

Women's Access to Justice

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1. Introduction

Access to justice for women must be equal and effective. The securing of equal and effective access to justice entails gender-sensitive engineering of the entire chain of justice in a way which guarantees not only formal but also substantive equality. The chain of justice extends through international courts and tribunals, treaty bodies, in particular the CEDAW Committee under its Optional Protocol, Special Procedures, regional mechanisms, state courts and other formal and informal justice systems within the state. The link in the chain of justice which I will discuss in my presentation is the constitution. Of course this is only one aspect of legal framework for women's access to justice but it is a key aspect since it empowers women to claim equality through the legal system on all issues: civil and criminal, economic and social, family and public. It enables women to access the courts to challenge discriminatory statutes or to demand remedies even in the absence of anti-discrimination legislation.

A constitutional guarantee of equality for women, in line with international standards, most especially CEDAW, and regional standards is essential in order to establish a universal imperative of equality for women on which the entire chain of access to justice within the state will rest. Constitutional guarantees of equality are the source of authority for effective judicial review of legislative and governmental action and empower women to process their claim for equality through the courts. Beyond state courts, the possibility of recourse to international and regional mechanisms opens access to interpretation of the constitutional provisions in line with international and regional state obligation to respect, protect and fulfill women's right to equality.

The inclusion of any clause in the constitution which derogates from the guarantee of gender equality, whether by excluding certain spheres of life from the constitutional guarantee or by deferring to another order of justice such as religious principles, undermines the equality standards of international human rights law. Many of the countries which have derogation or exclusion clauses in their constitutions have entered reservations to the human rights treaties, in particular to CEDAW, and these reservations have been addressed in the concluding observations of the treaty bodies, which have called for their withdrawal.

There is, furthermore, a tension between the constitutional guarantees of a universal imperative of equality for women and the co-existence of plural or parallel systems of traditional justice which are usually patriarchal both institutionally and in the substantive norms which they apply. Some states delegate authority to parallel systems, usually by bestowing jurisdiction on religious or customary courts to adjudicate on family law issues, creating a plural legal order. In some states, there is state recognition of community arbitration, quasi-judicial systems, alternative dispute resolution, marriage ceremonies etc. In all states, there may be non-state informal systems of justice which are not formally recognized or state-sanctioned. The tension with constitutional guarantees of equality for all parallel systems of justice exists on two levels. First, some constitutions, as shown above, authorize an exception or override for the issues dealt with by parallel systems of justice granting them impunity for discrimination against women. Second, even where the constitutional guarantee of equality applies to the parallel systems of justice, there are problems in providing effective access to constitutional justice and the right to equality for women within these systems.

Constitutional guarantees of equality

A constitutional guarantee of equality is a critical component in securing gender equality in access to justice. While constitutional guarantees of equality do not necessarily guarantee that equality rights will be available to women in practice, the articulation of equality for women is a significant and essential foundation for the realization of women's rights and is an indispensable expression of political will. Constitutional rights are never interpreted or implemented in a political or ideological vacuum, which means that political, cultural and social norms may continue to impact women's ability to access their human rights. However, having the legal and constitutional framework in place within the state is a first step in the chain of access to justice.

In order for constitutions to ensure equal and effective access to justice for women, more than a general equality guarantee is required. The constitutional provisions for gender equality should be specific and it is critical that the requirement of equality *between women and men* should be incorporated to frame the equality priorities throughout the entire document. Indeed, increasingly, women's right to equality and non-discrimination clauses have been incorporated into new constitutions or are part of constitutional reform efforts in different regions. This, in part, is a result of ratification of the CEDAW Convention together with organized campaigning by women's activists. In many recently drafted constitutions in sub-Saharan Africa and in the Latin-American region there is careful attention to articulate the right of women to equality. However, there are also counter examples, where recent constitutions, provide, without mention of women's right to equality: "Law applies equally to all citizens, and they are equal in rights and general duties. They may not be discriminated against due to race, origin, language, religion, or creed." Such clauses are to be found in some states on the Middle East and Asia-Pacific regions and have been adopted in some of the 2012 Constitutions in the Maghreb. However, a particularly good practice in the Maghreb is the 2011 Moroccan Constitution which systematically throughout its provisions, confers constitutional rights expressly on women as well as men

Good practices in constitutional guarantees of equality for women, which enhance women's equal and effective access to justice, may include the following:

- guarantee of women's equality in all fundamental rights, including both civil and political, social, economic and cultural rights
- incorporation of international women's human rights law, such as CEDAW, in order to make the human rights treaties self-executing within the constitution
- applicability of the constitutional equality guarantees to both the public and private and the civil and criminal spheres
- prohibition of direct/indirect discrimination in all fields
- prohibition of intersectional discrimination
- prohibition of violence against women
- gender equality in representation in political and public life, including quotas
- providing for affirmative action and temporary special measures
- availability and accessibility of judicial review or mechanisms needed to monitor or implement the constitutional provisions

The wide spread inclusion of guarantees of gender equality or equality for women in post 1980 constitutions might well be regarded as sufficient evidence of state practice to serve as a basis, together with the opinion juris of the CEDAW Committee, of a customary international law requirement that women's right to equality be entrenched in explicit constitutional provisions.

2. Judicial Review

Where the right of women to equality is guaranteed in the Constitution, it lays the groundwork for challenges to gender inequality in other areas of law, such as the civil code, family law and criminal law. This empowers women to challenge discriminatory legislation and discriminatory governmental policies in the courts. Provisions for gender equality provide a more solid legal basis for rights claims and give women's rights activists the "tools to challenge state activity in the courts". Research suggests that equal rights provisions increase the likelihood of a favourable judicial decision regarding the assertion of women's rights and increase the likelihood of a court applying a higher standard of law.

