Guaranteeing Equality Between Women and Men in the Constitution

(Drafting and Contents)

A Paper on Women’s Rights in the constitutions of a number of countries that went through transitional phases

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Special thanks

are due to Khadiga Hafez and Valentina Loukita for their contribution to the research.
Egypt, at present, is going through a critical legal situation regarding the Constitution and the time-frame for its drafting, as we find ourselves caught between the hammer of time and the anvil of guaranteeing rights. To overcome this predicament, some constitutional experts try to mitigate this dilemma by improving the image of the 1971 Constitution and selling it to the public, claiming that its first four chapters do not need great effort, and that what is actually needed is to regulate the President’s powers and responsibilities.

This, in fact is an over-simplification and a distorted deprecation of the Egyptian Revolution, as if it had erupted only out of retaliation against Mubarak or whoever was going to replace him, ignoring the fact that it erupted against the aggressive monopolization of power whether it is that of the President or that of the Parliament. Hence, we need a thorough and comprehensive reading of the Constitution, not working on it in a fragmented manner, by omitting a word here or adding an article there. Although the consecutive Egyptian constitutions emphasized various fundamentals emanating from the principle of citizenship, yet every constitution, especially the 1971 Constitution, designated a certain right in one article and repealed it in a following or a preceding one. It suffices to look at the Chapter on Freedoms to be aware of the extent of basic freedoms guaranteed by the Constitution, however, it entrusted to the law to detail these rights, which resulted in jeopardizing most, if not all, of them. For example, the right to physical safety is contravened by the texts that give impunity to perpetrators of violations of this right whether through torture or even murder in the process of extracting confession, and forbid victims of such violations to resort directly to justice if the prosecutors refrain from investigating complaints. As for equality and non-discrimination, there is a lot to be said. For example, Article 11 of the 1971 Constitution stipulated women’s rights, but on condition that they do not contravene with the principles of “Sharia” (Islamic laws), thus opening the door to interpretations and to discrimination against women in many laws which become subject to the legislators’ own interpretations concerning rules that support or restrict women’s rights. It is worth mentioning here that it is the only article on rights in which the “Sharia” law is mentioned.
In addition, the 1971 Constitution is no longer considered suitable from the philosophy point of view and the modern orientation of experts in constitutional law around the world. Modern constitutions are not limited any more to specifying rights; rather, they extend to emphasizing these rights by guarantees stipulated in the constitution itself to secure these rights against circumvention. Moreover, it regulates the consequences of violating these rights. It is no longer acceptable that the law guarantees the right to health, when a citizen, men or women, have no access to medical care, or the right to a home when citizens, men and women, inhabit the streets. Studying the amendments of the 2011 Moroccan Constitution shows that though not completely adopting the modern philosophy of constitutions, yet it did not completely ignore it. Article 19 provides for equality between men and women in a practical way and calls for establishing a mechanism to ensure this equality through stipulating that “the State shall endeavor to achieve the principle of equality (fifty/fifty) between men and women and to this end shall establish an organization for equality and for combating all forms of discrimination.”

We can deduce from the above that:

1. Approving the constitutional document is not a request per se; rather it is the hope that it will be implemented and adjusted according to the national interests and not to private interests, nor the interests of a certain group or a certain political inclination.

2. Constitutional texts should not be alienated from their final goals, or regarded as moving in a vacuum; they should always contain the prerequisites for democratic and economic development which ensure human rights and transcend all forms of discrimination or retaliatory reactions against certain policies or groups. They should be representative of all citizens.

3. The fundamentals of the constitutional texts should be taken as an integrated entity and the meanings emanating therefrom should be coherent to prevent any contradiction or disharmony. It is inadmissible to mention a right in one instance and nullify it in another.
Equality Between Men and Women in the Constitutions

Constitutional articles concerned with equality between sexes should be formulated in a certain manner and have special places in the text that should be taken into consideration in every constitution of any civilized, democratic country.

First, we cannot assume that there is equality between the sexes in a country if its constitution addresses men - half the society only - and marginalizes the other half, by using pronouns such as, “his” or “him” etc. This makes women feel, one way or another, that they are being excluded and not taken into consideration, since the most important document that governs the state and which constitutes the principal and supreme law of the country in which they live, disregards them.

