Code.” Further, the state acknowledged that the provisions were “out of date.”⁹⁹ However, as of the date of the filing of the petition, none of the articles had been reformed.

The Commission, in making its recommendation, focused on Maria Eugenia’s right to equal protection, found in Article 24 of the American Convention on Human Rights. The Commission recognized that “differences in treatment in otherwise similar circumstances are not necessarily discriminatory” and that “[a] distinction which is based on ‘reasonable and objective criteria’ may serve a legitimate state interest in conformity with the terms of Article 24.”¹⁰⁰ However, the Commission did not find in favor of the state. Instead, although it recognized that the Constitutional Court of Guatemala had upheld the Civil Code provision as a matter of domestic law, “essentially on the basis of the need for certainty and juridical security, the need to protect the marital home and children, respect for traditional Guatemalan values, and in certain cases, the need to protect women in their capacities as wives and mothers,” the Commission also noted that Guatemala had “made no effort to probe the validity of these assertions or to weight alternative positions.”¹⁰¹ The Commission thus urged Guatemala to amend the provisions of the Civil Code.

On October 1, 1998, the Inter-American Commission decided the case in Maria Eugenia de Sierra’s favor and asked Guatemala “to take legislative and other measures necessary to amend, repeal or definitely leave without effect the offending provisions of the Civil Code.”¹⁰² As a result, seven of the nine offending provisions of the Civil Code were removed or amended¹⁰³ and the Commission’s decision stands in direct contradiction to the Guatemalan

and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void. 4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.” Article 16, states, in particular that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. . . .”

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *Guatemalan Civil Code*, available at <http://www.oj.gob.gt/es/QueEsOJ/EstructuraOJ/UnidadesAdministrativas/CentroAnálisisDocumentaciónJudicial/cds/2004/PDFs/Codigos/CODIGO%20CIVIL.pdf> (last visited December 18, 2007).

Constitutional Court's own interpretation of its Constitution. The effect of the *Maria Eugenia* case is that the Constitution has essentially been reinterpreted by the Inter-American Commission, in consultation with the Guatemalan Women's Rights Defender, as prohibiting the kinds of formal and substantive discriminations previously contained in the Civil Code.

This case stands as an example of women exiting their national borders to actively demand that their rights as citizens of the world – as cosmopolitan citizens with internationally defined human rights – should be reflected and respected within their national borders as well. The effects of the *Maria Eugenia* case are significant not just for Guatemalan women, however. The *Maria Eugenia* case serves a quasi-precedential function for other States Parties to the Inter-American Convention and, less directly, to any state and international body attempting to define the content and meaning of women's rights and gender equality. The case, and the Civil Code revisions that resulted from it, also provide significantly different information than was previously available to anybody attempting to discern Guatemala's contribution to international custom on women's rights and gender equality. This substantive difference now reflects women's participation and engagement with the international legal system, rather than being merely a reflection of the predilections of the Guatemalan state, had it been left to revel in its own sovereignty.

III. CONTINUED CAUSE FOR COSMOPOLITANISM

Regardless of the improved interpretation of the Constitution and significant Civil Code amendments, it is important to bear in mind that the Constitutional Court's stated reason for upholding the retrograde provisions of the Civil Code – that those provisions were in keeping with tradition – continues to have resonance in Guatemala. Guatemala is a traditionally family-oriented society and the organization of this traditional family ordinarily favors men. Where, before the *Maria Eugenia de Sierra* case, tradition and law were once in agreement that men held a dominant role in society and within the family, that tradition is no longer reflected in Guatemala's Civil Code and Constitution. This dissonance results from relatively recent domestic and transnational activism reflecting evolving norms regarding gender relations.

Most currently, women in Guatemala have taken up the issue of violence against women, drawing on the 1994 Bélem do Pará Convention, now part of the Guatemalan Constitution through Article 46. The situation in Guatemala, together with violence against women in many parts of the world, has garnered international attention from the Inter-American Commission

on Human Rights¹⁰⁴ and the United Nations General Assembly, which has recently released an in-depth study on all forms of violence against women.¹⁰⁵

In the years following the adoption of the Bélem do Pará Convention, the rate of femicide in Guatemala has skyrocketed. Whether there is a causal relationship between Guatemala's adoption of Bélem do Pará and the increased cases of femicide, or whether a relationship exists among the trifecta of Bélem do Pará, the *Maria Eugenia de Sierra* case, and a controversial family planning law (which falls outside the scope of this essay)¹⁰⁶ and the increase in femicide, is uncertain and surely controversial. What is clear, however, is that the Bélem do Pará Convention has not brought any resolution to the problem, despite its being integrated into the Constitution. In the year 2000, six years after Bélem do Pará, only 60 women were classified as victims of femicide; by 2005, the number had reached 556.¹⁰⁷

Guatemalan women again called on international institutions to provide a stronger interpretation of constitutional protections than they were able to extract from within Guatemala. The alarming femicide rate and the lack of satisfactory state action regarding the problem led to a petition before the Inter-American Commission of Human Rights through the case of *Maria Isabel Veliz Franco v. Guatemala*.¹⁰⁸ The allegations included the government's inability to process crime scene evidence, judicial delays, and the

¹⁰⁴ See, e.g., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.LN/II., Doc. 68, January 20, 2007, available at <http://www.cidh.org/women/Accesso7/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf> (last visited December 12, 2007); *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OEA/Ser.LN/II, Doc. 67, October 18, 2006, available at <http://www.cidh.org/countryrep/ColombiaMujeres06eng/TOC.htm> (last visited, December 12, 2007).

¹⁰⁵ U.N.G.A., *In Depth Study on all Forms of Violence Against Women*, A/61/122/Add.1 (July 6, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/419/74/PDF/No641974.pdf?OpenElement> (last visited December 12, 2007).

¹⁰⁶ The Universal and Equitable Access to Family Planning Services Law requires the government to pay special attention to monitoring and financing of contraceptive services. State of the Practice Brief, *Ensuring A Voice and a Choice for the Women of Guatemala*, available at http://www.usaid.gov/gt/docs/contraceptive_security.pdf (last visited December 19, 2007).

¹⁰⁷ RED FEMINISTA – *Contra la Violencia de Género, Aumentan Asesinatos de Mujeres en Guatemala* (Jan. 18, 2006) available at <http://redfeminista.org/pnocioa.asp?id=3542> (last visited December 18, 2007).

¹⁰⁸ *Maria Isabel Veliz Franco v. Guatemala*, Inter-American Commission of Human Rights, Case Num. 92/06, Petition 95–04 (Oct. 21, 2005) available at <http://www.cidh.org/annualrep/2006sp/Guatemala95.04sp.htm> (last visited December 19, 2007). This case was admitted in Report No. 92/06 of the Inter-American Commission on Human Rights (October 21, 2006) available at <http://www.cidh.org/annualrep/2006eng/GUATEMALA.95.04eng.htm> (last visited December 17, 2007).

inability to follow police evidentiary leads.¹⁰⁹ The Commission also took into consideration the number of femicides that Guatemala has encountered from 2001–2004, totaling 1,188 cases, only 9 percent of which had been investigated before the Commission.

The effects this case will have on Guatemalan law and on the physical security or insecurity of women will take a number of years to unfold. Still, it serves as another example in which the prohibitions on sex-based discrimination and the guarantees to life and human dignity contained in the Guatemalan Constitution are being engaged and reinterpreted from above and below.

By November 14, 2006, the number of femicides in Guatemala had reached 2,796, with only 20 cases resulting in sentencing.¹¹⁰ In response to this statistic, which emerged from the proceedings before the Commission, women from twelve organizations met within Guatemala in the Supreme Court of Justice to discuss the problems related to investigations into women's assassinations.¹¹¹ Women's organizations have asked the government to allocate more funding to the prevention and prosecution of the violence.¹¹² On November 28, 2006, a little over a month after the Inter-American Commission had accepted the *Franco* case, and in response to mounting internal and international pressure, the President of Guatemala organized a plan against femicide.¹¹³ The plan, the *Abordaje del Femicidio*, focuses on investigation, training, capacity-building, and communication to sensitize the public about femicide and to prevent violence against women.¹¹⁴ These actions have resulted from the active role women have taken within Guatemala, as well as internationally, to redefine their state's orientation toward, and interpretation of, the gender equality obligations contained in their Constitution.

CONCLUSION

This chapter serves as an illustration, particular to Guatemala, though not uncommon in other countries, of women adept at strategically reaching outside their borders to seek the assistance of international law and transnational

¹⁰⁹ *Id.*

¹¹⁰ Lorena Seijo, *Prevalece Impunidad, Solo 20 Sentencias en Dos mil 796 Asesinatos de Mujeres*, *Prensa Libre* (Nov. 14, 2006) available at <http://www.prensalibre.com/pl/2006/noviembre/14/156292.html> (last visited December 18, 2007).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Presidente Guatemala Seguridad Nov. 28, 2006, *Presidentes Subscriben Compromiso de Implementar Una Estrategia Contra el Femicidio* (Nov. 28, 2006) available at <http://www.guatemala.gob.gt/noticia.php?codigo=204&tipo=1> (last visited December 18, 2007).

¹¹⁴ *Id.*

organizations as they engage with their domestic constitutional and statutory laws to attain greater formal protections and to force enhanced interpretations of already handsomely drafted constitutions. Rooted cosmopolitanism is a useful conceptualization of the changing nature of women's identities within countries such as Guatemala, as women access the benefits of legal protections and political participation outside of their own states. This reaching out is done in a context of local organizing and activism and has resulted in fundamental challenges to long-held cultural traditions within Guatemala, just as it has resulted in statutory and constitutional change.

The role of international law and transnational networking in this domestic constitutional reform cannot be underestimated. But, it would be a mistake to view the role of international law too simply – to see international law and transnational networking as *themselves* the source of change. This would lose sight of the individuals within Guatemala who have been active agents in wringing new meaning with respect to gender equality from the Guatemalan legal system. To the extent that international law has operated to exert pressure from *outside* of Guatemala, it has been largely the result of the actions of women *within* Guatemala.

As I stated at the outset of this essay, CIL, composed as it is of state action and *opinio juris*, must (of course) take account of changes like those that Guatemala has undergone with respect to gender equality since the end of its civil war. Although an argument may be made that the process of legal reform described herein demonstrates that states are a good proxy for the popular will, thus obviating the need for individuals to participate in the CIL formation process, this view misses important insights.

Guatemala's legal reforms regarding gender equality have developed in the short time since its civil war came to a close. This rapid pace of change indicates that the government of Guatemala, before and during the civil war, was reflective of some position other than that of actual democratic political will. Examples abound of this type of failure of state action and *opinio juris* to reflect the political will of the people in the realization of human rights, especially in failing democracies or in non-democratic states. Each serves as an example of the veiled, but actual, desires of individuals within non-democratic countries that are not accounted for under the current doctrine on CIL formation, and gives rise to significant concerns about the democratic legitimacy of CIL that fails to recognize the vital role of individuals in its formation.

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SECTION FIVE

WOMEN IN THE PROCESS OF CONSTITUTION MAKING

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Women in the Constitutional Drafting Process in Burma

Thin Thin Aung and Susan H. Williams*

Burma currently suffers under one of the worst governments in the world. Over the course of the past year, the world has watched in horror as the military dictators ordered the army to shoot down peaceful demonstrators, including monks, in the streets of Rangoon.¹ People around the world struggled to get word from inside Burma when the military government tried to close down all communications and rounded up the demonstrators in nighttime raids.² And, the world stood aghast while this military junta refused desperately needed aid for its people when they were devastated by a cyclone.³

The people of Burma have been living under repressive military rule for almost fifty years, but they have never accepted this fate. They have struggled for their freedom, both with arms and with words, and they continue to do so. The democracy movement has come to realize that peace for Burma will require a constitutional arrangement that can guarantee freedom and equality to all of Burma's people. The women of Burma have been active in all aspects of the democracy movement, including the turn to constitutionalism, and have worked to assure that the constitutional settlement will include meaningful guarantees of women's equality. This chapter describes the history of constitutionalism in Burma and women's role in that history. It then turns to the current constitutional processes, both within the military government and in the democracy movement. Next, the chapter briefly explains the sources of

* We would like to thank Naw May Oo Mutraw, Andrea Button, Catherine Clements, and Christina Clark for their assistance with the research for this chapter.

¹ See *Q & A: Protests in Burma*, *BBC News* (October 2, 2007) at <http://news.bbc.co.uk/2/hi/asia-pacific/7010202.stm>; *Buddhist Monks Stage Protest in Burma*, *The Australian*, (September 18, 2007) at <http://www.theaustralian.news.com.au/story/0,25197,22440569-12377,00.html>.

² *Ibid.*

³ See *Burmese Endure in Spite of Junta, Aid Workers Say*, *The New York Times*, *Asia Pacific* (June 18, 2008) at http://www.nytimes.com/2008/06/18/world/asia/18myanmar.html?_r=1&oref=slogin.

women's inequality in Burma and the barriers to women's empowerment. It presents the position of the Women's League of Burma (WLB, an umbrella group representing women's organizations from many of Burma's ethnic peoples) concerning the necessary constitutional mechanisms for promoting the equality of women in Burma, including an assessment of the achievements thus far and the challenges that remain ahead.⁴

I. A BRIEF HISTORY OF BURMESE CONSTITUTIONALISM

Burma has a long history of constitutionalism, but not until recently have women played a meaningful role in the constitutional process. Burma was under British colonial rule from 1885 until 1947. Originally, Burma was ruled as a province of India, with a Chief Commissioner in Burma responsible to the Governor General of India and his legislative council. When the British government first considered granting Burma its own constitution in 1931, only one woman, Daw Mya Sein, was asked to represent the interests of Burma's women at the Round Table conference in London. The first woman to hold elected political office was Hnin Ma, who was elected to the Senate in 1929.⁵

Burma achieved independence from Great Britain after World War II. Under Japanese rule during the war, an Independence Preparatory Commission was formed, but it included no women. At the end of the war, the British government established a Constituent Assembly with the authority to draft a new constitution. Only three women were elected to this body, and another four were appointed as replacements for their husbands, who had been assassinated.⁶ General Aung San, often described as the father of the nation's independence, was able to negotiate and sign the Panglong agreement with ethnic groups from the hill areas to gain independence together from the British and to establish a union based on equality on February 12, 1947. Burma officially became the independent Union of Burma on January 4, 1948.

During the brief period of democratic rule, women made a little progress in political participation. In 1953, Ba Maung Chain was appointed as a minister to represent Karen State.⁷ Two women were elected to the legislature in 1952, five in 1956, and three in 1960.⁸ Thus, although there were distinguished women

⁴ The arguments in this chapter follow those in the texts of two position papers issued by the WLB, "Constituting Our Rights" and "Looking Through Gender Lenses." See <http://www.womenofburma.org>. The authors of this chapter were closely involved in the production of these papers.

⁵ See Kyaw Zwa Moe, *No Soft Touch*, 15 *The Irawaddy* No. 10 (2007).

⁶ Josef Silverstein, *Aung San Suu Kyi: Is She Burma's Woman of Destiny?* 30 *Asian Survey* 1007, 1009 (1990).

⁷ See *id.*

⁸ See *id.*

political leaders in both the colonial and post-colonial period, their numbers remained very small.

Unfortunately, the period of democracy was short-lived. The government of the early democratic period failed to fulfill the promise of genuine democracy and political equality for all ethnic nationalities. This situation led to armed resistance struggles by several of the ethnic minority groups and a series of civil wars. On March 2, 1962, a group of generals led by Ne Win, using the civil unrest as an excuse, took power over the country in a military coup and declared the 1947 constitution void. In 1974, the military regime drafted a new constitution based on a Burmese version of socialism and established a one-party rule in the country. Burma became the Union of the Socialist Republic of Burma with this 1974 constitution. Women played an even smaller role in politics under the military dictatorship.⁹

Under the military's one-party dictatorial rule, the country lost not only political equality for the ethnic people, but also basic democratic and human rights for all citizens. In response, people of Burma from all walks of life staged nationwide demonstrations against the government in 1988 and demanded the end of one-party rule, restoration of democracy, and creation of a multiparty system. But, instead of responding to these legitimate demands, the military regime brutally cracked down on the demonstrators, killing thousands on the streets, and suspended the 1974 constitution. The National League for Democracy (NLD), led by Daw Aung San Suu Kyi, was established as a result of the 1988 uprisings. In an attempt to mollify the population, the military junta allowed elections in 1990. The elections were a victory for the democracy movement because the NLD party won a clear majority, but again the participation of women was only marginal: women won only 3 percent of the 485 seats available.¹⁰ The military government, shocked by its loss, never allowed the elected representatives to take their seats. Many were arrested and jailed, many others fled the country and have since lived in exile, and Daw Aung San Suu Kyi has been under house arrest for most of the past two decades. In the absence of a constitution, and given its refusal to seat the elected government, the military junta (which currently calls itself the "State Peace and Development Council" or SPDC) has ruled Burma since 1988 under military law.

Thus, women had no meaningful role in the processes that led to the 1947 and 1974 constitutions. This failure to include women had a predictable effect on the substance of these constitutions with regard to gender equality.

⁹ See *id.* at 1009–1010.

¹⁰ See Assistance Association for Political Prisoners (Burma) web page at http://www.aappb.org/j_w_pol.html (last checked August 21, 2008).

Although the principle of equality for all citizens was enshrined in both constitutions, there was no recognition that a constitution could or should ensure that political, social, cultural, and economic changes occur to bring about that equality in practice. Therefore, although women's rights and equality were implied in the constitution, in practice, they were not realized.

II. CURRENT CONSTITUTIONAL PROCESSES

For many years, the SPDC claimed to be working on a new constitution for Burma. The National Convention, which the junta organized in 1993 to draft the guiding principles for the constitution, was made up of hand-picked representatives. The NLD party walked out of the Convention because it was so tightly controlled by the military government that no free process was possible, and many of the ethnic minority-based democracy groups also refused to participate.¹¹ In September 2007, after more than a decade of intermittent meetings, the National Convention finally finished its work. The result was a very long document entitled, "The Fundamental Principles and Detailed Basic Principles." This document was then given to a drafting committee to produce a constitution closely based on these principles. The English version of this constitution was officially released in September 2008.¹²

The SPDC constitution is the product of a process in which the women of Burma had no real participation. Of the 702 delegates to the National Convention, only 5 percent were women.¹³ Moreover, the women's organizations that were allowed to participate were only those dominated by the military government. There are no independent women's organizations allowed in the country. The government-sponsored women's groups are often run by the wives or family members of military officials and the ordinary members are often coerced into participating.¹⁴ As a result, the women of Burma have had no meaningful opportunity to participate in the creation of the SPDC constitution.

The substance of the SPDC constitution shows the clear effects of the exclusion of women from the drafting process.¹⁵ Although the constitution includes a general equality provision and a guarantee against discrimination on

¹¹ See Ethnic Nationalities Council (Union of Burma), <http://www.encburma.org>.

¹² Available at <http://www.myanmarforum.net/2008%20constitution.pdf>.

¹³ See *Looking Through Gender Lenses*, WLB Position Paper 9/06.

¹⁴ See *Burma Country Report on Human Rights Practices 2006*, Bureau of Democracy, Human Rights, and Labor, U.S. State Department (March 6, 2007).

¹⁵ This assessment of the SPDC constitution closely follows the text of a position paper prepared for the WLB by Susan H. Williams. See *Gender Analysis of the SPDC's "Fundamental Principles and Detailed Basic Principles"* (May 25, 2008) (paper on file with the authors).

the basis of sex, these apparent protections are illusions. First, these provisions are extremely general and vague. The military government of Burma has demonstrated that it is entirely willing to ignore the much more precise and powerful gender-equality guarantees included in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), to which Burma is a signatory.¹⁶ Indeed, in 2006, the United Nations Development Program ranked Burma 129th of 177 countries in terms of the empowerment of women in economic and political decision making.¹⁷ There is, therefore, little reason to believe that they will do any better with the vague and general provisions in their constitution.

Moreover, the junta's failure to implement the protections of CEDAW is completely consistent with its attitude toward gender equality. The generals have repeatedly asserted that the women of Burma already are, and always have been, equal to the men.¹⁸ They regard the protections of CEDAW as unnecessary because, in their view, there is no problem with gender equality. To cite just one stunning example of the government's lack of awareness and concern about women's issues, the body charged with promoting women's equality – the National Committee for Women's Affairs – lacks any significant funding and is headed by men.¹⁹

In addition to the government's general lack of understanding or interest, there are more specific reasons why these constitutional guarantees are likely to mean little. The apparent equality guarantees are directly undermined by other parts of the SPDC constitution. The clearest example of such an undermining provision is in Chapter VIII, section 352. This provision prohibits discrimination on the basis of sex in the appointment to government posts or duties, but then adds that "nothing in this section shall prevent appointment of men to the positions that are suitable for men only."²⁰ In other words, the ban on discrimination does not apply whenever the government believes that women are "unsuited" for the post. When this provision is combined with the repeated references to women as mothers elsewhere in the constitution,²¹ it becomes plain that the equality guarantees are not intended to challenge the traditional gender roles that keep women out of public life.

¹⁶ See Brenda Belak, *Gathering Strength* 27–32 (2002) (describing the CEDAW Committee's negative assessment of the country report submitted by Myanmar in 1998).

¹⁷ *Human Development Report 2005*, UNDP, September 2005, p. 228. See http://hdr.undp.org/en/media/HDR05_complete.pdf.

¹⁸ See Belak, *supra* at 27–32.

¹⁹ See *id.* at 28–29.

²⁰ See Chapter VIII, s. 352.

²¹ See Chapter VIII, s. 351; Chapter 1, s. 32(a).

In considering the impact of the SPDC constitution on women, the provisions that do not mention gender are just as important as the ones that do. This constitution ensures that the military will continue to exercise substantial governmental power in Burma. The constitution reserves at least 25 percent of every legislative body for sitting military officers;²² it delegates to the military the power to choose the Ministers of Defense, Home Affairs, and Border Affairs;²³ it gives the military complete control over its own affairs, with no civilian oversight;²⁴ and it gives the military terrifying power in a declared State of Emergency.²⁵

These provisions creating so much power for the military are a threat not only to democratic, civilian government in general, but also to gender equality in at least two ways. First, any government positions reserved for the military are, by definition, unavailable to women, because women are excluded from the military. In other words, the one-quarter military quota in the legislature is like a gender quota for men, barring women from equal participation in parliament. Second, the unchecked power of the military over its own affairs and under a state of emergency will allow it to continue to violate the human rights of women. Burma's military rulers have a long history of human rights abuses, and women – particularly minority women – have often been the targets.²⁶ This constitution will encourage and abet such abuses by assuring impunity for the military and will, thereby, perpetuate the subordination of women.

The SPDC constitution can never provide the basis for peace and stability in Burma. In addition to its many failings from the perspective of the ethnic minority groups in Burma,²⁷ this constitution also fails to provide effective guarantees of gender equality and creates substantial danger for the women of Burma.

