

Looking Through Gender Lenses

Position Paper on Gender Equality

Women's League of Burma

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Methodology

The paper was compiled by the "Constitutional Study Team" which was formed in December 2004. The information was collected by doing research and documentation; and by initiating and facilitating several consultation workshops in order to get feedback from every sector of society especially women, youth and political leaders.

General Overview of the Paper

The Purpose: The Women's League of Burma (WLB) would like to emphasize the necessity of positive measures in creating a constitution for Burma that protects women's rights and promotes gender equality in Burma.

The Argument: This paper argues that it is necessary not only to recognize the unequal status between women and men in Burma, but also to address that unequal status by adopting constitutional mechanisms for affirmative action to achieve gender equality. . Specifically, we call for the inclusion of a quota system in the federal constitution to ensure representation of women at every level and in all branches of the federal government.

The Scope: This paper focuses on articulating the WLB's primary arguments for:

- Why women's rights should be included in the constitution
- Why affirmative measures are necessary to achieve gender equality
- What kinds of affirmative measures are necessary to achieve gender equality

The paper is structured in the following way:

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1. Introduction

The WLB seeks a constitution for Burma that enshrines a federal democratic system that guarantees – that is, ensures and protects – the rights of *all* its citizens. A constitution lays down the foundation for the structure of the political and legal systems of a community and it also reflects the core values and aspirations of that particular political community. WLB believes that equality before the law cannot be meaningful unless gender equality is guaranteed within the constitution.

WLB believes that gender equality has to be considered in order for a successful democracy in Burma. The WLB sees gender discrimination as analogous to discrimination on the basis of ethnicity or religion. All of these forms of discrimination create marginalized groups that must have their rights ensured, protected, and promoted. Like ethnic or religious discrimination, gender discrimination is fundamentally unfair and deeply damaging to the democratic hopes of Burma. Just as affirmative action programs and special measures may be necessary to eliminate the effects of ethnic or religious discrimination, so too such measures are necessary to create real equality for women.

The WLB believes that without special measures such as affirmative action, marginalized individuals will not be given an opportunity to fully realise their rights and will remain oppressed under systemic discrimination. The WLB supports such measures for other marginalized groups, as well as for women. This paper argues that such affirmative action is necessary for real gender equality and that a constitutional quota is one necessary affirmative mechanism.

2. Discrimination Against Women in Burma

A. Militarization

The sources of discrimination against women in Burma are deep and interlinked. First, since the military came to power in 1962, all aspects of Burmese society have become increasingly militarized. Because the military now dominates public/political life, and women are not permitted entry into the military in Burma, women are automatically excluded from holding many government positions. Moreover, the militarization of Burmese society has subjected large proportions of the population to human rights abuses, many of which are deeply gendered. The military's

use of rape as a tool of political intimidation and cultural destruction is a human rights abuse that falls particularly on women. Thus, the militarization of Burmese society has contributed to the marginalization of women.

B. Political History

But the end of military rule will not mean the end of discrimination against women in Burma because the cultural sources of discrimination run deeper and broader than just the military. Nearly all of Burma's ethnic cultures and societies are patriarchal, subordinating women to men in both the public and the private spheres. The social norm in Burma is that discriminatory practices are acceptable and women are regularly denied even the most basic rights. In the private realm, women suffer from discrimination in their rights to inheritance and property, as well as in their right to freedom from violence at the hands of their husbands. In the public realm, traditional gender roles exclude most women from participating in political processes and public leadership roles.

A brief examination of the political history of Burma clearly demonstrates the exclusion of women from politics. Since independence from British colonial rule in 1948, Burma had introduced two national constitutions: the first in 1947 and second in 1974. While women experienced discrimination prior to colonisation, the 1947 constitution, based on British common law, legalised various forms of gender discrimination in Burma for the first time. Women were not represented in either of these constitution-drafting processes. While the principle of equality for all citizens was enshrined in both constitutions, there was no recognition of the need to create measures to ensure that political, social, cultural and economic changes occurred to bring about equality – neither gender nor ethnic - in practice.

