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FEDERALISM AND GENDER EQUALITY

*Susan H Williams**

ABSTRACT

Despite the enormous literature on federalism in constitutional design, and the growing attention to gender equality in constitutional design, there has been remarkably little attention paid to the interaction between the two. This article seeks to provide a summary of the existing literature on this intersection, to apply the insights of that literature to the case of Myanmar, and to offer a contribution concerning the theoretical connections between federalism and gender equality. The analysis generates four primary conclusions. First, federalism is inherently neither good nor bad for gender equality: it all depends on the details of the federal system and the context in which they are applied. Second, there are, nonetheless, some guidelines that can be gleaned from the experiences of countries around the world about the design elements that can make federalism more or less useful for promoting gender equality under different conditions. Third, applying these elements in the case of Myanmar suggests that women's organisations might make common cause with the ethnic minority groups that are negotiating with the government and the army over federalism issues because the women share with these groups certain goals with respect to federal systems. And fourth, there is a connection between gender and federalism, not at the pragmatic or design level, but at the theoretical level. This connection concerns the type of (ideal) orientation that is required of citizens in a federal system and the ways in which that orientation might be valuable for gender equality. It is, then, the character of federal citizens, rather than the federal system itself, that could be inherently beneficial to gender equality.

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I INTRODUCTION

There is an enormous literature on federalism in constitutional design,¹ and a growing literature on gender equality in constitutional design,² but remarkably little attention to the interaction between the two. This article seeks to provide a summary of the existing literature on this intersection, to apply the insights of that literature to the case of Myanmar, and to offer a contribution concerning the theoretical connections between federalism and gender equality. This analysis will generate four primary conclusions. First, federalism is inherently neither good nor bad for gender equality: it all depends on the details of the federal system and the context in which they are applied. As a result, it would be useful if scholars and constitutional drafters stopped asking the general question about whether federalism helps or hurts women. Second, there are, however, some guidelines that can be gleaned from the experiences of countries around the world about the design elements that can make federalism more or less useful for promoting gender equality under different conditions. In other words, certain kinds of federal structures may help or hurt women and I will offer a list of some of these elements and examples from countries where they were effective, for good or ill. Third, applying these elements in the case of Myanmar generates the conclusion that women's organisations might make common cause with the ethnic minority groups that are negotiating with the government and the army over federalism issues because the women share with these groups certain goals with respect to federal systems. At the same time, the women's movement needs to be focused on ensuring that the type of federalism adopted fits the guidelines I will describe, so that it will be a benefit rather than a barrier to gender equality. The case study is not an exhaustive evaluation of the design of federalism for gender equality in Myanmar,³ but an illustration of the more general approach suggested in the theoretical analysis of federalism and gender equality. Finally, I will suggest that there is a connection between gender and federalism, not at the pragmatic or design level, but at the theoretical level. This connection concerns the type of (ideal) orientation that is required of citizens in a federal system and the implications of that orientation for gender equality. I will argue that federalism requires and encourages citizens to recognise a plurality of authority systems and to develop an openness to the challenges each of these multiple systems pose for the others. This sort of orientation, I

¹ For a small sampling, see, eg, Donald L Horowitz, *Ethnic Groups in Conflict* (University of California Press, 2nd ed, 2000); Arend Lijphart, 'Consociation and Federation: Conceptual and Empirical Links' (1979) 12(3) *Canadian Journal of Political Science* 499; Andrew Reynolds, *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press, 2002).

² See, eg, Beverley Baines and Ruth Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence* (Cambridge University Press, 2005); Susan H Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009); Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012); Kim Rubenstein and Katharine G Young (eds), *The Public Law of Gender: From the Local to the Global* (Cambridge University Press, 2016); Helen Irving (ed), *Constitutions and Gender* (Edward Elgar, 2017).

³ For a more detailed assessment of some of the specifics of a federal system in Myanmar that would help promote gender equality, see Christine Mary Forster, 'Advancing Gender Equality Within a Federal Governance Model in Myanmar', (Report, UNWomen, 2017) at 35–45 (suggesting specific allocations of particular subject matters to the union or the state levels).

will suggest, is valuable for the project of promoting gender equality. It is, then, the character of federal citizens, rather than the federal system itself, that could be inherently beneficial to gender equality.

II FEDERALISM

Before it is possible to determine whether federalism helps or hurts gender equality, it is necessary to define federalism. Federalism is, of course, a contested concept.⁴ While many different definitions might be useful for different purposes, I am going to use a very simple and minimalist definition that I hope will cover any system that most people would consider federal (and probably many systems that some people would not). Because my focus is on constitutional design, I adopt a constitutional definition. Federalism, as I will use it, is any system in which devolution of power to sub-national units is constitutionally guaranteed.⁵ This definition distinguishes federal systems from systems of voluntary decentralisation, in which the central government could choose to reduce or eliminate the powers of the subnational units. It does not, however, require any particular amount of devolved power or any particular form of devolution. It leaves open the possibility of sub-national units exercising specifically enumerated subject matter powers (as under the current Constitution of Myanmar),⁶ or holding all residual powers (as in the US),⁷ or exercising powers of administration even in areas of national policy-making (as in Germany).⁸ It leaves open the possibility of asymmetrical federalism, in which different sorts of sub-national units exercise different powers.⁹ But it does require that some powers be devolved to the subnational units by the

⁴ See Daniel Elazar, *Exploring Federalism* (University of Alabama Press, 1987) 34–8 (comparing contrasting models of federalism); see also Thomas Hueglin, 'Federalism at the Crossroads: Old Meanings, New Significance' (2003) 36 *Canadian Journal of Political Science* 275, 275 ('On all counts, federalism has remained a contested concept.')

⁵ Compare Elazar, above n 4, 34 ('Federalism is based on a particular kind of constitutional framework.'). Vincent Ostrom, 'The Meaning of American Federalism: Constituting a Self-Governing Society' (ICS Press, 1991), 7 ('The standard definition of federalism is a system of government where authority is exercised concurrently by a national government and state or provincial governments.')

⁶ *Constitution of the Republic of the Union of Myanmar*, May 29, 2008, sch 2.

⁷ *United States Constitution* amend X.

⁸ See *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 83, translation at <https://www.gesetze-im-internet.de/englisch_gg/index.html> ('The Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.'). Arthur Gunlicks, 'The Länder and German Federalism' (Manchester University Press, 2003) 60–1 ('As we have seen above, the federation in fact carries most of the responsibility for legislation, while the Länder are primarily responsible for administration.').

⁹ See Donald L Horowitz, 'The Many Uses of Federalism' (2007) 55 *Drake Law Review* 953, 959 ('Third, federalism can make it possible to mitigate discontent by making special, asymmetric arrangements for regions with special problems or distinctive identities'); Charles D Tarlton, 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' (1965) 27 *The Journal of Politics* 861, 869 ('The ideal asymmetrical federal system would be one composed of political units corresponding to differences of interest, character, and makeup that exist within the whole society').

Constitution and that such powers be exercised by state or provincial or autonomous regional governments¹⁰ independently of the central government.

In terms of constitutional design, this basic definition focuses on three categories of mechanisms as the hallmarks of federal systems. The first category directly addresses the powers devolved to states and the ability of state governments to exercise those powers autonomously. This set of mechanisms includes both lists of powers (union, state, and/or concurrent) and provisions that establish the ability of state governments to act autonomously and efficaciously (eg, guaranteeing states the right to choose their own chief executive or the administrative ability to administer their own affairs). A second set of mechanisms concerns the process of resolving conflicts between exercises of power at the union and state levels. These include a supremacy or subsidiarity clause (suggesting a rule for decision in such cases) and a dispute resolution mechanism (eg, a Supreme Court or Federalism Council). Finally, a last set of mechanisms concerns one special set of powers that may be devolved to states: the power to influence the making of union policy and law. Such mechanisms may include an upper house with representation for (or controlled by) the states, intergovernmental bodies that include representation for states, and union-level state of emergency procedures that give state governments veto or oversight powers.¹¹

Defined in this general way, and from a design perspective, a federal system is one in which some combination of the mechanisms in each of the categories above results in the constitutionally guaranteed devolution of powers to subnational units. The question taken up by a number of political scientists interested in gender equality is: does such a system help or hurt women's struggle for equality?

III FEDERALISM AND GENDER EQUALITY IN GENERAL

Political scientists have argued over whether federal systems help or harm women in their pursuit of policies promoting gender equality.¹² Interestingly, observers on both sides of this debate have identified the same three basic characteristics of federal systems, each of which has both advantages and disadvantages to women's political activism. The three characteristics are: (1) the fact that federal systems provide multiple access points for political activism (at a minimum the two different levels, union and

¹⁰ For the purposes of brevity, I will, from this point on, use 'states' to refer to all forms of subnational units that are constitutionally authorised to exercise powers, whether large or small, symmetrical or asymmetrical.

¹¹ For a discussion of a range of such emergency powers for states, see Susan H Williams, 'States of Emergency and Federalism: An Exploration of the Implications for Constitutional Design' (unpublished paper on file with the author).

¹² For views finding federalism has a positive impact, see, eg, Louise Chappell, 'Interacting with the State: Feminist Strategies and Political Opportunities' (2000) 2 *International Feminist Journal of Politics* 244; Sylvia Bashevkin, *Women on the Defensive: Living Through Conservative Times* (University of Chicago Press, 1998). For views that federalism disadvantages women, see, eg, Judith Resnik, 'Categorical Federalism: Jurisdiction, Gender and the Globe' (2001) 619 *Yale Law Journal* 111; Jill Vickers, 'Why Should Women Care About Constitutional Reform?' in David Schneiderman (ed), *Conversations Among Friends: Proceedings of an Interdisciplinary Conference on Women and Constitutional Reform* (Centre for Constitutional Studies 1991); Jill Vickers, 'Why Should Women Care About Federalism?' in Douglas Brown and Janet Hiebert (eds), *Canada: The State of Federation 1994* (Canadian Institute of Intergovernmental Relations, 1994).

state), (2) the fact that federal systems decentralise power to more local levels, and (3) the fact that federal systems generally involve multiple subnational entities. Each of these facts can be of benefit to activism for gender equality or can create barriers to change.