At the same time, the democracy movement has also been engaged in a constitutional process. Many of the democracy organizations came together in February 2005 at a federal constitutional seminar. Because there are women's

²² See Chapter I, s. 14; Chapter IV, s. 74 (a), (b), s.109 (b) (national legislature, lower house); Chapter IV, s. 141(b) (national legislature, upper house); Chapter IV, s. 161(d) (state and regional legislatures).

²³ Chapter V, s. 232(b).

²⁴ Chapter I, s. 20(b).

²⁵ Chapter XI, s. 418 (a) (b) and s.420.

²⁶ See *Burma Human Rights Yearbook 2006*, section 7.6 at <http://www.ncgub.net/BHRY/2006/women.html>.

²⁷ See *Position Paper on the National Convention's Principles for a Constitution for the Union of Burma* (submitted to the UN by the Ethnic Nationalities Council) (prepared by David C. Williams) (January 15, 2008) (paper on file with the authors).

organizations in the border-based opposition movement, women representatives were invited to participate in the seminar. Women representatives from individual member organizations of the WLB attended the seminar and agreed with the other democracy groups on eight basic principles that should guide our future democratic federal constitution: sovereignty of the people, equality, self-determination, federalism, minority rights, secular state, multi-party democratic system and, importantly, human rights and gender equality. These democracy organizations authorized the Federal Constitution Drafting and Coordinating Committee (FCDCC) to carry out the task of drafting the constitution, consulting with the Burmese people in different regions, and getting technical advice from international legal advisors. The FCDCC has produced two drafts, and the process of consultation and modification continues. This chapter offers an assessment of the substance of the FCDCC draft on the particular issue of an electoral gender quota in a later section. The constitutional process has, however, involved greater participation by women than any previous Burmese constitution.

The federal constitutional process grew out of a grass-roots movement to draft constitutions at the state level in many of the ethnic minority states of Burma. These state committees are at different stages in the process, some on their fourth or fifth draft, others just beginning their first, but all are working hard to produce constitutions that address the needs and dreams of the people of their states.

Women have been included in the constitution drafting processes supported by the democracy movement, but still at insufficient levels. For example, of the fifteen members of the FCDCC, only two were originally women. Moreover, both of these women members were present as representatives of the WLB; none of the other organizations that sent representatives to the committee chose to send a woman. The WLB and its member organizations have been active in pressing for greater participation by women in the pro-democratic constitution-drafting processes.

III. THE SOURCES OF DISCRIMINATION AGAINST WOMEN IN BURMA

The sources of discrimination against women in Burma are deep and inter-linked. First, since the military came to power in 1962, all aspects of Burmese society have become increasingly militarized. Because the military now dominates public/political life and women are not permitted entry into the military in Burma, women are automatically excluded from holding many government positions. Moreover, the militarization of Burmese society has subjected large portions of the population to human rights abuses, many of which are

gendered. The military's use of rape as a tool of intimidation and cultural destruction is a human rights abuse that falls particularly on women.²⁸ Thus, the militarization of Burmese society has contributed to the marginalization of women.

But, the end of military rule will not mean the end of discrimination against women in Burma. The cultural sources of discrimination run deeper and broader. Nearly all of Burma's ethnic cultures and societies are patriarchal, subordinating women to men in both the public and private spheres. In the private realm, women suffer from discrimination in their rights to inheritance and property under customary law, as well as in their right to freedom from violence at the hands of their husbands. In the public realm, traditional gender roles exclude most women from participating in political processes and public leadership roles.²⁹

In addition to these cultural barriers, there are practical barriers as well. For example, women in Burma are less likely to be educated than men. Accurate information about literacy rates is extremely difficult to get, but the United Nations has estimated that less than one-third of the girls who begin primary schools actually complete them.³⁰ The barriers to education for girls include poverty (which forces them to work rather than attend school), dangers posed by armed conflict (which blocks their access to school), the lack of schools and teachers in many areas, and school fees (which lead families to sacrifice the education of their daughters).³¹ Thus, empowering women will require changes in the practical conditions of women's lives as well as in the underlying cultural assumptions that shape those conditions.

IV. THE WLB'S POSITION ON GENDER EQUALITY

As Burma is a country where people of many ethnicities live, it is important to establish a constitution that guarantees political equality for all ethnic people, no matter how small their numbers. It is also very important that political equality for women, who comprise more than 50 percent of the population, is guaranteed in the constitution.

²⁸ See Betsy Apple, *Schools for Rape: The Burmese Military and Sexual Violence* 34-41 (EarthRights International 1998) at <http://www.earthrights.org/files/Reports/schoolforrape.pdf>; *License to Rape* (Shan Women's Network) at <http://www.shanland.org/HR/Publication?LtoR/license.to.rape.htm>.

²⁹ See *Looking Through Gender Lens*, Women's League of Burma, Chiang Mai, Thailand, September 2006.

³⁰ See U.N. Working Group, *Human Development in Myanmar* 7 (1998). See also *Situation of human rights in Myanmar*, C.H.R. res. 1998/63, ESCOR Supp. (No. 3) at 198, U.N. Doc. E/CN.4/1998/63 (1998).

³¹ See *CEDAW Shadow report on Burma* (2000) at <http://www.womenofburma.org>.

The experience of history and of other nations teaches us that formal equality of opportunity will not lead to real, substantive equality. For example, even if the law guarantees women an equal right to run for office and serve in government, women will continue to be underrepresented in political office. Both discriminatory attitudes and the underlying inequalities between men and women (of education, wealth, time, and experience) will lead to this result. Simple recognition of the principle of gender equality in the constitution is not sufficient if it does not lead to actual equality for women.

One of the most important forms of actual equality is equal representation for women in politics. The constitution must assure that women actually occupy positions of governmental power for three reasons. First, the democratic government for which the people of Burma have struggled for so long will lack legitimacy if women are underrepresented. If women are to enjoy full citizenship, they must have the same freedoms and opportunities as men to make the laws and policies that will shape their lives. If the constitution allows women to be excluded from this role, then women will have been denied their basic right to equal citizenship.

Second, a government with adequate representation for women will make better policies. Women have specific interests and perspectives that need to be addressed by the government and those concerns will continue to be overlooked unless women are present in government to raise them.

And third, the full participation of women in all realms of life is crucial for the future prosperity of Burma. International organizations agree that raising the health, education, and economic status of women is essential to promoting the positive development of a nation.³² When the condition of women improves, the condition of the whole community improves. A constitution that assures women's equality in all realms, including politics, will be the best foundation for building a strong, healthy, and prosperous future for Burma.

V. WLB'S STRATEGY FOR WOMEN'S PARTICIPATION

WLB believes that it is our duty to establish a national constitution that guarantees human rights, equality, and democracy for all citizens of Burma. After it participated in the constitutional seminar and signed the basic principles, WLB set up its own constitutional study team with five members. The task for the team was to study and research the constitutions from various countries and propose ways and means to increase women's participation. The team also organized workshops on gender equality and women's political

³² See Elizabeth M. King & Andrew D. Mason, *Engendering Development through Gender Equality in Rights, Resources, and Voice* (World Bank 2001).

participation for women from Burma on the Thailand, India, China, and Bangladesh borders.

One year after its formation, the team came up with a policy paper with suggested recommendations for the WLB leadership to consider. The paper provided the best constitutional options for promoting gender equality and increasing women's political participation. Based on this research, the WLB published two booklets, "Constituting Our Rights" and "Looking Through Gender Lenses," as its advocacy tools. At the heart of the WLB's approach is a quota system to assure adequate political representation for women.

The WLB does not see quotas as an end in themselves, but as a means to the end for getting gender equality. In addition, the WLB is well aware that quotas are not a sufficient solution by themselves. To make the necessary change in gender hierarchies, much more than a quota is required. Indeed, even to make the quota itself work effectively, other programs, such as support for female candidates and office-holders, are required. Quotas are not sufficient, but they are necessary because without adequate representation for women in government, the many other necessary reforms become very unlikely.

WLB has proposed a three-part quota system at the federal level and has suggested specific constitutional language to implement the system. First, the constitution must create an electoral system that will allow for the effective operation of a quota. The best electoral system for making a quota work well in a society like Burma is a closed party list proportional representation (PR) system. PR electoral systems, even without quotas, are much more likely to generate representation for women than single-member, plurality systems. In a single-member district, where the candidate with the most votes wins (often called "first past the post" or FPP), local parties have an incentive not to run a woman candidate, who will be less likely to win against a male opponent because of gender discrimination. But, in a PR system, parties have an incentive to include women candidates on their lists, along with men, so as to appeal to the broadest possible constituency.³³ As a result, PR systems worldwide generate an average of 19.6 percent women members of parliament MPs, whereas FPP systems average only 10.5 percent women MPs.³⁴ Moreover, closed list PR is more likely to lead to higher levels of women's representation than open list PR.³⁵ A closed list system allows for simple enforcement of the

³³ See Pippa Norris, *The Impact of Electoral Reform on Women's Representation*, 41 *Acta Politica* 197–213 (2006).

³⁴ See Drude Dahlerup and Lenita Freidenvall, *Gender Quotas in Politics – A Constitutional Challenge*, *supra* chapter 1 at 30.

³⁵ See Navia Jones, *Assessing the Effectiveness of gender quotas in open-list proportional representation electoral systems*, 80 *Soc. Sci. Q.* 341–355 (1999).

quota through regulation of the party list, and it reduces the ability of voters to selectively discriminate against women candidates. For example, Peru and Argentina both have PR systems, but Peru is open list whereas Argentina is closed list. When both countries adopted 30 percent quotas for women candidates, the results were quite different. In Peru only 18 percent of the representatives actually elected were women, whereas in Argentina, the election produced 27 percent women MPs.³⁶ So, the WLB supports including a closed list PR electoral system in the constitution.³⁷

There are many reasons for specifying the type of electoral system in the constitution for a future, democratic Burma. For example, as mentioned earlier, Burma's ethnic minority groups need a constitution that guarantees them a meaningful role in the central government. But, the protections for minority groups built into the structure of government may be largely illusory unless the electoral system is designed to support minority representation. Thus, the constitution should include a clear statement about the nature of the electoral system. Ensuring that the electoral system promotes representation for women, and is consistent with the adoption of a quota to guarantee such representation, is only one of the reasons for including the electoral system in the constitution.

The second part of the quota system is the quota itself. The constitution must create a requirement that both genders be represented at a specified minimum percentage at every level in all three branches of the federal government: the legislature, the executive, and the judiciary. The WLB recommends a 30 percent minimum requirement.

In some countries, the quota is either a voluntary measure adopted by the political parties (as in Norway, Sweden, and Germany) or a statute, passed by the legislature (as in Belgium, China, and Panama.) For Burma, however, the WLB believes that the quota must be included in the constitution. In a country still struggling to overcome deep cultural resistance to women in politics, it is unlikely that either political parties or the politicians elected to

³⁶ See Pippa Norris, *Fast Track Strategies for Women's Representation: What Works?* Table 2, Paper on the occasion of the 50th session of the Commission for the Status of Women, UN (March 1, 2006) (paper on file with the authors).

³⁷ Another advantage of a PR electoral system is that it allows the quota to take the form of a candidate quota rather than reserved seats in the legislature. Different quota arrangements work better or worse with different electoral systems. See *Stina Laserud & Rita Taphorn, Designing for Equality: Best-fit, Medium-fit, and Non-favorable Combinations of Electoral Systems and Gender Quotas* (IDEA 2007). Candidate quotas do not work well with FPP systems, so reserved seats are often used in this sort of electoral system. See Norris, *supra* n. 20. Reserved seats raise a number of problems, however, including both the democratic legitimacy and the effectiveness of their incumbents. For these reasons, the WLB prefers candidate quotas in a PR system to reserved seats in an FPP system.

the parliament will choose voluntarily to implement a gender quota. The constitutional moment is a special opportunity for women's voices to be heard and for a quota to be adopted while the eyes of the international community are on the nation. If this opportunity is lost, then the democratic representation of women will be left to the often-changing desires and interests of political parties and politicians. If such representation is crucial to democratic legitimacy, as we have argued it is, then it must be guaranteed by the constitution. Constitutional quotas exist in a number of countries, including Afghanistan, Argentina, France, and India (at the local government level).³⁸

The WLB has proposed specific language for the federal constitution to implement the quota. The language is:

Article: Gender Equity in Government

In order to assure gender equity in all aspects of government, every body in the government of the Federal Union of Burma, at every level within the legislative, executive, and judicial branches, must include a minimum of 30% women and a minimum of 30% men among its members. . . . Each branch of the federal government is responsible for promulgating any rules, election procedures, or other procedures necessary to ensure that all bodies under the authority of that branch comply with this minimum requirement. Any person who believes that the rules regarding the composition of any body of the government of the Federal Union of Burma fail to implement this gender equity requirement may petition the Constitutional Court to declare those rules unconstitutional.³⁹

This language creates a constitutional requirement that applies to all bodies of the federal government in all three branches, the executive, judiciary, and the legislature. Women's perspectives and concerns must be heard not only in the process of making the laws, but also in the process of executing and interpreting the laws. In fact, a gender quota that applies only to the legislature could result in gender-sensitive laws that are then undermined or made ineffective by executive officials and judges who lack the benefit of women's perspectives. The constitution must ensure that all branches of government include a meaningful number of women.

The provision sets out a minimum of 30 percent representation for each gender, but it does not specify the precise mechanism through which the quota

³⁸ See <http://www.quotaproject.org/system.cfm#constnational>.

³⁹ See *Looking Through Gender Lenses*, Women's League of Burma, Chiang Mai, Thailand, September 2006, p. 13. http://www.womenofburma.org/Statement&Release/genderpaper_english.pdf.

will be applied. The mechanics of the quota will vary depending on the nature of the particular government body at issue. For example, an appointed executive commission will require a different quota mechanism than the elected lower house of the federal legislature. This article leaves such details largely to the discretion of the branch of government controlling the relevant body. But, to ensure that such discretion is exercised in a way that meets the goal of gender equality, the draft Article allows for review by the Constitutional Court.

The language of this provision is also gender neutral: it requires at least 30 percent of each gender in every government body. Obviously, under current conditions, there will not be a need for positive or affirmative action to ensure that at least 30 percent of government officeholders are men. Only women's representation will require such positive action. Despite this fact, the WLB believes that a gender-neutral constitutional approach is preferable for two reasons. First, casting the quota in gender-neutral terms makes it clear that the issue here is a fundamental matter of democratic representation and not simply a desire to promote the advancement of one group. Second, in this gender-neutral form, there is little or no pressure for removing the provision from the constitution in the future. One objection to including quotas in constitutions, as opposed to statutes, is that the quota is understood to be a temporary measure, whereas the constitution is supposed to be more permanent. But, a gender-neutral quota that assures adequate representation for both genders is not a temporary measure; it is a permanent democratic requirement. The particular mechanisms used to assure such representation may, indeed, become outdated and change over time, but the underlying goal of equitable representation will never need to be changed. This Article specifies that goal.

The third part of the quota system is the electoral laws, which will specify precisely how the quota operates. These laws will take the form of normal legislation and regulation, rather than being part of the constitution, so that they may be adapted to the particular government body concerned and modified over time in the light of experience. Whatever their specific form, however, these rules must specify the details of the quota system in a way that ensures the effective operation of the quota. For the electoral quota that applies to members of parliament, there is a great deal of research addressing the effective design of quotas. The simplest quota mechanism in a closed party list PR system is to require each party to submit a list of candidates' names that includes a minimum of 30 percent of each gender. But, this requirement alone will not create an effective quota.

There are several other requirements that are necessary to ensure the effectiveness of the quota. First, the quota rules must include a mechanism for

determining the order of names in the party lists. If a party includes one-third women, but all of the women's names are at the bottom of the list, then few of them will actually occupy seats in the legislature. To ensure that the quota results in approximately 30 percent of the legislature being female, the party must be required to list the names in a particular order. In some countries, the parties use a "zipper" or "zebra" system, alternating women's and men's names on the list. In other countries, the parties are required to ensure that a woman's name appears at least once in every group of three names on the list. Without some requirement, such as these, about the order of the names on the list, the quota will be ineffective.

Second, a quota system is only as effective as its enforcement mechanism. Experience has demonstrated that parties will violate the quota requirements if they believe it is to their electoral advantage to do so. Financial disincentives have only a limited effect because parties are often willing to lose the money if it means that they will win the election. The most effective enforcement mechanism, therefore, is one that hits parties where they live: in their ability to be elected. The simplest and most effective way to do this is to have a rule requiring that any party that turns in a candidate list that fails to meet the quota – including the ordering requirements – will not be included on the ballot. This mechanism has been extremely effective in Argentina, for example.

Finally, to be effective, a quota also requires the adoption of programs to support and increase women's political participation. Parties will continue to resist the quota unless they are able to find qualified and interested women candidates. Increasing the pool of such candidates – through training in political skills, support for campaign funding, and so on – will help to make the quota work. In addition, the quota will be worth little if the women candidates, once elected, are unable to be effective in their political positions. Programs providing training and support for women office-holders can help increase their ability to provide effective representation.

VI. RESULTS OF THE WLB'S APPROACH

The first achievement of the women involved in the constitutional process was to get gender equality included as one of the eight basic principles for drafting the future federal constitution of Burma. The second achievement was to ensure that there would be women on the drafting committee by including members of the WLB. These early steps provided the foundation for the argument concerning a gender quota. After a series of dramatic, and sometimes

emotional discussions, the FCDCC agreed to include a 30 percent quota for the legislature in the first draft of the constitution. The FCDCC has recently released its second draft of the federal constitution and the quota provision remains, although there has been substantial controversy about it. The general cultural background led many men to find the quota objectionable. Especially strong resistance came from a group of exiled parliamentarians elected in the 1990 general elections. Also, some women who are not closely connected with women's organizations cannot accept the quota as a means of improving gender equality. Despite this opposition, the current draft of the FCDCC includes a quota.

The present language of the draft reads: "To ensure gender equality, at least 30 percent of the seats at all levels of legislation of the Federal Union shall be reserved for women."⁴⁰ This language falls short of the WLB's proposal in several respects. It is limited to the legislature and does not include other branches of the government. It is not gender-neutral. And, it does not explicitly include a right of judicial review.⁴¹ But, it represents a hard-won victory for the WLB and the women of Burma and a first step towards real constitutional protection for gender equality. The WLB will continue working on this issue.

At the current time, the drafting committee is promoting awareness of the constitution among different areas and communities, and organizing consultation meetings with people from Burma to get their feedback on the draft. The WLB is utilizing this opportunity to educate these constituencies about gender equality and explain the importance of including a gender quota in the constitution. Simultaneously, the WLB set up a women's political empowerment program in April 2006. This program is designed to implement a series of strategies for increasing the number of women in decision-making positions and the level of women's participation in politics. The strategies and skills taught to participants in the empowerment program include advocacy (both international and internal), capacity building, research, and documentation.

The WLB also believes that the years of advocacy around the constitution in general and the quota in particular have begun to have an effect on our male colleagues in the democracy movement. The male FCDCC committee members have come to understand gender equality better and have begun to answer questions from the public about these issues. They now feel much

⁴⁰ See *The Constitution of the Federal Republic of the Union of Burma*, Chapter 2, Article 37 (2d draft 2008).

⁴¹ The language is also less than ideal because it suggests a reserved seat system rather than a candidate quota system, although it is general enough to be interpreted as either, depending on the electoral system adopted.

more comfortable explaining that affirmative action by the government is necessary to counteract the effect of cultural patterns that deny women their human rights. Beyond the drafting committee, the border-based democracy movement has also recognized the importance of women's participation and invited representatives from women's organizations to the strategic meetings for Burma.

VII. REMAINING CHALLENGES: WHERE DO WE GO FROM HERE?

Women have become a part of the current democratic constitutional process in a way that is unique in Burma's history. Nonetheless, we hope for greater levels of participation in the future. In particular, we hope that women will be recruited and included in all of the democracy organizations and constitutional drafting committees. We continue to work in conjunction with our male counterparts toward this goal, while we build on our past achievements.

The constitution itself will require continued work as well. We don't know when we will be able to use this constitution for Burma or how long it will take to adopt the final version. But, we believe that this process is an important part of our efforts to bring genuine democracy and equality to the country. As a result, we would like the constitution to reflect the best vision for our democratic future. In terms of gender equality, that will require additional work. The quota provision itself should be strengthened in all of the ways described above. In addition, the constitution should clearly indicate that the electoral system for the lower house of the legislature will be a proportional representation system.⁴² And, of course, the WLB is working on a number of other constitutional provisions that are of concern to women, including a government Ministry on Gender Equality and reproductive rights. This chapter has focused on a gender quota in government as an illustrative example of women's participation in the constitutional process, but this is not the only issue on which women have been active.

Once the constitution is complete, we will present it to the international community. We would like the nations of the world to look at our constitution and compare it with the military government's undemocratic version. Such a comparison will make clear the stark choice facing the world. If the world does nothing, then the military dictators in Burma will use their new constitution as a shield, behind which they will continue to perpetuate the tyranny, suffering,

⁴² The current draft says that the members of this house will be elected "through elections based on the proportion of the population." This may well mean a PR system, but it could be more clearer See *The Constitution of the Federal Republic of the Union of Burma*, Chapter 4, Article 82 (2d draft 2008).

and injustice they have imposed on the people of Burma for almost fifty years. But, if the world does take action, it can rely on a well-developed democratic movement, with a fair and workable constitution, to lead the country towards peace, justice, and gender equality. And, women will be a central part of that movement.

www.urdukutabkhanapk.blogspot.com

Founding Mothers for a Palestinian Constitution?

Adrien Katherine Wing and Hisham A. Kassim*

INTRODUCTION

As this chapter went to print, the Gaza Strip and West Bank Palestinian Territories were under the authority of two different Palestinian governments. Gaza was under the control of the Islamist group, *Harakat al-Muqawama al-Islamiya* (Hamas or the Islamic Resistance Movement), which unexpectedly won the majority of seats for the Palestinian Legislative Council (PLC) in January 2006. The West Bank was under the control of the Palestinian Authority (PA) under the leadership of President Mahmoud Abbas, head of the mainstream Fatah party. President Abbas appointed an alternative cabinet and received support from the international community in 2007, after brutal internecine fighting between the two parties led to a Hamas takeover of Gaza in June. Palestinian political conflict and ongoing problems in the peace process with Israel have prevented any focus by either Hamas or Fatah on the internal legal regime. At some point, the situation may improve and the dream of an independent state of Palestine may become an imminent reality. If so, Palestinians may return to a constitutive process that has been at a standstill for many years. Hopefully, women will be demarginalized and play a greater role than they did in the past. This chapter provides some potential guidance for those unknown founding mothers of the new Palestinian state, assuming that some of them, regardless of their political affiliation, will have a special interest in the plight of women.

