

## Asking the Woman Question of Constitutions: Insights from Sri Lanka

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**Abstract:** What do we learn when we ask ‘the woman question’ of constitutions of the Global South? Constitutions worldwide are increasingly the subject of gender analysis, which rests on ‘asking the woman question’ to uncover the gendered implications of seemingly neutral constitutional provisions. But can gender analysis account for all forms of gender inequality in all kinds of constitutions? In this article, we place three lines of inquiry in conversation in responding to these questions: the feminist method of asking the woman question, dominant approaches to constitutional gender analysis, and the perspective(s) from the Global South. In doing so, we develop a way to understand how constitutions of the Global South are gendered in their design and operation, in ways that are perhaps distinctive. We use Sri Lanka as a case study to show how asking the woman question of Sri Lanka’s Constitution requires us to revise some fundamental assumptions about constitutions and to engage with laws, institutions and practices that are close to the constitution, but not usually considered within the constitutional remit. We argue that constitutional gender analysis needs to move beyond a focus on constitutional text and institutions to better address gender inequalities in societal institutions, such as the family, institutions relating to labour, religious institutions and the military. We describe these institutions as ‘proximate institutions’, by which we mean institutions that are close to the constitution, because of their role in constitutional governance and in the exclusion and subordination of women from it. We propose the identification and analysis of proximate institutions as a methodology that calibrates the issues of context that are critical for fully understanding the gendered nature of constitutions, in the Global South and beyond.

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## A. Introduction

What do we learn when we ask ‘the woman question’ of constitutions of the Global South? Constitutions worldwide are increasingly the subject of gender analysis, which rests on ‘asking the woman question’ to uncover the gendered implications of seemingly neutral constitutional provisions.<sup>1</sup> But can gender analysis account for all forms of gender inequality in all kinds of constitutions? In this article, we place three lines of inquiry in conversation: the feminist method of asking the woman question, dominant approaches to constitutional gender analysis, and the perspective(s) from the Global South. In doing so, we develop a way to understand how constitutions – broadly defined to mean the values, principles, rules and institutions that structure government and its relationship with the people – of the Global South are gendered in their design and operation, in ways that are perhaps distinctive.

We use Sri Lanka as a case study for two reasons. First, we consider it to be a jurisdiction of the Global South, albeit one that presses on the limits of that category. Second, it is a case study that is familiar to one of us (Dinesha Samaratne). In the use of case studies, we take the view that familiarity combined with distance can deepen the insights to be gained, and academic collaboration, as with writing this piece, is one method of achieving this outcome. While we use Sri Lanka as a case study, our findings about the utility of gender analysis are of wider application. We argue that constitutional gender analysis needs to move beyond a focus on constitutional text and institutions to better address gender inequalities in societal institutions. We propose the identification and analysis of ‘proximate institutions’ as a context-specific approach to the study of constitutions and a method of constitutional gender analysis. The value of a Global South perspective is that the dynamics in jurisdictions in the Global South reveal more clearly the need to study proximate institutions. The benefit of studying proximate institutions, however, is by no means relevant only to the Global South.<sup>2</sup>

We begin, in Part B, by explaining what we think is a dominant approach to gender analysis of constitutions and identify its limits, drawing on insights from feminist legal methods and Global South perspectives. We suggest that gender analysis is often too narrowly focused on the constitutional text and imports assumptions about constitutions which have less purchase in the Global South. We turn to our case study of Sri Lanka in Part C, mapping out the legal, political and constitutional context and conducting a constitutional gender analysis of the kind most usually encountered in practice. In Part D, we seek to go beyond this kind of gender analysis and ‘ask the woman question’ of Sri Lanka’s constitution, broadly conceived. Doing so highlights the role of four institutions which prevent women relying on constitutionally guaranteed rights and utilising the constitution in a way that advances gender equality, namely the family, institutions relating to

1 Katharine T. Bartlett, *Feminist Legal Methods*, Harvard Law Review 103 (1990), p. 829.

2 See for example Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, Canadian Journal of Comparative and Contemporary Law 7 (2021), p. 156.

labour, religious institutions and the military. We describe these institutions as ‘proximate institutions’ meaning proximate or close to the constitution. In Part E we draw from this analysis of Sri Lanka’s proximate institutions to provide a more generalised definition of proximity and explain how attention to proximate institutions can address some of the limitations of constitutional gender analysis.

## B. Three Lines of Inquiry

Asking the woman question of constitutions in the Global South requires that we place three lines of inquiry in conversation: the woman question, constitutional gender analysis and the Global South. In this part, we set out each of these lines of inquiry, before explaining how insights from feminist legal methods and the turn to the Global South in comparative constitutional law help us to identify some of the limitations of constitutional gender analysis.

### I. The Woman Question

‘Asking the woman question’ is a method of feminist inquiry that seeks to expose the gendered implications of laws and practices that might otherwise appear to be neutral or objective.<sup>3</sup> It requires considering not only discrimination and inequalities on the face of a legal text, but also how that law operates in its institutional and social context and impacts on women’s lives. The woman question might be framed differently at various stages of constitution making or reform: have the experiences of women been taken into account when framing the constitution? Does constitutional law reflect experiences more typical of men than women? Does the implementation of the constitution marginalise, disadvantaged or exclude women?<sup>4</sup> Asking the woman question seeks to show how constitutions institutionalise inequality, exposing hidden presumptions and challenging claims to gender neutrality.<sup>5</sup>

The focus on the impact of law in practice directs attention to the particularities of context, and how constitutional values and principles manifest in a particular time and place. This broadens the legal inquiry in ways that potentially also include political, economic and cultural factors. Asking the woman question is a method that has been used for

3 *Bartlett*, note 1, pp. 836–843.

4 *Ibid.* p. 836.

5 *Catharine MacKinnon*, Gender in Constitutions, in: Michel Rosenfeld / András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 415. For examples of scholars who explicitly ask the woman question of constitutions, see *Daphne Barak-Erez*, *Her-Meneutics: Feminism and Interpretation*, in: Beverley Baines / Daphne Barak-Erez / Tsvi Kahana (eds.), *Feminist Constitutionalism: Global Perspectives*, Cambridge 2012; *Vicki C. Jackson*, Conclusion: Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, and Interpretation, in: Susan H Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge 2009.

intellectual inquiry and advocacy by feminist legal scholars. As we demonstrate in this article, asking the woman question continues to be intellectually rewarding and insightful for constitutional analysis in the Global South and beyond.

## *II. Gender Analysis*

Gender analysis is a commonly-used tool to understand how a policy or issue affects, and is affected by, gender.<sup>6</sup> Gender analysis seeks to understand the different experiences of women and men and the different effects that policies and programs may have on women and men. The underlying premise of gender analysis is that gender is a factor in all social, economic and legal relations, even those that appear to be neutral and objective. In this way, constitutional gender analysis can be understood as one way of asking the woman question of constitutional provisions, their interpretation and application.

While much gender analysis and important scholarship in the field centres on equality and non-discrimination provisions and their application by courts,<sup>7</sup> increasing attention is given to constitutional design and implementation, including the role of other institutions and actors. Gender analysis thus encompasses structural and procedural aspects of constitutions, including issues such as citizenship; voting and representation; social rights to education, health and wellbeing; the allocation of power between the branches of government and between levels of government; monitoring and enforcement institutions; and constitutional amendment rules.<sup>8</sup>

Academic scholarship has been supplemented by practical guides and toolkits, which provide step-by-step processes or questionnaires to assist those engaged in constitutional change to conduct gender analysis.<sup>9</sup> These guides extract the key constitutional issues that arise for women to help people engaged in constitutional reform, including those not familiar with legal or constitutional language, to identify gaps and limitations for gender equality.

6 Gender analysis is a key part of the gender mainstreaming strategy emphasised in the Beijing Platform for Action from the Fourth United Nations World Conference on Women in Beijing in 1995 and has been promoted by the United Nations in the decades since: see Office of the Special Adviser on Gender Issues and Advancement of Women, *Gender Mainstreaming: An Overview*, United Nations 2002.

7 See eg Beverley Baines / Ruth Rubio-Marin (eds.), *The Gender of Constitutional Jurisprudence*, Cambridge 2004.

8 See eg *Vicki C. Jackson*, Feminisms and Constitutions, in: Katharine G. Young / Kim Rubenstein (eds.), *The Public Law of Gender: From the Local to the Global*, Cambridge 2016; *Helen Irving*, Gender and the Constitution: Equity and Agency in Comparative Constitutional Design, Cambridge 2008.