The existence of at least two levels of government that provide multiple access points can be of benefit to women trying to get more gender equal policies adopted for two reasons. First, it allows for forum shopping: choosing the most hospitable venue for each issue.¹³ For example, if women are trying to get a certain employment discrimination policy adopted, they can approach either the union or particular state legislatures, depending on which is more open to this policy. Second, the multiple access points also facilitate multiple bites at the apple: if a reform fails in its first attempt, it is often possible to try again quickly in a different forum.¹⁴ In a centralised system, on the other hand, only one venue may be available and that may make it difficult to try again for some time.

The fact that federal systems involve decentralisation of power to more local levels also has potential benefits for women. First, there are simply more positions and therefore more opportunities for political participation.¹⁵ In addition, women in many countries find it easier and more congenial to participate in politics at the local level, rather than at higher levels of government. Partly this is simply a matter of logistics: because women carry the majority of responsibility for child care and homemaking, they find it difficult to participate in politics that take place far away from their homes and families.¹⁶ There may also be psychological or motivational issues: women may feel

¹³ See Melissa Huassman, Marian Sawyer and Jill Vickers (eds), *Federalism, Feminism and Multilevel Governance* (Ashgate, 2010) 229 ('forum shopping ... lets women work around a blockage at one governance level and take advantage of an opening at another level'); see also Louise Chappell, 'The "Femocrat" Strategy: Expanding the Repertoire of Feminist Activists' (2002) 55 *Parliamentary Affairs* 85, 92 ('[F]ederalism has been important to Australian femocrats because they have been able to shift their attention between governments when blocked at one level or another.').; see also Bashevkin, above n 12, 10 ('federal arrangements with their multiple access points appeared to assist feminist interests, because decision makers in North America could not exert a reliable power of veto over group claims as they could in Britain.'). (internal quotations and footnote omitted).

¹⁴ See Alison Grey Anderson, 'The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934' (1984) 70 *Virginia Law Review* 813, 842 ('Federalism can be seen as in some sense intended to give interest groups two chances.').

¹⁵ See Marian Simms, 'Gender, Globalization and Democratization' in Rita Mae Kelly et al (eds), *Gender, Globalization, and Democratization* (Rowman & Littlefield, 2001); Fiona Mackay, 'Devolution and the Multilevel Politics of Gender in the UK' in Huassman, Sawyer and Vickers, above n 13.

¹⁶ See Jennifer L Lawless and Richard L Fox, 'Men Rule: The Continued Under-Representation of Women in U.S. Politics' (American University Women & Politics Institute, 2012) 13–15 ('What emerges from this analysis of family roles and structures is the fact that women, though no longer directly impeded from thinking about a candidacy just because they have certain familial responsibilities, face a more complex set of choices than do their male counterparts'); see also Directorate General for Internal Policies of the European Parliament, 'Women in Decision-Making: The Role of the New Media for Increased Political Participation' (2013) 31 ('The situational explanation emphasises the unequal division of unpaid labour and the higher burden of family responsibilities that women bear which inhibits their engagement in politics.').

more confident about their ability to understand local issues and to be effective leaders at the local level.¹⁷ Finally, there are clearly structural issues that account for women's greater levels of participation at local levels: they face fewer obstacles in terms of party gatekeepers and campaign funding in local elections.¹⁸ For all of these reasons, women in some countries participate in higher rates at local and state levels than in union-level governments.¹⁹ To the extent that federal systems push policy-making power down to these lower levels, they increase women's access to such power.

The fact that federal systems generally include multiple subnational units can also function as a benefit to women working for gender equality. These multiple units contribute to the forum shopping and multiple bites at the apple discussed above. They also offer what is sometimes described as a 'laboratory' or 'contagion' effect: if one state experiments with a reform and it is successful, then other states are likely to follow suit.²⁰ Sometimes this dynamic is characterised as competition between the different

¹⁷ For some evidence supporting the idea that women are more likely to consider themselves qualified to run for office at the local level, see Jennifer L Lawless and Richard L Fox, 'Why Are Women Still Not running for Public Office?' (2008) 16 *Issues in Governance Studies*, Brookings Institute. One result of this difference is that women are much more equally represented on local school boards. See Janie Boschma, 'Why Women Don't Run for Office', *Politico*, 6 December 2017 ('One arena in which women are willing to run for office – and do seem to feel qualified – is the local school board. A poll of school superintendents estimates that women represented 43 percent of the nation's school board members in the 2014-15 school year.').

¹⁸ Party gatekeepers are one of the primary barriers to women's political participation. See Christine Cheng and Margit Tavis, 'Informal Influences in Selecting Female Political Candidates' (2011) 64 *Political Research Quarterly* 460, 461 ('The first mechanism is that gatekeepers are more likely to directly recruit and promote people like themselves.'). The suggestion in text is that this barrier might be lower in the context of local politics, but there is little evidence to document any differences. In terms of fundraising, it is plain that competing in national and state elections is more expensive than in local ones and fundraising is the number one barrier cited by women candidates. See Jena Macgregor, 'Why More Women Don't Run for Office', *Washington Post*, 21 May 2014 (citing a report by Political Parity studying women who ran for legislative positions). For a general description of these barriers, see Judith Warner, *Opening the Gates: Clearing the Way for More Women to Hold Political Office* (19 May 2017) Center for American Progress <<https://www.americanprogress.org/issues/women/reports/2017/05/19/427206/opening-the-gates/>>.

¹⁹ For an interesting empirical study, see Richard Vengroff, Zsolt Nyiri and Melissa Fugiero, 'Electoral System and Gender Representation in Sub-National Legislatures: Is there a National- Sub-National Gender Gap?' (2003) 56(2) *Political Research Quarterly* 163, 168 (the rate of women's political participation in sub-national legislatures is higher than in national legislatures in developed countries, but not in less developed countries). In the US, for example, women are 24.9% of all state legislators, see National Conference of State Legislatures: National Conference of State Legislatures, *Women in State Legislatures for 2017* (11 July 2017) <<http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2017.aspx>>, and 20% of Congress: Center for American Women and Politics, *Women in Elective Office 2018* (2018) <<http://www.cawp.rutgers.edu/women-elective-office-2018>>.

²⁰ For general discussions of such effects, see, eg, David Osborne, *Laboratories of Democracy* (Harvard Business School Press, 1988); G Alan Tarr, 'Laboratories of Democracy? Brandeis, Federalism, and Scientific Management' (2001) 31 *Publius* 37; Julianna Pacheco, 'The Social

sub-state units over policy improvements.²¹ This ability to try out a reform in one place and to see the effects of that in other places is one of the general benefits of federalism often highlighted by political scientists.²² The point here is that this general benefit applies to gender equality along with other sorts of reforms. Based on these arguments, some scholars have suggested that federalism is helpful to women in terms of their political participation and their ability to promote a gender equality agenda.²³

Ironically, however, each of these characteristics of federal systems can also prove to be a barrier to gender equality. The multiple access points that facilitate forum shopping also create a serious resource strain on feminist movements. Women must often litigate or lobby for a given policy change in all of these different fora in order to achieve their goals. For example, it is not enough to get an employment discrimination policy adopted in only one state: it will then be necessary to take that example to other states and try to get it adopted in all of them. If a policy could be resolved once for everyone, as in a unitary system, that can be much more efficient in terms of the use of scarce advocacy resources.²⁴ The argument applies to human resources as well as financial ones: multiple systems of government mean multiplication of political offices and more positions require more women candidates in order to achieve equal representation levels.

The fact that federal systems move policy-making down to more local levels can also be a double-edged sword for women. While it may facilitate women's access to policy-

Contagion Model: Exploring the Role of Public Opinion on the Diffusion of Antismoking Legislation Across the American States' (2012) 74 *Journal of Politics* 187, 188–9.

²¹ See Paul Pierson, 'Fragmented Welfare States' (1995) 8(4) *Governance* 449; Jill Vickers, 'A Two-Way Street: Federalism and Women's Politics in Canada and the United States' (2010) 40 *Publius* 412.

²² See generally Jenna Bednar, 'Nudging Federalism toward Productive Experimentation' (2011) 21 *Regional & Federal Studies* 503; see also Craig Volden, 'States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program' (2006) 50(2) *American Journal of Political Science* 294, 310 ('As used here, this approach uncovers a robust pattern of states acting as policy laboratories'); see also Wallace E Oates, 'An Essay on Fiscal Federalism' (1999) 37 *Journal of Economic Literature* 1120, 1132 ('recent legislation that transfers the responsibility for these programs back to the states represents ... a recognition of the failure of existing programs and an attempt to make use of the states as "laboratories" to try to find out what make sorts of programs can work'); see Susan Rose-Ackerman, 'Risk Taking and Reelection: Does Federalism Promote Innovation?' (1980) 9 *Journal of Legal Studies* 593, 594 ('If state and local governments are supposed to be "laboratories", then my model predicts that few useful experiments will be carried out in them').

²³ See Fiona Mackay, 'Descriptive and Substantive Representation in New Parliamentary Spaces: The Case of Scotland' in Marian Sawer, Manon Tremblay and Linda Trimble (eds), *Representing Women in Parliament: A Comparative Study* (Routledge, 2006) (political participation); see also Fiona Mackay, 'Devolution and Multilevel Politics of Gender' in Haussmann, Sawer and Vickers, above n 13; Chappell, above n 13, 251 (gender equality agenda); see also Bashevkin, above n 12, 10 (gender equality agenda).

²⁴ This is the point, of course, in the common strategy of seeking to guarantee women's reproductive rights through the federal Constitution, rather than fight them out in every state legislature. See Melissa Haussman, *Abortion Politics in North America* (Lynne Rienner Publishers, 2005). Thus, the unified route is possible for some issues in a federal system, but the whole point in federalism is to limit the number and importance of such issues, so as to maintain the ability of subnational units to make policy independently. The point is not that federalism makes a unified approach impossible for everything, but that it makes it less available for many things.

making positions, as discussed above, it also carries two potential disadvantages compared to centralised decision-making. First, local communities may be more conservative in terms of gender roles and ideologies than national elites.²⁵ This is a highly contextual issue, of course, and will not be true everywhere. But it is a common enough phenomenon around the world to be a serious concern for feminist reformers facing federalising efforts.²⁶ Where it is true, shifting policy power to these local levels may make it harder for feminist reforms to be adopted. Second, bringing power down to the more local level systematically creates an advantage for geographically concentrated groups as opposed to other sorts of groups. Empowering local communities is, of course, one of the primary reasons for the adoption of federal systems: communities that are minorities at the national level but majorities (or at least much more substantial players) in the smaller arena will have more control in a decentralised system.²⁷ The problem is that women are not a geographically concentrated minority; in most countries, they are a geographically dispersed majority. As a result, their political power is not increased by decentralisation in this way. And since the power of other sorts of communities is increased, women as a demographic may be weaker relative to these groups than they would be at the national level.²⁸

Finally, the existence of multiple subnational units may also create costs for women. In addition to the resource strains mentioned above, the existence of many states making different policy choices means that women in different areas of the country may have very different rights and/or benefits. For example, the availability of child care or reproductive health services may be dramatically different across states.²⁹ For reformers who believe that such inequality between women is itself a feminist issue, this is a disadvantage of a federal system.