Part I of the chapter provides background information on the status of women's rights in Palestine under the existing complex legal order. It provides a survey of the laws, including customary, religious, and statutory sources. Part II presents a review of the current constitutional regime under the 1997

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Basic Law and the proposed third Draft Constitution of 2003. Part III provides suggestions for the future founding mothers based on several different scenarios concerning the unfolding future of Palestine.

I. THE EXISTING LEGAL REGIME

This part discusses the existing legal regime as it pertains to Palestinian women's legal status. Although the entire system has been deeply affected by the ongoing forty-plus year Israeli Occupation, this part will emphasize customary, religious, and statutory sources (such as the Personal Status Code), which all reify disparate treatment on the basis of gender. In particular, deeply rooted customary and religious practices present serious obstacles to the adoption of reforms by Palestinian founding mothers. The electoral laws of 1996 and 2005 were attempts to help rectify entrenched sexism.

A. Custom and Tradition

This subpart describes the customary law and traditions in effect in Palestinian society. It analyzes the effects of custom and tradition, which result in the disparate and discriminatory treatment of Palestinian women. Customary law in Palestine is known as the legal tradition *urf*. Customary law is comprised of unwritten norms that have been passed down and may be invoked by any legal actor, including mediators, clan elites, lawyers, judges, government officials, or warring families in a "blood feud." *Urf* may be invoked within the civil and religious court systems as well as in disputes falling outside of the official court systems.¹ Customary law may be applied to women regardless of their class, educational level, or geographical location and affects women in several major areas, including family law, education, honor killings, and domestic violence. This subpart addresses the problematic ramifications of customary law on Palestinian women in each of these areas.

Custom affects family law by creating a patriarchal society in the private sphere.² Women are ideally the "nurturers and repositories of family honor."³ According to custom, even adult women cannot live independently.⁴ Custom requires a woman to live with either her husband or her father's family.⁵

¹ Adrien Katherine Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 *Case W. Res. J. Int'l L.* 383, 396 (1999) [hereinafter *Embryonic Constitutionalism*].

² Adrien Katherine Wing, *Custom, Religion and Rights: The Future Legal Status of Palestinian Women*, 35 *Harv. Int'l L.J.* 149, 152 (1994) [hereinafter *Custom*].

³ *Id.*

⁴ *Id.* at 155.

⁵ *Id.*

Women should be very conservatively attired, by wearing the *hijab* (headscarf), and should be involved primarily in nurturing their children and family in the private sphere of the home.⁶ The conservative attire and behavior help protect women's sexuality, which is the cause of *fitna* or disorder.⁷ Marriage should occur without any dating or socialization with the opposite sex.⁸ It is also customary for women to get married at a very young age,⁹ which compromises many important development opportunities, such as education and employment. The dowry, known as *mahr*, is based on the education and family background of the woman, and must be paid by the man to the fiancée.¹⁰ Embarrassment, divorce, or worse can result from failure to prove virginity on the night of the wedding.¹¹

Under customary law, Palestinian men may marry multiple wives, but are limited to four under Islamic law.¹² Even though polygamy is not widely practiced in Palestine,¹³ its ongoing legality can have many negative effects on women. These effects are discussed in the next subpart. Women are expected to bear a male child, hopefully within a year after the marriage, which increases their status in the family.¹⁴ After the birth of a son, the mother is known as *Um* (mother of) followed by the name of her oldest son.¹⁵ It should also be noted that the same naming system is extended to fathers as well. The father is known as *Abu* (father of) followed by the name of his oldest son. At the same time, sons and daughters are often referred to as *Ibn* (son of) or *Bint* (daughter of) followed by his or her father's or mother's name.

Under customary practices, education for girls may be limited¹⁶ because society may not deem education as necessary for women, who are mainly responsible for unpaid child care and household chores. As one woman acknowledged, "if a family is unable to educate all the children, they will

⁶ *Id.* at 152, 154.

⁷ Adrien Katherine Wing, *Democracy, Constitutionalism and the Future State of Palestine* 34 (1994) [hereinafter *Future State*].

⁸ *Id.* at 35.

⁹ Wing, *Custom*, *supra* note 2, at 196.

¹⁰ *Id.* at 161.

¹¹ WING, *Future State*, *supra* note 7, at 35.

¹² Heather Jacobson, *The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip*, 10 *Mich. J. Gender & L.* 143, 160 (2003).

¹³ See Dahlia Scheindlin, *Palestinian Women's Model Parliament*, *Middle E. Rev. Int'l Aff.*, Sept. 1998, at 36, 38 (contending that the percentage of polygamy may be as low as 4%), available at <http://meria.biu.ac.il/journal/1998/issue3/scheindlin.pdf>.

¹⁴ Wing, *Custom*, *supra* note 2, at 155.

¹⁵ *Id.*

¹⁶ *Id.* at 155. According to the CIA World Fact Book, the literacy rate for women over the age of 15 years is 88% whereas for males over the age of 15 years, it is 96.7% see <https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html> (last viewed October 18, 2008).

choose the man because he will be the breadwinner and the head of the household.”¹⁷

The most horrific influence of customary law is exemplified by honor killings. These murders usually occur as a result of unacceptable, “dishonorable” behavior by Palestinian women, typically “involving their sexuality, considered socially and culturally taboo.”¹⁸ A few women have been killed for reasons such as failing to prove virginity on their wedding night or for dishonoring their families by “conversing with a man, smoking, coming home late, or engaging in a romantic relationship.”¹⁹ Close relatives such as fathers, brothers, husbands, or uncles, conduct the honor killing in most cases.²⁰ Although such deaths do occur, fortunately they are extremely rare and take place primarily in very conservative and traditional families.²¹

In prosecuting those responsible for honor killings, judges and prosecutors act in a gender discriminatory fashion.²² Both gossip and rumors are admissible as mitigating evidence in honor killing proceedings.²³ Indeed, the Jordanian Penal Code, which is in effect in the West Bank, offers “reduced punishment, and even exemption from” punishment for honor killings under certain circumstances.²⁴ Complete exemption from murder is afforded under the Jordanian Penal Code if a man kills his wife after he sees her committing adultery.²⁵ The same exemption or reduced punishment is not afforded to a woman who murders her husband after seeing him commit adultery.²⁶

Custom has also led to a societal acceptance of the physical abuse of women. A poll conducted regarding domestic violence and Palestinian women determined that 50 percent of the Palestinian men surveyed believed that “disobedience by a woman would justify battery.”²⁷ According to a psychiatrist in Gaza, domestic violence is widespread because “[m]en have a lot of aggression and very few channels for ventilating it. . . . Men . . . use women to ventilate, and

¹⁷ Wing, *Custom*, *supra* note 2, at 157.

¹⁸ Nadera Shalhoub-Kevorkian, *Femicide and the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?*, 36 *Law & Soc. Rev.* 577, 578 (2002).

¹⁹ *Id.* at 579–580.

²⁰ *Id.* at 585.

²¹ No official statistics are available. One web site estimates that there were 22 honor killings in a year. *Case study: Honour Killings and Blood Feuds*, http://www.gendercide.org/case_honour.html (last visited Sept. 15, 2008).

²² Shaloub-Kevorkian, *supra* note 18, at 593–96.

²³ *Id.* at 599.

²⁴ *Id.* at 580.

²⁵ *Id.*

²⁶ *Id.* at 585.

²⁷ Adrienne Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 *Alb. L. Rev.* 943, 965 (1997) [hereinafter *Violence*].

beating is part of the culture.”²⁸ There are few options available to women suffering from domestic violence. Shelters for battered women are not a viable option because custom does not permit women to live independently.

Custom interferes with effective legal responses to violence against women. The Jordanian Penal Code provides punishments for sexual abuse, including rape, of women.²⁹ Under this Code, a court has the authority to suspend a criminal proceeding if the offender agrees to marry the rape victim.³⁰ Likewise, perpetrators of domestic violence can go unpunished because there is a “custom of noninterference in domestic disputes.”³¹ Some women are reluctant to report cases of domestic violence because they would rather “handle the situation within the family.”³²

In conclusion, customary law severely limits the development of Palestinian women. Despite its problematic effects, many Palestinian women and men find reliance on custom to be “necessary and desirable.”³³ Moreover, some women’s rights activists claim that the Palestinian government and society at large “are not interested in providing counseling or outreach” to women who have suffered from the negative effects of custom and tradition.³⁴

B. Religious Law (*Shari’a*)

This subpart explains the impact of *Shari’a* on the rights of Palestinian women. Islamic *Shari’a*, which applies to 90 percent of Palestinians,³⁵ provides for more women’s rights than customary law, but still discriminates on the basis of gender.³⁶ Similar to custom, religion is a central part of the Palestinian community.³⁷ *Shari’a*, which is found in the *Qu’ran* and other sources, has rules that govern daily life, and has intertwined itself with custom over the centuries.³⁸

Shari’a improves the status of women in several ways. For example, as previously mentioned, under *Shari’a*, polygamy is limited to four wives³⁹ and

²⁸ *Id.* at 964 (internal citation omitted).

²⁹ Shalhoub-Kevorkian, *supra* note 18, at 592.

³⁰ *Id.*

³¹ Wing, *Violence*, *supra* note 27, at 964.

³² *Id.*

³³ Wing, *Custom*, *supra* note 2, at 157.

³⁴ Wing, *Violence*, *supra* note 27, at 965.

³⁵ See Gihane Tabet, *Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria* 24 (2005) (stating that 90% of Palestinians are Sunni Muslims).

³⁶ Wing, *Custom*, *supra* note 2, at 158.

³⁷ Wing, *future State*, *supra* note 7, at 15.

³⁸ *Id.* at 15–16.

³⁹ Wing, *Violence*, *supra* note 27, at 963.

“women are allowed to divorce their husbands on certain limited grounds and receive maintenance.”⁴⁰ Women also have the right to own and inherit property.⁴¹ Women can establish their own businesses.⁴² They can file a lawsuit without their husband’s consent and act as legal guardians for a minor in legal proceedings.⁴³

Despite these advantages over custom, *Shari’a* also discriminates against women in a number of ways. An example of discriminatory treatment of women can be found in the following *Qu’ranic* passage: “Men have authority over women because Allah made the one superior to the other. . . . As for those from whom you fear disobedience, admonish them and send them to beds apart and beat them.”⁴⁴ Thus, under *Shari’a*, husbands are permitted to beat their wives, “who must submit and endure their punishment.”⁴⁵

Shari’a allows Muslim men to marry non-Muslim women, but Muslim women are only allowed to marry Muslim men.⁴⁶ Men can marry up to four wives, but women are limited to one husband.⁴⁷ Although each wife should theoretically be treated equally under *Shari’a*, in reality, the subsequent wives may be favored “with respect to economic resources, social support, and attention.”⁴⁸ Furthermore, the threat of polygamy restricts the development of women because a woman may hesitate to disagree with her husband for fear of her husband marrying a new wife.⁴⁹

Men can divorce (*talaq*) their wives for any reason, whereas women are only allowed to divorce on limited grounds.⁵⁰ Women can only get custody when their children are very young.⁵¹ A very minimal amount of alimony is awarded.⁵² Finally, even though women have the ability to make certain stipulations in their marriage contracts to afford them rights they normally would not have under *Shari’a*, these stipulations are made infrequently because of

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Adrienne Katherine Wing & Shobhana Ragunathan Kasturi, *Palestinian Women: Beyond the Basic Law, 1994–1995 Third World Legal Stud.* 141, 147.

⁴³ *Id.*

⁴⁴ *The Koran* (N. J. Dawood, trans., 1974). The *Bible* also contains similar language: “Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything.” *Ephesians* 5:22.

⁴⁵ Wing, *Custom*, *supra* note 2, at 159.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Jacobson, *supra* note 12, at 160–61.

⁴⁹ Wing, *Custom*, *supra* note 2, at 159.

⁵⁰ Wing, *Violence*, *supra* note 27, at 963.

⁵¹ *Id.*

⁵² Wing, *Embryonic Constitutionalism*, *supra* note 1, at 423.

custom.⁵³ Women can receive only half the inheritance of men who bear the “same degree of relationship to the deceased.”⁵⁴

Because *Shari’a* sanctions disparate treatment of women, some Palestinian women activists view the replacement of the *Shari’a*-influenced personal status code with more secular legislation as crucial to the development of Palestinian women.⁵⁵ In contrast, some traditional Palestinian women express their feelings in the following way: “Our role as women is clear. . . . We are able to raise scores of courageous men. . . . It is the woman’s obligation to bring up her children in the true Islamic way – to spur them on to [holy war] in the path of God to elevate the glory of their religion.”⁵⁶ The popularity of *Shari’a* among the Palestinian population led the Fatah-run PA to become more “religious,”⁵⁷ and use religion as a political tool.⁵⁸ Hamas is well known for its Islamist agenda on women’s rights.

In conclusion, although Islamic law has certain benefits over custom for Palestinian women, both the customary and religious traditions have intertwined over the centuries with the net effect of subordinating women’s status. Aspects of both traditions have been codified, as discussed in the next subpart.

C. Personal Status Code

Family law in the West Bank is governed by the Personal Status Code (PSC), which is essentially the old Jordanian Personal Status Code of 1976. Gazan family law is derivative of Egyptian law and the subject of future research. The provisions of the PSC discussed here are limited to the areas concerning marriage, divorce, and child custody. For a Palestinian woman to be married, she must obtain the consent of her guardian, which in most cases is her father. This rule applies even if the woman is legally an adult.⁵⁹ However, there is an exception to this general rule. The woman may marry without the consent of her guardian if she has obtained the age of majority, has been previously married, and has obtained a divorce.⁶⁰ It is only after she fulfills these three

⁵³ *Id.*

⁵⁴ Wing, *Custom*, *supra* note 2, at 158–59.

⁵⁵ *Id.* at 163.

⁵⁶ *Id.*

⁵⁷ Nahda Y. Sh’hada, *Gender and Politics in Palestine: Discourse Analysis of the Palestinian Authority & Islamists*, 11 *Miami Int’l & Comp. L. Rev.* 3, 65 (2000).

⁵⁸ *Id.* at 72.

⁵⁹ Lama Abu-Odeh, *Modernizing Family Law: The Case of Egypt*, 37 *Vand. J. Transnat’l L.* 1043, 1102–03 (2004).

⁶⁰ Personal Status Code (PSC) No. 61, art. 13 (1976) (Palestine) (Hisham Kassim trans.).

requirements that she is able to enter into a marriage contract without the consent of her guardian. In effect, the PSC treats a legally competent woman who has reached the age of majority as a minor with regard to marriage.

With regard to the minimum age of marriage, the PSC requires that the husband be 16 years of age and the wife be 15 years.⁶¹ Increasing the minimum age of marriage to 18 years can reduce the amount of familial intervention in the marriage process, produce more stable marriages, and decrease the birth rate.⁶² In Palestine, the birth rate is very high, 6.1 births per woman.⁶³ Palestinian women, especially younger women, would benefit greatly from having the minimum marriage age increased. If the age were increased to 18 years, the additional three years could give women the chance to complete high school or pursue a career. Also, at an older age, these young women might be less susceptible to family or peer pressure and will be more able to voice their opinions regarding marriage or the potential husband.

Spousal maintenance during the marriage is one of the few areas in which the PSC provides the wife with some protection. Under the PSC, the husband is required to support his wife.⁶⁴ She has no obligation under the marriage contract to contribute to the expenses of the household. The PSC also requires that the husband provide the wife with a dwelling according to his financial ability.⁶⁵ The wife, however, loses her right to spousal maintenance and a dwelling if she works outside the home without her husband's permission.⁶⁶ These protective statutes could be interpreted as limiting the responsibilities of Palestinian women, because some of their rights have been limited as well. Another way of looking at these provisions is to view them as a method of further discrimination and limitation of women's rights. The fact that wives are not required to work outside the home could mean that society either does not expect them to or does not want married women to work in the public sphere, because their proper role is in the home – raising children and doing household maintenance. This view is further strengthened by the PSC provision that eliminates the wife's right to spousal maintenance if she works outside the home without her husband's permission. The general rule under

⁶¹ *Id.* art. 5.

⁶² Mounira M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* 225 (2001).

⁶³ Adrien Katherine Wing, *Constitutionalism, Legal Reform, and the Economic Development of Palestinian Women*, 15 *Transnat'l L. & Contemp. Probs.* 656, 699 (2006) [hereinafter *Legal Reform*].

⁶⁴ PSC No. 60, art. 13.

⁶⁵ *Id.* art. 36.

⁶⁶ *Id.* art. 68.

the PSC is that the wife is to obey her husband and the husband is to treat his wife with respect.⁶⁷

If the wife is generally required to obey her husband and must obtain the husband's consent before she can undertake certain actions, it raises the question of what the husband's remedies are should his wife disobey. The authors believe that the duty of obedience imposed on the wife encourages spousal abuse and domestic violence. This belief is based on some of the provisions found in the Penal Code as discussed previously. Complete exemption from punishment is afforded to the husband if he murders his wife after he sees her committing adultery.⁶⁸ The wife, however, is not afforded the same complete exemption from punishment should she murder her husband after witnessing him committing adultery.⁶⁹ This rule signifies the state's unwillingness to regulate the domestic sphere unless it reinforces patriarchy. The custom of no state interference in domestic disputes is well documented in one of author Wing's previous articles.⁷⁰

The PSC codifies the Islamic rule on polygamy and allows Muslim Palestinian men to marry up to four wives. A Muslim man may marry any woman who is a Christian, Jew, or Muslim, whereas a Muslim woman may only marry a Muslim man.⁷¹ Should a Muslim woman want to marry a non-Muslim man, he must convert to Islam before the marriage. Palestinian women may limit the number of wives their husbands may marry in the marriage contract.⁷² However, the default rule is that Muslim men may marry up to four wives unless the wife stipulates otherwise. Younger women, especially teenaged women, may not be in a position to demand a limit on the number of wives their husbands may marry. That being said, polygamy is practiced rarely in Palestine, with some estimating the rate at approximately 4 percent.⁷³ However, the threat of marrying a second wife severely limits the wife's bargaining ability and forces her to accept conditions she otherwise would not. The PSC does provide some protection for women in polygamous households by requiring the husband to treat all his wives equally and to secure their unanimous consent before housing them in the same dwelling.⁷⁴ The wives that do not wish

⁶⁷ *Id.* art. 39.

⁶⁸ Shaloub-Kevorkian, *supra* note 18, at 580.

⁶⁹ *Id.*

⁷⁰ Wing, *Violence*, *supra* note 27, at 964.

⁷¹ Wing, *Custom*, *supra* note 2, at 159.

⁷² PSC No. 60, art. 19(1).

⁷³ Wing, *Legal Reform*, *supra* note 63, at 659.

⁷⁴ PSC No. 60, art. 40.

to live in the same dwelling would be entitled to a separate dwelling as well as the spousal maintenance discussed above.

In the area of divorce, the Palestinian husband has the right to initiate a divorce, but the wife does not.⁷⁵ The husband may effectuate the divorce non-judicially, in writing or orally.⁷⁶ The widely held belief in Palestine, as in most Arab Muslim countries, is that the husband only needs to utter the phrase “I divorce thee,” three consecutive times to effectuate the divorce. The wife, as we saw earlier regarding the husband’s right to practice polygamy, may stipulate in the marriage contract that she has the right to divorce her husband without his consent.⁷⁷ However, the default rule is that the woman does not have the right to divorce her husband without his consent, and youthful brides are not in the best position to demand this provision.

The law does carve out a few exceptions in which the woman may ask a court to dissolve her marriage. A woman may request a divorce if her husband is diagnosed with an incurable disease,⁷⁸ if her husband becomes mentally challenged or insane,⁷⁹ or if he is sentenced to imprisonment for a minimum of three years.⁸⁰ The wife may only ask for a divorce after her husband has served one year of his three-year prison sentence.⁸¹ She may also ask for a divorce if her husband abandons her,⁸² fails to provide spousal maintenance,⁸³ or severely harms her.⁸⁴

The justification for most of these exceptions is rooted in the idea that if the husband were to abandon his wife, be imprisoned, or become mentally challenged, then he would not be able to fulfill his obligations toward the marriage – providing his wife with a dwelling and general spousal support. One of the exceptions raises a potential conflict with other PSC provisions: the right of the wife to ask for a divorce if her husband harms her. As discussed earlier, there are strong societal norms and some statutory provisions that give the husband free reign – if not encourage him – to discipline his wife in the private sphere. There is also a strong custom against state intervention in domestic matters. The PSC exception granting the wife a right to divorce her

⁷⁵ Scheindlin, *supra* note 13.

⁷⁶ PSC No. 60, art. 86.

⁷⁷ *Id.* art. 19(1).

⁷⁸ *Id.* art. 115.

⁷⁹ *Id.* art. 120.

⁸⁰ *Id.* art. 130.

⁸¹ *Id.*

⁸² *Id.* art. 123.

⁸³ *Id.* art. 127.

⁸⁴ *Id.* art. 132.

husband if he harms her may be severely limited by the husband's right to have his wife obey him, and by the strong societal norms of obedience.

In the realm of alimony, the PSC grants the ex-wife one year of spousal maintenance should her husband divorce her for no legitimate reason.⁸⁵ The reasoning behind requiring limited alimony payments is that the ex-wife is expected to return to her family, who will then resume financial responsibility for their daughter. The expectation that the ex-wife's family will resume financial responsibility, however, is no longer realistic given the devastating economic situation in Palestine.

The International Monetary Fund and World Bank estimate that the unemployment rate in 2006 was at a staggering 23.6 percent.⁸⁶ Gaza experienced more than a third of its labor force being jobless and the West Bank experienced a 20 percent unemployment rate.⁸⁷ Real gross domestic product (GDP) actually fell by 8 percent from 2005 and real GDP per capita fell by 11 percent.⁸⁸ Real GDP per capita is currently 40 percent below 1999 levels,⁸⁹ with low-income households feeling the brunt of the economic recession.⁹⁰ Because economic conditions in Palestine are so bleak, many families are simply unable to resume the financial responsibility of supporting a recently divorced daughter. The ex-husband may be in a better condition to help support his ex-wife.

In the realm of child custody, the PSC separates the issue of physical custody from legal guardianship. The PSC follows the traditional Muslim approach by vesting legal guardianship of all the children in the father.⁹¹ Physical custody of male children remains with the mother until the son has reached the age of 9 years.⁹² The daughters remain with the mother until the age of 11 years.⁹³ It is possible for the mother to maintain physical custody of the children until they reach the age of majority under limited circumstances.⁹⁴ If the mother remarries a non-relative of the child, then all physical custody rights of the mother are terminated.⁹⁵ For a westerner to understand this last provision, it is

⁸⁵ *Id.* art. 134.

⁸⁶ International Monetary Fund - World Bank, *West Bank and Gaza: Economic Developments 2006 – A First Assessment*, Table 1, (Mar. 2007) available at <http://www.imf.org/external/np/wbg/2007/eng/032607ed.pdf>.