9 Eg International IDEA, *Constitution Assessment for Women's Equality*, International Institute for Democracy and Electoral Assistance 2016; *Silvia Suteu / Ibrahim Draji*, ABC for a Gender Sensitive Constitution, Euromed Feminist Initiative 2015.

### III. The Global South

The term ‘the Global South’ can be described in geographical terms, economic terms and intellectual terms.<sup>10</sup> In each of those approaches, clearly demarcating the Global South is difficult.<sup>11</sup> In the context of comparative constitutional law, the term has most recently been described as a sensibility to marginality.<sup>12</sup> As such, it resonates among comparative constitutional law scholars who are interested in the effect of global imbalances of political and economic power on constitutions, and legal and theoretical scholarship about them. We take the Global South to refer not only to geographical location, but to a sensibility that draws attention to the jurisdictions, issues and ideas at the margins of the field of comparative constitutional law and to the hierarchies and inequalities of political and epistemological power.<sup>13</sup>

Paying close attention to the Global South disrupts several assumptions in the comparative study of constitutions. Much like ‘asking the woman question’, ‘asking the Global South question’ exposes hidden presumptions about what constitutions are and should do. The comparative study of constitutions is dominated by the Global North, in terms of the scholars who produce it, the laws and legal systems they engage with and the methods they use.<sup>14</sup> The constitutional problems and solutions on the agenda of comparative constitutional law are, for the most part, derived from the constitutional experiences of North America and Europe.<sup>15</sup> The result is not only that many constitutional experiences are left out or understudied, but that the basis on which constitutions are defined, understood and compared is itself of the Global North.

10 See for instance, Speech by *Willy Brandt*, Chairman of the Independent Commission for International Development Issues ‘Why a New International Order?’ (26 October 1978, United Nations, New York) p. 3 available at <https://pubdocs.worldbank.org/en/588261389301413116/World-Bank-Group-Archives-Folder-1771352.pdf?redirect=no> (last accessed on 23 February 2023); *Jean Comaroff / John L Comaroff*, *Theory from the South Or, How Euro-America is Evolving Toward Africa*, London 2012, p. 19.

11 *Tobias Berger*, The ‘Global South’ as a relational category – global hierarchies in the production of law and legal pluralism, *Third World Quarterly* 42 (2021), pp. 2001-2017.

12 *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, *The Global South and Comparative Constitutional Law*, Oxford 2020, p. 3.

13 *Dann / Riegner / Bönnemann*, note 12; *Lena Salaymeh / Ralf Micheals*, Decolonial Comparative Law: A Conceptual Beginning, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 86 (2022), p.166.

14 *Salaymeh / Micheals*, note 13, p. 167.

15 *Dinesha Samaratne*, Comparative Constitutional Law, Colonialism and Empire (Part II), *IACL-IADC Blog*, 26 October 2021, <https://blog-iacl-aidc.org/2021-posts/2021/10/26/comparative-constitutional-law-colonialism-and-empire-part-ii> (last accessed on 23 February 2023).

#### *IV. Feminist and Global South Critiques and what they Reveal*

Gender analysis of constitutions seeks to provide a set of questions that are ‘useful transnationally and transculturally’, rather than a single template or solution.<sup>16</sup> Gender analysis tools are deliberately framed at a level of generality so that they can be applied to constitutions anywhere. Despite these intentions, our concern is that gender analysis is so deeply informed by the assumptions that animate constitutionalism in the Global North, that it does not fully account for gendered constitutionalism in the Global South. We identify four such limitations and risks here.

The first is that the generalised approach to gender analysis is based on assumptions about equality and constitutions that do not hold true in all contexts. The insights obtained through constitutional gender analysis face a challenge common to many comparative constitutional methodologies: that theories and methodologies developed in one context may not necessarily apply, or apply in the same way, in another context. This is true of feminist theory as well as comparative constitutional law. Critiques of western feminism and white feminism challenge the assumption that women everywhere deal with similar kinds of oppression and criticise the marginalisation of other aspects of identity and experience that affect how women live in the world – such as race, ethnicity, religion, sexuality and class – and the erasure of the effects of history, colonialism and imperialism.<sup>17</sup> These critiques find an echo in the turn to the Global South in comparative constitutional law, which highlights the marginalisations and hierarchies inherent in conceptions of the constitution, standards of constitutionalism, and methods of comparison.

One such assumption relates to the idea that there is a fixed meaning of gender equality itself. Feminism, gender, and gender equality are all open to diverse meanings within the Global North, let alone across other contexts.<sup>18</sup> Seyla Benhabib argues that there is ‘reasonable pluralism’ among peoples’ interpretations of the principle of gender equality. She gives the example of some women’s groups in non-western contexts who regard ‘complementarity’ to be as compatible with the constitutional right to gender equality as formal or strict equality, and notes similarly contentious conversations in relation to the meaning of equality and feminism in western contexts.<sup>19</sup> Even once an understanding of equality is reasonably settled, there are different ways in which constitutions might enshrine

16 Irving, note 8, p. 22.

17 Ranjoo Seodu Herr, *Reclaiming Third World Feminism: Or Why Transnational Feminism Needs Third World Feminism*, *Meridians* 12 (2014), pp. 4–5.

18 Jenna Sapiano / Beverley Baines, *Feminist Curiosity about International Constitutional Law and Global Constitutionalism*, *Journal of the Oxford Centre for Socio-Legal Studies* 1 (2019), p. 9. Feminist scholars from queer and post-structuralist perspectives in particular have highlighted how ‘asking the woman question’ is necessarily and productively complicated by the variety of women’s experiences, including non-binary and trans and fluid gender identities.

19 Seyla Benhabib, *The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, *Global Constitutionalism* 5 (2016), pp. 109, 128–9.

it.<sup>20</sup> Even when gender analysis professes to be open to different approaches and exhorts attention to context, the curation of ‘best practice’ or ‘good examples’ rests on deeper assumptions about what gender equality looks like that may not hold true in all contexts.

Another assumption is the centrality of state law and the homogeneity of national legal systems.<sup>21</sup> Pluralism is a feature of many legal systems.<sup>22</sup> The paradigm, however, based on modern European and North American experience and theory, is legal centrism, in which the state and its laws provide the dominant, if not exclusive, legal order for the community.<sup>23</sup> Both constitutions and much of feminist theory are situated in a framework of legal centrism. The constitution is an expression of the pre-eminence of state law in that it is the supreme law with which all other laws must comply. In communities of the Global South, the significance of non-state law is more apparent, as various Indigenous, religious, ethnic and other communities are governed by their own legal orders which co-exist and intersect with each other and with state law. In such cases, state law is not the only, and perhaps not even the most important, source of norms, and courts formally endowed with constitutional jurisdiction are not the only forum for interpreting and enforcing gender equality. The focus on the constitution and state laws risks overlooking the significance of other kinds of normative orders in the lives of women.<sup>24</sup>

A second shortcoming of constitutional gender analysis is its focus on the text of the written constitution. Gender audits tend to set out a check list of constitutional provisions, asking whether the constitution includes specific kinds of provisions which, for example, guarantee particular rights, establish a gender commission, or increase women’s participation in political parties.<sup>25</sup> Some collect and offer as examples provisions from different constitutions. UN Women, for example, has created a database of what it considers to be ‘gender equality related provisions’ from constitutions across the world.<sup>26</sup> Not only do these resources focus on the constitutional text, but they imply that the solution to women’s marginalisation and oppression is to add more text. Feminist and Global South critiques identify a range of risks attendant on this strategy. It may not be effective, as constitution

20 See *Rosalind Dixon*, Feminist Disagreement (Comparatively) Recast, *Harvard Journal of Law & Gender* 31 (2008), p. 277, for a detailed study of how six schools of feminist thought map onto three different constitutional goals.

21 *Salameh / Micheals*, note 13, pp. 171–2.

22 *Brian Z. Tamanaha*, Understanding Legal Pluralism: Past to Present, Local to Global, *Sydney Law Review* 30 (2008), p. 375.

23 *John Griffiths*, What Is Legal Pluralism, *Journal of Legal Pluralism and Unofficial Law* 24 (1986), p. 1, p. 3.