²⁵ For a study of the gap between elite and non-elite attitudes toward gender equality, see Claire Wallace, Christian Haerpfer and Pamela Abbott, 'Women in Rwandan Politics and Society' (2008/9) 38(4) *International Journal of Sociology* 111.

²⁶ See Vickers, above n 21, 'A Two-Way Street: Federalism and Women's Politics in Canada and the United States', 419 ('Most English-Canadian feminists favor federal government control of social programs which they fear conservative provincial governments will dismantle').

²⁷ See Elazar, above n 4, 88 ('The second face of territorial democracy was that represented by Massachusetts and most of New England, whereby different groups were expected to settle in different territorial entities which they then could use to build polities that would express their separate visions and protect their separate group interests'); see also Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press, 1977) 42 ('Similarly, federalism can be used as a consociational method when the plural society is a "federal society": a society in which each segment is territorially concentrated and separated from the other segments, or, to put it differently, a society in which the segmental cleavages coincide with regional cleavages.'). See also Horowitz, *Ethnic Groups in Conflict*, above n 1, 613-17 (discussing the concept of 'homogenous states' that refers to territorial devolution to geographically concentrated ethnic groups).

²⁸ See, eg, Haussman, Sawyer and Vickers, above n 13, 234 ('Chapters on India, Nigeria, Russia and Canada show how women's entitlement to 'national' citizenship rights such as gender equality can be challenged by or made to compete with group rights of ethnic, religious, national or language communities at another level of local government.')

²⁹ See *ibid* ('Leaving welfare provisions to the latter may result in uneven access to programs and services across the country and unequal citizenship entitlements.'). See also ('[F]ederalism arguably remains an important obstacle to that pan-Canadian goal.').

Thus, the general characteristics of federal systems create both potential opportunities and potential challenges from the perspective of gender equality. Depending on the circumstances in the country—political, cultural, economic and social—the very same federal system could be either a benefit or a harm: indeed, it could be both at the same time, in different ways. At the abstract level, then, it is not possible to say that federalism in general is either good or bad for women as a group or for the promotion of gender equality.

Turning from an abstract approach to a more empirical one, the question then becomes: is there any empirical evidence that federalism helps to promote or hinder gender equality? In order to determine whether federalism has an impact on gender equality, we used the Gender Inequality Index provide by the United Nations Development Programme³⁰ as the dependent variable. We then ran a regression with the United Nations Human Development index³¹ as a control variable and federalism as a binary, dummy explanatory variable. We limited the set for analysis to countries that showed up both on the United Nations' Gender Inequality Index and United Nations Human Development Index. Countries appearing on both lists were categorised as being federal, based on a qualitative assessment of their constitutions' vertical separation of powers. The federal countries were: Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Ethiopia, Germany, India, Iraq, Malaysia, Mexico, Myanmar (Burma), Nepal, Pakistan, Russia, South Africa, Spain, Switzerland, Tanzania, United Arab Emirates, United States and Venezuela. Four of the federal countries in the world were not present on both lists and were, therefore, not included in the analysis (Comoros, Micronesia, Nigeria and Saint Kitts and Nevis). As a result, only 24 of the 28 federal countries in the world were analysed. Given the value of the p-value, however, it is unlikely that the inclusion of these four countries would affect the outcome of the analysis.

With a linear regression analysis, controlling for development using the Human Development Index, we find that there is no statistically significant relationship between a country being federal and its Gender Inequality Index. As the chart indicates, the p-value is .703 and the intercept is -7.639 with a 95% confidence interval spanning values of -45.145 and 31.866. The extremely high p-value and the 95% confidence interval containing both positive and negative values indicate no relationship between federal structure and gender equality. Federal countries are no more or less likely to have high levels of gender equality than non-federal countries. In other words, federal countries vary widely in terms of their gender equality policies, as do non-federal countries. Neither category has a statistically significant likelihood of being more gender equal.³²

³⁰ The Gender Inequality Index was multiplied by 1000 to transform from a three-digit decimal to integers so that the output in the regression would yield a more intuitive result. This transformation is purely aesthetic and does not affect the results. See United Nations Development Programme, *Gender Inequality Index* (2016) available at <<http://hdr.undp.org/en/content/gender-inequality-index-gii>>.

³¹ The Human Development Index was multiplied by 1000 to transform from a three-digit decimal to integers so that the coefficient in the regression would yield a more intuitive result. This transformation is purely aesthetic and does not affect the results. United Nations, *Human Development Index* (2016) <<http://hdr.undp.org/en/composite/HDI>>.

³² I am very grateful to my research assistant, Cody Vaughn, for doing the calculations for this analysis. His assistance was invaluable.

Regression analysis

VARIABLE	COEFFICIENT	STANDARD ERROR	P-VALUE	LOWER 95%	UPPER 95%
Intercept	1128.821	33.637	2.986x10 ⁻⁷³	1062.378	1195.262
HDI x 1000	-1.083	0.0468	2.284x10 ⁻⁵²	-1.175	-0.991
Federalism	-7.639	20.000	0.703	-47.145	31.866
Regression statistics					
Multiple R			0.883		
R Square			0.779		
Standard Error			0.776		
Observations			159		

Summary Statistics of Continuous Variables

GIIx1000	
Mean	359.6415
Standard Error	14.98858
Median	374
Mode	362
Standard Deviation	188.9988
Sample Variance	35720.55
Kurtosis	-1.08053
Skewness	-0.06037
Range	727
Minimum	40
Maximum	767
Sum	57183
Count	159

HDIx1000	
Mean	709.0063
Standard Error	12.18223
Median	739
Mode	579
Standard Deviation	153.6121
Sample Variance	23596.68
Kurtosis	-0.76922
Skewness	-0.46124
Range	597
Minimum	352
Maximum	949
Sum	112732
Count	159

Moving from a large-n approach to a case study approach also yields no general conclusions about the impact of federalism (ie, constitutionally mandated devolution of powers to subnational units) on gender equality. If we look at the history of federalism in particular countries, we find no consistent pattern of whether greater federalism helps

or hurts women.³³ Federal systems vary in terms of which level of government tends to be more favourable on women's issues.³⁴ And, even within a single country, the impact of federalism on gender equality can change over time.³⁵

In short, neither abstract theory nor statistics nor historical experience indicates any general relationship between federalism and gender equality. Federalism in general is neither good nor bad for gender equality. Asking about the general relationship between these two is, I believe, asking the wrong question. Instead, we need to be asking about which specific aspects of federalism tend to promote (or hinder) gender equality under which specific conditions.³⁶ Only this much more fine-grained approach holds any hope of generating useful conclusions. And such conclusions are urgently needed by women who are seeking to respond (or contribute) to federalism reforms in their countries. They need to know *what kind* of federalism and *which specific* federal mechanisms they should support or oppose in order to serve their ultimate goal of promoting gender equality.

IV A DESIGN APPROACH TO FEDERALISM AND GENDER EQUALITY

When the question is reframed in this way, the experience of a range of countries can be used to generate some useful conclusions about the types of federal arrangements that can promote gender equality under specific circumstances. Each element on the list provided in this section is intended to raise a series of specific questions to guide those hoping to create a woman-friendly form of federalism. The elements on this list generally do not prescribe specific institutions or constitutional provisions; instead they direct attention to particular issues, which may require different approaches under different circumstances. The list provided is a summary of the design elements

³³ See Haussman, Sawyer and Vickers, above n 13, 229–36 (assessing the impact of federalism, devolution, and multilevel governance on women from the case studies in edited volume and finding a mixed picture on all fronts).

³⁴ Cf Laura Macdonald and Lisa Mills, 'Gender, Democracy and Federalism in Mexico: Implications for Reproductive Rights and Social Policy' in Haussman, Sawyer and Vickers, above n 13; Chappell, above n 12; Bashevkin, above n 12 (all providing examples where states are ahead of the federal government on gender equality reforms); Sabine Lang, 'Gendering Federalism—Federalizing Gender: Women's Agencies and Policies in German Multilevel Governance' (2010) 33 *German Studies Review* 517, 524; Laura Macdonald and Lisa Mills, 'Gender, Democracy and Federalism in Mexico: Implications for Reproductive Rights and Social Policy' in Haussman, Sawyer and Vickers, above n 13, 194–5 (providing examples where states rolled back federal government reforms).

³⁵ For an argument that federalism was only briefly an advantage for women's reproductive rights, see Melissa Haussman, 'Caught in a Bind: The US Pro-Choice Movement and Federalism' in Haussman, Sawyer and Vickers above n 13, 123 ('With reference to the questions posed to all authors about federalism and multilevel governance, the answer is that the architecture of federalism only worked briefly to promote women's reproductive freedom in the US, while there was political will to implement it and money to support it.').

³⁶ And this is, in fact, the question that many gender scholars have come to focus on: see Vickers, above n 21, 'A Two-Way Street: Federalism and Women's Politics in Canada and the United States', 419–20 ('Many contemporary gender scholars (Sawyer and Vickers 2001; Chappell 2002; Riedle 2002; Smith 2008; Vickers 2008) adopt a third, "conditional approach" (Gray 2006) that federalism *per se* has neither positive nor negative consequences for women because federal characteristics and their effects vary between institutions, across institutional arenas, and policy or issue sectors, and with time and space. They claim, therefore, that federalism's effects depend on characteristics of specific federations, at specific times.').

highlighted by the current literature on federalism and gender equality. It is, therefore, only a first step in identifying a menu of issues for drafters to consider, not an exhaustive catalogue. My hope is to stimulate discussion that will generate additional elements to add to the list.