⁸⁷ *Id.* at 10.

⁸⁸ *Id.* at 8, Table 2.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 10.

⁹¹ PSC No. 60, art. 154.

⁹² *Id.* art. 161 (1976).

⁹³ *Id.*

⁹⁴ *Id.* art. 162.

⁹⁵ *Id.* art. 156.

common for first cousins to marry in some Middle Eastern societies, and also widows sometimes marry their late husband's brother. Thus, it is legally and culturally possible for a divorced woman to marry a relative of her child, that is, the child's uncle or cousin.

In conclusion, the PSC codifies many aspects of customary and religious law, reifying patriarchal norms that perpetuate female subordination. Founding mothers of a new Palestinian state will want to review it carefully to align it with the final constitution.

D. ELECTORAL LAWS

Because of the political situation, the PLC has not been able to pass many laws since its founding in 1996. It has, however, taken a stand on gender issues in the electoral laws. Only five women had been elected to the eighty-eight-member PLC in the 1996 elections. As might be imagined, these were extraordinary women, including Hanan Ashrawi, an internationally known Christian professor, Intisar al Wazir, the widow of martyred leader Abu Jihad, and Rawiya al Shawa, the well-to-do wife of the former mayor of Gaza City. Only one, Dalal Salameh, was a young unmarried woman in a headscarf from a West Bank refugee camp.⁹⁶ Few women would have been in the educational or financial position to seek political office. With so many children per women, few mothers would have the time to run for office and serve. Undoubtedly, many husbands and fathers would have forbidden their wives or daughters from running, either regarding it as inappropriate for a woman at all or feeling the need for women to take a back seat in the political sphere in the first election of its kind in the area.

The PLC has passed two laws to address the stark gender underrepresentation. These include Local Elections Law No. 5 of 1996, and Elections Law No. 9 of 2005. Both laws stipulate a quota system, so that a minimum number of women are elected into the PLC and local councils. Although quota systems could be seen as undemocratic, other articles in Part One of this volume indicate that they can ensure the participation of women in the political process

⁹⁶ For a brief bio on one of these women, Rawiya al Shawa, see Women's Affairs Technical Committee, Voice of Women, Issue 239, April 28, 2006, *Profile, Part 2, Rawiya al Shawa, The Journey to Parliament* at <http://www.watcpal.org/english/display.asp?DocID=47>. For an article written by Dalal Salameh, see *The Member of Parliament's Environment of Accountability, in World Bank Institute, Parliamentary Accountability and Good Governance* at 39, available at <http://www.parlcent.ca/publications/pdf/sourcebooktext.pdf>. The Women's Affairs Technical Committee has produced a book, *Pioneer Women of My Country*, in Arabic, about all five women. See the press statement, *WATC Recognizes the First Five Women in the Legislature* available at <http://www.watcpal.org/english/display.asp?DocID=193>.

on a higher level than would occur otherwise.⁹⁷ The theory is that once pre-set levels of women are engaged in the political process, the quota system could be dropped.⁹⁸ The electoral laws offer a glimpse of how concerned legislators, women's groups, and activists have been able to change the law to increase women's rights and to provide the platform for further change.

Local Elections Law No. 5 of 2005 amended Local Elections Law No. 5 of 1996, and the law added a provision stating that if women run for town council elections, they are entitled to two seats.⁹⁹ Another author has translated this provision slightly differently as stating that the law guarantees "two women on each town council if at least that many run."¹⁰⁰ The provision then states that the reserved seats will go to the two women who gained the highest number of votes among the female candidates.¹⁰¹ If no women run for town council elections, then the guaranteed two-seat provision does not apply.

The Elections Law No. 9 of 2005 establishes a quota system at the national level. The law states that Parliament will be composed of 132 members.¹⁰² The law then divides the 132 members into two equal categories. The first category of sixty-six members will be elected according to the population size of each of the sixteen Palestinian districts.¹⁰³ The provision also stipulates that a minimum of six members will be Christian.¹⁰⁴ The second category reserves sixty-six seats for party-nominated candidates.¹⁰⁵ In this second category, the law requires that each party list include a minimum number of women candidates. There must be one woman among the first three candidates listed, then one woman among the next four candidates, and finally one woman among the next five candidates listed thereafter.¹⁰⁶ For example, if a list contains seventeen candidates, a total of four women must be listed. This system, depending on the number of candidates on the list, will ensure that 20–23 percent of the candidates are women.

The quota system has had some success in increasing the number of women in the political arena. In the 2006 parliamentary elections, seventeen women were elected utilizing the quota system, or about 25 percent of the sixty-six

⁹⁷ See chapters 1 and 2 *supra*.

⁹⁸ Janet Powers, *Blossoms on the Olive Tree* 128 (2006).

⁹⁹ Amended Local Elections Law No. 5, art. 28 (Hisham Kassim trans.).

¹⁰⁰ Powers, *supra* note 98, at 129.

¹⁰¹ Amended Local Elections Law No. 5, art. 28.

¹⁰² Elections Law No. 9, art 2.2 (Hisham Kassim trans.).

¹⁰³ *Id.* art. 3.2.A.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 3.2.B and 3.2.C.

¹⁰⁶ *Id.* art. 4.

party-nominated seats.¹⁰⁷ Because no women were elected to the district seats, women currently occupy approximately 12 percent of total parliamentary seats. At the local level, 50 of the 306 town council seats went to women in 2004.¹⁰⁸ Thus, women at the local level occupy approximately 16 percent of total seats.

In conclusion, the PLC has not passed many laws in its decade long history. The electoral laws provide a modern approach to gender issues by legislating a moderate form of quotas. Founding mothers will want to reconsider the success of these statutes because the overall percentage of women elected on the local and national levels was still not very high from a global perspective. Because founding mothers in the parliament are so few, it will be essential to convince a majority of founding fathers as well of the necessity of changing electoral and other laws.

II. THE BASIC LAW AND DRAFT CONSTITUTION

This part provides a brief background on the evolution of the two relevant constitutive documents – the Basic Law and the Draft Constitution. It analyzes and compares the various equality and human rights provisions in each of these with respect to women’s rights. It also outlines the limitations of these documents.

Adrien Katherine Wing served as a U.S. Agency for International Development (USAID) consultant, in 1996, during the drafting of the Basic Law by the PLC. The framers of the document thought that it would be an interim constitution in effect until the State of Palestine was formed as part of the final status negotiations under the Oslo Peace Accords.¹⁰⁹ At that stage, the prospective date for final status talks was anticipated to be 1999. The document was ratified by the PLC in 1997 and signed five years later in May 2002, by the late President of the PA, Yasser Arafat.¹¹⁰ The drafting committee for the Basic Law included one of the six female PLC members. Thus, the official role of women was rather minimal. Although the Basic Law has theoretically been in effect since 2002, the document has had little day-to-day impact because of the Israeli occupation and limited ability of the PA to actually govern any part of Palestine.

¹⁰⁷ International Institute for Democracy and Electoral Assistance, University of Stockholm, *Global Database for Quotas for Women*, available at <http://www.quotaproject.org/displayCountry.cfm?CountryCode=PS>.

¹⁰⁸ *Id.*

¹⁰⁹ Adrien Katherine Wing, *The Palestinian Basic Law*, Palestine Center (Feb. 25, 2003), in Information Brief No. 96, available at <http://www.palestinecenter.org/epap/pubs/20020730ib.html> [hereinafter *Palestinian Basic Law*].

¹¹⁰ *Id.*

The current Draft Constitution provides a snapshot of the evolution of constitutive thinking since the Basic Law was finalized in 1997. It was drafted by the Palestinian Liberation Organization (PLO), which theoretically represents all Palestinians worldwide, rather than the PLC, which only represents those living in the West Bank, Gaza, and East Jerusalem. The final Constitution would take effect and abolish the Basic Law once the State of Palestine is formed.¹¹¹ In 1999, a Constitution Committee was established to begin the process,¹¹² and the most current version of the Constitution, the third draft, was submitted to the PLO Central Committee on March 9, 2003.¹¹³ The drafting committee did not contain any women, and there were no women among the international consultants either. The Central Committee approved the document and advised the drafters to continue working “in view of its final discussion and approval at the next Central Committee meeting.”¹¹⁴ Final approval has not occurred because of the complicated political situation, including the breakdown of Israeli-Palestinian peace talks and increased violence, among other things.

In addition to the general human rights provisions applicable to both genders, the Basic Law and the Draft Constitution contain various sections affording certain rights and freedoms to Palestinian women that attempt to assist them in their struggle to gain a more equal footing with men in Palestinian society.¹¹⁵ Article 9 of the Basic Law, the Equality Clause, declares, “[a]ll Palestinians are equal under the law and judiciary, without discrimination because of race, sex, color, religion, political views or disability.”¹¹⁶ The Draft Constitution contains a similar provision. Article 19 states, “All Palestinians are equal before the law. They enjoy civil and political rights and bear public duties without difference or discrimination, regardless of race, gender, color, religion, political opinion, or disability. The term ‘Palestinian’ or ‘citizen’ wherever it appears in the constitution refers to male and female.”¹¹⁷

Additionally, the Draft Constitution contains several provisions that specifically address the rights afforded to women. Such rights are not present in the Basic Law. Article 22 of the Draft Constitution states: “Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties and duties as men.”¹¹⁸ Furthermore, Article 23 states:

¹¹¹ Nushka min Al Dustoor [ND] art. 193 (Palestinian Nat’l Auth.) (Hisham Kassim trans.).

¹¹² *Id.* Preface.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Wing, *Violence*, *supra* note 27, at 973.

¹¹⁶ Basic Law art. 9.

¹¹⁷ Nushka min Al Dustoor [ND] art. 19 (Palestinian Nat’l Auth.).

¹¹⁸ *Id.* art. 22.

“Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The Law shall strive to abolish restraints that prevent women from contributing to the building of family and society.”¹¹⁹ The “restraints” that limit the development of Palestinian women might include the negative effects of custom, religion, and the Israeli occupation.

On their face, the above provisions seem to give Palestinian women equal status to men, both in the private and public spheres. Nevertheless, another provision that appears in both the Basic Law and the Draft Constitution severely restricts the potential positive effects of the foregoing equality provisions. The Basic Law and the Draft Constitution state that *Shari’a* will be “a major source” for legislation.¹²⁰ The Draft Constitution also places all personal status matters, including women’s rights, under the jurisdiction of religious law and as a result, for the majority of Palestinians, personal status matters will be governed by the *Shari’a*. Furthermore, the Basic Law states that “*Shari’a* affairs and personal status shall be assumed by *Shari’a* and religious courts in accordance with law.”¹²¹ The Draft Constitution does not specifically create religious courts; however, it states that the “law shall define the institutions of the judicial branch and regulate their structure and the types of courts.”¹²² It is uncertain how the Draft Constitution will affect *Shari’a* courts, which are already established institutions in Palestine.

Because *Shari’a* endorses disparate treatment of women, the provisions designating *Shari’a* as a source of legislation create a potential conflict with the equality provisions. Further, both the Basic Law and the Draft Constitution state that Islam is the official religion in Palestine.¹²³ The meaning and effects of this clause are unclear.¹²⁴ Most Arab countries have such a provision in their constitutions and the meaning of the clause depends on each country’s cultural context.¹²⁵ The clause has the potential to provide the authority to enforce Islamic law against all Palestinians, which may lead to discriminatory treatment of women. Thus, this clause could also conflict with the equality provisions and restrict the rights afforded to Palestinian women.

The Draft Constitution specifically addresses Palestinian women’s rights to participate in political life. Article 8 of the Draft Constitution states: “The rights and liberties of all citizens shall be respected, including the right to

¹¹⁹ *Id.* art. 23.

¹²⁰ *Id.* art. 7.

¹²¹ Basic Law art. 92, § 1.

¹²² Nushka min Al Dustoor [ND] art. 162.

¹²³ *Id.* art. 5 (Palestinian Nat’l Auth.); Basic Law art. 4, § 1.

¹²⁴ Adrienne Katherine Wing, *Healing Spirit Injuries: Human Rights in the Palestinian Basic Law*, 54 *Rutgers L. Rev.* 1087, 1096 (2002).

¹²⁵ *Id.* Lebanon does not have such a clause.

form political parties and engage in political activity without discrimination on the basis of political opinions, sex or religion.”¹²⁶ In Article 53, the Draft Constitution further states: “Citizens shall have the right to assume public office, on the basis of competence, merit and equal opportunity in accordance with the requirements of the law.”¹²⁷ Thus, the Draft Constitution, on its face, seems to provide equal political rights to men and women.

In contrast, Article 26 of the Basic Law, which lists certain political rights, including the right to establish political parties,¹²⁸ does not specifically include a non-discrimination provision. Moreover, the language of Article 26 allows for the restriction of the rights listed therein because many of the provisions in Article 26 state that the rights are afforded “in accordance with the requirements of the law.”¹²⁹ Thus, the political rights listed in the Basic Law are subject to limitations imposed by legislation.¹³⁰

There are three additional articles in the Draft Constitution that could be interpreted to apply to domestic violence. Article 61 of the Draft Constitution states that “[t]he state shall assume responsibility for the safety of persons and property.”¹³¹ Protection of the “safety of persons” may apply to domestic violence. Further, Article 23 declares that the “constitutional and legal rights of women shall be safeguarded; and any violation of those rights shall be punishable by law.”¹³² Freedom from domestic violence may be a legal or constitutional right of Palestinian women, and thus protected by Article 23. Additionally, Article 28 states: “Every person has the right to freedom and personal safety. Such right may not be violated, except in cases and in accordance with procedures stipulated by law.”¹³³ Thus, “personal safety” may encompass freedom from domestic violence.

Even though the foregoing articles in the Draft Constitution may potentially be applicable to domestic violence, they are ambiguous and subject to different interpretations. Moreover, because *Shari’a* specifically allows the beating of women and is a “major source of legislation” in the Draft Constitution, it may prevent the application of these ambiguous sections to the private sphere. The scope of Article 28 is further limited by the provision that allows the right to personal safety to be violated “in accordance with procedures stipulated

¹²⁶ Nushka min Al Dustoor [ND] art. 8.

¹²⁷ *Id.* art. 53.

¹²⁸ Basic Law art. 26.

¹²⁹ *Id.*

¹³⁰ *Palestinian Basic Law, supra* note 109.

¹³¹ Nushka min Al Dustoor [ND] art. 61.

¹³² *Id.* art. 23.

¹³³ *Id.* art. 28.

by law.”¹³⁴ Legislation or *Shari’a* can be “law” within the meaning of this provision, allowing the suspension of the right to personal safety of Palestinian women.

In conclusion, this part has shown that both the Basic Law and Draft Constitution contain provisions that may be interpreted in both helpful and harmful ways with respect to women’s rights. Founding mothers have a rich array of provisions to work with from both documents when finalizing the Constitution.

III. SUGGESTIONS FOR THE FOUNDING MOTHERS

This part provides some relevant suggestions for Palestinian founding mothers. These proposals depend upon the scenario in existence, each of which has its strengths and weaknesses, at the time a new constitution is drafted. For example, if the status quo remains, there could be two separate Palestinian entities; one in the West Bank and one in Gaza. The West Bank entity could be regarded globally as the state of Palestine, with the Gaza entity remaining in diplomatic and legal isolation. This option is not very desirable because most Palestinians would probably want the new state to include both areas. Another potential scenario is that a compromise is reached between Fatah and Hamas, and a federal nation is created with great autonomy for Hamas in Gaza and a similar autonomy for Fatah in the West Bank. Many Palestinians might find this choice undesirable, as the area and population may be too small to sustain a federal system. An additional scenario is that there is a return to a coalition government between Fatah and Hamas, the situation that was just getting started before the Hamas takeover of Gaza. This outcome might be unstable, much as actually happened on the ground. One further alternative is that new elections could be called and Hamas could win again to govern the whole territory. The downside is that any Hamas win might result in international isolation unless Hamas meets various conditions including recognition of Israel, and renunciation of terrorism. Alternatively, new elections could result in a Fatah win, although many Palestinians continue to view Fatah as weak and corrupt. Over its ten years in “power,” it failed to deliver an independent state.

If Hamas has *de facto* control over Gaza, or rules it in a reunified federal state, or wins a national election again, it will, at some point, focus on a domestic agenda. Given its Islamist bent, Hamas would more than likely institute the imposition of *Shari’a* law in all domains. Hamas-affiliated founding mothers

¹³⁴ *Id.*

would join this call as well. Specifically, they would call for clarification in the final constitution and make *Shari'a* the source of law, rather than a source of law. The equality clause would be either explicitly or implicitly interpreted to mean that women's rights to equality would be only as permitted by *Shari'a* law. The PSC would then be amended to take a much more conservative approach to women's rights.

The remainder of this Part gives advice to the founding mothers assuming that a scenario exists in which a more secular approach is desirable, either because Fatah wins the next round of elections in both Gaza and the West Bank or Fatah maintains exclusive control over the West Bank. Who might the founding mothers be at this point? We will assume the model of the Basic Law is followed and founding mothers are women in the PLC, who will be part of a drafting committee for the final constitution as well as part of the plenary that ultimately adopts it. They will then also be legislators implementing statutes that must be brought into alignment with the new constitution. An alternative scenario is possible if the process of the Draft Constitution is followed. The PLO could form a drafting committee, perhaps with no women at all, which finalizes the constitution. The Draft Constitution could then either be sent to the PLC for adoption and/or to a national plebiscite, much as happened with the Iraqi constitution. The latter undesirable scenario leaves no room for founding mothers other than as passive recipients of a final version and/or as voters in a plebiscite.

In an ideal world, women could be preparing to enhance their participation in a number of ways. Groups that emphasize democratization generally or have specific democratization projects could focus on women's participation in constitutionalism and politics more broadly. For example, the Women's Center for Legal Aid and Counseling (WCLAC), the Women's Affairs Technical Committee, and the Birzeit Institute for Women's Studies program have all been involved in such efforts in the past. WCLAC hosted a women's model parliament that considered various legal changes in 1998.¹³⁵ Unfortunately, the continued occupation, the stagnant status of the international peace process, and the failure of Hamas and Fatah to reach reconciliation have also led to similar stagnation in women-empowering projects.

At whatever point the situation moves forward again, we recommend that the founding mothers suggest revisions to the language in the third Draft Constitution. For example, Article 23 states: "Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The Law shall strive to abolish restraints that prevent women from contributing

¹³⁵ See www.wclac.org.

to the building of family and society.”¹³⁶ The Draft Constitution used the word “actively” rather than “equally,” which could suggest “that the provision stops short of guaranteeing full equality in these areas.” We recommend changing the wording so that the phrase reads “equally participate.”¹³⁷

To resolve any potential tension between the equality clause and the clause mandating Islam as the national religion, a new section is needed. A provision should indicate that the equality clause trumps the national religion clause. Based on the new provision, several changes in the PSC could be legislated. For example, the PSC stipulates that a Muslim woman can only marry a Muslim man. If the sexes are to be treated equally, then both Muslim men and women should be able to marry any person, whether they are Christian, Jew, or Muslim.

In previous scholarship, we have suggested that Palestinians consider some of the provisions found in the Tunisian Personal Status Code.¹³⁸ Tunisia is one of the most secular Muslim countries and is known worldwide for its progressive status on women’s rights, developed soon after the country’s independence, thus having had time to become internalized by the country’s population. For example, in Tunisia, no guardian’s consent is required for the marriage of an adult female, whereas it is required in Palestine.¹³⁹ In Tunisia, there is a uniform marriage age of 18 years, whereas there is a differential age in Palestine of 15 years for girls and 16 years for boys.¹⁴⁰ Tunisia has eliminated the Islamic duty of the wife to obey the husband, whereas Palestinian women still have the duty.¹⁴¹ Most notably and radically for the Muslim world, Tunisia abolished polygamy, whereas it still exists in Palestine.¹⁴² Additionally, Tunisian men and women have equal rights to divorce, whereas in Palestine men can divorce easily, but women must meet onerous grounds.¹⁴³

In addition to the *Shari’*a-based PSC, a secular personal status code could be promulgated to give the citizens of Palestine a choice between having their marriages governed by religious or secular laws.¹⁴⁴ It should be noted that even though a secular personal status code could grant Palestinian women more

¹³⁶ Nushka min Al Dustoor [ND] art. 23.

¹³⁷ Adrienne Katherine Wing and Hisham Kassim, *Hamas, Constitutionalism, and Palestinian Women*, 50 *How. L.J.* 479, 490 (2007)[hereinafter *Hamas*].

¹³⁸ Adrienne Katherine Wing and Hisham Kassim, *The Future of Palestinian Women’s Rights: Lessons from a Half Century of Tunisian Progress*, 64 *Wash & Lee L. Rev.* 1551 (2007).

¹³⁹ *Id.* at 1560–1561.

¹⁴⁰ *Id.* at 1561.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1564–1565.

¹⁴⁴ Wing and Kassim, *Hamas*, *supra* note 137, at 511–512.

rights, there might be substantial societal and familial pressures on couples to continue to be governed by the religiously based PSC. Educating people about this option, however, could increase its usage over time. Some western-educated elites might be interested in a secular personal code, although such individuals may have become even more religious after long-term exposure to western secularist principles.

As previously mentioned, there is some ambiguity as to whether the current provisions cover the case of domestic violence. Palestinian founding mothers could consider the clause that exists in the South African constitution on freedom and security of the person. Article 12 states: "Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources."¹⁴⁵ Private sources can be interpreted to mean family violence.

A final suggestion would be for the constitution to include an electoral quota system. The founding mothers could survey a number of countries and suggest supportive language. For example, the Iraqi constitution mandates that women make up one-fourth of the representatives in Parliament.¹⁴⁶ A fallback position would be to take the system from the current electoral laws and place it in the constitution. It may be a necessary fallback because the current electoral laws have resulted in still relatively low numbers of women in the PLC.

In conclusion, this part has provided several suggestions to increase gender equality if Palestine takes a more secular approach in the future. Founding mothers might consider several revisions to the Constitution, and then subsequent amendments to the PSC to enhance the status of women.

CONCLUSION

The Palestinians in the Occupied Territories appear far from gaining their independent state. If, at some point, independence is realistic, they might be able to focus on the internal legal regime as well as their international relations. An important part of the internal legal system will be advancing the rights of women, who remain subject to patriarchal presumptions under existing customary, religious, and statutory regimes. This chapter provides some suggestions to the future Palestinian founding mothers for enhancing the status of women, first in the Constitution, and later in the PSC. Because the number of women in the existing (and probably any future) parliament or drafting committee will be small, it will take the concerted efforts of founding fathers

¹⁴⁵ *South Afr. Const.* art. 12(c).