24 *Ambreena S. Manji*, Imagining Women’s “Legal World”: Towards a Feminist Theory of Legal Pluralism in Africa, *Social & Legal Studies* 8 (1999), p. 435.

25 International IDEA, note 9. See also *Suteu / Draji*, note 9, which lists the kinds of language and provisions that a gender-sensitive constitution must contain.

26 UN Women, Global Gender Equality Constitutional Database, <https://constitutions.unwomen.org/en> (last accessed on 23 February 2023).

makers and advisors overestimate the likely benefits of legal changes aimed at achieving gender justice.<sup>27</sup> This might be especially the case where constitutional ‘solutions’ are transplanted from one context into another, very different, context, without attention to whether they will work as intended. An emphasis on legal text can even be harmful. Feminists have shown how the legal recognition of issues of concern to women can come at the cost of stereotyping, subordination and criminalisation.<sup>28</sup> Because constitutional provisions are entrenched, they can lock in particular understandings of gender, of women, of equality, and of inclusion and agency, precluding later re-interpretation.<sup>29</sup> Constitutional gender analysis, and the reforms that might stem from it, need to encompass more than text if they are to be effective.

A third limitation is that gender analysis tools can sometimes move away from being a method of analysis of the problem of gender inequality and become the prescribed solution. Feminist legal methods direct attention to women’s practical and lived experience of the law, going beyond what the law says, to what it does and how it is experienced. It is analytical and descriptive rather than prescriptive, and for this reason can be an inclusive methodology for constitutional analysis in the Global North and the Global South. In feminist practical reasoning, *what counts as a problem* emerges from the specifics of the situation and is not foreordained by definition or prescription.<sup>30</sup> The concern is that gender analysis, as it is sometimes framed, ceases to ask how a constitutional provision impacts on women in a particular context and instead asks whether the constitution includes particular kinds of provisions, and whether those provisions are framed in a particular way. Rather than ask a question, gender analysis framed in this way seeks to provide a favoured constitutional solution to the problem of gender inequality (for example, quotas for women’s representation, or a specific rights provision for women), without first understanding what women experience as the most pressing problems.

This kind of prescriptiveness would be a concern in all contexts, but takes on particular dimensions in the context of constitution making in the Global South, where local actors are often assisted by international actors armed with ‘virtual toolboxes filled with modules and guidelines’.<sup>31</sup> As Katrin Seidel has shown, ‘best practice’ guidelines standardise the range of issues under the banner of ‘the rule of law’ and impose a framework that can

27 Dixon, note 20, p. 299.

28 Katharine G. Young, Introduction: A Public Law of Gender?, in: Katharine G. Young / Kim Rubenstein (eds.), *The Public Law of Gender: From the Local to the Global*, Cambridge 2016, p. 15, citing the work of ‘governance feminism’.

29 On the value of leaving the constitutional meaning of gender equality open see: *Benhabib*, note 19; *Jackson*, Conclusion: Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, and Interpretation, note 6, pp. 322–25; *Sapiano / Baines*, note 18, p. 21.

30 *Bartlett*, note 1, p. 851.

31 *Katrin Seidel*, The Promotion of Rule of Law in Translation: Technologies of Normative Knowledge Transfer in South Sudan’s Constitution Making, in: *Tobias Berger / Alejandro Esguerra* (eds.), *World Politics in Translation*, London 2018, p. 76.

work to confine constitution making to a standard set of technical questions, glossing over more fundamental questions about the nature of state and society. She shows too how the 'marketplace' of 'products and recipes' provided by international actors gives local actors the space to choose between them, giving the example of the chairperson of a constitutional review commission who refused assistance from UN Women on gender equality, preferring to first seek consensus on the building blocks of the constitution.<sup>32</sup> It is possible to imagine also a different kind of example in which the form of a gender sensitive constitution is adopted by a non-democratic government to provide a veneer of international legitimacy. As Seidel explains, local actors are likely to utilise internationalised guidelines and moments of choice between them to pursue their own interests, perpetuating existing power relations.

The fourth limitation that we identify is that the dominant approach to gender analysis may lead to incomplete explanations. When formal methods of constitutional reform are found to be ineffective, the failure is often attributed to the wider context, be it a matter of entrenched culture, lack of political will, or economic conditions. Context is factored in at the stage of excusing or explaining why constitutional reforms fail, or why changes to constitutional text resulting from gender analysis have not yielded the desired outcomes for gender equality in practice. It is common to see a reminder that advice on gender-sensitive constitutional design must be adapted and be appropriate to context. But there is little guidance on exactly what that might entail and how context is to be incorporated into gender analysis. This narrowness, especially when combined with prescriptiveness, can mean that gender analysis misses its mark.

#### *V. Our Inquiry*

We write this article to respond to these limitations which we see in the dominant approach to gender analysis of constitutions. Our interest is to understand how context – and in particular the contexts that we find in the Global South – can be made to matter in a meaningful way to gender analysis. To some extent, our intellectual inquiry is inspired and informed by our engagement in practice. We are both academics who have had a steady engagement in practice whether in terms of constitutional advice, reviewing formulations for constitutional reform, or advocacy. In our engagement with practitioners, women's groups, activists and other scholars, we have been confronted with different perspectives on the place and relevance of the woman question to constitutions, by which we mean the text of the constitution as well as its interpretation and operation in practice. To reflect on these dilemmas, we use Sri Lanka as a case study from the Global South, and ask the woman question of Sri Lanka's Constitution, mindful of the critiques and limitations just outlined.

We consider Sri Lanka to be a case study from the Global South due to the way in which this jurisdiction is framed in scholarship and in constitutional practice. Sri Lanka

32 Ibid, p. 80.

has primarily been a site for receiving knowledge rather than generating knowledge in the field of comparative constitutional law. This is evident, for instance, in scholarship related to Sri Lanka on constitution-making and power-sharing.<sup>33</sup> This point is further illustrated in the way in which constitutional developments in Sri Lanka are analysed through the lens of transgression of dominant understandings of constitutional law and practice as opposed to seeking to interpret such developments in the light of specific institutional and cultural dynamics. The approach is reform oriented, drawing from theory and institutional models designed elsewhere, with a well-meaning intention to address the malaise of malgovernance. This approach is changing to some extent and two examples are the approach to interpreting Sri Lanka's experience with parliamentary system of governance and with fourth branch institutions.<sup>34</sup>

When we ask the woman question of Sri Lanka's Constitution we obtain two significant insights. First, it demands an investigation of the value systems with which constitutionalism (itself a system of values) competes, and which, in the Global South, is informed by histories and contemporary experiences of colonialism, imperialism and nationalism. This requires the revision of some fundamental assumptions about constitutions, including the centrality of state law, the centrality of text, and the significance of context. Second, it requires engagement with what we describe as 'proximate' laws, institutions and practices which are close to the Constitution and which operate as barriers to women's equality, but are not usually considered to be within the remit of constitutions and so tend to be marginalised in gender analysis.

### C. Women, Law and Governance in Sri Lanka

What would a gender analysis of Sri Lanka's Constitution look like? This part sets out the kind of analysis likely to result from engagement with the common tools of constitutional gender analysis, beginning with the contextual background before turning to key provisions of the Constitution.

#### I. Women in Law, Politics and Society

On the question of women's equality, Sri Lanka is a rich case study. It was the first colonial territory in Asia to grant universal franchise in 1931. Welfare legislation and policies introduced during British colonial rule, and continued since, have resulted in a high human

33 See eg *Kristina Eichhorst*, Asymmetric Autonomy and Power Sharing for Sri Lanka: A Political Solution to the Ethnic Conflict?, in: Marc Weller / Katherine Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, Philadelphia 2010, p. 252.

34 See for instance the analysis of Sri Lanka in *Harshan Kumarasingham*, *Constitution-making in Asia: Decolonisation and state-building in the aftermath of the British Empire*, Oxon 2016.

development index in Sri Lanka for all, in parallel with developed countries.<sup>35</sup> There is some evidence to suggest that, before colonisation, women enjoyed relatively high levels of quality of life due to the introduction of Buddhism to the island in the third century BCE. Successive waves of colonial invasion by the Portuguese (1505-1658), the Dutch (1664-1795) and the British (1796-1948) had the result of changing social institutions and structures. Only the British conquered the entire island and thereby had the most enduring impact. In some cases, the changes had a progressive impact, for example in access to education, while in other cases, the changes restricted the freedoms hitherto available to women, for example, the introduction of fault-based divorce.<sup>36</sup> Strong welfare measures meant that in general women enjoyed good health and had access to education.<sup>37</sup> Ironically, the advancement of social welfare was not matched by growth in economic opportunities and this, together with the abuse of political power, contributed to two youth insurrections in Sri Lanka in 1971 and 1988-89 respectively.