Burma has been without a functioning national constitution since 1988. The rule of law was suspended in response to nation-wide civil uprisings calling for a return to democratic rule. A military-led constitutional drafting process has been sporadically on-going since 1993. Women constitute approximately 5% of the 702 delegates selected to participate in the National Convention organized by the State Peace and Development Council (SPDC). Through this process, the SPDC seeks to install a system of rule that reserves 25% of parliamentary seats for military

representatives, which would, of course, enshrine the political exclusion of women in the constitution. However, the National Convention has again been deferred until the end of 2006.

Although individual women have been quite significant in Burmese politics, from colonial Burma to the present day, they have rarely been afforded the same recognition as their male counterparts. Moreover, the numbers of women involved in politics have always been extremely small. It was only in 1937 that Burmese women received the right to vote and even then this right was not applicable to the women of the Shan, Kachin and Chin states.¹ In the democratic elections held in 1990, only 3% of the 485 seats were won by women (15 women from the NLD). While this number represents an achievement for the Burmese women's rights movement, it also makes it quite clear that systemic discrimination against women continues in Burma.

C. Cultural Roots of Discrimination

Why are women so dramatically underrepresented in politics? The reasons are deep in our cultures. Public sphere structures such as the government and the political process are seen as “off-limits” for women. Women are told that their place is in the home and that their identities are limited to being a mother, daughter, or wife. In Burmese society, there is the strong belief that only male qualifications are essential in being a good and capable leader. It is generally thought that women should not be involved in politics because they are not as qualified as male candidates. This belief reflects social prejudices against women as actors of equal value in the public sphere in Burma. Men have been accepted as better leaders not because of any innate superior abilities but simply because they have been given the opportunity to become leaders. In other words, the culturally and socially accepted bias against women has given men an unfair advantage over women in the political realm. These prejudices are extremely harmful as they serve to diminish the value of woman's experiences and create “mysticism” about the male-dominated sphere of politics.

¹ “The Shan states were treated as a protectorate of the British government rather than a directly administered colony like Burma proper. The British created the Federated Shan States with its own governing Council comprised of the ruling princes or *saophas*, and the British Governor in Rangoon in 1922.” In Bertil Lintner, *Burma in Revolt: Opium and Insurgency Since 1948* (2000).

The cultural prejudice that is the source of discrimination against women is exactly analogous to the prejudice against minority ethnic groups that has been so crippling throughout the history of Burma. Such ethnic discrimination is an effective barrier that prevents members of these groups from playing a full role in all aspects of society. If this ethnic discrimination continued, it would seriously undermine the democratic legitimacy of a future government of Burma. To prevent this, the present constitution-drafting process has involved careful attention to structural mechanisms to ensure the full participation of all ethnic groups in the future, democratic government of Burma. Mechanisms like the federal structure of the government, the Chamber of Nationalities, and the procedures for choosing the President, all ensure that no ethnic group can be marginalized in the political process, despite the history of discrimination. Discrimination against women is exactly the same as discrimination against ethnic minorities. It has the same roots deep in cultural attitudes; it requires the same attention to structural remedies; and it poses the same challenge to democratic legitimacy if it is allowed to go unchecked.

3. Why gender equality must be guaranteed by the Constitution of Burma

The WLB believes that the future of Burma depends on the full and effective guarantee of gender equality in the Constitution. Simple recognition of the principle of gender equality is not sufficient if it does not lead to actual representation for women in government. The democratic legitimacy of the government we are struggling to create as well as the prosperity and economic development of our country require a constitutional commitment to the real equality of women.

A. Democratic Legitimacy

First, the democratic government for which this movement has struggled so long cannot be legitimate if it does not guarantee adequate representation for women. For women to enjoy full citizenship, they must have the same freedoms and opportunities as men to decide how to live their lives. As citizens subject to the laws and policies of the government, women must have a truly equal opportunity to participate in the formulation of those laws and policies. Without a real opportunity for such participation in the political, social and economic life of the country,

women cannot be free and equal citizens. If the Constitution allows cultural prejudice to prevent women from playing this role in the public realm, then women will have been denied this basic right.