A Subject Matter Areas of State/Union Authority Should Not Track Culturally Defined Gender Roles

In some federal countries, the division of powers between union and state governments is similar in many ways to the division between culturally defined gender roles for men and women. For example, in the US, family law is generally a subject of state authority and not one on which the federal government directly legislates (although, of course, federal laws can and do have a very large impact on families).³⁷ To the extent that the family is seen as the proper domain of women, this division of authority tracks the traditional gender role categories. Such a division can be contrasted with, for example, the Canadian federal arrangement in which different aspects of family law are controlled by different levels of government: marriage and divorce law are a federal competence, while adoption and disputes within marriage are handled under provincial law.³⁸

Divisions of power between the levels of government that track traditional gender role categories are problematic for women's equality for at least three reasons. First, such divisions reinforce the idea that the traditional roles are natural, inevitable, and necessary.³⁹ If the structures of government mirror the structures of gender, then it becomes harder to get people to question the structure of gender roles. Second, if the traditionally masculine roles are given to the union and the traditionally feminine ones to the states, this is likely to reinforce the idea that feminine issues/concerns are less

³⁷ See *Sosna v Iowa*, 419 US 393, 404 (1975); *Ex Parte Burrus*, 136 US 586, 593–4 (1890) ('The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States'; see also *Barber v Barber*, 60 US 582, 584 (1859). But see generally Judith Resnik, "'Naturally' Without Gender: Women, Jurisdiction, and the Federal Courts' (1991) 66 *New York University Law Review* 1682 (challenging the limited conception of family law, and noting that other areas of law touch directly on family life); also see generally Ann Laquer Estin, 'Sharing Governance: Family Law in Congress and the States' (2009) 18 *Cornell Journal of Law and Public Policy* 267, 330 ('Many subjects of national legislation incorporate significant family policy dimensions.').

³⁸ *Constitution Act 1867 (Imp)*, 30 & 31 Vict., c 3, ss 91–2 (giving the federal government exclusive jurisdiction over Marriage and Divorce and provincial governments exclusive jurisdiction over solemnisation of marriage, property and civil rights, and '[g]enerally all Matters of a merely local or private Nature'); see also Christine Davies, Alastair Bissett-johnson and Julius Grey, *Family Law in Canada*, (23 February 2015) The Canadian Encyclopaedia <<https://www.thecanadianencyclopedia.ca/en/article/family-law/>>.

³⁹ See Resnik, "'Naturally' Without Gender: Women, Jurisdiction, and the Federal Courts', above n 37, 1696 ('What underlies both this lack of interest in and opposition to jurisdiction over gender-related injuries is the usually unstated and widely shared assumption that women are not relevant to the federal courts. This assumption, in turn, is fueled by an association of women with roles traditionally governed by state law (marriage, childbearing, and family care—oversimplified, a "private" world) and a corresponding association of the federal courts not with such "domestic" concerns but rather with commerce, constitutional law, federal statutory enforcement (oversimplified, a "public" world) in which men predominate.').

important.⁴⁰ In other words, the hierarchy implicit in federal arrangements—where union governments are often seen as superior to and more powerful than state governments—will support gender hierarchy. And third, if local authority is concentrated in areas traditionally associated with women, it may increase the likelihood that local cultural groups will see gender roles as a primary battle ground with the majority culture and resist reforms.⁴¹ In most places, local cultural minorities who might seek to exercise power under a federal system have a wide and rich range of issues that distinguish them from the majority culture: language, religion, customs, dress and food, property arrangements, and, of course, family structures and gender roles. If the division of powers makes gender a salient category for local power, then that is more likely to be the place where the battles for local autonomy will be fought. If the division mixes things up, however—giving both levels of government powers related to both masculine and feminine gender roles, decentring gender as a central category of analysis—it may help avoid the dynamic where women's bodies and behaviour become the central culturally contested terrain. For these reasons, it is likely that a federal division of powers that tracks traditional gender roles could have damaging symbolic effects on feminist reform efforts.⁴²

The guidance to avoid such a division of powers is not, of course, sufficient to determine which competences should be assigned to each level of government. First, this guideline cannot be translated directly to a list of areas that should always be given to the states, or areas that should always be given to the union. Because cultures differ in their views of traditional gender roles, the lists will be different in different places. Moreover, avoiding a federal system that tracks gender roles can be achieved in many different ways: there are many possible combinations of powers at each level that would break up the gendered categories. Finally, the assignment of powers in a federal system must answer to a long list of other important considerations beyond gender equality: autonomy for local minority groups over things that matter to them, capacity of each

⁴⁰ See *ibid* 1749 ('Women and the families they sometimes inhabit are not only assumed to be outside the federal courts, they also are assumed not to be related to the "national issues" to which the federal judiciary is to devote its interests. Jurisdictional lines have not been drawn according to the laws of nature but by men, who today are seeking to confirm their prestige as members of the most important judiciary in the country. Individual problems move lower on the federal courts' agenda. Dealing with women—in and out of families, arguing about federal statutory rights of relatively small value—is not how they want to frame their job.').

⁴¹ For a description of the development of this phenomenon and a suggestion about dividing up jurisdiction over such issues in ways that defuse it, see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001).

⁴² But it is important to recognise that the exact location and meaning of these dividing lines is never fixed by a constitutional text: most exercises of government power will have implications for multiple subjects, often on both sides of whatever line divides union and state powers. For example, a policy about who counts as married for immigration purposes concerns both the power over immigration and the power over marriage. Because of the uncertainty and malleability of such boundaries, one of the most important issues in federal systems is who will decide on which side of the line a particular exercise of power falls. This is often the role of the Supreme Court or a specialised council. For a discussion of this line drawing issue, see Judith Resnik, 'Federalism(s) Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations' in James E Fleming and Jacob T Levy (eds), *Federalism and Subsidiarity* (New York University Press, 2014) 363.

level of government to carry out different tasks, needs for coordination or unity to achieve certain goals, etc.⁴³ The point is not that gender equality trumps any one or more of these concerns, but that it should be added to the list of goals that shape the division of powers in a federal system. And, if gender equality is on that list, one of the central questions that will need to be answered is whether a proposed division tracks gender roles or not.

B Fiscal Arrangements Must Facilitate Rather than Frustrate Attention to Policy on Women's Issues

Money matters to all forms of governance. And in a federal system, the division of revenue raising powers and the potential for resource sharing across jurisdictions are centrally important to the ability of each level of government to exercise its authority and meet its obligations. If the federal system allocates many areas of concern to women to state authority but fails to provide states with the ability to raise sufficient revenue to carry out those tasks, then women's concerns will suffer. Because women are, on average, poorer, less educated, and less able to access health care than men,⁴⁴ it is of particular concern to them that the level of government charged with providing basic services is adequately resourced. In other words, fiscal federalism, while important to all citizens in a federal country, may be of particular concern to women and of particular importance to the promotion of gender equality.⁴⁵

In addition, from a gender equality perspective, it is also important to pay attention to the possibility of resource and revenue sharing: either by redistributing federal resources to the states or by redistributing resources from wealthier states to less wealthy ones. Since women tend to be poorer and more in need of government services for health and education, and since federalism will presumably entail moving greater responsibility for some of those services to the state level, it is crucial that states with fewer sources of revenue are supported by transfers that will allow them to meet these responsibilities. One form of transfer raises particular issues, however: conditional transfers by the central government to the states. When the money comes with strings attached, it tends to reduce the ability of states to make their own policy judgments about how to spend it.⁴⁶ This can be good or bad for women, depending on whether the central government or the states are likely to be more sympathetic to women's needs and concerned about promoting gender equality. In short, a gender equality perspective raises the question about the best balance between revenue sharing (which is general

⁴³ See David C Williams, 'Constitutional Design for Burma: The First Lecture' in David C Williams and Lian H Sakhong (eds), *Designing Federalism in Burma* (2005) 55, 73–90.

⁴⁴ UN Women, *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development* (2018), 20.

⁴⁵ For similar reasons, women have a particularly strong interest in the inclusion of positive rights to social and economic benefits in the constitution. See Susan Williams, 'Introduction: Comparative Constitutional Law, Gender Equality, and Constitutional Design' in Susan H Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, above n 2, 1.

⁴⁶ Anwar Shah, 'Comparative Conclusions on Fiscal Federalism' in Anwar Shah (ed) *The Practice of Fiscal Federalism: Comparative Perspectives* (McGill-Queen's University Press, 2007) 370, 391 ('In most case study countries, with a few notable exceptions, federal conditional grants use input-based conditionality. Such conditionality impairs state and local autonomy and is a source of conflict.').

and unconditional) and conditional transfer payments.⁴⁷ The answer to that question will vary in different countries (and perhaps in the same country at different times or on different issues), but this is one factor that can affect how federalism contributes to gender equality.

C Political Representation and Party Arrangements Must Increase Women's Voice and Attention to Gender Issues

Federalism offers the possibility for changing the political system at the level of the state in ways that will increase women's political representation and voice. In order to maximise this potential, the constitution must allow the states to create electoral systems that differ from the one used by the union government. On the subject of woman-friendly electoral systems, there are some clear guidelines that can be gleaned from global experience. Women's representation is higher in proportional representation (PR) systems, as compared to majority/plurality systems (FPP).⁴⁸ Women's representation is increased even more by the adoption of an electoral gender quota that works well with the particular electoral system.⁴⁹ Electoral funding is also an important variable. Women candidates (who are less likely to be personally rich and less likely to have powerful economic forces supporting them) are aided by campaign finance laws that limit the impact of money on elections.⁵⁰ Public funding for electoral campaigns could also reduce the resource strain of running the larger number of candidates required by a federal system. In short, to the extent that a federal system allows for the possibility of states adopting more woman-friendly political systems, it will help promote greater gender equality.

Pushing power down to the state level also has the potential to shift the nature of political parties in ways that might help or hurt women's equality. One result of federalism may be a rise in (or an increase in power for) identity-based parties that have a chance to win at the state level, even if they would be unable to compete effectively

⁴⁷ See Robin Boadway and Anwar Shah, *Fiscal Federalism: Principles and Practice of Multiorder Governance* (Cambridge University Press, 2009) 291–391 (Chapters on Revenue Sharing and Fiscal Transfers); regarding revenue sharing see 295 ('Standard revenue-sharing systems provide transfers in a lump-sum and unconditional way to the states. The states are left with full discretion over how to spend them.').