Sri Lanka is a plural society comprising a majority ethnic group, Sinhalese, and ethnic minority groups, Tamils and Muslims. These ethnic groups in themselves are diverse. Ethno-nationalism and discrimination against ethnic minorities has caused violence and a protracted armed conflict in Sri Lanka. The Liberation Tigers of Tamil Eelam (LTTE) fought the Sri Lankan state for approximately 30 years. That conflict was defeated militarily in 2009 by the Government of Sri Lanka. Kumari Jayawardena has shown how nationalism in (what was then described as) the third world stereotyped women as subordinate in the family within patriarchal social structures while at the same time producing forms of contestation in law and politics.<sup>38</sup> The contemporary reality is even more complex: in Sri Lanka's post-independence history, women have been victims of violence by state and non-state actors; purveyors of violence as guerrilla fighters; agents of peace in demands for resolution of the ethnic conflict; and long-suffering advocates for justice, including for victims of enforced disappearances. With the military defeat of the LTTE in 2009, the protracted history of the conflict has led to demands made in the form of claims for transitional justice, such as truth seeking, reparations and access to justice for women impacted by the armed conflict, whether as heads of household, ex-combatants, women with disabilities, or mothers and partners of the disappeared.

35 For 2021, Sri Lanka continued to lead South Asia on the human development index and was ranked 72 out of 189 countries (High Human Development) with a value of 0.782.

36 Marriage Registration Ordinance No 19 of 1907, s 19. See *Luc Bulten and others, Contested Conjugalit? Sinhalese Marriage Practices in Eighteenth-Century Dutch Colonial Sri Lanka, Annales de demographie historique* 135 (2018), p. 51; *Carla Risseeuw, Gender, Kinship and State Formation: Case of Sri Lanka under Colonial Rule, Economic and Political Weekly* 27, (1992), p. 7.

37 *Laksiri Jayasuriya, The Evolution of Social Policy in Sri Lanka 1833-1970: The British Colonial Legacy, Journal of the Royal Asiatic Society of Sri Lanka* 46 (2001), p. 1.

38 *Kumari Jayawardena, Feminism and Nationalism in the Third World, Social Scientists' Association* 2009, p. 133.

Many law reforms have sought to recognise and advance women's right to equality. They include mandatory maternity leave in formal employment,<sup>39</sup> the amendment of Sri Lanka's citizenship laws to permit a woman marrying a non-citizen to pass her citizenship to her children,<sup>40</sup> the reform of statutory rape to include a mandatory minimum sentence,<sup>41</sup> the adoption of the Domestic Violence Act<sup>42</sup> and the introduction of a quota for women in local authorities.<sup>43</sup> Sri Lanka's labour laws do not discriminate against women and in fact, adopt a protectionist approach to women working in risky conditions and at night.<sup>44</sup> However, as illustrated in this section, the implementation of some of these laws has been weak, resulting in the denial of equal rights and gender justice for women.

Formal and/or legal barriers to the enjoyment of equality arise primarily in the area of customary (personal) laws. As with other South Asian colonial territories, the British recognised the personal laws of ethnic groups and regulated their enforcement. These laws are the Kandyan law (applicable to descendants of Sinhalese living in Kandyan provinces at the time those provinces were ceded to the British), the Muslim law (applicable to those professing Islam) and the Tesawalamai (applicable to Malabar inhabitants of Jaffna). Some provisions of these laws affect gender equality. For example, Muslim law does not stipulate a minimum age of marriage; while under Tesawalamai, a married woman is required to provide her husband's consent in writing when transacting her immovable property.<sup>45</sup> In contrast, Kandyan law includes progressive provisions, including divorce by consent.

Other areas in which the law has explicitly discriminated against women include the gender-based allocation of carder positions in Sri Lanka's police force and the disaggregation of positions by gender, which have been challenged by women aspiring to advance their careers as police officers.<sup>46</sup> The law does not criminalise marital rape, an example of a legal omission which discriminates against women. Abortion is criminalised.<sup>47</sup> In practice, several laws have a discriminatory impact. For instance, while the law does not explicitly criminalise sex work, the Vagrancy Ordinance has been used to arrest and detain sex workers.

39 Maternity Benefits Ordinance No 32 of 1939 as amended in 1985.

40 Citizenship Act No 15 of 1993 as amended in 2003.

41 Penal Code No 2 of 1883 as amended in 1995, s 362(2).

42 Prevention of Domestic Violence Act No 34 of 2005.

43 Local Authorities Elections (Amendment) Act No 16 of 2017.

44 Employment of Women, Young Persons, and Children Act No 29 of 1973 as amended.

45 Under Matrimonial Rights and Inheritance (Jaffna) Ordinance No 1 of 1911 s 6, if the husband does not give consent, the law provides that a wife may seek consent from the District Court.

46 Achieving Gender Equality in the Sri Lanka Police: An Analysis of Women Officers, United Nations Development Programme Sri Lanka and Centre for Women's Research 2020; *Natasha Bhardwaj*, Structural Sexism in the Police Force, Groundviews, 16 August 2021, <https://groundviews.org/2021/08/16/structural-sexism-in-the-police-force/> (last accessed on 23 February 2023).

47 Penal Code No 2 of 1883 as amended, ss 304-307.

Despite women's activism and this range of legal reforms, the realisation of equality for women in practice has proved to be challenging in Sri Lanka.<sup>48</sup> Even today, women comprise approximately 35% of the formal work force despite their access to higher education. Violence against women in the private and public spheres is a serious concern. Sexual violence including in the context of armed conflict has been reported but investigations and prosecutions of those offences have not been effective, with a few exceptions.<sup>49</sup>

Although Sri Lanka is considered to be the first Asian jurisdiction in which universal franchise was granted, that did not translate to dynamic political engagement by women in electoral politics. Since 1931, women's representation has been below 12% in the Parliament and sub-national governments. Sri Lanka produced the first woman prime minister of the world and the fourth woman president.<sup>50</sup> However, it has been established that these developments are primarily attributable to patriarchal notions of family and lineage in dynasty politics, rather than the result of equality of women in politics. The absence of women as a critical mass has had an impact. Progressive legislation on women's issues has been the exception<sup>51</sup> and many policy decisions have had serious negative consequences for women.<sup>52</sup>

Women and women's movements have a strong and dynamic political history in Sri Lanka.<sup>53</sup> Issues taken up by women's movements include women's right to vote, labour issues both in the plantation sector and in export-processing zones, enforced disappearances and extra judicial killings. It is noteworthy that despite some exceptions, women's movements on the issues of enforced disappearances and extra judicial killings have remained divided along ethnic lines.

Similar activism has remained distant from Sri Lanka's engagements in law reform. The few attempts at constitutional reform have focused heavily on the issue of power-sharing as a constitutional solution to the ethnic conflict in Sri Lanka, to the exclusion of other issues, including those significant to women. The reform of personal laws and a review of the constitutional protection for personal laws have been met with resistance from political representatives each time they have been proposed.

48 Dinesha Samaratne, Gendering "The Legal Complex": Women in Sri Lanka's Legal Profession, *Journal of Law and Society* 47 (2020), p. 666.

49 Kumari Jayawardena / Kishali Pinto-Jayawardena (eds.), *The Search for Justice: The Sri Lanka Papers*, New Delhi 2016.

50 The first woman Prime Minister was Sirimavo Bandaranaike and the fourth woman President was her daughter Chandrika Bandaranaike Kumaratunga.

51 Examples include the introduction of a quota for women in local government in 2017; criminal law reforms in 1998 and amendments to the Citizenship Act in 2001.

52 See eg policies for migrant workers: Sri Lankan Female Migrant Workers and the Family Background Report, International Labour Organization 2018; and dress code policies and the banning of the face veil.

53 Kumari Jayawardena / Malathi de Alwis, *The Contingent Politics of the Women's Movement in Sri Lanka after Independence*, in: Swarna Jayaweera (ed.), *Women in Post-Independence Sri Lanka*, Delhi 2002.