Moreover, a government without adequate representation for women will fail to represent the people as a whole and that failure will be reflected in its policies. A legislature that fails to meaningfully represent approximately 50% of the population cannot be said to be truly democratic. And the policies adopted by such a legislature will reflect this failure of democracy. Women have specific interests and perspectives that need to be addressed by the state and those concerns will continue to be overlooked unless women are present in government to raise them. The give-and-take of democratic politics, the process of sharing experiences and perspectives and designing policies that serve the interests of all the people, will be seriously compromised if 50% of the population is effectively unrepresented.

B. International Community

In addition, the future government of a democratic Burma must guarantee effective gender equality in order to occupy a respected position in the community of nations. We now live in a global era of democracy that holds gender equality as a central norm for civilised society. This norm is enshrined in a number of international treaties to which Burma is a party, including CEDAW, the Beijing Platform for Action, UNSC Resolution 1325, and the Millennium Development Goals.² To participate in an

² The international instruments that include such a commitment to gender equality include the Convention on the Elimination of Discrimination against Women (CEDAW), the Beijing Platform for Action, United Nations Security Council Resolution 1325, and the Millennium Development goals. CEDAW, for example, makes clear that women's participation in government and the political process is necessary in ensuring gender equality. The SPDC became signatory to CEDAW on July 22nd, 1997. Perhaps the most significant aspect of CEDAW is its definition of discrimination, which includes "any distinction, exclusion or restriction...which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women...of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." This broad definition highlights the fact that cultural practices can be a major barrier to equality even when formal equality of opportunity is guaranteed. Article II of CEDAW details the practices by which states should proceed to eliminate all forms of discrimination against women. These practices include: 1) the adoption of constitutional principles of equality; and 2) the modification or abolishment of existing laws that constitute discrimination against women. CEDAW is quite clear in requiring positive action by government to counteract and modify cultural barriers to equality. Article II continues that the state must "ensure through the law and other appropriate means the *practical realization* of gender equality."

increasingly globalised world, Burma must recognise and adjust to modern norms of gender and justice.

C. Gender Equality and Traditional Cultures

This recognition for the norm of gender equality is in no way disrespectful to the traditional cultures in Burma. The concern about traditional culture takes two different forms. First, some people worry that gender equality is a foreign import to Burma, an imposition of Western culture. But, actually, gender equality is not a traditional part of Western cultures, any more than it is a traditional part of Asian cultures. Patriarchy is the traditional rule everywhere. Gender equality is a value that people within all of these patriarchal societies have come to see as necessary for true freedom and human flourishing. Gender equality, in other words, is not specific to Western culture; it is a value that develops within cultures all over the world and that is a challenge to traditional cultures on every continent.

The challenge posed by gender equality leads to the second concern about traditional cultures. Some people worry that legal protection for gender equality will destroy traditional cultures. This worry misunderstands the nature and strength of culture. No culture is static. As long as a culture is alive, it is constantly in a process of transformation over time. Change is not the death of culture; it is the life of culture. When a culture becomes frozen and incapable of change, it dies. The constitutional commitment to gender equality may, indeed, lead to growth and change in some of Burma's cultures, just as other forces of modernity -- like a globalizing economy or the advent of new technology -- have led to cultural change. Change and growth is a natural part of culture. The suggestion that Burma's cultures cannot withstand such growth is itself deeply disrespectful. The WLB believes that Burma's many cultures are strong and vital enough to grow and adapt to the inevitable changes in the world and still play an important and valuable role in the future of our country.

D. Development and Prosperity

Finally, the full and effective equality of women is crucial for the future prosperity of Burma. International organizations all agree that raising the health, education, and economic status of women is essential to promoting

the positive development of a nation. There are many statistics to bear out this correlation between the condition of women and the condition of the nation.³ When the situation of women improves, the situation of the whole community improves. Thus, the World Bank has discovered that women are more likely to invest additional household income in children's health and education, raising child survival rates and improving the welfare of the whole community.⁴ A constitution that ensures that women have real equality in all public realms – political, economic, and social – will give Burma the best foundation for building a strong, healthy, and prosperous future.