¹⁴⁶ *Iraq Const.* art. 47(4).

as well to realize and solidify constitutional and legislative reforms. Although feminism remains an “F” word for many Palestinian women and men, most will recognize that the future success of Palestine as a nation requires both genders to work together in all arenas. Without the occupation, more Palestinians might decide to take on new priorities, including a more concerted emphasis on women’s rights. Even then, it will require a committed Palestinian civil society, female and male, young and old, Christian and Muslim, to take new norms and turn them into reality on the ground.

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Conclusion: Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, Interpretation

Vicki C. Jackson*

As Katharine Bartlett has written, being a legal feminist entails “asking the ‘woman question’” in law.¹ This essay asks the “woman question” about constitutions and constitutional law, largely with the purpose of generating areas for future research. I focus neither on particular subject areas nor on doctrinal issues, but rather on three areas of constitutional theory: the idea of constitutions as entrenched law under difficult-to-amend provisions, the allocation of jurisdiction in and among different levels and branches of government, and the idea of interpretive theory in constitutional law.

First, I want to acknowledge the wide range of subjects in and around constitutions that are amenable to analysis through the lens of gender. Women in many parts of the world now participate in constitution making – the title of a recent collection of essays, *Women Making Constitutions*, would have been almost inconceivable a century ago.² As Vivien Hart notes, greater emphasis on participation in constitution making has in many countries offered opportunities for women to place their mark on and in constitutions.³ Many questions are embraced in this topic: How have women organized to participate? What have women sought to include in their constitutions? What have women disagreed about? What are the relationships among women’s participation in

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¹ Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 831 (1990).

² *Women Making Constitutions: New Politics and Comparative Perspectives* (Alexandra Dobrowsky & Vivien Hart, eds., 2004).

³ Vivien Hart, *Democratic Constitution Making* 10 (U.S. Inst. Of Peace, Special Rep. 107, July 2003), available at <http://www.usip.org/pubs/specialreports/sr107.html> (last visited June 30, 2008).

constitution making, the constitutional texts that emerge, and the changed conditions for women in the years thereafter? How much do women participate as office holders, judges, and in other government positions under these constitutions? We might think of these questions as being about constitutional agency – about ownership of and participation in constitution making.

Next is the question of what constitutions say about women's equality, status, and condition as a substantive matter – the subject matter of another excellent recent collection, *The Gender of Constitutional Jurisprudence*.⁴ Among the questions Professor Kathleen Sullivan suggests in her Brennan Center Lecture are these: Is there a general or specific equality principle? Is sex a prohibited classification or does the constitution prohibit discrimination against women? Do bans on discrimination apply only to government action or also to private actors? Does the constitution include only negative or also positive rights? Does it recognize “only judicially enforceable or also broadly aspirational equality norms”?⁵

One could also ask whether discrimination is measured only by an intent test, as in U.S. constitutional law, or whether disparate effects are treated as presumptive forms of constitutionally banned discrimination. This category goes to the recognition of women as equal participants in the polity, and is concerned not only with rights, but also with obligations to improve the material conditions of women's lives. Are there specific guarantees relating to support for pregnancy, childbirth, and reproductive autonomy? To protect women's employment and social security from the adverse effects of pregnancy, childbirth, and child rearing? To recognize the discriminations, needs, and challenges faced by women differently situated by reason of race, ethnicity, religion, or sexuality? Does the constitution provide sufficient protection against the forms of violence that disproportionately harm women? Does the constitution recognize rights or provide protection for caregiving, as Robin West has argued for,⁶ and how does the constitution support women in their existing positions and at the same time enable more equitable sharing of the caregiving responsibilities that have historically been assigned to women? How are asserted conflicts between gender equality and gender-biased traditional, cultural, or religious practices to be resolved? Between equality and asserted freedoms of expression?

⁴ *The Gender of Constitutional Jurisprudence* (Beverly Baines & Ruth Rubio-Marín, eds., 2005).

⁵ Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 *Calif. L. Rev.* 735, 747 (2002).

⁶ See Robin West, *Rights, Capabilities, and the Good Society*, 69 *Fordham L. Rev.* 1901, 1925–26 (2001).

A third set of general questions relate to constitutional structures of voting and governance. We know that proportional voting systems have tended to produce a higher percentage of women office holders than single member districts using first-past-the-post systems,⁷ but many questions of design – quotas, parity, “twinning,” reserved seats, and other approaches to increasing women’s representation, and doing so for both majority and minority group women – remain. Another kind of question about governance is whether the particular institutional structure of governance matters – for example, do parliamentary systems offer more opportunities for women than presidential or quasi-presidential systems? Likewise, one can ask whether federalism, or the balance between localism and centralization of government powers, affects women differently from men. For example, is governance closer to home more hospitable to women’s participation? Or does federalism make the kinds of social change women need more difficult to achieve?

But, these are not the questions I raise in this essay, which instead discusses three questions that overlap with or cut across these categories of comparative constitutional law.

First, entrenchment. Even the most casual comparative study suggests that constitutions are usually distinguished from other laws by their entrenched character; they are, usually, harder to change than other laws, through amendment procedures requiring supermajorities.⁸ Entrenchment is, then, part of the idea of a constitution, which may be critically evaluated from a gender-equality perspective.

Second, jurisdiction. Constitutions typically allocate jurisdiction, and concepts of jurisdictional exclusivity, concurrency, and preemption are deployed to construct and mediate relationships within federations and between local and global jurisdictions, creating multiple spheres of law whose rules condition the generation and implementation of equality law.⁹ How do these allocations of jurisdiction affect women and their position and choices in their societies?

⁷ See, e.g., Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation Elections in the United States* 102–13 (1993); Richard H. Pildes & Kristin A. Donoghue, *Cumulative Voting in the United States*, 1995 *U. Chi. L. Forum* 241, 275–76; Mary Becker, *Toward a Progressive Politics and a Progressive Constitution*, 60 *Fordham L. Rev.* 2007, 2028–2029, 2048–2049 (2001). For an excellent collection on the use of quotas in political systems to increase women’s participation and representation, see *Women, Quotas and Politics* (Drude Dahlerup, ed., 2006).

⁸ See, e.g., Cass Sunstein, *Constitutionalism and Secession*, 58 *U. Chi. L. Rev.* 633, 636–643 (1991); see also Donald Lutz, *Principles of Constitutional Design* 150–51 (2006).

⁹ See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 113 *Yale L.J.* 619 (2001); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *Yale L. J.* 1564 (2001).

Finally, interpretation. Interpretation – over rights, boundaries, and powers – is an important site of constitutional struggle. Interpretive theory describes who,¹⁰ and what sources of law, may participate in contests over constitutional meaning, as shown by current debates over the role of transnational sources in constitutional adjudication.¹¹ I turn first to this issue, then explore the issues of entrenchment and jurisdiction, before closing with a return to women's lives and constitutional interpretation.

I. FEMINIST THEORY AND CONSTITUTIONAL THEORY: RAPPROCHEMENT OR DISENGAGEMENT?

Despite substantial feminist critiques of constitutional law, Tracy Higgins and other scholars have observed that feminist legal theory, which has had a large impact on many areas of legal scholarship, has had a relatively small impact on theories of constitutional interpretation in the United States.¹² Professor Higgins' account for the limited effects of feminism on constitutional interpretation was this: Scholars of constitutional interpretation tended simply to assume individual capacity to make choices whereas feminist theory emphasizes social construction and constraint on choices.¹³ I would like to build on

¹⁰ Compare, e.g., Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away From the Courts* (1999), with Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *Const. Commentary* 455 (2000).

¹¹ Compare, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *Harv. L. Rev.* 109, 116 (2005) with, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 *UCLA L Rev.* 639 (2005).

¹² See Tracy Higgins, *Democracy and Feminism*, 110 *Harv L. Rev.* 1657, 1658 (1997). The focus of most widely cited works on constitutional theory and interpretation is to provide an account, positive and normative, of what constitutions are for and how they should be interpreted. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *Calif. L. Rev.* 535 (1999). In his first footnote, collecting important works of constitutional theory, not a single feminist writer or scholar is included. *Id.* at 537 n. 1 (referring to works by Richard Posner, Bruce Ackerman, Raoul Berger, Alex Bickel, Philip Bobbitt, Robert Bork, Jesse Choper, Ronald Dworkin, John Hart Ely, Richard Epstein, David A. J. Richards, Laurence Tribe and Michael Dorf, Harry Wellington, Lawrence Lessig, Frank Michelman, and David Strauss).

¹³ Higgins, *supra* note 12, at 1664–1665. Not all feminists, to be sure, have neglected questions of constitutional theory. Mary Becker has persistently critiqued the U.S. Constitution from a theoretical as well as practical viewpoint and Robin West has made major contributions to constitutional theory. See, e.g., Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 *U. Chi. L. Rev.* 453 (1992); Robin West, *The Supreme Court, 1989 Term, Foreword: Taking Freedom Seriously*, 104 *Harv. L. Rev.* 43 (1989); Robin West, *Progressive and Conservative Constitutionalism*, 88 *Mich. L. Rev.* 641 (1990); Robin West, *Katrina, The Constitution and the Legal Question Doctrine*, 81 *Chi. Kent L. Rev.* 1127 (2006); see also Catherine MacKinnon, *Does the Constitution Deserve Our Fidelity: "Freedom from*

Professor Higgins' work by offering some additional explanations about the relative lack of dialogue between feminist theory and constitutional theories relating to interpretation. I want to suggest that conflicting ideas about what a legal theory can and should do are also part of the explanation for the relative lack of fruitful dialogue.

There are at least three fundamental tensions between what counts as a good interpretive theory in constitutional law and what counts as a good theory in light of feminist epistemologies. These tensions grow out of the following assumptions about what a good theory of constitutional interpretation entails.

First, a good constitutional theory is widely understood to be one that has "bite," which is defined to mean that it causes the proponent to reject certain outcomes that otherwise the proponent would favor.¹⁴ In some writings, this is captured as the difference between what the Constitution permits (or requires) and what the decision maker, as a legislator or politician (presumed not to be thinking about the Constitution) would favor, a formulation that implies, more generally, that law-interpretation is distinctive from law-making.¹⁵ Constitutional theory tends to assume the distinctiveness of law that is called

Unreal Loyalties: *On Fidelity in Constitutional Interpretation*, 65 *Fordham L. Rev.* 1773 (1997); cf. Sullivan, *supra* note 5 (identifying theoretical substantive choices for constitutionalizing equality). Yet, the focus of most feminist work in law has been to determine as a matter of policy and values how to understand the problem of sex inequality and what courses of action to take to remedy those problems, subjects that are vast and on which there are significant disagreements among feminists. For philosophical work with implications for what a good constitution should provide, see Martha Nussbaum, *Women and Human Development: The Capabilities Approach* 5 (2000), which suggests that the "basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires" can be determined by an approach focused on human capabilities. She argues that ten human capabilities are universally valued and argues that these capabilities can inform a feminist philosophy "that is strongly universalist, committed to cross-cultural norms of justice, equality and rights, and at the same time sensitive to local particularity, and the many ways in which circumstances shape not only options but beliefs and preferences." *Id.* at 7. See also Martha C. Nussbaum, *The Supreme Court, 2006 Term, Foreword; Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 *Harv. L. Rev.* 4 (2007).

¹⁴ See, e.g., Guido Calabresi, *The Supreme Court, 1990 Term, Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 *Harv. L. Rev.* 80, 132 n.169 (1991) ("A judge who does not decide some cases, from time to time, differently from the way he would wish, because the philosophy he has adopted requires it, is not a judge."). *But cf. id.* ("But a judge who refuses ever to stray from his judicial philosophy, and be subject to criticism for doing so, no matter how important the issue involved, is a fool."). Despite the qualification of the second quotation, the suggestion of the first is a dominant trope in the literature on constitutional theory – that once having adopted a "philosophy" or "theory," a true "judge" must apply it even where it causes a decision that the judge would not wish for.

¹⁵ Perhaps the best known formulation is Justice Stewart's view that the statute challenged in *Griswold v. Connecticut*, 381 U.S. 479 (1965) was constitutional but, "uncommonly silly." *Id.* at 527 (Stewart, J., dissenting).

constitutional; its entrenched character is, in part, the basis for the search for “judicial constraint” in interpretation, because of the intrusion on democratic processes resulting from decisions about entrenched constitutional law. The larger point is that constitutional theory, it is thought, must constrain decision makers from acting on what would otherwise be their norms of justice, good government, or justified behavior. As Professor Bartlett put it, a good “method” is assumed to be separable from “substance” primarily because the substance of prevailing methods is, in a sense, invisible to those accustomed to those methods.¹⁶

Second, a good constitutional theory is one that is based on reason, not passion or “interest.” Indeed, its purpose may be seen to constrain the operation of passions or interests in the interpretation of law, reinforcing a distinction between the interpretive evolution of constitutional law and the creation of statutes through ordinary politics. Alternatively, one might understand the commitment to reason as reinforcing the relative autonomy of the activity called “legal interpretation,” from the realm of politics, passions, and interests.

Third, for many scholars, a good constitutional theory is one that “fits” with most of the existing legal framework. Given the mix of positive and normative functions that theory plays in the world of constitutional law, a theory that does not fit most of the existing terrain is regarded as failing to meet the (often implicit, sometimes articulated) expectation that “reasonable” theories must account for most existing, important cases.

Contrast these assumptions with those of much of the writing on feminist method and epistemologies. A caveat: I recognize that there are several important schools of feminist legal theory.¹⁷ But, my effort here is to identify epistemological approaches that I think many feminists share.

¹⁶ Bartlett, *supra* note 1, at 862. For a notable departure from this more general approach, see Fallon, *supra* note 12, at 539, 567–70 (arguing that one should choose a constitutional theory that will yield “morally and politically acceptable” rights, and that constitutional theory must be developed with some eye to who the current and foreseeable judges applying it will be).

¹⁷ Among them are a liberal “sameness”-oriented approach, premised on assumptions of similarities between women and men that law should act upon; difference-oriented cultural or relational schools of thought, concerned with understanding the differing experiences and perspectives of women and men, as groups, in their physical and psychological experiences of the world; “dominance” theories, such as Catherine MacKinnon’s, which are concerned with identifying what legal and other sources of power contribute to and reinforce the subordination of women and look to the law to redress power imbalances; and critical feminist approaches that insist on the importance of acknowledging the diversity in experience among different groups of women, some situated in one or another kind of “majority” and others situated in distinctive (perhaps multiple) minority groups. For useful introductions, see *Martha Chamallas, Introduction to Feminist Legal Theory* (2d ed. 2003); *Deborah L. Rhode, Justice and Gender* (1989).

First, a good theory in this universe of feminist epistemologies is one that grows out of and is recursively refined by its interactions with facts, experiences, and interpretations of those experiences from the perspectives of women.¹⁸ Reasoning must be contextualized and abstract propositions tested against a substantive norm of equality or antisubordination. If a theory has “bite,” in the sense that it suggests a result that its proponent believes is unjust or unjustifiable, then the theory itself should be reexamined. The emphasis on the need to contextualize reasoning is in tension with trans-substantive interpretive theory, that is, the possibility of useful theory that is abstracted from substance.

Second, feminist epistemology would hold that reason cannot be exercised entirely apart from a particular perspective and experience, which would include the passions and interests of its human subject.¹⁹ Passion, reflective of a deep human reaction to a lived experience, should be made articulate and conscious to inform reason, just as reason should inform our passions and how they are directed. Feminist theory situates its subjects in their lived lives of reason and passion, politics, interests, and law, which are viewed as interdependent.²⁰

There are, of course, many versions of feminist epistemologies. Bartlett, for example, identifies the methods of feminist reasoning in law as embracing three components: first, asking the woman question about all legal rules, structures, frameworks, and assumptions; second, feminist practical reasoning, which is concerned with the substantive impact of doctrines and rules, and third, consciousness raising – “testing the validity of accepted legal principles through the lens of personal experience of those directly affected by those principles.”²¹ Susan Williams has identified feminist epistemology as “abandon[ing] the idea that knowledge consists of accurate representations of an external reality” and has argued that this epistemology requires a willingness “to have our values challenged . . . [by] perspectives that differ from our own,” so as “to reach across our differences to construct a shared reality on which

¹⁸ See Christine Littleton, *In Search of a Feminist Jurisprudence*, 10 *Harv. Women's L.J.* 1, 4 (1987) (“Sociological data is central to feminist methodology. . .”).

¹⁹ See Susan H. Williams, *Feminist Jurisprudence and Free Speech Theory*, 68 *Tulane L. Rev.* 1563, 1569 (1994) (explaining how the “social construction of knowledge reintroduces emotion and value judgment as . . . integral to the process of defining a problem, collecting data and interpreting them.”).

²⁰ On the importance of experience to feminist jurisprudence, see Margaret Thornton, *Feminist Jurisprudence: Illusion or Reality?*, 3 *Austl. J. L. & Society* 5 (1986).

²¹ Bartlett, *supra* note 1 at 836–37; see also Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *Yale L. J.* 1373, 1401 (1986) (discussing “perceptual” models of knowledge and the “distinction between knowing subject and known object”).

policy choices can be based.”²² Whatever the possibility for shared agreement on what is true or more true than other understandings of realities, a common element in these and other feminist approaches is the importance of perspective – of the experiences and feelings of those in the experience – in identifying what is important to know and what counts as knowledge, as well as the importance of asking how law does or does not include women as participants in its making, and how law and legal doctrine affect women.

Third, those on the receiving end of a subordinated status may see themselves as having little reason to accept theories that place principal weight on fit with existing norms or frameworks of laws that may promote or accept women’s subordination; and yet “fit” is a cornerstone of much of constitutional theory, even among progressive theorists.²³ The purposes of feminist theory are to describe how women’s inequality and subordination are constructed and framed in law; to reveal the ideological presuppositions and material conditions of that inequality or subordination while understanding how differently situated women may be by virtue of other important aspects of identity; and, to develop understandings of justice and remediation that will improve the lived lives of women and the relationships of equality between women and men. All forms of law – constitutional, statutory, or otherwise – may be seen as instruments toward those goals.

So, we see here, two very different sets of ideas about what a legal theory is supposed to do. When we bring these two approaches together, in looking at a set of basic constitutional concepts – entrenchment, jurisdiction, interpretation – what can we learn?²⁴

II. CONSTITUTIONS AND ENTRENCHMENT

One of the most distinctive features of constitutions as law is that they are, usually, at a formal level, entrenched more deeply than other forms of written law. They are, in theory, harder to change than a statute, and, in jurisdictions like the United States, Canada, and Australia, they have in fact been much

²² Susan H. Williams, *Religion, Politics, and Feminist Epistemology: A Comment on the Uses and Abuses of Morality in Public Discourse*, 77 *Ind. L. J.* 267, 271–272 (2002).

²³ See, e.g., Ronald Dworkin, *Taking Rights Seriously* 85–87, 339–342 (1978); Ronald Dworkin, *Law’s Empire* 176–178 (1986); cf. David A. Strauss, *What Is Constitutional Theory?*, 87 *Calif. L. Rev.* 581, 584 (1999) (describing constitutional theory as trying to organize “points of agreement” in the legal culture in ways that do not contradict areas of “rock solid” agreement and that provide guidance on how to resolve controversial issues).

²⁴ Two recent helpful collections reveal the diversity of contexts in which women interact with constitutions. See *The Gender of Constitutional Jurisprudence*, *supra* note 4; *Women Making Constitutions*, *supra* note 2.

harder to change through formal amendment than ordinary statutes.²⁵ The foundational character of constitutions is represented by their entrenchment – a legal fact of power that invites feminist theorizing.

At least three questions arise: does entrenchment matter – is it really harder to change constitutions than other laws? Recent work by Robert Post and Reva Siegel seems to accept that constitutions should be understood to entrench political structures and guarantees of free discourse through which the constitution's own meaning is contested, evolves, is challenged, or affirmed.²⁶ At a positive level, however, their work also suggests that even a formally quite-difficult-to-change constitution is necessarily understood through political contests about the constitution's meanings over time. On a normative plane, their work argues that the amenability of constitutional interpretation to change through social and political movements and contests is necessary to reconcile an entrenched constitution with foundational commitments to democracy.²⁷ And, at still another level, their work represents a fundamental challenge to the distinction between interpretation and amendment in the process of constitutional change that emerges from social movements contesting constitutional norms.²⁸ Their work thus raises the question, to what extent is entrenchment normatively attractive? One might also ask, does “asking the woman” question affect our evaluation of the procedures by which an entrenched constitution is changed?

Trying to answer the question of whether the degree of entrenchment or method of amendment is good for women's equality might seem too hopelessly

²⁵ See *U.S. Const.* Art. V (requiring two-thirds of each House and three-fourths of the states to approve amendments); *Const. Austl.* §128 (as a general rule requiring passage by absolute majorities in both houses of the national legislature, followed by approval in a public referendum by a majority of the people as a whole and a majority of the states); *Canada Constitution Act, 1982*, §38 (providing different amending formulae for different kinds of amendments, but generally requiring resolutions by both houses of parliament and affirmative votes by two thirds of the provinces that must have, together, at least 50% of the population), *id.* §41 (requiring agreement of every province for certain amendments, including those relating to the Supreme Court of Canada, the Office of the Queen, and other provisions).

²⁶ See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv C.R.-C.L.L. Rev.* 373, 404 (2007).

²⁷ See, e.g., Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L. J.* 1943 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism and Judicial Supremacy*, 92 *Calif. L. Rev.* 1027 (2004).

²⁸ See *supra* note 27; Reva B. Siegel, 2005–06 *Brennan Center Symposium Lecture: Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Cal. L. Rev.* 1323 (2006). Professor Siegel's work argues that social movements legitimately affect constitutional meanings, sometimes, but not necessarily, through formal amendment; it thereby arguably elides distinctions between amendment and interpretation. See *id.* at 1324.

abstract to admit an answer. It might depend on when the constitution was made and what its substantive commitments are, and on the relationship of different interpretive theories to the law of the constitution as further or closer to appropriate theories of justice. A constitution that incorporates substantive and concrete equality principles is one that feminists might well want to see deeply entrenched. A constitution committed to human equality provides a basis for appeal to shared values; its firm entrenchment can be helpful in providing a focus, or in David Strauss' words, a "common ground," for argument and persuasion about what equality means.²⁹

On the other hand, entrenchment could be seen as an unmitigated obstruction to women's equality, if the entrenched constitution does not commit to equality or, worse, commits to inequality. Where a constitution is drafted and comes into legal effect without the full and equal participation of women – as was the case with both the U.S. and Australian Constitutions³⁰ – the entrenchment provisions of such constitutions, drafted without women's participation, may assume their nonparticipation or obstruct their full participation in public life. Entrenched constitutions, enforced by judicial review, may be seen as devices by a dominant group to secure their privileged positions against the future, including against the effects of democratization.³¹ In the United States, entrenchment of the three-fifths clause and the super-entrenched rule of two senators per state made the national organs of government more effective at entrenching than abolishing slavery;³² some feminist scholars, including Mary Becker, suggest that the two senators rule (more deeply entrenched than other parts of the Constitution) continues to have a regressive effect on the adoption of welfare and economic policies that disproportionately affect women.³³

But, apart from its substantive valence, one might also ask whether entrenchment of *any* legal instrument – even a highly egalitarian one – is consistent with a desire for contextualized substantive justice and the progressive realization of aspirations for equality. If asking the "woman question" with a post-modern sensibility suggests that the answers will vary in different contexts and at different times, should the idea of entrenchment be rejected altogether? It has been argued that abstract rights are less useful to those lacking power

²⁹ David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 *Yale L. J.* 1717 (2003).