## *II. Gender Analysis of Sri Lanka's Constitution and its Limits*

Women's issues have not figured significantly in Sri Lanka's history of constitutional governance. Much of the focus in Sri Lanka in the constitutional sphere has been on constitutional reform to consolidate the political power of the ruling party or coalition, while the contestations to constitutional reform have come from political representatives of Tamils, who have demanded the right to internal self-determination. The current Constitution, adopted in 1978, has been amended 21 times since, the last amendment being in 2022. In Sri Lanka's recent history, significant (failed) attempts at constitutional reform include the Draft Constitution of 2000, the reform process of 2016-2019 and the constitutional reform process of 2020-2022. In this section we ask the question: what might a gender analysis of Sri Lanka's Constitution, using the standard text-focused approach described in Part B, look like?

Sri Lanka's Constitution recognises the right to equality of all persons and the right to freedom from discrimination for citizens, including on the basis of sex.<sup>54</sup> These rights are framed in such a way that equality may be interpreted to mean both formal and substantive equality.<sup>55</sup> Moreover, the Constitution recognises that the state may take affirmative action to advance the rights of women.<sup>56</sup>

Sri Lanka has ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) with no reservations and has ratified all the other main human rights treaties.<sup>57</sup> Enabling legislation is required for treaties to take effect in Sri Lanka's legal system. While there is no express constitutional provision on the role of international law in constitutional interpretation, in several instances the Sri Lankan judiciary has relied on international treaties in interpreting the Constitution. For example, in *Manohari Pelaketiya v Secretary, Ministry of Education*<sup>58</sup> the Supreme Court relied on CEDAW in its interpretation of the right to equality. The Fundamental Rights petition was filed by a teacher in a state-run school who alleged that she was subjected to sexual harassment at her workplace. The Court upheld her petition and extended the right to be free from discrimination to include the right to be free from sexual harassment.

Constitutional review in Sri Lanka is limited to the review of legislation before it is finally passed by the parliament. The constitutionality of existing legislation cannot

<sup>54</sup> Constitution of Sri Lanka 1978 art 12.

<sup>55</sup> Susan H. Williams, *Gender Equality in Constitutional Design: An Overview for Sri Lankan Drafters*, in: Asanga Welikala (ed.), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*, Colombo 2012, p. 836.

<sup>56</sup> Constitution of Sri Lanka 1978 art 12(4).

<sup>57</sup> Ratified in 1981. Sri Lanka has submitted eight reports to CEDAW and the Concluding Observations capture most of the issues that women encounter in seeking equality and gender justice.

<sup>58</sup> *Manohari Pelaketiya v Secretary, Ministry of Education* SC/FR 76/2012, SC Minutes 28 Sept 2016.

be challenged.<sup>59</sup> This limits the avenues available to challenge unequal laws, although discriminatory and harmful executive conduct is subject to administrative review, including on rights grounds.

Sri Lanka's Constitution does not expressly include social and economic rights, although some such rights, along with the protection of the family 'as the basic unit of society' are included as non-justiciable directive principles of state policy.<sup>60</sup> Gender analysis acknowledges that equality is not the only right that is important to women. Social and economic rights, such as access to housing, welfare, education and health, provide important mechanisms to redress the feminisation of poverty; rights to freedom from violence might expressly cover sexual violence and violence against women in the family; while rights relating to family, marriage and reproduction also have particular salience for women.

The Constitution explicitly recognises that all existing written and unwritten law that may contradict fundamental rights guarantees is nevertheless valid and operative.<sup>61</sup> This provision has serious implications for women. Several laws which specifically discriminate against women, including personal laws and the law regulating the grant of state land, are therefore protected by the Constitution.

A gender analysis might note that the Constitution does not include provisions to ensure that issues of gender are systematically considered in the legislative, executive and judicial functions of government. Sri Lanka has had a Ministry for Women' Affairs, a National Women's Committee and a Women's Bureau at the national level.<sup>62</sup> At the local level the state has placed 'women development officers' while at every police station the state has undertaken to maintain a 'women and children's desk'. Although these institutional interventions have increased the sensitivity of state institutions to women's issues, discrimination against women remains embedded in some aspects of the law and its application.

In relation to the participation and representation of women in government, a gender analysis would note that although Sri Lanka adopted a system of proportional representation in 1978 (which is considered more likely to result in the election of women than single member plurality voting systems), the proportion of women in the national parliament remains low. Women are also underrepresented in the other branches of government and in sub-national governments.

A full gender analysis would provide a great deal more context and discussion than can be presented in this brief overview. It would also set out a range of possible reforms that might be considered to address these issues, and which might be appropriate in the

59 Constitution of Sri Lanka 1978 arts 118, 121(1).

60 Constitution of Sri Lanka 1978 art 27.

61 Constitution of Sri Lanka 1978 art 16(1).

62 *Savitri Goonesekere / Dinesha Samaratne*, Human Rights of Women, Review of the Implementation of Beijing Platform for Action: Sri Lanka 1995-2014, CENWOR Centre for Women's Research 2015.

particular context.<sup>63</sup> Even so, the focus on constitutional design and drafting tends to overlook matters of importance to women in Sri Lanka. Without diminishing the importance of the issues of constitutional design, what else might be uncovered if we ask ‘the woman question’ of the constitution in a way that focuses on the lived experiences of women in Sri Lanka?

#### **D. Asking the Woman Question in Sri Lanka**

In 2002, Malathi de Alwis noted that debates on the ‘woman question’ in Sri Lanka have been ‘overdetermined by ethnonationalism and the civil war.’<sup>64</sup> She argued that despite a vibrant feminist movement, it has been reactive than proactive, and its focus has shifted from agitation against ‘the cultural oppression of women or their exploitation in the labor market’ to questions about development and human rights.<sup>65</sup> Today, when we ask the woman question of Sri Lanka’s Constitution, de Alwis’s comments resonate. Asking the woman question of the Sri Lankan Constitution reveals several obstacles or barriers that prevent 1) women from relying on constitutionally guaranteed rights (such as the right to be free from discrimination) before the courts, but also before other institutions of government and non-state actors; 2) constitutional institutions from furthering gender equality; and 3) constitutional reform that would advance gender equality. Several of these barriers or obstacles can be found in what we describe in this article as ‘proximate’ laws, institutions and practices, which are close to the constitution, but are not necessarily fully recognised or regulated by it. We identify four such proximate institutions in Sri Lanka: the family, institutions that govern labour, religious institutions and the military. In this part, we examine each of these institutions to show why a gender analysis of Sri Lanka’s constitution that focuses only constitutional text and institutions would be incomplete and ineffective. We suggest that it is necessary to expand the frame of analysis to include proximate institutions to explain the problems of gender inequality in the constitutional sphere. In Part E we draw from this analysis of Sri Lanka’s proximate institutions to provide a more generalised definition of proximity and explain how attention to proximate laws, institutions and practices can enhance constitutional gender analysis.

##### *I. Family*

The family is often positioned as part of the private sphere. Constitutions formed in the liberal mould protect the private sphere from state interference. Feminist scholarship has shown how women are subordinated within patriarchal family structures and how the creation and the exemption of the ‘private’ sphere of the family from public intervention

63 See eg *Williams*, note 55.

64 *Malathi de Alwis*, The Changing Role of Women in Sri Lankan Society, *Social Research: An International Quarterly* 69 (2002), p. 675, p. 687.

65 *Ibid.*

perpetuates gender inequalities.<sup>66</sup> We suggest that there are ways that the family can be situated in relation to the constitution and considered a proximate institution.

One way is the extent to which the family is governed by non-state legal systems. In Sri Lanka, the Constitution recognises that all existing written and unwritten law that may contradict fundamental rights guarantees is nevertheless valid and operative. Not only does this provision gesture towards legal pluralism, but it also questions notions of constitutional supremacy that sit uncomfortably with the predominant understanding of constitutions that informs gender analysis.

