Introduction: Comparative Constitutional Law, Gender Equality, and Constitutional Design

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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. 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. 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.”

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.
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. 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. 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. 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


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

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\(^8\) 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

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