⁴⁸ See Rob Salmond, 'Proportional Representation and Female Parliamentarians' (2006) 31(2) *Legislative Studies Quarterly* 175, 190–2; (see also Pamela Paxton, Melanie M Hughes and Matthew A Painter II, 'Growth in Women's Political Representation: A Longitudinal Exploration of Democracy, Electoral System, and Gender Quotas' (2010) 49 *European Journal of Political Research* 25, 43 ('Compared to plurality-majority systems, countries with PR or mixed-PR systems consistently have significantly higher levels of women's political representation.').

⁴⁹ See Stina Laserud and Rina Taphorn, *Designing for Equality: Best-Fit, Medium-Fit and Non-Favourable Combinations of Electoral Systems and Gender Quotas* (1 March 2007) International Institute for Democracy and Electoral Assistance <<https://www.idea.int/publications/catalogue/designing-equality-best-fit-medium-fit-and-non-favourable-combinations>>.

⁵⁰ For a full analysis of these issues, see Lolita Cigane and Magnus Ohman, *Political Finance and Gender Equality* (August 2014) International Foundation for Electoral Systems <https://www.ifes.org/sites/default/files/political_finance_and_gender_equality.pdf>.

nationally.⁵¹ This development can be dangerous to women's equality if those parties define their identities, in part, in terms of the maintenance of traditional gender roles. But women's organisations can sometimes leverage identity politics to support gender equality agendas. For example, women's groups in Quebec, Canada, have been very effective at using Francophone identity politics as a basis for getting some of the most supportive child care and maternity policies in the country.⁵² Whether this synergy is possible is a question that will be answered differently in different contexts; the point here is that the impact of federalisation on gender equality depends on variables like whether women can build coalitions with identity-based parties or not.

D The Federal Structure Should Include Powerful Women's Policy Agencies at All Levels of Government and Facilitate Coordination Among Them

One of the more effective mechanisms for promoting women's equality is a strong women's policy agency as part of government (eg, a Ministry, Commission, or Bureau devoted to gender equality issues).⁵³ Such a body can be tasked with a variety of projects that will support the equality agenda: research into the causes and nature of gender inequality in the particular jurisdiction, formulation of policy proposals to address it, gender mainstreaming and gender budgeting to assess proposed laws and regulations, and public education.⁵⁴ Federalism complicates the operation of such an agency, however. In a federal system, women's policy agencies must exist at all levels of the government—state (and, possibly, local) as well as union—because law and policy affecting women will be made at all these levels. In order to be effective in this more complex system, these agencies must be networked in a way that allows them to share information and coordinate their activities.⁵⁵ There is also good evidence that such

⁵¹ Cf. William M Chandler and Marsha A Chandler, 'Federalism and Political Parties' (1987) 3 *European Journal of Political Economy* 87, 87–8 (describing how federalism facilitates the formation and strength of 'regionalist' parties). For an interesting description of how federal systems in Asia create a role for ethnic parties at the sub-state level, see Michael G Breen, 'Federalism and the Role of Multiethnic Political Parties in the Accommodation of Minority Ethnic Groups in Asia' (Paper presented at IPSA World Congress, Brisbane, Australia, July 2018) <<https://www.ipsa.org/sites/default/files/ipsa-events/wc2018/papers/paper-102651-2018-07-16t213946-0400.pdf>>.

⁵² Rianne Mahon and Cheryl Collier, 'Navigating the Shoals of Canadian Federalism: Childcare Advocacy', in Haussman, Sawyer and Vickers, above n 13, 51, 65.

⁵³ See Dorothy E McBride and Amy G Mazur, 'Women's Policy Agencies and State Feminism', in Georgina Waylen et al (eds), *The Oxford Handbook of Gender and Politics* (Oxford University Press, 2013) 654, 672 ('This chapter has shown the various ways women's policy agencies through state feminism are important sites of representation, policy change, and ultimately democratization.'). 669 ('the analysis confirmed the significant independent influence of agencies on state response to movement demands.').

⁵⁴ For a comprehensive exposition of the forms and functions of Women's Policy Agencies of 151 countries worldwide, see generally Christine Scheidegger, *Institutional Architecture for Women's Empowerment and Gender Equality Worldwide* (2014) <https://www.academia.edu/9314562/Institutional_architecture_for_womens_empowerment_and_gender_equality_worldwide_Institutional_diversity_in_151_countries>.

⁵⁵ For a good example of such effective networking, see Lang, above n 34, 519 ('Nearly 1,900 local Women's Equality Offices work in cities and counties, networking through their national association the Bundesarbeitsgemeinschaft kommunaler Frauenbüros (BAG). They frequently cooperate with equality officers in parties, universities, and large private businesses.').

policy agencies are improved by keeping a close connection to civil society women's organisations with strong grass-roots support.⁵⁶ One goal of women involved in the creation of a federal system should be the creation of such strong agencies at each level of government and the provision of resources and incentives to keep them connected to each other and to civil society organisations.

E Intergovernmental Mechanisms Must Include Women's Voices and Be Open to Women's Influence

In a federal system, where decisions are made by both union and state governments, there is a need for communication and coordination between the different levels of government and between the multiple states. Without such coordination, there is tremendous potential for conflicting or competing policies that will reduce effective governance. As a result, most federal systems have a variety of intergovernmental mechanisms to facilitate communication and coordination. These range from associations to bring together executive officials from different states and the union for consultation (eg, First Minister's Meetings in Canada,⁵⁷ the National Development Council in India,⁵⁸ or the Council of Governors in the US), to bodies to deal with natural resource and environmental issues that cross state boundaries (eg, Interstate River Tribunals in India),⁵⁹ to bodies primarily for sharing information and ideas and mobilising political influence (eg, the Conference of Mayors in the US).

In many cases, these bodies are less formal, and less subject to democratic political controls, than official government bodies.⁶⁰ And because they tend to draw their members from among current officeholders (particularly in executive branch positions), they often have few women members. As a result, women's voices—whether as participants or as constituent watch-dogs—may be weak in intergovernmental mechanisms.⁶¹ Thus, women involved in transitions to federalism should raise questions about the structure and openness of these important institutions. For example, women might push for more formal structures that include gender quotas for the membership, or inclusion of members from civil society. Or they might insist on public access to information about the activities of the body or a public right to submit information to the body. In thinking about how federalism will work for women, it is important not to ignore these institutions.

F The Federal Structure Should Facilitate Global-to-Local Interactions, Which Are a Fruitful Source of Energy, Ideas, and Resources for Gender Reform

Finally, one of the interesting effects of federalism may be to create an opening for greater global-to-local interactions, which can, in turn, be an important impetus for

⁵⁶ See McBride and Mazur, above n 53, 669.

⁵⁷ See Government of Canada, *Intergovernmental Relations in the Canadian Context* (2018) <<https://www.canada.ca/en/intergovernmental-affairs/services/relations-canadian-context.html>>.

⁵⁸ See Chanchal Kumar Sharma, 'Intergovernmental Coordination Mechanisms in India: A Review' (2011) 15(2) *South Asian Journal of Socio-Political Studies* 40.

⁵⁹ Ibid.

⁶⁰ See Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems* (Oxford University Press, 2015).

⁶¹ See Gwen Gray, 'Women, Federalism and Woman-Friendly Policies' (2006) 65 *Australian Journal of Public Administration* 34.

gender equality reform. When power is decentralised to state and/or local governments, those governments may wish to develop relationships with governments outside of the country. Such relationships can take many forms, eg sister cities, states seeking to sign international human rights conventions that the nation as a whole has not signed, states developing cultural and economic exchange programs with foreign countries.⁶² This sort of transnational contact or influence has been a potent catalyst for feminist reform in many places.⁶³ For example, feminist organisations in Latin America have supported each other across country lines to bring cases to the InterAmerican Court of Human Rights advancing women's equality.⁶⁴ It is in the interest of women for the form of federalism to allow, or even encourage, these cross-national linkages and the influence of international law.

There are a variety of ways to build a supportive environment for these connections into the federal structure. For example, tertiary federalism—including constitutional protection for a third, local layer of government⁶⁵—can help to strengthen the ability of cities to engage in transnational connections. It would also be possible to explicitly authorise states to have certain kinds of relations with foreign governments, such as cultural exchange and economic development ties, in the list of state powers in the federal constitution.⁶⁶ And the federal system could allow states to write their own constitutions and to incorporate international law into them, either as an interpretive

⁶² For a description of the range of such connections, see Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry' (2006) 115 *Yale Law Journal* 1564, 1647–52.

⁶³ See Julie C Suk, 'An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home' (2017) 28 *Yale Journal of Law and Feminism* 381 (discussing the convergence between foreign models of gender equality and US state and local efforts to adopt stronger equal protection models than at the federal level).

⁶⁴ See Christiana Ochoa, 'Guatemalan Transnational Feminists: How Their Search for Constitutional Equality Interplays with International Law', in Susan H Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, above n 2, 248.

⁶⁵ See, Nico Steytler, 'Comparative Conclusions', in Nico Steytler and John Kincaid (eds), *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen's University Press, 2009) 406–11.

⁶⁶ This could be an important addition to clarify state's capabilities, given that the foreign affairs power is almost always assigned to the central government in federal systems. See, eg, Grundgesetz (Basic Law) ch II art 32 s 3, translation at <https://www.gesetze-im-internet.de/englisch_gg/index.html> ('Insofar as the Länder have power to legislate, they may conclude treaties with the consent of the Federal Government'); see also Bundesverfassungsgesetz [B-VG] [Constitution] BGBl No 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No 102/2014 art 10(3), <https://ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html> (Austria) ('Before the Federation concludes state treaties which make necessary implementing measures in the sense of art 16 or affect the autonomous sphere of competence of the provinces in another way it must give the provinces the opportunity to give their opinion. If the Federation is in possession of a uniform opinion of the provinces, the Federation is bound thereby when concluding the state treaty. The Federation may depart therefrom only for compelling foreign policy reasons; it shall without delay advise the provinces of these reasons.').

aid⁶⁷ or as part of state law.⁶⁸ A federal system that recognises and supports these global connections is likely to be more open to gender equality reforms.