The indirect constitutional protection of personal laws is a barrier to gender equality. As with several other jurisdictions in South Asia, personal laws in Sri Lanka were codified during colonial rule. It has been argued that in codifying these customs, colonial administrators also introduced social and cultural values prevailing at the time in the metropole, such as limited property rights for married women.<sup>67</sup> Activists and women's movements have documented the negative impact of Sri Lanka's personal laws.<sup>68</sup> However, successive governments have ignored calls for reform or failed to implement reform initiatives. For example, since 2015, a grassroots movement has been consistently calling for reform of the Muslim law that discriminates against women. This movement has created a high level of public awareness about the impact of these laws, but government is yet to act.<sup>69</sup>

The constitutional protection afforded to discriminatory laws has a normative impact on society including its legal actors and institutions. Stereotypes of gendered roles in the family are reinforced by constitutional institutions, which in turn, prevent them from providing for gender justice. For example, domestic and intimate partner violence is a significant issue that affects women's enjoyment of equality in the family in work, and in public life.<sup>70</sup> However, the institutions responsible for the implementation of the law preventing domestic violence, such as the police and the judiciary, have been reticent, leaving victims of domestic violence (often women and children) without access to the

66 MacKinnon, note 5, pp. 412–13.

67 *Dinusha Panditaratne*, Towards Gender Equity in a Developing Asia: Reforming Personal Laws within a Pluralist Framework, *New York University Review of Law & Social Change* 32 (2007), p. 83, p. 97.

68 *Savitri WE Goonesekere*, Family Law in a Multi Cultural Society with Plural Legal Traditions: The Sri Lanka Experience Sri Lanka 1996, *International Survey of Family Law*, The Hague 1996, p. 461. See also Sri Lanka Shadow Report submitted to the Committee on the Elimination of All Forms of Discrimination Against Women, 66<sup>th</sup> Session, 13 February to 3 March 2017, by the Women and Media Collective.

69 See eg, *Hyshyama Hamin / Hasana Cegu Isadeen*, Unequal Citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka, Muslim Personal Law Reform Action Group 2016.

70 *Anuruddhi Edirisinghe* and others, Fatalities: Accidents, Suicides and Femicides of Women and Girls in Sri Lanka, United Nations Population Fund 2021.

few legal remedies in place.<sup>71</sup> To take another example, the exercise of judicial discretion in relation to cases of sexual violence has often failed to advance gender justice, and in some instances, judges have given stereotypical and discriminatory interpretations of the law relating to consent.<sup>72</sup> These issues undermine the prospects for gender justice through the courts including in cases of rape and conflict related sexual violence that extend beyond the family.<sup>73</sup>

For these reasons, the law's influence on the family is minimal and cultural values exert the strongest influence. Sri Lanka is a highly diverse society and different sub-cultures impact women's equality in the family in divergent ways, but one theme that cuts across this diversity is that of gender stereotypes. This is coupled with the political ideology of ethno-nationalism to create very specific expectations of women in the family, as women are expected to be ambassadors for ethno-national identities and ensure the perpetuation of that identity through the family.<sup>74</sup>

## II. Labour

Women are a key component of Sri Lanka's labour force, as tea-pluckers in the plantation sector, as garment factory workers in the export processing zones and as unskilled migrant workers.<sup>75</sup> These are key sectors which drive Sri Lanka's export-driven economy. However, legal and policy regulation of worker's rights have been weak in these sectors. Women workers are exploited in many instances. Unskilled migrant workers have been subject to abuse by their employers and have in certain instances been killed or driven to suicide.

Exploitative work conditions are a barrier to the enjoyment of constitutional guarantees. Institutions that function and/or regulate labour often fail to address this problem and could even be part of the problem. Examples include the requirement that a migrant woman worker must file a family report pre-departure,<sup>76</sup> the low wages paid in the garment industry in

71 *Chulani Kodikara*, Only Until the Rice Is Cooked? The Domestic Violence Act, Familial Ideology and Cultural Narratives in Sri Lanka, Colombo 2012. On access to justice see: *Caitlin Mollica* and others, Women and the Justice Divide in Asia Pacific: How Can Informal and Formal Institutions Bridge the Gap?, *Human Rights Quarterly* 44 (2022), p. 612, p. 620.

72 *Kodikara*, note 71.

73 *Dinesha Samaratne*, Reframing Feminist Imperatives in Adjudication through a Reading of Sri Lankan Jurisprudence, in: *Melissa Crouch* (ed.), *Women and the Judiciary in the Asia-Pacific*, Cambridge 2021.

74 *Nalika Gajaweeda*, The Mothers of the Righteous Society: Lay Buddhist Women as Agents of the Sinhala Nationalist Imaginary, *Journal of Global Buddhism* 21 (2020), p. 187; *Jayawardena*, note 38.

75 *Vidyamali Samarasinghe*, The Feminization of Foreign Currency Earnings: Women's Labor in Sri Lanka, *Journal of Developing Areas* 32 (1998), p. 303; *Matt Withers / Janaka Biyanwila*, Patriarchy, Labour Markets and Development: Contesting the Sexual Division of Labour in Sri Lanka, *IIM Kozhikode Society & Management Review* 3 (2014), p. 33.

76 Sri Lankan Female Migrant Workers and the Family Background Report, note 52.

Sri Lanka and its impact on women,<sup>77</sup> and the failure to reform the Vagrancy Ordinance and to regulate the sex work industry in Sri Lanka.<sup>78</sup>

As with the institution of the family, labour and the market are often considered exempt from state interference in the liberal constitutional model and are resistant to constitutional and legal regulation. But like other iterations of the public-private distinction, what does and does not fall within the domain of the state is constantly shifting. The increasingly transnational character of the labour market further complicates its relationship with domestic constitutions and law. Constitutions influenced by other traditions – most notably socialist and welfare-state constitutions – conceive a different relationship between labour and the state, but do not often feature in constitutional gender analyses. For present purposes, we seek only to suggest that the regulation of labour and the market is a constitutional choice, and one that has great significance for women.

### *III. Religious institutions*

The people of Sri Lanka practice diverse religions. Sri Lanka's Constitution, however, expressly 'gives to Buddhism the foremost place' and imposes a duty on the state to 'protect and foster the Buddha Sasana, while assuring to all religions the rights granted by [the Constitution].'<sup>79</sup> Even without an express clause of this kind, religion – and the Buddhist religion of the majority – exerts a strong influence over Sri Lanka's constitution and governance. The idea that Sri Lanka is the designated protector of Theravada Buddhism is central Sri Lanka's political identity.<sup>80</sup>

The dominant religious institutions in Sri Lanka (the Buddhist sasanaya, Christian churches, Muslim mosques and Hindu temples) are exclusively led by men, even though several of these religious traditions have examples of women in leadership either elsewhere or in their histories.<sup>81</sup> In Buddhist practice in Sri Lanka, women have received ordination in the past, however in contemporary Sri Lanka, women priests are not recognised as ordained priests, resulting in legal disputes.<sup>82</sup> In the Muslim, Hindu, Catholic and Protestant religious

77 *Kanchana Ruwanpura, Garments Without Guilt? Global Labour Justice and Ethical Codes in Sri Lanka Apparels*, Cambridge 2022.

78 *Jody Miller, Violence and Coercion in Sri Lanka's Commercial Sex Industry: Intersections of Gender, Sexuality, Culture, and the Law, Violence Against Women* 8 (2002), p. 1044; *Jody Miller / Kristin Carbone-Lopez, Gendered Carceral Regimes in Sri Lanka: Colonial Laws, Postcolonial Practices, and the Social Control of Sex Workers*, *Signs* 39 (2013), p. 79.

79 Constitution of Sri Lanka 1978 art 9.

80 *Roshan de Silva Wijeyeratne, Nation, Constitutionalism and Buddhism in Sri Lanka*, Oxon 2013.

81 *Engy Abdelkader, To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, and Iran)*, *Fordham International Law Journal* 37 (2014), p. 309; *Tessa J. Bartholomeusz, Women under the Bo Tree: Buddhist Nuns in Sri Lanka*, Cambridge 2008.

82 *Susanne Mrozik, Sri Lankan Buddhist Nuns: Complicating the Debate over Ordination*, *Journal of Feminist Studies in Religion* 36 (2020), p. 33.

institutions too, women may not occupy positions of leadership. Moreover, some of the religious practices advanced by these institutions treat men and women differently.

We do not seek to debate here whether such differential treatment is acceptable or not. Rather, we suggest that in a social context where religious institutions and the public display of religious practice has prominence in political life and in governance, the approach of these institutions to gender relations has a normative impact that reaches the constitutional sphere.