Examples of cases from different regions in which courts overturned discriminatory legislation or regulations, by relying on constitutional equality provisions, demonstrates the importance of constitutional guarantees of women's right to equality for women's access to justice in the courts, throughout the spectrum of issues which affect their lives: citizenship rights and privileges (Unity Dow case, Botswana Court, 1992); affirmative action in government companies and public institutions (IWN, Israel Supreme Court, 1996); sexual violence/gang rape (Bhanwari Devi, India's Supreme Court, 1997); inheritance/primogeniture (Bhe Case, South Africa Constitutional Court, 2004), abortion (Martha Solay Case, Constitutional Court of Columbia, 2006); domestic violence/marital rape (FWLD, Nepal Supreme Court, 2010); and political representation (SGP, Netherlands 2012).

3. International and regional adjudication

The access to adjudicatory tribunals or committees at the international or regional level is an important link in the chain of access to justice, even where constitutional guarantees of equality and access to judicial review are in place at the national level. Thus the human rights treaty bodies and regional adjudicative mechanisms play an important role in ensuring women's access to justice.

It is well known that there have been a great many reservations to CEDAW, in particular in relation to articles that pertain to family law, particularly Articles 9 and 16. These reservations create a central barrier to women's access to justice, breaking the chain of access at the level of international human rights law and the CEDAW Committee has frequently called for States parties to withdraw them.

4. Constitutional override clauses: derogation or exclusion for customary or religious principles

Constitutions which have an override, that is include a derogation from the gender equality guarantee for any system of norms which may discriminate against women, violate the equality standards of CEDAW. In some regions, Africa, the Middle East, Asia Pacific, there are many states in which structural impediments to gender equality are firmly embedded within the constitutional texts, containing provisions, derogation clauses, that either specifically subordinate constitutional equality to religious principles or exclude family and customary law from constitutional non-discrimination. A number of countries in the African region have retained claw-back clauses that exclude personal and customary law from the reach of constitutional human rights guarantees. The constitutions which entrench religious law as an overriding principle of legislation in the state are mainly those of Islamic Republics and Arab Republics. The drafting of constitutions in the Maghreb states in the period after the Arab Spring has been accompanied by attempts to derogate from the supremacy of the right to gender equality. Derogation clauses severely undermine that commitment to equality as they do not establish a constitutional requirement of equality which will override any possible discriminatory interpretation of religious law.

Good practice is to be found in some constitutions, in sub-Saharan Africa and South-East Asia, which, where they incorporate recognition of religious values or traditional custom in the constitution, nevertheless provide that they will not override the right to equality.

5. Plural and parallel legal systems

There is a growing recognition that access to justice does not take place only or even mainly in state courts. Parallel legal systems include personal law systems, in which jurisdiction is bestowed on religious or customary court systems by the state; indigenous systems of justice recognized by the state; alternative dispute procedures; and informal systems of community justice which are not officially sanctioned by the state. “The State has responsibility for ensuring that compliance with human rights standards extends to all justice practices, including non-state legal systems that exist without formal state sanction” (UN Women). In order for states to fulfill this obligation there are essential measures. The first is the application of constitutional equality guarantees for women to all plural and parallel systems of justice. The second is the empowerment of women through NGOs, education and funding policies to promote equality in the institutional decisions and procedures of religious courts and informal systems of justice. There are good practices in both these measures in many countries in the Latin-American and Caribbean constitutions which require recognized indigenous systems to respect the fundamental human rights of women.

6. Criminal law

The criminal law deserves special mention in the chain of access to justice. By means of the criminal law the state may directly victimize women. The criminal law may either target women by criminalizing behaviours which are not criminalized or punished in the same way when performed by men or by not criminalizing behavior in which women are the sole or main victim.

The criminalizing of women’s sexual and reproductive behavior in some states includes: prohibition and punishment of abortion, including pregnancy resulting from rape and therapeutic abortion to save the woman’s life; adultery, including sexual relations of unmarried women or girls, with or without their consent; prostitution; immodesty in dress or behavior.

Non-criminalization of behavior in which women are the sole or main victim includes: impunity for marital rape; impunity or reduced sentences for domestic violence, honour killings or crimes of passion; impunity for child or forced marriage; or failure to prosecute rape.

The discrimination in the criminal law is particularly egregious since the state is using its police power to discriminate against women, to negate their control over their sexual, family and reproductive life.

International and constitutional guarantees of equality for women can enable women to challenge this discrimination in the use of the police power of the state.

7. State obligation to respect, protect and fulfill women’s access to justice

CEDAW Article 2 (a) places great importance on the role of law in contributing to the elimination of discrimination against women. CEDAW did not expressly require that the guarantee of equality

for women be incorporated in a constitution and adds that the obligation can be satisfied by embodying the principle in other appropriate legislation. However the requirement that the state pursue a policy of eliminating discrimination “by all appropriate means” is unlikely to be met by a process of legislating on all the wide variety of issues in which women may suffer from discrimination. The CEDAW Committee indeed regularly recommends that States parties guarantee women’s human rights in the national constitution and thus ensure that they prevail over inconsistent laws of less than constitutional status – and that such rights be enforceable in national courts. The constitution is the optimal legal instrument through which the equality guarantees of CEDAW can be incorporated into all aspects of women’s lives. It is the constitutional guarantee of equality which can ensure women’s equal and effective access to justice. This can, theoretically, be achieved by other means but, as we have seen, the constitution provides the most direct and reliable path.