V APPLYING THIS APPROACH TO MYANMAR

The current peace process in Myanmar is primarily focused on federalism issues. The conflict in this country, which has been going on for over fifty years, has its roots in the resistance of Burma's ethnic minority groups to dominance by the Burman majority.⁶⁹ During the period of military dictatorship, from 1962 until the adoption of the 2008 Constitution and the elections in 2010, the military government pursued a consistent policy of destruction of minority ethnic cultures and peoples. The military offensives against the ethnic groups targeted civilian populations and led to massive numbers of refugees and internally displaced people.⁷⁰ During this period, the teaching of ethnic minority languages was banned, the religious freedom of the many non-Buddhists in some of the ethnic groups was restricted, and the government adopted an explicit policy of 'Burmanization'.⁷¹ Although all of the people in Burma suffered under the military regime, the ethnic minorities were distinctively oppressed and they have been at the centre of the armed resistance.

Once the new Constitution was adopted and elections were held, the (nominally civilian) government and the military began a process of negotiation with the armed resistance groups. Several of these groups signed a Nationwide Ceasefire Agreement (NCA) and there is an ongoing process of dialogue through Union Peace Conferences (held on a somewhat erratic schedule) that is intended to result in a Comprehensive Peace Accord (CPA) that will end the civil war.⁷² Since the 2015 elections, in which

⁶⁷ As in the South African Constitution, see *Constitution of the Republic of South Africa Act 1996* (South Africa) art 39(1) ('When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law ...'), art 233 ('When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.').

⁶⁸ As in the Costa Rican Constitution, see art 7 (1949, rev 2011) ('The public treaties, the international agreements and the concordats, duly approved by the Legislative Assembly, will have from their promulgation or from the day designated by them, authority superior to that of the laws.').
<https://www.constituteproject.org/constitution/Costa_Rica_2011.pdf?lang=en>.

⁶⁹ See David C Williams, 'Changing Burma From Without: Political Activism Among the Burmese Diaspora' (2012) 19 *Indiana Journal of Global Legal Studies* 121, 124–7.

⁷⁰ See John Bray, 'Ethnic Minorities and the Future of Burma' (1992) 48 *The World Today* 144, 144 ('This year the Burmese army has launched offensives against Karen, Kachin, Naga and Rohingya insurgents ... Burma's civil war is an international issue as much as a domestic one ... because of the flood of refugees who have fled to neighbouring countries.').; see *ibid* 126–7.

⁷¹ Josef Silverstein, *Burmese Politics: The Dilemma of National Unity* (Rutgers University Press, 1980) 51 ('What moved them [the ethnic minorities] were their common fears of Burmanization, loss of cultural identity, interference in their affairs by the national government and a belief that the Burmans were creating an internal colonial system in which they would not share the wealth of the country.').

⁷² For a description of the history of the peace process, see Myanmar's Peace Process: Getting to a Political Dialogue, Briefing Paper #149, International Crisis Group (19 October 2016) at

power shifted, the government negotiators have represented the National League for Democracy (NLD) party, under the leadership of Aung San Suu Kyi, but the army remains a third partner in the negotiations and is effectively independent of the control of the civilian government. Meanwhile, some of the most important armed groups are not yet parties to the NCA and fighting continues in Kachin and Shan states,⁷³ along with the military attacks on the Rohingya in Rakhine state, which have received more international attention.⁷⁴ In short, the transition to a democratically elected, civilian government has not ended the war in Myanmar: the current peace process is difficult and imperfect, but it is still the greatest hope for an end to the longest running civil war in the world.

The ethnic groups who have been fighting for decades have never been fighting only for democracy: simple majoritarian democracy will not prevent their oppression. Their struggle has always been for sufficient autonomy to guarantee them self-government.⁷⁵ In the past, many believed that only secession and the formation of their own countries would achieve this goal—and some still believe this.⁷⁶ But the current peace process—in which a number of the ethnic armed organisations (EAOs) are in dialogue with the government and the army—is an effort to find a form of federalism that will provide them with sufficient self-determination to feel safe within the nation of Myanmar and end the conflict. Thus, the central issue in the peace negotiations is federalism. Our Center for Constitutional Democracy has been advising the ethnic nationality groups for over 17 years. We have worked with them to develop constitutional solutions that could help them achieve federalism and peace. The question now is whether the current peace process will succeed in adopting the constitutional changes necessary to bring an end to the war.⁷⁷

<<https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-s-peace-process-getting-political-dialogue>>.

⁷³ See Oliver Slow, 'Fighting in Kachin Highlights Myanmar Civil War Worries', *Voice of America* (online), 26 April 2018, <<https://www.voanews.com/a/kachin-fighting-myanmar-civil-war/4365603.html>>; 'Myanmar: 19 Die in Fresh Clashes Between Army and Rebels in Shan State', *The Guardian* (online), 12 May 2018, <<https://www.theguardian.com/world/2018/may/12/myanmar-19-die-in-fresh-clashes-between-army-and-rebels-in-shan-state>>.

⁷⁴ For a sampling of the extensive press coverage of the Rohingya crisis, see 'Myanmar Rohingya: What You Need to Know About the Crisis', *BBC News* (online), 24 April 2018, <<https://www.bbc.com/news/world-asia-41566561>>; 'The Rohingya Crisis', *CNN*, <<https://www.cnn.com/specials/asia/rohingya>>; Eleanor Albert, 'The Rohingya Crisis', *Council on Foreign Relations*, 20 April 2018 <<https://www.cfr.org/background/rohingya-crisis>>.

⁷⁵ See David C Williams, 'Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order', (2009) 87 *Texas Law Journal* 1657, 1660.

⁷⁶ See Christina Fink, *Living Silence: Burma Under Military Rule* (Zed Books, 2001) 28 (describing the history of secession claims); David C Williams, 'Changing Burma From Without: Political Activism Among the Burmese Diaspora' above n 69, 1673 (describing how some groups still seek secession).

⁷⁷ For a discussion of how the CPA can make constitutional change, see David C Williams, 'Can the Constitution of the Republic of the Union of Myanmar Be Changed Outside the Legislature and Outside the Normal Amendment Process?' (unpublished paper on file with the author).

At the same time, women in Myanmar suffer from systematic gender inequality, as in much of the rest of the world. Women have been particular victims of the civil war, in which rape has been used as a tool of 'ethnic cleansing' by the military in some areas.⁷⁸ Women face discrimination in education⁷⁹ and employment⁸⁰ and are massively underrepresented in political office.⁸¹ The women's organisations with whom I have worked, particularly the Women's League of Burma (WLB),⁸² care about the federalism issues in the same way and for the same reasons as their male ethnic colleagues. But they have an additional set of concerns, as well. First, they want women's voices to be part of the decision-making process on constitutional reform. Currently, very few of the decision makers in the peace process are women.⁸³ Second, they want to make sure that federalism is adopted in a way that benefits women as well as men. They do not want power shifted to state governments, only to discover that those governments have no women in them and little concern about the needs and desires of women. And third, they want the process of constitutional reform to pay attention to the gender

⁷⁸ See eg, Katya Cengel, 'Rape is a Weapon in Burma's Kachin State, but the Women of Kachin Are Fighting Back', *Time* (online), 11 February 2014, <<http://time.com/6429/burma-rape-in-kachin/>>; Rick Gladstone, 'Rohingya Were Raped Systematically by Myanmar's Military, Report Says', *New York Times* (online), 16 November 2017 <<https://www.nytimes.com/2017/11/16/world/asia/myanmar-rohingya-rapes.html>>.

⁷⁹ While women are actually more likely to have higher education than men in Burma, there is overt discrimination to keep them out of certain subjects in universities. See Samantha Michaels, 'Suu Kyi Criticizes Gender Bias at Burma Universities', *The Irrawaddy* (online), 6 December 2013, <<https://www.irrawaddy.com/news/burma/suu-kyi-criticizes-gender-bias-burma-universities.html>>.

⁸⁰ For a comprehensive assessment of the status of women in Myanmar, see Gender Equality and Women's Rights in Myanmar: A Situation Analysis (Report by Asian Development Bank, United Nations Development Programme, United Nations Population Fund, and the United Nations Entity for Gender Equality and the Empowerment of Women) (2016) <http://mm.one.un.org/content/dam/unct/myanmar/docs/unct_mm_UNWomen_Report_Gender%20Situation%20Analysis.pdf>.

⁸¹ See statistics on pp 28–9.

⁸² The WLB is an umbrella organisation, bringing together representatives from the many women's groups that are associated with particular ethnicities in Burma. It includes women's groups from both ethnic minority and majority (Burman) communities. It was based in Chiang Mai, Thailand for many years during the military junta, but has recently moved its headquarters inside the country, to Yangon. The WLB, because of its close ties to ethnic groups and its history of refugee leadership, has a special concern for the women impacted by the civil war and sees its role in the peace process as one of its central priorities. For more information about the organisation, see <<http://womenofburma.org/aboutus/>>.

⁸³ With a female representation of only 17 percent, women accounted for 120 out of the 700 delegates at the most recent UPC, 40 of them being lawmakers or government officials, eight being members of the Tatmadaw, 28 representing the political parties, 31 coming from the EAOs, and 13 acting as civilian representatives. See Nyein Nyein, 'Women Playing Larger Role at This Year's Peace Conference', *The Irrawaddy* (online), 15 July 2018, <<https://www.irrawaddy.com/news/burma/women-playing-larger-role-years-peace-conference.html>>. Female underrepresentation has been even more severe on the UPDJC (one of the central decision-making bodies in the peace process), where, at least as of 2017, only eight out of 75 members were women. Roslyn Warren et al, 'Women's Peacebuilding Strategies Amidst Conflict: Lessons from Myanmar and Ukraine' (Georgetown Institute for Women, Peace and Security, 2018) <<https://giwps.georgetown.edu/wp-content/uploads/2017/01/Womens-Peacebuilding-Strategies-Amidst-Conflict-1.pdf>>.

implications of the changes contemplated. They want gender equality to be one of the goals of the reforms and fully part of the analysis, rather than simply added on as window dressing.⁸⁴

The focus of the remainder of this paper is on the second concern: making sure that Burma gets a form of federalism that promotes gender equality rather than hindering it (or simply failing to help with it). Using the list of issues generated in the prior section, this part of the paper will summarise a few of the more important ways that a concern for gender equality might lead to particular forms of federalism in Burma and to a particular agenda for the women's groups that are trying to participate in the peace process. This is not an exhaustive analysis of a woman-friendly form of federalism for Burma: there are many additional issues and details that would need to be filled in to provide such a complete case study.⁸⁵ Instead, this is simply an illustration of the usefulness of the guidelines offered in the earlier section of this paper. The major conclusion of this section will be that there is substantial overlap between the goals of feminists and the goals of ethnic armed groups in terms of the types of federalism they want and that they could work together for certain specific federal arrangements. But there are also some issues of concern to women that are unlikely to be prioritised by the EAOs and on which groups like the WLB will need to focus and mobilise independently.