The lack of inclusion and representation of women at leadership levels in religious institutions have immediate consequences for women's enjoyment of constitutional freedoms. It can also serve as an obstacle to the advancement of gender justice through constitutional institutions and law reform. An example is the intermittent debate on the regulation of abortion in Sri Lanka. Religious institutions have consistently objected to proposals presented by medical professionals and activists for the decriminalisation of abortion or for permitting abortion in limited circumstances.<sup>83</sup> Another example is the failure to establish a Women's Commission with advisory, inquiry and monitoring powers, despite demands by women's movements and recommendations of the CEDAW Committee.<sup>84</sup>

#### *IV. Military and militarisation*

Militancy, military control of public life and militarization have all had a direct impact on the enjoyment of equality by women in Sri Lanka.<sup>85</sup> These phenomena, in the Sri Lankan context, bring together patriarchal notions and ethnonationalism, and also undermine values of accountability and transparency in governance.

Due to the internal armed conflict and two youth insurrections, the military has been a significant institution in Sri Lanka's republican era. The Constitution regulates public security but does not expressly regulate the military, except to recognise that the President is the Commander-in-Chief of the Armed Forces.<sup>86</sup> The armed forces are regulated by legislation.<sup>87</sup> This constitutional silence is not unusual in global practice. The National

83 *Sunila Abeysekera*, Abortion in Sri Lanka in the Context of Women's Human Rights, Reproductive Health Matters 5 (1997), p. 87, p. 89.

84 Consideration of reports submitted by states parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Third and fourth reports of States parties, Sri Lanka UN Doc CEDAW/C/LKA/3-4 (1999). For discussion see *Deepika Udagama*, Implementation of the UN Convention on Women (CEDAW) in Sri Lanka: A Country Study, Sri Lanka Journal of International Law 24 (2012), p. 53.

85 *Radhika Coomaraswamy*, Violence, Armed Conflict and the Community, in: *Swarna Jayaweera* (ed.), Women in Post-Independence Sri Lanka, Delhi 2002, p. 91.

86 Constitution of Sri Lanka 1978 art 30. Chapter XVIII provides for a declaration of emergency and recognises that the Public Security Ordinance would apply.

87 Army Act 1949, Navy Act 1950 and Air Force Act 1949. Under the Public Security Ordinance 1947, the President may call out the armed forces during a state of emergency or to assist the police in the maintenance of law and order.

Security Council is an extra constitutional body that deals with the maintenance of security. The protracted armed conflict and the long periods during which Sri Lanka was under emergency rule have meant that the military has been involved in the maintenance of law and order, alongside the police.<sup>88</sup> Despite the end of the armed conflict in 2009, the budget allocation for defence has remained high in Sri Lanka. It has been higher than the allocation for health (even though Sri Lanka offers universal health care). The allocation for defence in Sri Lanka is the highest in the South Asian region.<sup>89</sup>

Over time governance and popular culture has been militarised in Sri Lanka.<sup>90</sup> This has taken the form of 'soft power' in Sri Lanka's post-war period.<sup>91</sup> For example, the President has used a general power vested in his office to appoint presidential taskforces that are headed by the military or which include in-service and retired military personnel.<sup>92</sup> Another example is the appointment of retired military personnel to the public service.<sup>93</sup> The significant role of the military, militancy and militarization has a broad reach, beyond the immediate sphere of government, affecting, for example, women in the sphere of labour.<sup>94</sup>

Militancy itself has been the cause of extreme violence in Sri Lanka. It has manifested in the two uprisings of 1971 and 1988-89, as well as in the LTTE and other Tamil armed groups in the armed conflict. While women are underrepresented and marginalised in state security forces, women have been involved in these militant movements. The LTTE female suicide cadre is an example. This image contrasts with the limited rights of married women under Tesawalamai law, the law applicable to Malabar Tamils from Jaffna. At the same

88 *Radhika Coomaraswamy / Charmaine de los Reyes*, Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience, *International Journal of Constitutional Law* 2 (2004), p. 272.

89 In 2020, the allocation for defence was 1.97% of the GDP while the allocation for health in that same year was 1.7% of the GDP. See further <https://publicfinance.lk/en/topics/how-much-does-sri-lanka-allocate-for-the-defence-sector-1643901269> (last accessed on 23 February 2023).

90 *Neloufer De Mel*, Militarizing Sri Lanka: Popular Culture, Memory and Narrative in the Armed Conflict, Delhi 2007; *Jonathan Spencer*, Securitization and Its Discontents: The End of Sri Lanka's Long Post-War?, *Contemporary South Asia* 24 (2016), p. 94; *Ahilan Kadirgamar*, The Question of Militarisation in Post-War Sri Lanka, *Economic and Political Weekly* 48 (2013), p. 42.

91 *Neloufer De Mel*, Risky Subjects: Militarization in Post-War Sri Lanka, in: Rita Manchanda (ed.), *Women and politics of peace: South Asia narratives on militarization, power, and justice*, Delhi 2017, p. 138.

92 Centre for Policy Alternatives, The Appointment of the Two Presidential Task Forces, Media Release, 5 June 2020.

93 The Economist, Sri Lanka's new president is putting soldiers in charge of everything', 16 May 2020.

94 *Sandyra Hewamanne*, Duty Bound? Militarization, Romances, and New Forms of Violence among Sri Lanka's Free Trade Zone Factory Workers, *Cultural Dynamics* 21 (2009), p. 153; *Kanchana N. Ruwanpura*, Militarized Capitalism? The Apparel Industry's Role in Scripting a Post-War National Identity in Sri Lanka, *Antipode* 50 (2018), p. 425.

time, women have been victims of sexual violence during the armed conflict.<sup>95</sup> With one notable exception, the law has failed to hold state and non-state perpetrators accountable for such violence.<sup>96</sup>

The ideal (developed largely through engagement with constitutional traditions of the Global North) is that the military is subject to civilian or state control through the legislative and executive institutions of government. This belies the reality in places like Sri Lanka, where the military is deeply embedded in the institutions of government and where militarisation has broad political and social impact.

## **E. Proximate Institutions and Gender Analysis**

In Part D, we sought to show how asking the woman question of Sri Lanka's Constitution takes us beyond the written text and the narrow range of issues usually captured by constitutional gender analysis, to demonstrate how other institutions such as family, labour, religious and security institutions can impact on women in unequal and harmful ways. In this part, we consider how these institutions might be incorporated in constitutional gender analysis and address the methodological concerns about the breadth of constitutional analysis that arise when proximate institutions are taken into account.

### *I. Defining Proximate Institutions*

The notion of proximity seeks to focus on the relationship between constitutions and other social institutions and practices. Laws, the jurisprudence created by courts, societal institutions – indeed any phenomena – can be put in a relationship with the constitution and that relationship analysed through a gender lens. Proximity asks us to consider the closeness of the relationship between the law, practice or institution and the constitution. However, as our analysis of the Global South critique in Part B shows, proximity is not simply a matter of whether or not something is regulated by the written constitution or subject to it. In the Global South – and perhaps in other contexts – non-state institutions and state institutions that are not typically directly regulated by the constitution might have a role in constitutional governance, because they are deeply embedded within constitutional institutions, because they are carved out by the constitution and left to operate alongside constitutional institutions, or because they stand in the place of constitutional institutions in the provision of governance. Proximate institutions may be recognised or presumed by the constitution, but do not derive all of their authority from it.

Potential examples include religious or customary institutions, which may be recognised by the constitutional text and/or may be given space to operate in the place of

95 Jayawardena / Pinto-Jayawardena, note 49.

96 Somaratne Rakapakse v Attorney-General (2010) 2 Sri LR 113. For an analysis, see Samaratne, Reframing Feminist Imperatives in Adjudication through a Reading of Sri Lankan Jurisprudence, note 73, pp. 93 ff.

state institutions in certain areas of governance, such as personal laws (as is the case in Sri Lanka), education, or local government. Institutions that are presumed to exist for the effective functioning of the political system, such as political parties, trade unions, or even in social movements, might also be proximate to the constitution. In some contexts, knowledge institutions such as universities or the press might be understood as proximate institutions, because they develop or disseminate knowledge that is critical to sustaining the ‘epistemic and ethical base of democratic constitutionalism’.<sup>97</sup> Other examples may be institutions that are critical for an effective judiciary and its role in interpreting and applying the constitution, such as the legal profession.<sup>98</sup> Another kind of proximate institution might be state institutions that are in some ways separated from the institutions of government established by the constitution but which – at times – may stand in their place: the military in some contexts is such an example. While we have focused on institutions, other phenomena might also be considered proximate to the constitution, including law itself (for example quasi-constitutional statutes<sup>99</sup> or jurisprudence<sup>100</sup>).