4. The Need for Affirmative Action and Quota Systems in Burma

What does the Constitution need to do in order to guarantee real and meaningful gender equality? A formal declaration of equality and a negative prohibition against discrimination is simply not sufficient. The principle of equality has been enshrined in Burma's earlier national constitutions, however this has not resulted in positive change in the status of women in Burma. The current constitution drafting processes present the opportunity to avoid past mistakes and to learn from the experiences of other countries.

A. Formal Equality Is Not Sufficient

The experience of history and of other nations teaches us that formal equality of opportunity will not lead to real, substantive equality. Even if the law guarantees women an equal right to run for political office and serve in government, women will continue to be dramatically underrepresented in government office. The problem lies in the culture of gender discrimination. As discussed above, discriminatory attitudes toward women are endemic: they permeate all aspects of our cultures. Women as well as men have come to believe in the inferiority of women and their inability to exercise political power. The unfair advantages men receive from this culture – such as opportunities to learn leadership skills, encouragement to succeed rather than an expectation that they will fail, control over economic resources, and confidence in their own abilities –

³ See Elizabeth M. King and Andrew D. Mason, *Engendering Development through gender equality in rights, resources, and voice* (World Bank 2001).

⁴ See *Gender and Development*, World Bank website at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:20620484~menuPK:336874~pagePK:148956~piPK:216618~theSitePK:336868,00.html>

are often invisible to both men and women, but these advantages have a profound impact on who will end up governing the country. In order for women to actually exercise power and influence in political and social life in Burma, the Constitution must require concrete action to change social and cultural norms and practices to counteract these unfair advantages.⁵ Affirmative or positive action is necessary.

B. The Role of Government

Affirmative action needs to be taken up at all levels of society, but this cannot be achieved without the leadership of the government. The government is the only institution with the authority to enforce the change necessary to overcome structural barriers and to promote equality in all of the realms of society. Affirmative action must address women's inequality in the economy, education, family, society, and politics. The government must take affirmative action to increase women's economic status, to educate women and girls, and to secure women's rights in the family. In the context of a future federal constitution, one concrete and proven mechanism to bring about greater gender equality in government is the quota system for women's representation in politics.

The WLB believes that quota systems are mechanisms for change for gender equality, not solutions in themselves. Therefore, quota systems need to remain in place until gender equality has been achieved and the mechanism has become redundant because of its success. Moreover, quota systems alone are not sufficient mechanisms for change; they are designed to work in conjunction with other mechanisms and strategies for realising gender equality. Although a quota system is not sufficient, it is necessary. A quota system is necessary because without adequate representation in government, the many other necessary reforms will become impossible.

C. International Law and Quotas

Such a quota system is consistent with, indeed, demanded by, international law. CEDAW, for example, in Article IV, allows for the adoption of "temporary special measures aimed at accelerating de facto equality between men and women." When "special measures" are temporary and used to erase the results of discrimination against women,

⁵ Article V (a) of CEDAW calls on states to modify social and cultural patterns of conduct in order to eliminate the traditional prejudicial notions that women are inferior to men.

Article IV specifies that they are not to be considered as discriminatory towards men. “Special measures” include legislative quotas and affirmative action programs, including special training programs for women workers to enter traditionally male-dominated industries. Similarly, the Beijing Platform calls on governments to commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary. The Platform envisions governments setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action including electoral reform, in all governmental and public administration positions.⁶ UNSC Resolution 1325 reflects the same position when it calls on member states to “ensure increased representation of women at all decision-making levels in national, regional and international institutions.”⁷

The pro-democracy forces that have come together to draft this constitution have committed themselves to produce a constitution that promotes human rights and gender equality. As we have demonstrated in the discussion above, equality requires affirmative action by the government to counteract the effect of cultural patterns that deny women their human rights. Quotas are an effective mechanism for promoting equality and have been accepted by the international community. Moreover, Burma can benefit from the experience of other nations in designing a quota system that is effective, fair, and workable.

5. Gender Parity in Practice: The Design of a Quota System

There are numerous ways in which a quota system can be implemented. In this section, the WLB will propose a three-part quota system for the Federal Constitution and will suggest specific constitutional language to implement the system. At each point, we will outline the options available, explain why the particular mechanism was chosen, and describe the relevant experiences of other nations.