A State Powers

The division of powers between the union and state governments in the current Constitution of the Republic of Myanmar gives few important powers to the states.⁸⁶ One of the central negotiating issues in the peace process is the transfer of some of the union powers to state governments. The analysis in the last section suggests that, in these negotiations, gender equality will be benefitted if the powers given to the states do not track gender roles and stereotypes. Some of the areas of competence that the ethnic nationalities want transferred to state power might raise this concern about the 'feminisation' of state powers. For example, because they are concerned to preserve their ethnic cultures, they would like the states to have control over education, culture, and language.⁸⁷ But the ethnic nationality groups also want the state governments to control natural resources and economic development within their borders and they want state governments to have the power to create and maintain their own security forces (eg militias and police). These are, of course, much more controversial claims of state power and will be harder to achieve through the negotiating process. But, if the states got these sorts of powers, the division of powers between state and union would be much less likely to reflect traditional gender roles. This analysis suggests that activists concerned about creating a form of federalism friendly to gender equality should support the ethnic

⁸⁴ The first and third of these goals are not addressed in this paper. For a discussion of these concerns, please see the 'WLB Response to the Gender Equality Principles Adopted at the UPC in August 2018 (paper on file with the author).

⁸⁵ For an interesting effort offering some of the details about specific divisions of power and reaching similar conclusions on some issues, see Forster, above n 3.

⁸⁶ Cf *Myanmar Constitution 2008* sch 1 with sch 2.

⁸⁷ This claim, and others in this section of the paper describing the positions of the EAOs in the peace negotiations, are based on my years of working with these groups on constitutional reform issues. There are few publicly available sources on the positions of the parties in the peace negotiations, but our Center has been talking to the leaders of these groups for over a decade and those conversations are the basis for my descriptions of their positions.

nationalities' demands for the transfer of these sorts of powers to state governments. A form of federalism in which states have power over resources, development and security – along with education, health and culture – is a common goal for feminists and ethnic nationalities.

B Resource and Revenue Sharing

Another of the difficult issues on the negotiating table concerns the distribution of revenues from natural resource development and from general taxes. Currently, the vast majority of the revenue flows to the union government. The union government controls all natural resource development⁸⁸ and, indeed, large economic development of every kind.⁸⁹ As a result, the ethnic minorities have seen very little of the benefit of such development, despite the fact that most of the natural resources are located in the states where the ethnic minority populations live. The union also controls all of the major sources of tax revenues.⁹⁰ As a result, shifting powers to the state governments will be useless unless there is also a shift in the revenues to support the exercise of such powers. The EAOs in the peace negotiations have, therefore, also raised the issue of adding to the Constitution a shared revenue scheme that will give them a guaranteed percentage of the money generated both by taxes and by development.⁹¹ As discussed earlier, the financial ability of state governments to carry out their responsibilities for social welfare projects is of particular concern to women and of particular importance to promoting gender equality. So, again, this is an area of common ground where women's groups and others concerned about equality issues could add support to the claims by ethnic minority groups for greater state revenues.

In addition, one of the issues on which the different ethnic states are not in agreement concerns the extent to which revenue from natural resource development should be shared among all the states or remain in the state where the resource was located. Because some of Burma's states are very resource rich (eg, natural gas in Rakhine State, jade in Kachin State) while others have few exploitable resources (eg, Chin State and Karenni State), they have very different interests on this subject. Most of the ethnic representatives in the peace process agree that there should be some redistribution of such revenues in the interest of equalisation across states, but there is no consensus about how much of the revenues should be used in this way. Women's groups and others concerned about equality (including, but not limited to, gender equality) could

⁸⁸ See *Myanmar Constitution 2008* art 37 ('The Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union ...').

⁸⁹ *Myanmar Constitution 2008* sch 1.

⁹⁰ See *ibid.*

⁹¹ They would also like a greater role in the design and implementation of tax and development schemes, particularly with respect to the natural resources located within their borders. In other words, they do not just want a share of the profits, they also want to be able to ensure that the programs are carried out in ways that respect the customs and community identities of their people. For example, they would like to prevent the government from destroying intact communities and scattering their population in order to build dams. See, eg, 'Myanmar Urged to Review Hydropower Dam Projects Seen Damaging to Rural Communities', *Radio Free Asia* (online), 10 July 2018, <<https://www.rfa.org/english/news/myanmar/myanmar-urged-to-review-hydropower-dam-projects-07102018170207.html>>.

be useful in bringing the ethnic states together if they entered this debate and pressed for larger equalisation funds.

C Electoral Law and Party Politics

Women suffer from low political representation at all levels in the government of Myanmar. In the national Parliament, as of the 2015 elections, there are 23 women in the upper house and 44 in the lower house. This represents a total of 13.7% of all elected MPs. When the military-appointed MPs are added (25% of every legislative body),⁹² the female percentage is 10.5% of all MPs. In the state/region level parliaments, 84 women were elected in 2015, bringing the female percentage of elected representatives to 12.7% and the female percentage of total MPs (including the military appointees) to 9.7%.⁹³ Moreover, currently, the structure and electoral system for state governments is specified in the union-level Constitution. That structure calls for a first-past-the-post electoral system for the state legislatures as well as the national one and fails to include any form of gender quota.⁹⁴

One of the central demands of the ethnic groups negotiating in the peace process has been for states to have the power to write their own state constitutions. These groups want the states to be able to choose a form of government and an electoral system different from the national government. There are many good reasons to allow the states to make these choices for themselves – and to make different choices from the union⁹⁵ – but one of those reasons is to promote gender equality. If the states can choose their own systems, some of them might choose a proportional representation electoral system, which would be likely to lead to more women in the state legislature. Some states might also choose to adopt explicit gender quotas to guarantee a certain level of representation to women. Indeed, some of the draft state constitutions on which people have been working for over a decade include both of these elements.⁹⁶

If the states have no power to write their own constitutions, there will be no chance for greater representation for women until and unless the union Constitution is changed in these ways. And under current conditions, such a change at the national level is unlikely. A change to a proportional representation system would reduce the majority premium currently enjoyed by the NLD party and so is not favoured by the

⁹² See *Myanmar Constitution 2008* arts 141(b) (Upper House), 109(b) (Lower House), 161(d) (state and region legislatures).

⁹³ See Shwe Shwe Sein Latt et al, 'Women's Political Representation in Myanmar: Experiences of Women Parliamentarians 2011-16' (Asia Foundation, 2017) vol ii.

⁹⁴ See *Myanmar Constitution 2008* arts 109(a), 141n(a)(national), 161(a)(state); 'Myanmar Election Guide, Democracy Assistance and Election News' <https://www.google.com/search?client=firefox-b-1-ab&ei=YgrCW6-cEYm6ggfvnJaoCg&q=PR+electoral+system+in+Amyotha+Hluttaw&oq=PR+electoral+system+in+Amyotha+Hluttaw&gs_l=psy-ab.3...28667.33422..34306...0.0..0.134.409.3j1.....0....1..gws-wiz.....0i71.MqDcbEX4k3s>.

⁹⁵ Most of these reasons have to do with the differences between the states in terms of size and diversity and their ability to design governing structures that fit their specific characteristics. These reasons would, of course, benefit women in the states along with their male counterparts. The point in text is simply that women have an additional reason to support the ability of states to write their own constitutions: it gives them a chance to create more woman-friendly conditions in the electoral systems of their states than the system required by the current union Constitution.

⁹⁶ See state constitution drafts on file with the author.

government.⁹⁷ And Aung San Suu Kyi has been consistently opposed to gender quotas.⁹⁸ As a result, the best hope for an increase in women's political representation in the near future lies in the possibility of states writing constitutions that make different choices on these subjects.⁹⁹ Again, this is an area where women's organisations and others concerned about gender equality can make common cause with the ethnic nationalities in the current peace negotiations.

The situation with respect to the character of political parties may also present opportunities. There are ethnically based parties in many of the states and, if the power of state government increases, then it is likely that those parties will play a significant role in some of the state governments. The women's movement has also been organised largely (although not completely) around ethnic identity. For example, the member organisations of the WLB include the Burmese Women's Union, the Karen Women's Organization, the Shan Women's Action Network, and several other groups identified with particular ethnic groups.¹⁰⁰ The question then is whether women's organisations can form alliances with ethnic political parties in which the women's support is not simply taken for granted, but instead reciprocated by adoption of woman-friendly policies by the parties. The women's groups may need to demonstrate both the usefulness of their support—for example, in terms of getting out the vote—and their willingness to shift their support to a different party if they are not given certain policy commitments. Under current circumstances, this would be difficult, because the need for ethnic solidarity is so powerful in the peace process that there is no credible threat of shifting support. But, if the federalism agenda makes progress, this kind of bargaining may become easier within the context of a newly powerful state politics freed from the bipolar orientation (Burman/ethnic minority) that has dominated ethnic politics.

D Intergovernmental Mechanisms and Women's Policy Agencies

These two aspects are less useful to women in the present situation in Myanmar and will probably not provide a significant opportunity for shaping the constitutional negotiations. The policy agencies for women's affairs/gender equality are currently quite weak in Myanmar. At the union level, the Myanmar National Committee for Women's Affairs is chaired by the Minister of Social Welfare, Relief and Resettlement. This body does not have the status or resources of a Ministry. Instead, it is a policy-making mechanism that is intended to advise the Ministries and government on issues of concern to women. One measure of the insufficient commitment to gender equality is that the Minister chairing the Committee is a man: Dr Win Myat Aye.¹⁰¹ The National

⁹⁷ See Nicole Loring, *Political Twist: A Combined Electoral System in Myanmar* (December 2014), <http://www.academia.edu/9676238/Political_Twist_A_Combined_Electoral_System_in_Myanmar>.