³⁰ On Australia, see, e.g., Deborah Cass and Kim Rubenstein, *Representation/s of Women in the Australian Constitutional System*, 17 *Adel. L. Rev.* 3, 11, 28–39 (1995).

³¹ See, e.g., Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

³² See, e.g., Akhil Reed Amar, *America's Constitution: A Biography* 20–21, 89–90 (2005).

³³ See Becker, *supra* note 7, at 2053–54; *U.S. Const.*, Art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

than to those who already have it, and that concrete rights better protect the powerless.³⁴ History may cast some doubt on the generality of this proposition; much depends on who the interpreters are. Perhaps more abstract statements of rights are, in the long run, better for those who lacked power at an earlier time, if their generality permits extension of their principles once the social imagination expands to embrace the inclusion of such subordinated groups. And, if the powerless are able to secure enactment of concrete rights, then perhaps they are not as powerless as they first appeared. But, it is certainly true that the meaning and scope of equality rights, particularly when stated at a high level of generality, are likely to be contested, even among feminists, and the application of those rights beyond enacting generations may be increasingly uncertain (and perhaps susceptible to unjust interpretations).

So, is constitutional law too hierarchical a form of law to be embraced by feminist theory? Is the idea of a constitution – the idea that human beings are capable of devising forms of governance that are sufficiently just and can outlast a particular moment in a particular generation – fundamentally flawed? If knowledge is only and always partial, and if humility requires that we be open to new understandings and perspectives, should deeply entrenching legal structures be resisted?

Mary Becker has suggested that if there were no constitution at the time of the *Lochner* decision in the United States, we might live in a more just society today. But, she added in a footnote, it is also possible that if there were no constitution in the early twentieth century, we might now live in fascist dictatorship.³⁵ As Becker's footnote suggests, women as members of a polity have a stake in the development of frameworks for good governance and justice, powerful reasons in favor of legal entrenchment as a strategy toward these goals.³⁶

Establishing a stable framework for elections and government offices in a system of universal adult suffrage can facilitate democracy. Entrenching

³⁴ Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 *U. Chi. L. Rev.* 453, 456 (1992).

³⁵ Becker, *supra* note 34, at 516 & n. 309.

³⁶ Cass Sunstein identifies several reasons for entrenchment that should be attractive to women as members of the polity, including (1) protecting pre-political human rights – as long as they include rights for women; (2) providing for a stable framework for democratic decision making; (3) protecting rights that are particularly important to good democratic decision making, including free speech rights; and (4) solving collective action problems, particularly in the economic sphere. Cass Sunstein, *Constitutionalism and Secession*, 58 *U. Chi. L. Rev.* 633, 637–40 (1991). Sunstein's view that constitutions can take controversial issues off the table for long periods of time seems doubtful; but, constitutions can and do embody compromises that are necessary for large groups of people with different ideas to live together.

protections for meetings, speech, and the press permit and protect the dissemination of new ideas that can change traditional views that undergird patriarchy. Although law has been part of the structure of women's subordination, law has also been a tool for dismantling governmental and private patterns of subordination. Entrenching equality norms in a structure that also entrenches democratic processes and independent courts that enforce those norms may well offer a platform for the advancement of women's equality. Professor Becker does not deny that constitutional rights may offer something of value to women's movements, but argues that they offer more of value to the powerful.³⁷ The question is, compared to what? If, under a regime *without* entrenched law, the powerful have even greater capacities to increase their resources and remain in power, a constitution that inequitably distributes rights and access to power might still be an improvement.

If the idea of a constitution as a form of entrenched basic law is accepted, does feminist theory have anything to say about the amendment process? Consider two possibilities. First, the French experience with *la parité* might inspire questions about voting for constitutional amendments.³⁸ After the French Constitutional Council held unconstitutional, as inconsistent with the constitution's commitment to universalism and citizen equality, a requirement that at least 25 percent of party lists be female, the constitution was amended to authorize statutes to promote "equal access" by women and men to elective office.³⁹ Parity statutes followed, requiring – in many multimember bodies – that 50 percent of the election lists, evenly distributed so as to promote 50 percent winners, be of each gender.⁴⁰ Interestingly, French feminists had developed arguments that the 50 percent requirement was not a quota, but a method of incorporating the entire unity of the people into representative bodies because it corresponded more fully to the representation of women and men in the polity.⁴¹ The idea is contentious even among some of its proponents, but politically, parity resonated (more than quotas) and was accepted.

³⁷ Becker, *supra* note 34, at 456.

³⁸ See generally Eric Millard, *Constituting Women: The French Ways*, in *The Gender of Constitutional Jurisprudence*, *supra* note 4, at 122, 134–48; Noëlle Lenoir, *The Representation of Women in Politics: From Quotas to Parity in Elections*, 50 *Int'l & Comp. L. Q.* 217 (2001).

³⁹ CC Decision No. 82–146, Nov. 18, 1982 Rec. 66; see also Meg Russell & Colm O'Connell, *Positive Action to Promote Women in Politics: Some European Comparisons*, 53 *Int'l & Comp. L. Q.* 587, 604 (2003).

⁴⁰ See 1958 Const. 3 ¶15 (Fr.) ("Statutes shall promote equal access by women and men to elective offices and positions."). For discussion of the reasons for the limited success of this approach, including limitations on the legislative bodies to which it applies, see Lenoir, *supra* note 38 at 241–42, 245–46; Millard, *supra* note 38, at 137–138, 43–44.

⁴¹ See Lenoir, *supra* note 38, at 218–220.

If women and men are understood as the two equal parts of a people, then the question arises, should constitutions and their amendments require approval through some method that separately samples women and men?⁴² Many constitutions require supermajority approval for constitutional change; in federal nations it is not unusual to require approval by some percentage of the subnational units or their representatives in a national legislature. Women are not geographically concentrated, but are generally dispersed. But, if constitutions can be drafted to seek highly consensual agreement to proposed amendments (through supermajority or dispersed approval requirements), should future constitution makers consider requiring separate majorities among women and men? Would such an approach further “establish” gender, more deeply entrenching its power as a basic category of social organization, and ignoring or submerging other important aspects of identity?⁴³ Or would it help disentrench gender hierarchies, by assuring that women’s views received equal consideration in forming a constitution with men?⁴⁴ A question (whose answer is not at all obvious), not a proposition.

Finally, consider whether feminist theory might lend support to a strategy already found in a number of existing constitutions: differential requirements for different kinds of amendments.⁴⁵ If an important part of feminist epistemology is taking seriously how differences in contexts affect application of general principles, and rejecting a legal formalism that ignores salient differences, then perhaps differential degrees of entrenchment would be an attractive strategy. Such differential strategies might mark out some particular constitutional

⁴² Cf. Becker (2006), *supra* note 7 at 2007, 2053–54 (proposing a constitutional amendment to require that at least one senator from every state be a woman).

⁴³ Cf. David Cruz, *Disestablishing Sex and Gender*, 90 *Calif. L. Rev.* 997 (2002) (discussing, *inter alia*, Lynn Wardle’s argument that same-sex marriage would entrench gender hierarchies).

⁴⁴ Such possibilities challenge the idea in constitutional theory of a single “*pouvoir constituant*,” or of a single “people,” who exercise “sovereignty”: it asks, who are the people in whom popular sovereignty resides, a question the answer to which may not simply be assumed, but must be analyzed and decided. Segmentation of populations by gender for lawmaking purposes also would raise questions about other forms of segmentation – e.g., for racial, ethnic, or linguistic minorities of salience in the community – raising additional risks of entrenching rather than transcending such differences.

⁴⁵ Thus, in Canada, the general rule requires parliamentary action by the House of Commons and the Senate and the concurrence of at least two-thirds of the provincial legislatures representing at least 50% of the population. Constitution Act, 1982, §38(1) (b). If an amendment would derogate from the existing powers of the provincial legislature or governments a province; may “dissent” and avoid its application. See §38(2), (3); Moreover, certain changes require provincial unanimity to amend. See *id.*, §41. On the other hand, amendments relating to the national executive may be made by the national parliament alone. See *id.*, §44. In some cases, the concurrence of the Senate may be dispensed with if the House of Commons passes the proposed amendment a second time. See *id.* §47(1).

norms or provisions as unamendable; under the German Basic Law, for example, the principles of federalism, democracy, and respect for human dignity and inalienable human rights are described as non-amendable.⁴⁶ In South Africa, at least three different amending procedures are provided: the most stringent amending formula is required to make changes in Section 1 – which provides inter alia that South Africa is devoted to human dignity, anti-racism, anti-sexism, universal suffrage, and democracy – or to the amending provision itself.⁴⁷

Looking at amendment from a feminist perspective might provide support for more stringent entrenchment of equality rights and less stringent entrenchment of governance structures, for example, given the limited input that the design of governance structures has had from women. Recent constitutional changes in Scotland, in which women played an important role in the terms of devolution, suggest that more active participation from women could change a range of ways in which the structures of government are constituted, including their meeting hours.⁴⁸ Some constitutions do more deeply entrench their individual “rights” provisions.⁴⁹ On the one hand, deep entrenchment (or even prohibiting amendment) of provisions guaranteeing gender equality might seem an important hedge against future bias. On the other hand, rights (and their interpretation by future courts) may limit majoritarian decision making, and women may now, at least in many polities, be able more effectively to participate in majoritarian decision making. Moreover, deep entrenchment of rights poses other challenges. It is unlikely that a polity would give the deepest entrenchment only to equality rights – over and above, for example, liberty rights. Rights may conflict – they are not an unambiguous normative good; some kinds of rights may frustrate the achievement of others, including those of gender equality. Perhaps it could be argued that amendments designed to enhance equality or increase the capacity to exercise personal liberties should be easier to pass than amendments designed to restrict equality or liberty. But, characterization would plainly be an issue on such an approach.⁵⁰

⁴⁶ *Grundgesetz (GG) [Basic Law]* art. 79 (F.R.G.).

⁴⁷ *S.A. Const.* 1996 §. 74; see also *India Const.* art. 368.

⁴⁸ See Fiona McKay et al., *Towards a New Politics? Women and the Constitutional Change in Scotland*, in *Women Making Constitutions*, *supra* note 2 at 88 (noting rules requiring parliament to observe school holidays).

⁴⁹ See, e.g., *S.A. Const.* 1996, art. 74 (2) (establishing rule for amending its Bill of Rights Charter that requires two-thirds of the National Assembly plus the votes of at least 6 provinces in the Provincial Council) *Cf. id.*, art. 74(3) (permitting constitutional amendments that affect the national government by two-thirds of the National Assembly, though with additional requirements for changes affecting the provinces).

⁵⁰ The Equal Rights Amendment (ERA), proposed to the U.S. Constitution, was plainly an effort to expand women’s rights; proponents of amendments designed to overturn the U.S. Supreme

An approach focused on whether amendments are designed to enhance equality or increase personal liberties would define the values over which interpretive battles concerning the amendment process would be fought, but would not resolve some of the hard questions of characterization that might arise. Its net effect might be to increase argument around legalized issues without, in any substantive way, enhancing constitutional protections for women's equality.

There are other questions about entrenchment that might be fruitful to consider from the perspective of the intersection of feminism and constitutionalism. For example, a question much debated these days is whether constitutions should provide for an "override," that is, for a possibility short of amendment that would permit legislative decision makers to immunize temporarily certain acts or areas from invalidation through judicial review. Canada's 1982 Charter permits legislative override of the application of certain of its rights provisions – but, notably, not of its guarantee of gender equality.⁵¹ Other possibilities within the domain of what Mark Tushnet calls "weak" versions of judicial review exist,⁵² which can be conceptualized as encouraging a more active form of dialogue between courts and legislatures over constitutional meaning. Thus, in the United Kingdom, the Human Rights Act authorizes judicial declarations of incompatibility with incorporated provisions of the European Convention on Human Rights, but does not permit actual invalidation of the statute;⁵³ the expectation is that the Parliament ordinarily will correct any incompatibilities. Analyzing these more dialogic forms of judicial review and legislative control of constitutional questions from the perspective of women might require analysis of contextual differences, for example, the makeup of the bench, and the accessibility of majoritarian processes to effective influence and participation by women.

III. JURISDICTION

If constitutional entrenchment intersects with feminist theory, so too do allocations of jurisdiction – a central feature of most constitutions. According

Court's abortion jurisprudence might characterize them as an effort to expand the rights of fetuses; and one could imagine "fathers' rights" amendments that would be viewed by their proponents as expanding rights, and by their opponents as impairing the rights of others.

⁵¹ See 1982 *Charter of Rights and Freedoms* (Can.), §33 (authorizing legislative override of rights found in sections 2, and 7–15); §28 ("Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.")

⁵² See, e.g., Mark Tushnet, *Marbury in the Modern Era: Alternative Forms of Judicial Review*, 101 *Mich. L. Rev.* 2781 (2003).

⁵³ For discussion, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *Am. J. Comp. L.* 707 (2001) (also discussing Canada and New Zealand).

to some legal scholars, a central purpose of constitutions is to construct and maintain a jurisdictional boundary between public and private decision making, not because such boundaries are in any way “natural” but because positive human values may be served by allocating “jurisdiction” – in the sense of decisional autonomy – to individuals (to make decisions with which government cannot interfere).⁵⁴ Much feminist writing has attacked this “public-private” boundary, arguing that it is not “natural,” but constructed in ways that injure women, and contesting where the line is drawn.⁵⁵ The connection to constitutional law is obvious in cases asserting individual rights, for example, to use contraceptives, to have sexual relationships, to seek an abortion, to be free from violence. But, it is not only jurisdictional boundaries between “public” and “private” decision making that may affect women’s interests, but also the jurisdictional boundaries among different forms and levels of governmental power.

Constitutions demarcate boundaries and establish jurisdiction among governments and laws within and outside of the polity. How does a feminist perspective inform our thinking about the idea of a constitution in allocating jurisdiction among governments?

A. Federal Jurisdiction – Hierarchy, Exclusivity, Concurrency

In federal nations like Germany, the United States, Canada, and Australia, powers over substantive areas are allocated to the different levels of government – sometimes through explicit enumerations to all constitutionally protected levels of government supplemented by a residuary clause,⁵⁶ sometimes to one level of government with the residuary clause functioning to allocate the remainder.⁵⁷

One way to ask the “woman question” is to ask, if women had designed federal allocations, would they differ from those found in existing constitutions? It is at least possible that there would be important differences, for example, in

⁵⁴ See L. Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *Yale L. J.* 1006, 1007–1008 (1987).

⁵⁵ See, e.g., Catherine A. MacKinnon, *Towards a Feminist Theory of the State* 191 (1989); cf. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *Stan L. Rev.* 1, 20 (1992) (describing both “internal” and “external” perspectives and arguing against too broad a deployment especially of the external critiques); but cf. Tracy Higgins, *Reviving the Public/Private Distinction in Feminist Theorising*, 75 *Chi.-Kent L. Rev.* 858 (2000) (arguing that some feminist critiques of the public/private distinction overstate its threat to women’s liberty and equality).

⁵⁶ See, e.g., *Constitution Act, 1867*, §§91, 92 (Can.); *Grundgesetz (GG) [Basic Law]*, arts. 70–75 (F.R.G.)

⁵⁷ See *U.S. Const.*, art I, §8; *Amend. X*.

which level of government is authorized to legislate concerning family leave, child care facilities, family law, health care, or education⁵⁸ – all areas in which law has historically been hostile to women’s interests and in which women bear a disproportionate burden of uncompensated “nurture,” that is, protecting and creating human capital, often through unpaid labor and sacrifice of personal advancement in the market.

This is not to say that federal systems uniformly allocate these responsibilities only to one level. For example, in the United States the conventional wisdom is that “family law” is a matter for state control; yet, a number of scholars, including Judith Resnik, Naomi Cahn, Jill Hasday, and others, have challenged the conventional understanding, showing how federal law has had regulatory effects on marital status and the economic consequences of marriage for years.⁵⁹ In Germany, there is concurrent jurisdiction between the central and subnational governments over “registration of births, marriages and deaths,” as well as labor relations, social security and unemployment insurance, and artificial insemination.⁶⁰ In Canada, marriage and divorce is for the central government, whereas the provinces have control of the solemnization of marriage: the former was found to support federal power to adopt legislation permitting gay marriage, the latter to invalidate a provision in the federal law concerning religious excuse from officiating at such marriage.⁶¹ Feminists in Canada have in the past disagreed over these allocations, for example, with feminists in Quebec favoring devolution of the power over divorce to the provinces and feminists in Ontario favoring retaining that power at the national level.⁶²

It is not unusual for federalism or related structures to be adopted as a way of accommodating differences among geographically concentrated

⁵⁸ Cf., e.g., Helen Irving, *A Gendered Constitution? Women, Federation and the Heads of Power, in A Woman’s Constitution?* 101 (H. Irving, ed. 1996) (noting failure of the constitution to guarantee women’s suffrage and arguing that “women might well have written if not an entirely different Constitution at least one significantly different in parts.”).

⁵⁹ See, e.g., Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682 (1991); Jill Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 831 (2004); Naomi Cahn, *Family Law, Federalism, and Federal Courts*, 79 Iowa L. Rev. 1073 (1994). But cf. Anne C. Dailey, *Federalism and Family Law*, 143 U. Pa. L. Rev. 1787, 1821–24 (1995) (arguing that there are good reasons to reserve family law for state-level decision making).

⁶⁰ Grundgesetz [GG] [Basic Law] art. 74 (1), paras. 2, 12, 18, 26 (F.R.G.).

⁶¹ Constitution Act, 1867, §91(26), 92 (12) (Can.); Civil Marriage Act, S.C. 2005, ch. 33 (Can.); see also Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

⁶² See, e.g., Jill Vickers, Pauline Rankin, & Christine Appelle, *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* 104–106 (1993); see also Judy Rebick, *Avoiding a Split in the Women’s Movement, Alternatives*, Mar. 9, 2004, available at <http://www.alternatives.ca/article1154.html?lang=en>; Lucille Riedle, *The Impact of Quebec Independence on Canadian Federalism*, 51 New Brunswick L.J. 283, 284–85 (2002).

ethno-cultural-linguistic groups. If control over marriage, family, culture, and education is enumerated to the subnational level to accommodate group differences, especially where majority-minority groups at that level feel that their identity is threatened by the larger polity, issues of gender injustice can arise through application of “traditional” gender-biased norms. Polygamous marriages or odious treatment of wives by husbands are also countenanced in a number of countries by allocations of jurisdiction (sometimes to religious courts or using religious law) over civil or family law, which are defended as a recognition of minority religious or cultural practices. As the *Shah Bano* case in India suggests, government efforts to redefine the substantive content of those religious traditions may create a backlash that can coerce women brave enough to make initial challenges to renounce them.⁶³

Constitutions manage multiple jurisdictions through doctrines of exclusivity, preemption, concurrency, and subsidiarity. These jurisdictional allocations can have strongly gendered effects. In the United States, the Supreme Court held that the national government lacked power to prohibit or provide liability for gender-motivated violence, because such violence lacked sufficient connection to the national power to regulate the economy.⁶⁴ Conversely, in Canada, the Court recently upheld national legislation providing for maternity and parental benefits, but did so over the objections of Quebec – including women’s groups in Quebec – because the national legislation could adversely affect availability of the more generous legislation on the same subjects in Quebec.⁶⁵ Beverley Baines has argued for a doctrine she calls “equity federalism” under which, with respect to legislation designed to favor those groups traditionally subordinated in Canadian society, including women, the level of legislation that provides the more generous treatment should be given effect – a floating doctrine of legislative hierarchy.⁶⁶ It is an intriguing idea, although

⁶³ In this case, the Indian Supreme Court granted a Muslim woman substantially more alimony from her spouse, who had divorced her, than the Muslim religious leadership believed was required by the religion; the Court did so, moreover, as an interpretation of Muslim religious law. The case was regarded as a great provocation by the Muslim community, so much so that Shah Bano was reported to have renounced her rights under the judgment. See Martha Nussbaum, *India, Sex Equality and Constitutional Law*, in *The Gender of Constitutional Jurisprudence*, *supra* note 4 at 74, 190–91. Cf. Mark Landler, *German Judge Cites Koran, Stirring Up Cultural Storm*, *N.Y. Times*, p. A10, Mar. 23, 2007 (describing a German judge who cited the Koran in rejecting a request for divorce by a physically abused wife).

⁶⁴ *United States v. Morrison*, 529 U.S. 598 (2000).

⁶⁵ Reference re Employment Insurance Act, [2005] 2 S.C.R. 669 (Can.); Beverley Baines, *Federalism and Pregnancy Benefits: Dividing Women*, 32 *Queen’s L. J.* 190, 212–213 (2006).

⁶⁶ Baines, *supra* note 65 at 221–22 (rejecting both concurrency and exclusivity as doctrinal approaches).

one that may have difficulty gaining support, especially from those who are not members of such “equity” groups because, inter alia, of the uncertainty that would be created over the effects of lawmaking at both the national and provincial level.

An alternative doctrinal approach might be a presumption in favor of constitutional concurrency and against implied preemption of local by national legislation. For the most part, this is reflected in how the U.S. Supreme Court has dealt with overlapping state and federal legislation designed to protect civil rights, in negative discrimination situations – in interpreting both constitutional allocations of power and statutory exercises of federal powers in ways to permit concurrency. Thus, for example, in *Colorado Anti-Discrimination Comm’n v. Continental Airlines*,⁶⁷ the U.S. Supreme Court reversed a lower court’s conclusion invalidating a state anti-discrimination law on the grounds that it unduly burdened interstate commerce, that is, intruded on an area of federal jurisdiction. Overruling earlier decisions, the Supreme Court upheld the authority of the state legislature to apply its anti-discrimination law to airlines. The Court rejected jurisdictional foreclosure arguments based directly on the Constitution and also those based on a claim of statutory preemption by the Civil Aeronautics Act of 1938.⁶⁸ Similarly, Title VII,⁶⁹ a highly significant statutory tool prohibiting discrimination based on race or gender in the workplace, was repeatedly interpreted to “supplement, not supplant . . . existing laws and institutions relating to employment discrimination,” leaving “the States free, and indeed, encourag[ing] them, to exercise their regulatory power over discriminatory employment practices.”⁷⁰ And likewise, the federal Pregnancy Discrimination Act (PDA),⁷¹ which prohibits discrimination based on pregnancy, was found not to preempt a state law that required reinstatement after pregnancy-related disability leave.⁷² In that case, the Supreme Court rejected the arguments of three dissenting justices, that the PDA requires that pregnant workers be treated the same as all others and, thus, preempted a state law providing to workers disabled by pregnancy a benefit not available to others. Rather, the Court concluded, “Congress intended the PDA to be a ‘floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.’”⁷³

⁶⁷ 372 U.S. 714 (1963).