The proposed quota system has three parts. First, the Constitution must create an electoral system that will allow for the effective operation of a

⁶ UN Fourth World Conference on Women, Platform for Action: Strategic Objective G.1

⁷ UN Security Council Resolution 1325 (S/Res/1325 (2000)). The military government of Burma has, of course, largely ignored its obligations under these international instruments.

quota. As we will discuss below, this requires a closed party list proportional representation (PR) system. Second, the Constitution must create a requirement that both genders be represented at a specified minimum percentage at every level in all three branches of the federal government: the legislature, the executive, and the judiciary. The WLB recommends a 30% minimum requirement. And third, the electoral laws – which may well take the form of normal legislation rather than being part of the Constitution – must specify the details of the electoral system in a way that ensures the effective operation of the quota. As we will discuss below, this requires a mechanism for determining the order of names in the party lists and a requirement that parties must abide by these rules or they will not be included on the ballot. It also requires the adoption of programs to support and increase women’s political participation, including training in political skills, campaign funding, and so on.⁸

A. The Constitutional Provision On An Electoral System

First, the Constitution must specify the basic form of electoral system for a democratic Burma: majoritarian or proportional representation (PR), or some mix. There are many reasons to prefer a PR system for Burma, and one of them is that this system has been proven to be superior in achieving greater representation for women. Women are almost twice as likely to be elected under PR systems than under majoritarian electoral systems.⁹ Women were on average 8.5 percent of MPs in majoritarian systems, 11.3

⁸ If there is a perceived lack of qualifications among those women who desire to be leaders, either in government or on the constitutional committee, it is imperative that the government dedicates time and funding go to training these women. Article X protects the rights of women to have equal access to educational opportunities, including equal access to career and vocational guidance. Thus, Article X provides a basis for governmental affirmative action programs that encourage women to pursue work in fields that have historically been denied to them—including government representation.

⁹ PIPPA NORRIS, *Increasing Women's Representation in Government: What Strategies would work best for Afghanistan?* P. 2. unpublished paper online at <http://ksghome.harvard.edu/~pnorris/ACROBAT/Afghanistan.PDF> (last visited June 2005) (“Under proportional systems, each party presents the voters with a list of candidates in each multimember constituency. To increase votes for the list, parties have an incentive to include candidates representing all major social sectors of the electorate. Excluding any major social group, including women, could signal discrimination, and the group that feels excluded would not vote for that party. By contrast in other electoral systems ..., each party nominates one parliamentary candidate in each constituency, and the candidate with the most votes wins. Where the selection of candidates is in the hands of the local constituency party organization, this creates minimal incentives for each constituency to pick a ticket that is ‘balanced’ among different groups at the district or national level. Local party members often want a representative who will maximize their chances of winning in that constituency, irrespective of the broader consequences for the party or parliament.”)

percent in combined systems, and 15.4 percent of members in PR systems.¹⁰

Within PR systems, party-based closed list systems are the most effective for implementation of a quota. Such a system allows for simple enforcement of the quota through regulation of the party list. The list must be closed in order to prevent evasion of the quota. For example, compare the results in Peru and Argentina, both of which have PR representation systems with a 30% gender quota. In Peru, where the PR system is open list, the election after adoption of the quota resulted in 18% of the representatives being women.¹¹ In Argentina, with a closed list system, the election produced 27% women.¹² Similarly, the Iraqi Interim Constitution implemented a 30% quota with a closed list PR system and resulted in 31.5% women.

There are several other variables that determine the effectiveness of a quota system. These other variables will be discussed later in this section, because they are better left to election laws rather than included in the constitution. It is important that the constitution leaves sufficient flexibility for election laws to be modified over time to respond to experience and to meet new conditions. The constitution need only specify the basic electoral system in order to provide a stable foundation for a quota system.