Asking the woman question of proximate institutions can reveal the impact they have on women’s lives, directly and by affecting women’s relationship with the constitution. Our discussion of proximate institutions in Sri Lanka provides examples of at least three such effects. First, proximate institutions may present themselves as barriers to women’s access to constitutional institutions and protection of constitutional rights. For example, the exclusion of women from leadership in the family and in religious institutions translates into exclusion from political leadership and other constitutional offices. Second, proximate institutions have the effect of overriding or denying constitutional values. The status of the military, and the valorisation of security and nationalism have the effect of denying accountability for crimes committed during the war, including crimes against women, and responsibility for reparation for these and other harms. To take a different example, the ambiguous constitutional status of personal law effectively removes it from constitutional guarantees relating to equality, leaving it to regulate significant aspects of women’s lives, both public and private, outside the constitutional framework for equality. Finally, proximate institutions pose a challenge for reform. The authority and legitimacy of proximate institutions derives not (or not only) from the written constitution, but from other societal sources, be it custom, religion (as in Sri Lanka), ethno-nationalism (of which Sri Lanka is also an example), or other cultural, economic or political forces. As a result, constitutional

97 Jackson, Knowledge Institutions in Constitutional Democracies: Preliminary Reflections, note 2, p. 162.

98 See eg Samaratne, Gendering “The Legal Complex”: Women in Sri Lanka’s Legal Profession, note 48.

99 Vanessa MacDonnell, A Theory of Quasi-Constitutional Legislation, *Osgoode Hall Law Journal* 53 (2016), p. 508; Richard Albert / Joel Colon-Rios (eds.), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications*, Oxon 2019.

100 Gender Equality and Women’s Empowerment: Constitutional Jurisprudence, International IDEA and UN Women 2017.

change, by formal amendment or interpretation, is a secondary mechanism for reforming proximate institutions. As such, constitutional change alone is unlikely to be effective, and change from within the institution itself is also required.<sup>101</sup>

## *II. Proximity and Context*

One challenge raised by attention to proximate institutions concerns the breadth of the resulting analysis. By including proximate institutions, does constitutional gender analysis become a study of gendered power and subordination across the whole of society? Catharine MacKinnon explains the problem in the following way:

*If a gendered perspective calls for deeper and more complex approaches to constitutions, many barriers obstruct connecting constitutions with lived outcomes in the gendered domain. Gender, and the inequality based on it, is so pervasive in law and life that positing any link risks overdetermination.*<sup>102</sup>

MacKinnon's concern is that it is difficult to attribute causal effects to constitutional change, but the point is also important for constitutional gender analysis.

A common response to such concerns is to call for attention to context. While we agree that context is important, context is often used as a catch-all or a residual notion, to which failures of constitutional reform to achieve its goals, including gender equality, are attributed. Context becomes apology, but with limited analysis of what it is in the context that is relevant. In addition, context can be read as broad and all-encompassing. A constitutional gender analysis cannot include everything: the constitution is just one part of a legal system, and the legal system just one part of society. Context is important but seems too broad a thing to subject to constitutional gender analysis, which is limited both by the skills and knowledge of constitutional scholars and practitioners, and by what constitutions do and do not do.

We believe that framing the inquiry around proximate institutions allows us to consider context with greater specificity. The assessment of constitutional proximity requires that we consider an institution – such as the family, a religious body, or the military – in terms of its relationship to the constitution. The identification of proximate institutions will always require attention to context, but rather than referencing 'context' as a generality, proximity provides a measure to help to identify those institutions that are *closest* to the constitution and which *matter most* in the lives of women. Asking the woman question of proximate institutions helps to see that context is not an unchangeable background condition that must be taken for granted, but comprises institutions that themselves can be the subject of feminist inquiry and, potentially, change. It may be that institutions can be arranged on a spectrum, with some closer to the constitution and others more distant;

101 In the context of religious and customary law in Sri Lanka see: *Williams*, note 55, p. 855.

102 *Mackinnon*, note 5, p. 403.

while some constitute more significant barriers to gender equality than others. It is certainly the case that an institution which is a proximate institution in one context, may not be a proximate institution in a different context, militating against a checklist approach. In short, considerations of constitutional proximity provide a practical way to organise 'context' for the purposes of constitutional gender analysis.

Proximate institutions are difficult to identify and even more difficult to change. Their connections to democratic and state institutions are often tenuous and undefined, and as such proximate institutions challenge assumptions about the centrality and supremacy of written constitutional law. Proximate institutions may not be directly established by the constitutional text. They might instead be found in the odd details, the gaps and the practices which depart from the 'model' transnational constitutional provisions and which disclose local context and identity.<sup>103</sup> Not being fully of and in the constitution, proximate institutions are resistant to reform through constitutional change. They make a gender equal constitution difficult to define in the abstract, let alone achieve in practice.

Studying proximate institutions to better understand the barriers to gender equality is not a discrete process and it can lead to complex results. This is a reminder of the contingent and complex life of constitutions (and law in general) that defy discreet categories and analysis. Asking the woman question therefore will not produce a single answer that stands for all time. Rather it is an iterative process which frames a discussion, informed by multiple perspectives, to improve understanding and negotiate new relationships with and within the constitution.<sup>104</sup>

## F. Conclusion

The woman question, which is designed to expose the gendered implications of rules and practices that otherwise appear to be neutral, can be asked of constitutions everywhere, across the Global North and the Global South. However, we are concerned that in an effort to produce generalisable guidelines and assessment tools, constitutional gender analysis has become too focused on constitutional text and too prescriptive of constitutional solutions in a way that limits its utility for countries of the Global South.

By drawing on the methods of feminist inquiry and the insights to be gained from the turn to the Global South in comparative constitutional law, we have sought to better understand this concern as a problem of methodology. Feminist inquiry and Global South critiques help us to see the limits of gender analysis that focuses on constitutional text and its enforcement only in courts, which privilege (perhaps unconsciously) assumptions about the centrality of written constitutions in the wider constitutional order. Our proposed solution is to study what we describe as proximate institutions. We acknowledge that this

103 Gunter Frankenbergs, *Comparing Constitutions, Ideas, Ideals and Ideology – Toward a Layered Narrative*, *International Journal of Constitutional Law* 4 (2006), p. 439, p. 442.

104 A process that returns us to feminist legal methods, and in particular feminist practical reasoning: Bartlett, note 1, pp. 851 ff.

is only a partial solution. It broadens the scope of constitutional gender analysis, beyond the text of the constitution and the institutions of governance established by it, to include social institutions that are 'proximate' or close to the constitution because of their role in constitutional governance and in the exclusion and subordination of women from it. Defining proximate institutions, asking the woman question of them, and changing them are all challenging processes, but critical for fully understanding the gendered nature of constitutions.

The study of proximate institutions also helps in dealing with a broader issue of methodology. Existing approaches to constitutional gender analysis necessarily focus on the constitution, but in a way that unduly privileges the formal, written constitutional sphere. We think that this is, in itself, an inequality. To the extent that there are assumptions about the supremacy of the constitution, those assumptions prevent us from seeing the obstacles to the realisation of gender equality that are generated and perpetuated by proximate institutions. Broadening constitutional gender analysis beyond constitutional text and institutions is necessary if gender analysis is to avoid the very problem that it responds to – that of inequality.

#### **G. Postscript on the Sri Lanka crisis**

We wrote much of this article at the end of 2021. Since that time, Sri Lanka has been experiencing an unprecedented political and economic crisis. In 2022, this crisis prompted an organic and mass scale protest movement among the people. The nature of the crisis and the responses to it confirm the need to focus on proximate institutions in constitution building. The crisis has strengthened the discourse and critique of militarisation and it has provided insights into the way in which trade union action is a significant site for demanding constitutional governance. Most importantly, it has confirmed the fundamental links between economic governance, inclusion and representation, and constitutionalism. The impact of the crisis is acutely felt by women due to several factors including inflation and increasing food insecurity. Prominent during the mass scale protests were teaching sessions, debates and discussions (in person, in virtual spaces and other public fora) about the failures in Sri Lanka to include and represent women and to ensure equality for women in practice. Much work remains to be done in interpreting and learning from Sri Lanka's ongoing crisis, particularly in terms of what can be learned about gender, proximate institutions and constitution building. We hope that the approach and methodology proposed in this article provides a useful way to better understand these connections to help advance gender equality through a constitution.



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