⁶⁸ *Id.* at 721, 723–24; see also Civil Aeronautics Act of 1938, 52 Stat. 973, 40 U.S.C. §401.

⁶⁹ 42 U.S.C. §2000e *et seq.* (2008).

⁷⁰ *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 67 (1980).

⁷¹ 42 U.S.C. §2000e(k) (2008).

⁷² *California Fed’l Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987).

⁷³ *Id.* at 280.

I do not mean to suggest that the valence of U.S. decisions on concurrency and preemption has always been positive on gender-related issues; there are, to be sure, counterexamples.⁷⁴ The point here is that allocating jurisdiction to multiple levels of government to promote equality and prevent discrimination, combined with a presumption against preemption applied to the effect of the national on the subnational law – at least where subnational law is more favorable to women’s equality rights – may be a form of federalism doctrine compatible with the efforts of women (and other groups that have been the subject of persistent discrimination and subordination) to use government to overcome and improve their status.

Concurrency offers the possibility of multiple levels of government at which to seek redress, which for disadvantaged groups, including women, is on the whole not necessarily a bad thing because power at one or another level of government is likely to wax and wane with political cycles.⁷⁵ If multiple levels of government exist, principles of concurrency may be important in providing the flexibility to move forward (and avoid losses), which groups seeking recognition and equality from a position of disadvantage may need.⁷⁶

⁷⁴ See, e.g., *Shaw v. Delta Airlines*, 463 U.S. 85 (1983). *Shaw*, a much-criticized decision, interpreted the federal ERISA statute to preempt portions of a New York law requiring employers to cover pregnancy if they covered other non-occupational disease, to the extent that this New York law provided more coverage than was required by Title VII. This decision may have been something of an outlier, and, in more recent years, “the vast majority of lower courts have ruled against claims that ERISA or the Airline Deregulation Act preempt state and local laws prohibiting employment discrimination. There is a similar trend against preemption of state civil rights laws by federal policy.” Denise C. Morgan & Rebecca E. Zeitlow, *The New Parity Debate: Congress and Rights of Belonging*, 3 *U. Cinn. L. Rev.* 1347, 1388–1389 (2005).

⁷⁵ Cf., e.g., Sarah Maddison & Emma Partridge, “How well does Australian democracy serve Australian women?” Audit Report No. 8, at 39 (Canberra: Democratic Audit of Australia, Australian National University, 2007), available at: http://democratic.audit.anu.edu.au/papers/focussedaudits/200703_madpartozdocwom.pdf. (noting that in times when “the federal government has been unsympathetic to feminist demands, progress has been pursued at other levels.”); Marian Sawyer & Jill Vickers, *Women’s Constitutional Activism in Australia and Canada*, 13 *Can’n J. Women & L.* 1, 35 (2001) (noting that in Australia, the “multiple points of initiation within a federalist system have meant that some momentum in terms of feminist policy may be maintained even when unsympathetic governments are elected at one level or another”).

⁷⁶ A leading feminist scholar whose work has long insisted on the values of concurrency, or “redundancy,” is Judith Resnik. See, e.g., Judith Resnik, *Tiers*, 57 *S. Cal. L. Rev.* 840, 868 (1984). A presumption in favor of concurrent jurisdiction with narrow preemption should be distinguished from subsidiarity, a doctrine that has gained in importance in European law and is part of the constitutional law of federalism in Germany. The idea of subsidiarity is that governmental tasks should be allocated to the smallest and most local level of government capable of performing the task; in theory, if a central government has jurisdiction over a subject area, subsidiarity requires that the jurisdiction not be exercised unless there is some basis to think the central government can achieve the goal or perform the task better than leaving it to

B. International Jurisdiction

Let me now turn to jurisdictional allocations between the national and the international. In 1991, Hilary Charlesworth and her co-authors argued that “the international legal order is virtually impervious to the voices of women,” because of “the organizational and normative structures of international law.”⁷⁷ Yet, since the 1995 Beijing Conference, international law and international fora, aided by international NGOs, have provided resources for domestic constitutional change toward greater gender equality.⁷⁸

Constitutions may mold or shape interactions with the transnational; for example, they specify the hierarchical status of treaties, providing either that treaties become part of domestic law or that they do not (absent implementing legislation).⁷⁹ Whether the interests of gender equality are served by incorporating treaties into domestic laws depends in important measure on what the treaties provide and how they are likely to be interpreted. Although human rights treaties may be uppermost on the mind as one thinks about this, there are other kinds of treaties, such as those providing for various forms of cooperation in law enforcement or antiterrorism activities,⁸⁰ that may well raise human rights concerns. Moreover, adding an international remedy or international source of law may have different valences than authorizing concurrent jurisdiction within domestic politics; the association of gender equality with the foreign may in some cases be counterproductive.⁸¹

the local levels. In Europe, the principle of subsidiarity operates as a restraint on the exercise of central power in areas of concurrent jurisdiction. George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 332, 334 (1994).

⁷⁷ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 *Am. J. Int'l L.* 613, 621 (1991).

⁷⁸ See, e.g., Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 *Harv. Hum. Rts. J.* 19, 45 (2005).

⁷⁹ See, e.g., *U.S. Const.*, Art VI.

⁸⁰ See, e.g., Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] July 18, 2005, 2 BvR 2236/04, (“European Arrest Warrant Case”), *English translation available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html; 2 BverfGE [Federal Constitutional Court] 2236/04 (F.R.G.) (refusing to give effect to a new E.U. arrest warrant aimed at terrorists, because it was implemented by a national law that failed adequately to protect constitutional rights); *Kadi v. Council*, Case C-402/05, *Kadi v. Council and Comm'n*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (Sept. 3, 2008) (invalidating a regulatory instrument issued by the Council to implement a UN resolution requiring freezing of assets of suspected terrorists for its failure to provide procedural protections to verify accuracy of determinations).

⁸¹ Cf. Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 *Int'l J. Const. L.* 33 (2008) (implying that because law has affiliative

On the other hand, where the political will exists, for example, to agree to the Optional Protocol of CEDAW,⁸² that Committee is likely to provide an additional and sympathetic forum for the public naming and identification of gendered harms. The CEDAW Committee will incline toward substantive gender equality, as envisioned by the covenant, for at least three reasons. First, there are the detailed, substantive commitments of the CEDAW Convention itself. Second, the Committee consists of a specialized body of experts, chosen for their knowledge about (with, in all probability, a related commitment to) women's rights issues. Third, the CEDAW Committee does not have general government responsibilities – its authority lies only in monitoring and interpreting the CEDAW Convention – so its basis of authority may be grounded in an expansive understanding of the protections of CEDAW and its judgments may be less constrained from concern for every day issues of implementation and governance. For these reasons, CEDAW – the international human rights regime most clearly targeted at women's equality – is likely to be a source of support for women whose equality claims are rejected in their domestic countries.

Whether, as an empirical matter, the constitutional relationship of these international regimes to the domestic constitutional apparatus in fact matters to the advancement of women's equality is unclear. Oona Hathaway's research disquietingly suggests that the effect of human rights treaty ratification may be negative or may vary (from positive to negative) depending on the degree to which the rule of law is already well-instituted in the ratifying country.⁸³ Anne Bayefsky's study some years ago found a very poor record of compliance with the decisions of UN human rights monitoring bodies.⁸⁴ This would be an important field for empirical investigation; the possibility that law is doing harm rather than good must be considered. For example, are there differences in the degree to which CEDAW ratification matters, depending

and identity affirming properties, it may be better for decisions against the government to be based on domestic, rather than foreign or international law). Although local populations may also have resistance to a central government's interventions, in healthy democratic federalisms anti-government rhetoric is unlikely to move the subnational polity into a position of permanent opposition to equality norms, given the other benefits that accrue from membership in the nation and the presumptive commitments in democratic countries to abstract principles of equality, principles that cannot be rejected as "foreign."

⁸² Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. Doc. A/34/180 (1980), 19 I.L.M. 33 (entered into force Sept 3, 1981); United Nations Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. Doc. A/RES/54/4, 38 I.L.M. 763 (entered into force Dec. 22, 2000).

⁸³ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *Yale L. J.* 1935 (2002); Oona A. Hathaway, *The Cost of Commitment*, 55 *Stan L. Rev.* 1821 (2003).

⁸⁴ See Anne F. Bayefsky, *The U.N. Human Rights Treaty System: Universality at the Crossroads* 21 (2001).

on how the treaty is adopted within a particular polity? Investigating how the constitutions of the ratifying countries provide for ratification and either do or do not incorporate treaties would add complexity, but might shed interesting light on whether constitutional differences – for example, between monist and dualist regimes, or between regimes that ratify with greater or lesser degrees of legislative involvement – matter to the effectiveness of rights protection.

IV. INTERPRETATION

The international (or transnational) may come into constitutional law not only through formal incorporation as a binding norm pursuant to domestic treaty law but also as part of a body of sources on which judges draw in giving interpretive meaning to their own constitutional commitments.

Some feminist scholars have urged resort to politics, not courts, to end patriarchy. Any standard for challenging patriarchy, Becker writes, “would not be judicially manageable,”⁸⁵ and even if it were, federal judges having “risen to the top of a conservative and patriarchal profession,” cannot be looked at to overturn patriarchy. Professor Becker has instead proposed modifications to the basic structures of governance in the United States.⁸⁶ Thus, she argues for a shift away from winner-take-all single-seat election contests to greater reliance on proportional representation; for allocating votes for children to be voted by their parents; for a constitutional amendment to modify the makeup of the Senate to be more proportional; and for a set of changes to increase the number of poor persons who vote.

Becker’s critique is a powerful one, but constitutional litigation will not end because of scholarly calls for focus on politics and constitutional amendment.⁸⁷

⁸⁵ Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *U. Chi. Legal Forum* 21, 82 (1999). Becker writes that the “problem is never one rule or practice in isolation, but how it works and what it means within the social structure;” litigation being “patriarchal in that it valorizes qualities and attributes culturally defined as male,” and being heard before judges who have “risen to the top of a conservative and patriarchal profession” cannot be looked at to overturn patriarchy. *Id.*

⁸⁶ *Id.* at 60–81. Professor Becker distinguishes her focus from “dominance” theories that focus on power because the goal of having power should be improvement in women’s lives. *Id.* at 39. (Query whether her methods might appear to be equivalently indirect?). Likewise, she suggests, to the extent that liberal equality feminist theories focus on expanding choices through formal equality, such expanded choices may or may not actually contribute to improving women’s lived lives. *Id.* at 35.

⁸⁷ Professor Becker is more skeptical than I that judges are capable of moving beyond the limitations of their own experience through the practices of ethical judging. Compare Becker, *supra* note 85 at 82 (doubting judges’ capacities to get beyond patriarchal views) with Jackson, *Constitutional Comparisons*, *supra* note 11 at, 119 (suggesting that by engaging with “outsider” perspectives judges may come closer to the goal of impartiality in judging).

A basic tool of constitutions as law is interpretation, and in the ongoing debate about interpretation as a trans-substantive set of practices, women's voices are oddly absent, or muffled. Earlier I offered some speculations on the reasons for this absence, and I now want to argue how women, as players in the constitutional conversation, might engage with some of this internal-to-constitutional law debate. To do so, I provide a simplified outline of the major competing theories, as I see them, in the U.S. interpretive literature. And, I want to emphasize here that the argument I make defending one of these approaches is a contextualized one, not necessarily intended for all constitutions in all countries in all times, but one with important resonances, at least in the United States.

First, a large number of otherwise quite different theories are what I would call "purposive" theories, including feminist theories that argue that a primary value of the constitution is human equality or women's well-being and that its provisions should be interpreted to advance that value. Feminist legal scholars have done important work in developing aspirational norms and conceptual frameworks within which the Constitution should be interpreted. Robin West's work on progressive constitutionalism, building on the requirements of the Fourteenth Amendment for state "protection," of interpreting the constitution to minimize harm to women, and on developing constitutional rights of caregiving, or Linda McClain's work on meshing respect for liberalism (and the importance of individual choice) with a republican conception of the government's obligation to create the conditions for free choice, are among these significant contributions.⁸⁸

Theories that assert the importance of one or more particular substantive purposes – protecting liberty, advancing equality, advancing women's equality, promoting democratic decision making, or, most generally, promoting justice according to the interpreter's (typically contested) theory of justice – are all examples of purposive forms of interpretation.⁸⁹ Constitutional interpretation cannot reasonably be done without reference to purpose, as we shall see, so the distinction between purposive theories and other approaches is one of

⁸⁸ See, e.g., Robin L. West, *Rights, Capabilities and the Good Society*, 69 *Fordham L. Rev.* 1901, 1925–27 (2001); Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 *Cornell L. Rev.* 1221 (2000). See also Robin West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights and the Rule of Law* (2003); Linda C. McClain, *The Place of Families: Fostering Capacity, Equality and Responsibility* (2006).

⁸⁹ See generally Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 *Quinnipiac L. Rev.* 599 (2008). On purposive interpretation more generally, see Aharon Barak, *Purposive Interpretation in Law* (2005).

degree, not kind. For women, theories grounded in equality have played an important role in constitutional adjudication. Indeed, purposive theories to advance women's equality are essential – but, for reasons I will discuss below, they may not be sufficient for an interpretive theory of a constitution that can provide a common space for argument in a divided society.

Another group of theories are originalist or contractarian theories, grounded in understandings of the constitution crystallized at particular moments through constitution-making activities. On one view, constitutional meaning is fixed at the time of the adoption of the constitution; the public meaning of the words used at the time of their adoption controls, to remain “faithful” to that prior decision. Arguments can legitimately be had about how that original meaning would apply, but, not that the original meaning can legitimately evolve or change through means other than formal constitutional amendment.⁹⁰ For interpretation under older constitutions, interpretive theories focused on the meaning of a text at the time of its adoption are particularly problematic for women. Arguments from either contract, or democracy, in favor of the binding nature of past decisions or original meanings, are simply unpersuasive as applied to members of a group excluded from participation at the outset and whose participation in the future is hampered by super-entrenchment rules. As Catherine MacKinnon has written, “no one asked women about the [U.S.] Constitution. We never consented to it.”⁹¹

Arguments that originalist or contractarian approaches are the only legitimate source of interpretation must be rejected with respect to these older constitutions, entrenched without the full and equal participation of women,⁹² although they may well have greater force and legitimacy in interpreting more modern constitutions made under conditions of full adult participation – a point that emphasizes why interpretive theories must to some extent be grounded in particular constitutional contexts. Although the rule of law demands respect for constitutional text, applying narrow originalist methodologies to older constitutions, drafted and adopted by groups excluding or subordinating women or racial minorities, has a high risk of tending to replicate hierarchies of subordination that delegitimize that constitution. The importance of evaluating an interpretive theory in part by the substantive results it tends to produce is not only an important part of feminist approaches to law, but has broader support in the community of constitutionalists.⁹³

⁹⁰ See generally Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2005); Jackson, *supra* note 89 at 604–606.

⁹¹ MacKinnon, “Freedom from Unreal Loyalties,” *supra* note 13 at 1774.

⁹² Cf. John Elster, *Ulysses Reconsidered* 93 (2000) (arguing that where a 51% majority entrenches its view by requiring a 67% majority to undo a provision, “to speak of self-binding in such cases is cant”).

⁹³ See, e.g., Fallon, *supra* note 12 at 577–578.

A third interpretive theory is practice-based, and it is a theory women can use – although perhaps not always win with – in advancing gender-equality claims. It is a theory that grounds constitutional interpretation in the ongoing interpretive practices of constitutional courts – practices that look to text and purpose, original understandings and evolving meanings, the principles of the constitution and the past decisions of the courts, and reasons for change. It seeks to combine respect for that stability that law brings with an attitude, which Patrick Glenn describes as “law as enquiry,”⁹⁴ under which the law remains at once rooted in its origins and open to better answers through learning by experience.⁹⁵ The theory depends in part on the idea that the practice of interpretation is to some extent self-legitimizing and on the virtues of this multi-valenced interpretive practice in both linking to the past and allowing very different versions of what the constitution means to have a shared space of contest.

Naming this theory is an ongoing project. In one article, I have invoked the metaphor of the constitution as a living tree, having roots in a specific place and time, but capable of growth and change as social meanings and understandings evolve and as new doctrinal and textual branches are added.⁹⁶ In other work, I have called this a common law method of constitutional interpretation, as have a number of other scholars working in this vein (though with quite different emphases).⁹⁷ More recently, I have described it as a “multi-valenced” interpretation.⁹⁸ Some writers have referred to this method of interpretation as eclectic,⁹⁹ although there may be unwarranted implications of random bricolage implicit in this adjective.

This multi-valenced theory of interpretation is in some ways more modest than those of the other groups, asserting the primacy of neither past positivist decisions nor singular constitutional purposes. Respect for the past combines

⁹⁴ H. Patrick Glenn, *Persuasive Authority*, 32 *McGill L. J.* 261, 278–288 (1987).

⁹⁵ Contrast the widespread feminist critique of the common law (based on its patriarchal attitudes toward women and resistance to change), with Catherine MacKinnon’s appreciation of the common law method’s capacity to induce change by confronting particular judges with normatively powerful narratives that push toward legal change. See Catherine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 *Geo. L. J.* 813 (2002).

⁹⁶ See Vicki C. Jackson, *Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors*, 75 *Fordham L. Rev.* 921 (2006).

⁹⁷ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877 (1996); Strauss, *supra* note 29; Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 *N.C. L. Rev.* 619 (1994); Jackson, *supra* note 89. Unlike Young, I do not think that past precedents of the court are the most important source of decision; they are one, and not unimportant, but sometimes to be resisted.

⁹⁸ Jackson, *supra* note 89 at 601.

⁹⁹ Mark Tushnet, *The United States: Eclecticism in Service of Pragmatism, in Interpreting Constitutions: A Comparative Study* 7 (Jeffrey Goldsworthy, ed., 2006).

with a willingness to change or overrule. Indeed, in some ways, multi-valenced or common-law decision making recognizes and accommodates the considerable degree of overlap between originalism and purposivism as constitutional approaches – for originalists will often need to resort to understandings of purpose to determine how to “translate” original understandings to the present and how to apply original understandings to new problems, and purposivists will generally anchor their arguments in claims about well understood, albeit more abstract, original purposes.¹⁰⁰

Let me illustrate what I mean by this method by comparing the abortion decisions of the United States and Germany. Although the U.S. Supreme Court and the German Constitutional Court operate within different legal traditions (common law and civil law) and although the style of their opinions in constitutional cases is different (with the U.S. Court often starting with the facts of a case, or a judicial precedent, the German court typically starting with a principle), the opinions of each of these tribunals draw on a range of legal sources – constitutional text, precedent, history, purpose, structure, a sense of consequences, and sometimes, comparative or international legal materials.¹⁰¹ They also reveal a capacity for evolution and change in constitutional understandings.

In *Roe v. Wade*,¹⁰² Justice Blackmun’s opinion for the U.S. Supreme Court draws from a wide array of sources – legal, historical, and comparative. The Court’s prior case law on rights related to family and reproduction, set forth in *Griswold v. Connecticut*, *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, and *Skinner v. Oklahoma*, is invoked to establish a constitutional value in protecting people’s right to make decisions about their intimate lives.¹⁰³ The Constitution’s text is parsed – quite loosely in identifying a location for the right of privacy the case articulated, more precisely in deciding whether a fetus was a “person” under the Fourteenth Amendment.¹⁰⁴ The Court then reviewed how abortion was treated in English legal history, by various religious traditions

¹⁰⁰ Cf. Henry Monaghan, *Doing Originalism*, 104 *Colum. L. Rev.* 32, 37–38 (2004) (explaining challenges of sustaining strict originalism in the face of the “evolutionary aspects of common law institutions,” and suggesting that Justice Ruth Ginsburg’s “historically constrained” evolutionary approach may be the only form in which originalism will survive in the future). On translation, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395 (1995).

¹⁰¹ On the mechanisms for how different sources may influence the interpreter’s evaluation of each, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189 (1987).

¹⁰² 410 U.S. 113 (1973).

¹⁰³ *Id.* at 152–53.

¹⁰⁴ *Id.* at 152–52, 157–58.

of the world, and by medical communities at different times, perhaps for the purpose of showing the absence of a well-instantiated norm against abortion (though with perhaps only limited success).¹⁰⁵ The medical consequences of abortions for pregnant women at different time periods are compared with the risks to the woman of carrying the pregnancy to term.¹⁰⁶

Although *Roe* might have been a stronger opinion had it been grounded in an understanding of the impact of unwanted pregnancy on women's equality and capacity to participate in society,¹⁰⁷ the core of its reasoning drew on traditional sources of constitutional interpretation – primarily, the Constitution's text (concerning the status of the fetus) and the Court's past case law concerning women's liberty interests. In *Planned Parenthood v. Casey*,¹⁰⁸ the flexibility of the multi-valenced or common law method of interpretation worked to undermine the *Roe* regime, by allowing greater state regulation to protect fetal life while at least nominally preserving the right of women (who could afford it) to have an abortion in the period before viability. The *Casey* decision was, at least in part, motivated by advances in medical technology (both those permitting earlier survival of prematurely born babies and those providing greater capacity for visualizing early fetal life), and influenced, directly or indirectly, by the political mobilizations on both sides of the issue.

The German Court's 1975 decision on abortion is in some ways the converse of *Roe*.¹⁰⁹ The court there held unconstitutional a statute that liberalized the prior German abortion regime, holding that the state had a duty to protect unborn life (starting fourteen days after conception) and that by declaring abortions in the first eleven weeks to be permissible, the new law failed in this duty.¹¹⁰ In so ruling, the court invoked text (the Basic Law's protection of the right to life), its history (including the Nazi eugenic laws on forced abortion) and intent, the Court's own prior decisions on the fundamentality of the Basic Law's commitment to the protection of life and human dignity, and the

¹⁰⁵ *Id.* at 136–144.

¹⁰⁶ *Id.* at 149.

¹⁰⁷ Not until *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), does the right to decide on an abortion become more clearly linked to women's equality, *see id.*, 505 U.S. at 853–53 (plurality opinion); *id.* at 923 (Blackmun, J., concurring in part, dissenting in part), perhaps not surprisingly, as it takes time for the understandings developed by feminist legal methods to infiltrate legal consciousness.

¹⁰⁸ 505 U.S. 833 (1992).

¹⁰⁹ (1975) 39 BverfGE 1 (F.R.G.) For a translation of this decision, see *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *J. Marshall J. Prac. & Proc.* 605 (Robert E. Jonas & John D. Gorby trans., 1976) [hereinafter *West German Abortion Decision*]; *see also* Translation, Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 336 (2d ed. 1997).