The present draft constitution provides that the members of the Chamber of the People's Representatives will be elected directly and by secret ballot.¹³ The districts they represent and the number of representatives will be based on the principle of population proportionality, but the specific boundaries of districts and numbers of representatives are left to the Assembly to prescribe.¹⁴ The WLB proposes that the following language be added to the Federal Constitution; " provided that: (1) each district must have at least 2 members and (2) the members in every district will be

¹⁰ The majority of the statistics in this section were taken from the International IDEA website: <http://www.quotaproject.org>.

¹¹ See Pippa Norris, *Fast Track Strategies for Women's Representation: What Works?* Table 2, Paper on the occasion of the 50th session of the Commission for the Status of Women, UN (March 1, 2006). It is worth noting that, although this fell rather short of the 30% goal, it is still a substantial improvement over the 11% women elected in the previous election. *Id.*

¹² *Id.*

¹³ Draft Constitution, Chapter 4 (B), Art. 73 (A)

¹⁴ Draft Constitution, Chapter 4 (B), Art. 72 and 73 (B).

chosen through a closed party list proportional representation electoral system.”

B. The Constitutional Provision On a Gender Quota

Once the electoral system is specified, the second component is the gender quota. In some countries with closed party list PR systems, the gender quota does not need to be included in the constitution because it has been voluntarily adopted by the political parties. Thus, in Norway, Sweden and Germany, the quotas are not enforced by law but are the voluntary policy of the major parties. This system works well in these countries because the parties are deeply committed to the policy and enforce it on themselves. There are, however, few places in the world where the level of commitment to gender equality is high enough to allow voluntary party quotas to be effective in achieving adequate levels of women’s representation. Particularly in a country still struggling to overcome deep cultural resistance to women in politics, it is unlikely that enough parties will embrace voluntary quotas, and apply them with enough consistency, to actually result in substantial representation for women. Because there is no legal enforcement mechanism, many parties may refuse to adopt such quotas or may abandon them at any time for any reason. If, as we have argued, a minimum level of representation for women is crucial to the legitimacy and success of democratic government in Burma, it cannot be left to the vagaries of voluntary quotas.

At the opposite extreme from voluntary quotas, in some countries a gender quota is implemented by setting aside a specific number of seats in the legislature for women. Sometimes these seats are filled by election (as in Rwanda,¹⁵ Uganda, and Taiwan) and sometimes by appointment (as in Tanzania, Zimbabwe, and Bangladesh). This mechanism is most often adopted in single-member majoritarian systems.¹⁶ Reserved seats may be necessary to counteract the bad effects of the single-member district, winner-takes-all system on women’s representation. But reserved seats have serious drawbacks. If the women representatives are appointed, they

¹⁵ For example, in Rwanda, the 80 members of the Chamber of Deputies are elected as follows: 53 members elected in closed list PR; 24 women with two from each province and from the city of Kigali (by an electoral college with a women only ballot); 2 members elected by the youth council; 1 disabled representative. There is also a parallel system of women’s councils and women-only elections guaranteeing a women’s mandate for all elected bodies. In summary, there is a triple ballot system at the sector and district levels: a general ballot, a women’s ballot and a youth ballot.

¹⁶ See Pippa Norris, *supra* n. 12.

have little democratic legitimacy. Even if they are elected, if the system for electing them is separated from the election system for other seats, then they tend to be regarded as second-class representatives with little influence in the legislature. And, finally, if the number of seats is not specified then the system may have little effect.¹⁷

The WLB is not proposing that the constitution include a system of specific seats set aside for women. We believe that this mechanism is not necessary as long as Burma has a closed party list PR electoral system. It is only if the changes proposed above are not adopted, and a single-member district, majoritarian system remains an option, that reserved seats in the constitution might become necessary.