⁹⁸ 'NLD Won't Support Quota for Women in Political Positions', *The Irrawaddy* (online), 3 July 2018, <<https://www.irrawaddy.com/news/burma/nld-wont-support-quota-for-women-in-political-positions.html>>.

⁹⁹ Devolving power to the states might also give them more control over the structures and electoral rules of local governments. Under current law in Myanmar, Ward and Village Tract Administrators, who are important local officials, are elected not by all citizens, but only by heads of households (who are presumed to be men). As a result, women neither vote for nor hold these positions. See Forster, above n 3, 15.

¹⁰⁰ See Women's League of Burma website <<http://womenofburma.org/wlbmembers/>>.

¹⁰¹ Indeed, Aung San Suu Kyi has appointed no women to cabinet posts since her party won the 2015 elections. See Fiona Macgregor, 'Myanmar's New Cabinet: National Reconciliation

Strategic Plan for the Advancement of Women 2013–2022 (NASPAW), is the primary policy guideline for the work of the Committee, and the government in general, on gender equality issues. The plan is based on the priority areas from the Beijing Platform for Action, including livelihoods and poverty reduction, education and training, health, halting violence against women, emergencies/armed conflict, economy, decision-making, institutional mechanisms, human rights, media, environment and the child.¹⁰² There has been little policy activity to implement the plan. In addition to the Committee, there is the Myanmar Women's Affairs Federation, a government-funded and staffed nongovernment organisation, and the Myanmar Maternal and Child Welfare Association, which promotes maternal and child health in remote areas of the country.¹⁰³ There are few if any women's policy agencies at the state or local levels of government. Women's policy agencies are unlikely to be a topic considered in the peace process so this is not an area for focus at this time. But, once state governments are given more extensive powers and resources, it will be important to push for the creation of a network of policy agencies that can be a more effective engine for gender equality reform.

Similarly, there are few intergovernmental bodies currently operating in Myanmar. There is little need for them under the present conditions, when state governments function largely as arms of the union government. If the federalism agenda makes progress, then this need will grow and there may well be bodies created to meet it. For example, if the peace negotiations yield some form of shared competence over natural resources, then there will need to be a body to coordinate between state and union governments over this issue. At that point, it will be necessary to consider how such a body can be constituted in a way that promotes gender equality. As discussed earlier, the goals would be both to guarantee women's participation and to ensure that the body is open to public scrutiny.

E International Law and Global/Local Cooperation

The most likely mechanism for increasing the powers of local governments and for incorporating international law into the domestic legal system in Myanmar is, again, the writing of state constitutions. If states have the power to write their own constitutions, with structures and rules different from the union, then some of them will certainly choose to create local governments with some guaranteed powers. Indeed, the current conversations about state constitutions in many places in Burma are focused on the need for local autonomy to accommodate the ethnic diversity within many of the states.¹⁰⁴ Some states may also choose to include references to international law or constitutional principles from other systems as part of their own domestic legal system. As discussed above, both of these moves could be helpful to the promotion of gender equality. So,

Without Equality, *Myanmar Times* (online), 25 March 2016 <<https://www.mmmtimes.com/opinion/19660-myanmar-s-new-cabinet-national-reconciliation-without-equality.html>>.

¹⁰² See Sam Yamin Aung, 'Social Welfare Minister: "I will always campaign for gender equality"', *The Irrawaddy*, 8 March 2017.

¹⁰³ For the former, see <<http://www.mwaf.org.mm/en/about-us>>, for the latter, see <<http://www.mm-cwa-myanmar.org/>>.

¹⁰⁴ This observation is based on my own work with state constitution drafters in Shan State and Tanintharyi Region in May and August of 2018.

once again, this analysis suggests that those concerned about this goal should support the demand for states to have the power to draft their own constitutions.

In short, the type of federalism that is likely to promote gender equality in Myanmar is a form that includes: (1) more extensive state powers that are culturally coded as both feminine (eg, education and culture) and masculine (eg, economic development and security), (2) a substantial increase in revenues flowing to state governments and under their control, (3) a more equal distribution of the benefits of natural resource development across the different states, and (4) an extensive power in the states to write their own constitutions. If some of these federalism reforms can be achieved, then the door will be opened to further changes to improve gender equality. Some of those later changes would be at the state level, such as the adoption of proportional representation electoral systems and electoral gender quotas, the creation of strong women's policy agencies, and the incorporation of international human rights standards into state law. Other changes might be at the union level, such as the design of intergovernmental bodies to facilitate cooperation that are open to women. If this form of federalism can be created in Myanmar, then it has the potential to promote the long-term goal of gender equality.

VI AN AFTERTHOUGHT

This paper has argued that there is no general connection between federalism and gender equality in either a positive or negative direction. Instead, federalism can help or hurt with the promotion of gender equality depending upon the way the specific aspects of the federal system interact with the political, social and economic context of the country. I have suggested a list of some of the specific aspects of federal systems that create the potential for harm or benefit to gender equality and applied those aspects to the current situation in Myanmar, in which there are ongoing negotiations about federalism reforms. In this last section, I want to take a step back and suggest that there might be a more general connection between federalism and gender equality that transcends the specific aspects highlighted here. This connection operates at a very theoretical level and I am not sure that it should have any impact on decisions by feminists to support or oppose federalising moves in general or in any particular country. But I raise it here because I think it highlights a different way of thinking about the relationship between the concepts of federalism and gender equality that may prove useful for some purposes.

My suggestion is that the connection between these two ideas is not at the level of institutional design, but instead operates through the orientation or character of citizens. Federalism is a set of complex and sometimes technocratic institutional arrangements, but it can also be a kind of faith. And some of the most persuasive proponents of federalism are those people who plainly experience it as a deeply resonant world-view, and not merely as a bureaucratic arrangement. For people like Daniel Elazar and Vince Ostrom, federalism captures something foundational about politics. They saw in federal arrangements a blending of two of the most basic—albeit, perhaps inconsistent—political goals: protection for human freedom and communal solidarity. The division of powers between levels of government—like the separation of powers between branches of government—is one of the primary means of protecting freedom.¹⁰⁵ Indeed, it may

¹⁰⁵ See Vincent Ostrom, *The Meaning of American Federalism: Constituting a Self-Governing Society* (ICS Press, 1994).

be that human freedom lives primarily in the interstices created by the division of power. At the same time, political community can be more than merely instrumental; it can be an experience of solidarity in which we try to move together toward a shared future.¹⁰⁶ One way of understanding federalism is as a theory for reconciling these two goals, not only through certain institutional arrangements, but also through the cultivation of a particular orientation or character among citizens.

In order to make federalism work, citizens need several characteristics. They must be flexible and empathetic because they will need to negotiate issues at the federal level with people who have very different values and world-views. They must be willing to share their country with those who have such different views. They must be able to work together with people whose visions pose a challenge to their values without descending into cynicism or dogmatism. Partly this is simply about accepting that we will be different from each other and allowing communities in other subnational units to seek solidarity in their own ways. But partly it is about being committed to moving forward together with those different communities and struggling over which parts of our shared life will apply to all of us and which can be the basis for community variation. Federal citizens must be willing to tolerate ambiguity – because all federal systems include some uncertainty about boundaries – and even contradiction. At the heart of federalism is a commitment to work together with people with whom we disagree. This is not a mere *modus vivendi*; it is a commitment to living together that makes us willing to tolerate the, sometimes painful, challenges that we pose to each other. A pragmatic way of living together must be more important to us than clarity or certainty or consistency.¹⁰⁷

It is this orientation, this character of citizens, which makes it possible for federalism to bring together freedom and solidarity. Because we see ourselves and each other in this way, we can pursue a shared destiny while leaving the space for difference and dissent and freedom. The inevitable friction generated by federal institutions is the context in which we learn this orientation. The success of federalism may depend, then, not on any particular institutional arrangement, but on the inculcation of this character in citizens. For Elazar, and to a lesser degree Ostrom, this was the heart of the vision.¹⁰⁸

¹⁰⁶ See Daniel J Elazar, *Exploring Federalism* (University of Alabama Press, 1991) 5 ('In essence, a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on a mutual recognition of the integrity of each partner and the attempt to foster a special unity among them.').

¹⁰⁷ This model of character may connect in interesting ways to the 'second-order diversity' Heather Gerken has explored. See Heather Gerken, 'Second-Order Diversity' (2005) 118 *Harvard Law Review* 1099. Her analysis is focused on diversity between governance institutions (ie different sorts of institutions that allow different groups within the population to control certain decisions, as opposed to demanding diversity – in the form of mirror representation – within each institution). It may be that such second-order diversity is a good way to encourage the type of citizen character I am describing, or that this type of character is useful to allow second-order diversity to do the work Gerken describes. Her description of federalism as an example of this sort of diversity suggests such a connection. I am grateful to Rosalind Dixon for pointing out the possible connection here.

¹⁰⁸ See Elazar, above n 106, 12 ('The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life.').

And I would like to suggest that this vision has a connection to gender equality. It is not a simple connection: federal citizens of this sort would not necessarily embrace the value of gender equality and might have radically different conceptions of it, even if they did. But there is a less direct connection between this orientation and the promotion of gender equality. Gender equality is a challenge to all forms of traditional culture, almost everywhere in the world. It is an idea that makes people uncomfortable and that disrupts their expectations and social patterns. And, at the same time, gender equality is a call to solidarity across a difference that has often blocked the capacity for empathy. Citizens who are willing to engage with such challenges, willing to recognise the possibility that an unfamiliar value might make a claim on them for solidarity, able to live with the uncertainty and contradiction generated by the social negotiation of such challenges, are crucial to the long-term success of gender equality reforms.

Obviously, the adoption of federal institutions does not guarantee that citizens will develop this federal character. And, indeed, there may be no federal system in existence where this orientation has been fully achieved. But recognising that this character for citizens is a deep part of the appeal of federalism is a useful corrective to the common dismissal of federalism as an excuse for traditional cultures to resist modernisation. In fact, federalism—understood as based on this orientation—precludes any simple resistance and demands engagement. We owe to each other nothing less than freedom and solidarity. And that commitment may be the strongest foundation on which we can build a future in which women are fully equal.