¹¹⁰ *See Kommers, supra* note 109 at 336–337.

consequences of permissive statutory regimes in other countries (including England).¹¹¹ It specifically rejected the argument that the statute (which permitted early abortions only after counseling) should be upheld because it was better calculated to encourage women to continue their pregnancies to term than the prior regime, in which illegal abortions had grown; it would be inappropriate, the German Court said, to look at life in the aggregate, because the right to life was an individual one.¹¹²

However, after reunification, the Court was confronted with a statute trying to reconcile the prior abortion regime of East Germany with that of the former West Germany.¹¹³ Although the German Court also found constitutional problems with the new statute insofar as it failed to name abortions as presumptively wrongful and needed to direct the counselling required by statute more firmly toward persuading women to continue their pregnancies, it indicated a willingness to uphold a counseling model on the grounds that experience suggested it would be more effective in promoting full-term pregnancies.¹¹⁴ Thus, it displayed some of the same flexibility that was shown (working in the opposite direction) in the U.S. Supreme Court, by virtue of its interpretive method's openness to consequential information.

In some respects the German Court's approach – grounded in a more positive conception of the state – was more contextually sensitive to the adverse effects on women's equality of forced birth regimes (i.e., laws that made it difficult or impossible to terminate pregnancies) and in particular to the consequences for poorer women. It emphasized that the affirmative duty of the state was not only to encourage live births, but also to take positive steps to prevent pregnancy from adversely affecting women's productive capacities in the workplace, and provide social support to the raising of children.¹¹⁵ It also issued a complex ruling on the possibilities for the government itself, in some cases, to pay for abortions for poor women.¹¹⁶ The basic posture of the German

¹¹¹ *West German Abortion Decision*, *supra* note 109 at 618, 624, 631–632, 637–638, 639–640, 642–643, 656, 659, 662; *see also* Jackson, *supra* note 89, at 623–24.

¹¹² *West German Abortion Decision*, *supra* note 109 at 650, 655.

¹¹³ 88 BverfGE 203 (F.R.G.), translation in *Kommers*, *supra* note 109 at 349. For further discussion, see the excellent chapter in this book by Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*. *See also* Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse, and the Right to Protection in the United States and Germany*, 43 *Am. J. Comp. Law* 273 (1995).

¹¹⁴ *Kommers*, *supra* note 109 at 350–51; Neuman, *supra* note 113, at 282–283.

¹¹⁵ *Kommers*, *supra* note 109 at 353–54.

¹¹⁶ For a description of the high percentage of women whose abortions are paid for by the government in Germany, see Case, *supra* note 113 at [mss, p. 12] (indicating that because of liberal definitions of the income levels below which the state was obligated to pay, 80% of

Court – that, except where the pregnancy threatens the life or health of the woman, is the result of rape or other criminal conduct (or, possibly, where the fetus has serious congenital conditions), the constitution requires imposition on women of a duty to carry forward pregnancies under many circumstances – is completely incompatible with the U.S. Supreme Court’s understanding of women’s autonomy and equality. Yet, the German Court also showed at least some rhetorical appreciation of the burden on women’s equality and autonomy that pregnancy imposes, and a far greater rhetorical willingness to enforce the state’s positive duty to relieve that burden.¹¹⁷ This was in real contrast with what the U.S. Supreme Court did in *Casey*, in its discussion of whether a required waiting period was an “undue burden” on the right to choose an abortion.¹¹⁸

These two courts – one sitting in a common law country, one sitting in a civil law country, one beginning with a presumption for women’s autonomy to decide on abortion in the early period of pregnancy, the other starting with a presumption that women have a duty to carry forward pregnancies – nonetheless used a similar set of interpretive sources. The opinions reveal a pattern of attention to historic meaning and broader purposes, to past decisions (including of the court itself) and practices, to specificities in constitutional text and history as well as to more universal principles that the constitutional text is claimed to embody. In both of these cases, the interpretive methodology was multi-valenced and open to – if not persuaded by – arguments from women’s equality.

Is an interpretive methodology under which these two very different sets of results could be reached defensible? Perhaps, and on these grounds: First, constitutions – to serve their purposes, including promoting a more equal society for women and men – function as a location for contest over public principles among people who can be expected to disagree with each other, a contest conducted at times under the rubric of interpretation. There are many participants in this contest or conversation. Some will win – in elections, in the decisions of elected legislatures, in public opinion – and some will lose in those venues. A constitution needs to have space for both winners and losers, but, especially, for losers to come back and fight another day, to maintain

abortion are state funded). In the United States, statutes prohibiting the use of government funds to pay for abortions or provide abortion referrals or counseling have been upheld. See *Rust v. Sullivan*, 500 U.S. 173 (1991); *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980).

¹¹⁷ See *Kommers*, *supra* note 109 at 340.

¹¹⁸ See *Casey*, 505 U.S. at 885–887.

a locus for both stability and peaceful change.¹¹⁹ Recognizing the variety of viewpoints and perspectives that will be brought to bear on public meanings is, in some ways, compatible with feminist epistemologies of full participation and attention to competing perspectives.¹²⁰ Purposive interpretation – for those who do not share the same sense of which purposes are most fundamental – may not by itself provide this space.¹²¹ Second, constitutions also function to link societies' pasts to their futures. In constructing a connection to a common past, constitutions, like family narratives, provide a degree of social glue and cohesion, a common narrative out of which arguments can be made. Unless purposive interpretation can be linked to the constitution's commitments, it cannot by itself serve the function of providing links between a society's past and its future. *Stare decisis* (or attention to the Court's own past decisions) and attention to textual specificities and specific histories are modalities that give weight to a constitution's past and its interpretation as acts of law.¹²²

Third, feminist interpretive theory needs a mechanism by which, in Jennifer Nedelsky's words, it can persuade those with the power to interpret to "see links between what is familiar to them and what is essential to us."¹²³ Catherine MacKinnon has praised common law decision making on sexual harassment

¹¹⁹ Cf. Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (2001) (arguing that judicial review may be justified as a way of "unsettling" unjust results reached elsewhere).

¹²⁰ Cf. Williams, *supra* note 19 at 1570 ("[K]nowledge may be situated rather than universal. The neutrality that looks for a view from nowhere is unattainable; it is certainly not attainable in every case, it may not be attainable in any case. We could be faced, then, with not one but many equally valid interpretations of reality. Perspectives or points of view must be recognized as potentially valid alternatives . . .").

¹²¹ Professor Siegel writes: "When citizens who passionately disagree about the terms of collective life can advance their contending visions as the outworking of the nation's founding commitments, they belong to a common community, despite deep disagreement about its ideal form. The practice of negotiating conflict about the terms of collective life by reference to a shared constitutional tradition creates community in the struggle over the meaning of that tradition; it forges community under conditions of normative dissensus." Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Cal. L. Rev.* 1323, 1419 (2006).

¹²² Links to the text are important, but not because we are today bound by past understandings or intentions (although these may be relevant sources). Rather the text matters because law can only be law if it is treated as controlling. The words of the law can be interpreted, but not ignored; for law to be law, the words of a valid law must be given effect; and for interpretations to be valid, they must be linked to one another by some form of principled reasoning that plausibly relates to the text.

¹²³ Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 *Nw. U. L. Rev.* 1286, 1300 (1993); see also Martha Minow, *Foreword: Justice Engendered*, 110 *Harv. L. Rev.* 10 (1987); cf. Martha C. Nussbaum, *Human Rights Theory: Capabilities and Human Rights*, 66 *Fordham L. Rev.* 273, 296 (1997).

for similar reasons, that “within principled limits, it is open to reality,” enabling judges to be open to women’s realities.¹²⁴ An interpretive theory that relies on text *and* structure, past decisions *and* changing practice, principles *and* consequences, and that is open to revised understandings in light of social facts and constitutional purposes, undergirds this common law method.

In part, because of the inevitability of conflict over how to apply fundamental constitutional values, interpretive theory for a constitution in a complex and divided society benefits from having a framework that recognizes a range of common modes of argument. For example, regulation of hate speech is contentious among feminists and in many democratic societies, which have reached different answers to the question of whether regulation of hate speech is required (as under the International Covenant on Civil and Political Rights),¹²⁵ is constitutionally permissible (as has been held by the Canadian Supreme Court, 5 to 4),¹²⁶ or is constitutionally impermissible (as has been held by the U.S. Supreme Court.).¹²⁷ Purposive theories grounded in the value of promoting the equality of persons may be countered by purposive theories grounded primarily in the values of liberty. Theories based only on one overriding purpose offer no space for those who have a different sense of fundamental purpose; legitimate argument should not be confused with decisions with whose justifications we always agree.¹²⁸ Constitutional text provides a focal point, as David Strauss suggests,¹²⁹ and so too does the past; arguing about the text, and the past, as well as about fundamental purposes and current consequences, invites a wider range of perspectives into the process of interpretation. And – getting now to my last topic – in this broader, multi-valenced, common-law approach, foreign experience and transnational norms have a valuable role to play.

The debate over the role of foreign and international law in constitutional interpretation transects more general debates over interpretation. For women,

¹²⁴ MacKinnon, “Freedom from Unreal Loyalties,” *supra* note 13 at 1777; see also MacKinnon, *The Logic of Experience*, *supra* note 95 at 815 (“It was judicial engagement with the experiences of sexually harassed women presented to courts on an equality theory, in phenomenological depth and one case at a time, that made it happen. In this real sense, sexual harassment law is a women’s common law.”).

¹²⁵ International Covenant on Civil and Political Rights art. 20, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

¹²⁶ See *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

¹²⁷ *R.A.V. v. City of St Paul*, 505 U.S. 377 (1992).

¹²⁸ On the distinction between the legitimacy of constitutional argument and the justification of particular decisions, see *Philip Bobbit, Constitutional Fate: Theory of the Constitution* 181, 190–196 (1982).

¹²⁹ Strauss, *supra* note 29 at 910–911.

international human rights law has been a source of support for efforts to instantiate at least formal equality in constitutional interpretation, and sometimes far more. In Argentina, the 1994 Constitution incorporates ten human rights conventions, including CEDAW, as being of constitutional stature.¹³⁰ Colombia's 1991 Constitution requires that domestic constitutional rights, including an article protecting gender equality, be interpreted in conformity with international human rights treaties to which Colombia is a party (which include CEDAW); and, as Martha Morgan has shown, the Colombian Constitutional Court has been creative in redressing previously sanctioned harms against women (using, for example, *tutelas* as a tool to protect against domestic violence).¹³¹ The courts in Botswana relied on international human rights documents to overcome ambiguous language in its domestic constitution (about sex discrimination) and invalidated a gender-biased provision concerning the ability of men and women to pass on citizenship to their children when married to a non-national.¹³² The Indian Supreme Court in the *Vishaka* case explicitly relied on CEDAW, even though the legislature had not yet given it statutory implementation, in promulgating guidelines to prevent rape and sexual harassment of women workers.¹³³

In the United States, reliance on international or foreign law in the interpretation of the Constitution is controversial. At their recent confirmation hearings, both Chief Justice Roberts and Justice Alito indicated their resistance to considering foreign or international law in resolving constitutional questions.¹³⁴ Justice Scalia, too, has urged the path of resistance,¹³⁵ and scholarly work has raised objections, from democracy, sovereignty, original intent, fear of judicial discretion, and lack of competence, to argue against what some see as expanding the canon of sources that can be considered.¹³⁶ But, as I have shown in other scholarship, the canon has long included reference to foreign law in some of our most important cases – in the twentieth century,

¹³⁰ *Const. Argentina* (1994), art. 75 (22).

¹³¹ See *Republic of Colombia Const.* (1991) art. 93, art. 13; Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 *U. Miami Inter-American L. Rev.* 253, 269, 281–83 (1999).

¹³² See *Unity Dow v. Att'y Gen.*, reprinted in 13 *Hum. Rts Q.* 614 (Bots. High Ct. 1991), *affirmed in relevant part*, *Unity Dow v. Att'y Gen.*, 103 *I.L.R.* 128, (Bots. Ct. App. 1992) (1996).

¹³³ *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011.

¹³⁴ See, e.g., Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, *The New York Times*, Sept. 17, 2008 (describing Chief Justice Roberts' and Justice Alito's positions on this point in their confirmation hearings).

¹³⁵ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 625–626 (2005) (Scalia, J., dissenting).

¹³⁶ See, e.g., Charles Fried, *Scholars and Judges: Reason and Power*, 23 *Harv. J. L. & Pub. Pol'y* 807 (2000); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 *Notre Dame L. Rev.* 1149 (2006); Alford, *supra* note 11.

Jacobson v. Massachusetts,¹³⁷ *Wickard v. Filburn*,¹³⁸ *Youngstown Sheet & Tube Co. v. Sawyer*,¹³⁹ and *Miranda v. Arizona*,¹⁴⁰ – and since the nineteenth century in Eighth Amendment challenges to particular penalties for particular crimes or criminals.¹⁴¹ Another prominent example, *Muller v. Oregon*,¹⁴² relied on foreign law to uphold a statute limiting the working hours of women – a result viewed as progressive in its time, but now understood as raising much more difficult issues of gender equality and discrimination that would be difficult, if not impossible, to justify today, and which raises a real caution about undue or blind reliance on such transnational sources.

There are important distinctions between treating international or foreign law as “binding” (which would raise serious questions of democratic consent) and treating them as “helpful” in illuminating the content of the domestic constitution. What I call *engagement* with the transnational – the willingness to consider international or foreign law, without any presumption in favor of either following or resisting it – is compatible with many theories of constitutional interpretation. These theories include purposive interpretation and the multi-valenced, contextualized, common law method, especially to the extent that the latter approach is, in a sense, always open to further inquiry. Something of this spirit is expressed in a late-nineteenth-century opinion of the U.S. Supreme Court, rejecting the argument that the Fourteenth Amendment required state criminal proceedings to be initiated by grand jury indictment. Rather, the Court in *Hurtado v. California* wrote, understanding what due process requires should not

exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.¹⁴³

The Court further noted that although “[t]he Constitution of the United States was ordained . . . by descendants of Englishmen, who inherited the traditions

¹³⁷ 197 U.S. 11, 31–32 (1905).

¹³⁸ 317 U.S. 111, 125–126 (1942).

¹³⁹ 343 U.S. 579, 651–652 (1952) (Jackson, J., concurring).

¹⁴⁰ 384 U.S. 436, 486–489 (1966).

¹⁴¹ See Jackson, *Constitutional Comparisons*, *supra* note 11 at 110–11. On the longstanding role of international law in constitutional interpretation, see Sarah H. Cleveland, *Our International Constitution*, 31 *Yale J. Int'l L.* 1 (2006).

¹⁴² 208 U.S. 412, 419 (1908).

¹⁴³ 110 U.S. 516, 531 (1884).

of English law and history; . . . it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues.”¹⁴⁴ Engagement with the transnational allows a continued testing of the best understanding of domestic constitutional commitments; whether transnational developments will be relevant may vary from issue to issue, as some constitutional texts invite comparison and others have a specificity with a particular national context that defy comparison.

Why should women care about transnational law and constitutional adjudication? Let me suggest – as some of the examples I mentioned earlier surely do – that engagement with transnational sources may be of particular value in struggles over the meaning of constitutional guarantees of equality in those areas in which assumptions about the “natural” play a strong and regressive role. Once another country has moved toward a more progressive position, it becomes harder for judges in the common law method to simply assume things must be as they are. We saw this in *Lawrence v. Texas*,¹⁴⁵ where the Court cited a 1981 decision in *Dudgeon v. United Kingdom* by the European Court of Human Rights (at that time applicable to some twenty-one European nations, at the time of *Lawrence*, to forty-five nations).¹⁴⁶

In *Nguyen v. INS*,¹⁴⁷ decided just a few years after the VMI case had apparently strengthened the level of scrutiny of gender-based classifications,¹⁴⁸ the U.S. Supreme Court upheld an explicit instance of gender discrimination in our citizenship laws. Imagine if, in *Nguyen*, the Court had considered the constitutional approaches of other nations with which the United States might think it appropriate to compare itself. Canada had confronted a similar issue a few years earlier, and concluded it was inconsistent with the Charter to convey the sense that one gender was less capable of passing on Canadian citizenship than the other.¹⁴⁹ Or how might *United States v. Morrison*,¹⁵⁰ invalidating the civil remedy of the Violence Against Women Act on federalism grounds, have turned out had the Court known of the Canadian case in which a national gun registration law was challenged as an intrusion on the reserved powers of the

¹⁴⁴ *Id.* at 530–31.

¹⁴⁵ 539 U.S. 558, 575 (2003) (stating that the *Dudgeon* “decision is at odds with the premise in *Bowers v. Hardwick*, 478 U.S. 186 (1986)] that the claim put forward was insubstantial in our Western civilization”).

¹⁴⁶ *Id.* at 573.

¹⁴⁷ *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

¹⁴⁸ *United States v. Virginia*, 518 U.S. 515, 531–533 (1996) (indicating that only an “exceedingly persuasive” justification would allow use of gender classifications, to which courts would afford “sceptical scrutiny,” and finding the Virginia Military Institute’s exclusion of women unconstitutional).

¹⁴⁹ *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358 (Can.).

¹⁵⁰ 529 U.S. 598 (1999).

provinces over “property and civil rights,” acknowledged to include control of automobile registration; in a decision later affirmed by the Canadian Supreme Court, an appellate court relied, in part, on the disproportionate harm of gun violence to women in upholding the national statute.¹⁵¹

Some jurists are committed to the idea that national law, including constitutional law, should be interpreted in accord with international law or at least international human rights law.¹⁵² There are powerful arguments on behalf of such an interpretive posture, relying on transnational legal consensus as a check on self-interested decision making or the baser passions that can sweep popular majorities. But, it is not an argument I think one can make generally about constitutional law, particularly for constitutions that do not invite or license such convergence. Absent such a license, there are reasons both internal to the idea of constitutions and relating to the character of transnational law that incline me toward the “engagement” approach, rather than to ward a posture of convergence.

First, as an internal matter, given the complex and multiple functions a constitution performs, strategies of convergence with transnational norms may foster a politically unattractive version of universalism, which may undermine the transformative power of claims based on distinctively national communities’ constitutional aspirations. Constitutions function, in part, to constitute particular communities. Constitutional interpreters look at their own texts and precedents, and not just at broad purposes, in part, because the specificity of those texts and precedents are links to their particular histories and communities. And, it is, in part, from a perception of the courts as grounded in those communities that some of their legitimacy and power flows.

This is not to deny that an important project is the articulation of universal goals, values, or commitments that feminists and progressives ought to seek in all societies. Martha Nussbaum’s work on women and human capabilities is in this model.¹⁵³ Nussbaum argues that there are ten “capabilities” that all

¹⁵¹ Reference re Firearms, [1998] 219 A.R. 201 (Alberta Ct. App. 1998), aff’d [2000] 1 S.C.R. 783 (Can. Sup. Ct). Interestingly, in 1948 the U.S. Supreme Court upheld application of a state law prohibiting segregation as applied to a ferry service between the United States and Canada, challenged on dormant commerce clause grounds. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948). Specifically noting that the Province of Ontario had banned racial discrimination and that the direction of U.S. federal law was also to ban racial discrimination by statute, the Court concluded that the possibility of a conflict between the Michigan law and either Canadian or U.S. law was too remote a basis on which to invalidate the state statute. *Id.* at 37.

¹⁵² See, e.g., Michael Kirby, *International Law – The Impact on National Constitutions*, 21 *Am. U. Int’l L. Rev.* 327, 335–336 (2006).

¹⁵³ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (2000).

human beings should be able to develop, enjoy, and use in a good society.¹⁵⁴ Although these capabilities might be expressed in the language of rights, she suggests, and I think rightly so, that there is some power in keeping them separate.

As I see it, the power of the idea of human capabilities lies precisely in its focus on the substantive conditions of human development, rather than on the legal mechanism by which those capabilities are promoted. In the distance, between the idea of human capabilities and the idea of human rights, lies the possibility that, although some societies may rely on legal concepts of rights to protect these capabilities, it may be possible for them to flourish through different legal approaches. Constitutional interpretation is an event that, although it happens in many societies with constitutions and has common elements, methods, and concerns, is also and, at the same time, an intensely national act, and must be so understood to retain the legitimacy of the project within particular national polities.

Second, the transnational may itself be a double-edged complicated sword. International human rights treaties protect rights that may be construed in tension with each other, most notably religious and cultural rights, and even the rights of “self determination of a people,” which are capable of being read as authorizing a polity to adopt invidious distinctions if the polity “self-determines” to do so. The priority of these international agreements vis-à-vis one another is not yet determined and is capable of being contested in the many venues in which they are interpreted. International law itself may not always be a benign source of rights, but may authorize conduct, for example, in the pursuit of terrorism that raises what should be seen as serious questions under national constitutions. And, foreign comparative law has in the past been used to the detriment of women. Whatever one may think of *Muller v. Oregon*, cited earlier, as Professor Mossman has noted, a court in New Brunswick, Canada, in support of its conclusion that women could not be admitted to the practice of law,¹⁵⁵ relied in its 1905 ruling on an earlier U.S. Supreme Court decision upholding a similar state law in *Bradwell v. Illinois*.¹⁵⁶ So, whereas we each may have a stake in how other nations’ laws develop, we also have a stake in being able to argue about what is and is not “our own.”

¹⁵⁴ See *id.* at 78–80; Martha Nussbaum, *Human Rights and Human Capabilities*, 20 *Harv. Hum. Rts. J.*, 21, 21 (2007).

¹⁵⁵ Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 *Wisc. Women’s L. J.*, 147, 152 (1987) (citing *In re French*, [1905] 37 N.B. R. 359 (Can.)); see also *Re Mabel French*, [1929], 1 D.L.R. 80, 80–81 (Can.).

¹⁵⁶ 83 U.S. (16 Wall.) 130 (1872).

Some of the nationally specific groundedness of domestic courts may be needed to motivate their constitutional interpretation while remaining part of a larger interpretive community, and to retain the legitimacy of the court in the national community in which it is rooted. And, there may be developments in international law – both within and outside of human rights law – that should be resisted or reinterpreted. Without a presumption of convergence, engagement with the transnational, in a project of legitimate constitutional interpretation that draws on multiple sources of law, has much to offer to a form of constitutional interpretation that feminists can support.

CONCLUSION

I have tried to suggest that in three major conceptual areas of constitutional law – entrenchment, jurisdiction, and interpretation – asking the “woman question” has some real pay off – for women, for constitutional understanding, or (maybe) for both. I am not sure my conclusions on any of these subjects are right; I am open to challenge, and to changing my mind. But, what I am quite sure of is that women need to participate in the processes of constitution making and constitutional interpretation, in the scholarly projects of uncovering the gendered impacts and spaces of constitutional law (and using comparative constitutional law to do so) and in making the arguments over constitutional meaning and theory their own.

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