The WLB proposes a system that takes a middle course: the gender quota should be mandatory rather than voluntary, but should not require reserved seats. The constitution should include a provision setting out the goal of gender equity and committing the government to adopt whatever mechanisms are necessary to achieve a certain minimum level of representation. The following language, to be added to General Provisions chapter, would serve this purpose:

Gender Equity in Government

“In order to assure gender equity in all aspects of government, every body in the government of the Federal Union of Burma, at every level within the legislative, executive, or judicial branches, must include a minimum of 30% women and a minimum of 30% men among its members. In particular, this requirement applies to both Chambers of the National Assembly, the cabinet of Ministers, the National Security Council, the Supreme Court, the Constitutional Court, all lower federal courts, and the Commissions of the Federal Government. But the requirement is not limited to these bodies: it applies to all entities, units, or departments of the federal government. Each branch of the federal government is responsible for promulgating any rules, election procedures, or other procedures necessary to ensure that all bodies under the authority of that branch comply with this minimum requirement. Any person who believes

¹⁷ The reserved seat system appears to work better at the local level. It has been used with success at this level in India. See Louis Harmon & Eileen Kaufman, *Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*, 19 *Berkeley Women's Law Journal* 32 (2004).

that the rules regarding the composition of any body of the government of the Federal Union of Burma fail to implement this gender equity requirement may petition the Constitutional Court to declare those rules unconstitutional.”

The proposed Article would require that every body in the government of the Federal Union of Burma – at every level and within all three branches – must include 30% of each gender among its members. But the Article does not require reserved seats. The precise mechanisms for assuring this level of representation must, of course, vary with the different bodies involved. For some bodies, an election or selection mechanism may be sufficient to ensure this outcome; for others, reserved seats might be required. This Article leaves such details largely to the discretion of the branch or branches controlling the body. To ensure that such discretion is exercised in accordance with the goal of gender equity, the Article allows for review by the Constitutional Court.

The Article is drafted in gender neutral terms: it requires at least 30% women and at least 30% men. There are two reasons for this neutral language. First, it makes it clear that this is about fairness of representation rather than simply about promoting the advancement of one group. If at some future date there is a part of government that has less than 30% men, that situation would raise the same fairness concerns and would be equally unconstitutional under this provision. Second, the gender neutral language allows the provision to be a permanent part of the constitution rather than a temporary measure. It will always be important for both genders to have a minimum level of representation in government. The precise mechanisms necessary to achieve that level may vary over time – and this provision allows for such variation by not specifying those mechanisms – but the goal will not change. A quota for women might be temporary, but a minimum representation requirement for both genders can and should be permanent.

The Article applies to every body within the government of the Federal Union of Burma. It is crucial that the quota apply not only to the legislature itself, but to other bodies in the legislative branch (such as committees), and to courts and the executive as well. Women’s concerns and perspectives are just as important in executing the laws (the role of the executive) and interpreting the laws (the role of the courts) as in making the laws (the role of the legislature). Indeed, gender sensitive

laws passed by a legislature with adequate representation of women can be made ineffective by an executive or judicial branch that does not understand those laws because that branch is dominated by men. Much of the policy that affects women's lives will be made by committees, executive branch officials, or judges. If women are unrepresented among these bodies then the same democratic legitimacy concerns arise as with the legislature. The constitution must assure a fair level of representation for women in all three branches of government and at all levels.

One concern often raised about extending the quota to the executive and judicial branches is that it will be difficult to find a sufficient number of qualified women. While understandable, this concern is short-sighted. With the appropriate training and support programs, a pool of qualified women could be created within a relatively short time. For most positions in the executive branch or the lower courts, the qualifications are not so difficult to provide to women, if the government is committed to the project. And those high positions where more extensive qualifications are required are few and, therefore, only a few women will be needed to meet the 30% requirement. More importantly, a constitution is for the long-term; it must set the foundation and determine the agenda for a country for a substantial period of time. Including the executive and judicial branches in the quota assures that the foundation of a democratic Burma will include all its people – women as well as men – and that the agenda will include increasing the pool of qualified women.

C. Laws and Regulations Not in the Constitution Regarding the Electoral System

The third part of the quota system is the particular rules regarding each institution that will be used to ensure that the minimum representation requirements are met. Again, these rules will not be a part of the constitution itself because they require more flexibility than is possible in a constitution. They must be able to be changed in light of experience and changing circumstances. Thus, these rules are left largely to the discretion of the responsible branch, with court review.

But there is one subset of such rules that is so important that it warrants discussion even though it will not be made part of the constitution. These are the election laws that will implement the quota in the Chamber of the People's Representatives. Within the closed party list PR system, there

are several other mechanisms that are crucial to ensuring that adequate levels of representation are achieved. The first mechanism is simply a quota for the party lists. The election laws must require that every party list includes a minimum of 30% women and 30% men. This is a simple application of the constitutional requirement of gender equity.

Unfortunately, this simple rule is not sufficient to ensure that the legislature actually includes these levels of both genders. Even if a party lists 30% women among its candidates, if it places those women near the bottom of its list then few if any of them may end up in seats in the legislature. In order to achieve gender equity, the election laws must also require that the names on the party lists appear in a particular order. One possibility is the “zipper” system: men’s and women’s names must alternate on the list.¹⁸ A second possibility is to specify that women’s names must appear in every third position on the list. For example, the Electoral Law in Iraq promulgated by the Coalition Provisional Authority required that: “no fewer than 1 out of the first 3 candidates on the list must be a woman, no fewer than 2 out of the first 6 candidates on the list must be a woman, and so forth until the end of the list.”¹⁹ Some regulation of the order of names on the list is necessary in order to make the quota effective.²⁰

Finally, a quota system is only as effective as its enforcement mechanism. The best system in the world is of little use if the parties regularly violate it with impunity. In France, for example, the adoption of a gender parity requirement has had little or no effect on the level of representation of women.²¹ Partly this is because of the mixed, partially majoritarian, nature of the electoral system. But part of the cause also lies in the fact

¹⁸ This system is used by many of the European parties that have adopted voluntary quotas.

¹⁹ The 2005 election under this system led to 31% of the seats in the Lower House going to women.

²⁰ In addition to these order requirements, it may also be necessary to include a requirement that every party submit both a man’s and a woman’s name at the top of their list. Such a rule, which has been adopted in Argentina, assures that even parties that win only one seat can contribute to the necessary percentage of women. Combined with a quota for the party lists, this system has had a dramatic impact on the representation of women in Argentina. The 2003 election for the Lower House resulted in 87 women elected to 255 seats, or 34.1%, compared to only 4.6% (6 of 130) in the election of 1991; while the 2001 Upper House election resulted in 25 women elected out of 72 seats, or 34.7%. Currently all major parties have adopted a 30-35% quota of female candidates. This increase in women’s representation is not limited to the Parliament; government posts have also increased to 8% women appointees, up from 0% in 1990. See Human Rights Watch, “Decisions Denied Women’s Access to Contraceptives and Abortion in Argentina: Background,” <http://hrw.org/reports/2005/argentina0605/3.htm>

²¹ Norris, *supra* n. 12.

that the quotas are enforced only through financial pressure: if a party violates the quota then it forfeits public campaign funding. Parties are often willing to forgo this money if they think that violating the law will increase their chance of being elected to power. The most effective enforcement mechanism is electoral rather than financial: a party that submits a list that does not meet the quota requirement will not be placed on the ballot at all. This enforcement mechanism makes it clear that respect for the quota is a basic condition for participation in the electoral system.

6. Conclusion

Actual gender equality should be the ultimate goal of a future government of a Federal Democratic Burma. It is clear from Burma's history, that women have been systematically excluded from government. It is the goal of this paper to illuminate that, specific constitutional provisions can help achieve true equality of representation for the over 25 million women of Burma. In order to build Burma's future, it is necessary to recognize the practical inequality experienced by women in Burma and to realize that without true equality there can never be a truly democratic Burma.

Women's League of Burma

The Women's League of Burma (WLB) is an umbrella organization comprising twelve already-existing women's organizations of different ethnic backgrounds from Burma. WLB was founded on 9 December, 1999. Its mission is to work for women, and to work for the increased participation of women in all spheres of society in the democracy movement, and in peace and national reconciliation processes through capacity building, advocacy, research and documentation.

Aims

- To work for the empowerment and development of women.
- To encourage women's participation in decision-making in all spheres of life
- To enable women to participate effectively in the movement for peace, democracy and national reconciliation.

By working together, and encouraging cooperation between the different groups, the Women's League of Burma hopes to build trust, solidarity and mutual understanding among women of all nationalities in Burma. The 12 member organizations are listed on the inside front cover of this report.

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