Moreover, it is not appropriate that women are mentioned in the constitutions only when addressing issues dealing with motherhood or childbearing, because this reflects the country’s public policies as a whole, restricting or limiting the role of women in society to these two roles only. Women should be mentioned in every item that regulates the different aspects of life, private or public, such as the preamble and the rules of equality, the social and economic rights and the political participation.

This is explained here below:

I. The Preamble

The terms adopted in the preamble are of extreme importance. References aiming at establishing the principles of equality between women and men should be specified. Throughout the constitution, there should be clear and repeated reference addressed to both “women and men” instead of the ambiguous and general references or words such as “persons”, “citizens” or “individuals”. Referring to “men and women” in the preamble supports the notion that both of them are on equal footing before the constitution and that both have the same rights and duties and are treated equally with no discrimination.
The Constitution of Rwanda is an example of a preamble that clearly demonstrates that the policy of the country is based on equality between men and women. This constitution was adopted following a national referendum in 2003 to replace the transitional constitution that was in force since 1994 following the civil war. The preamble states:

- Building a country of law based on the respect of basic human rights, democracy, multiplicity, fair and just sharing of power, tolerance and resolving problems through dialogue.

- Commitment to guaranteeing equality in rights for all Rwandans, between women and men without prejudice to the principles of equality between the sexes and the integration in national development.

By learning what the preamble of the constitution should include to emphasize that countries’ policies shall be mainly and absolutely based on the principle of equality and non-discrimination between men and women to support democracy, national and social development, it is worth mentioning that stipulating an independent constitutional article relevant to non-discrimination is extremely important and non-debatable. This item should be phrased in a manner that provides for and guarantees the protection of the rights of all citizens, men and women, without any discrimination.

II. Principle of Non-discrimination

Article 19 of the Moroccan constitution adopted in 2011 stipulates the following:

- Men and women enjoy equal civil, political, economic, social, cultural and environmental rights and freedoms designated in this chapter of the constitution and other parts thereof, and also those designated in the international conventions and covenants to which Morocco is party, and in conformity with the stipulations of this constitution and other established principles of the Kingdom and its laws.

- The state shall endeavor to achieve the principle of parity between men and women and to this end shall establish an organization for equality and for combating all forms of discrimination.
Within the framework of the 1993 transitional Constitution of South Africa which was in force until 1996 as a provisional document aiming at paving the way until a permanent constitution was adopted, it is worth noting that the Supreme Constitutional Court in South Africa played a big role in the adoption of the permanent constitution which is in force now.

In the rights document in the South African Constitution, there is a special section for the principle of equality which is considered one of the best practices in this domain as it stipulates:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislations and other measures designed to protect or advance the individuals, or segments of society against discrimination should be taken.

3. The state may not unfairly discriminate directly or indirectly against anyone on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in the terms included under subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

It is obvious that these items are defined and detailed, and the reasons mentioned are specific, leaving little room for interpretation in court. We therefore see that texts should be drafted meticulously, detailed and specified to avoid interpretation in contradiction with the spirit of the constitution.

If we look at the second chapter of Rwanda’s Constitution, which defines the basic principles for the State of Rwanda, we find that the fourth paragraph of article eight stipulates: to build a country of law and to form a pluralistic democratic government, providing equality between all Rwandans and between men and women through ensuring that women occupy at least 30 percent of decision making positions.
III. The Principle of Equality before the Law

The best practices: “men and women equal before the law”.

Referring to the views of scholars and different constitutions, we find that the best drafting for the texts on equality before the law is the above-mentioned text, as it leaves no room for doubt or even interpretation in any way contrary to women’s rights.

If we refer to the Iraqi Constitution that was ratified through a referendum on October 15, 2005, we will find the model for implementing this principle. It is worth mentioning that the Iraqi Constitution was drafted by a founding committee set up to draft a permanent constitution to replace the Administration Law for the transitional period. This law was drafted during the period December 2003 – March 2004 by the Iraqi Presidential Council, a body appointed by the Provisional Coalition Authority after the Iraqi war and the occupation of Iraq by the US and Coalition Forces. The new Iraqi Constitution, in force since 2005, stipulates that all Iraqis are equal before the law and prohibits any discrimination based on sex.

- The Columbian Constitution:

Article 13 of the Columbian Constitution stipulates that: “all people are born free and are equal before the law, should receive the same protection and treatment from the authorities, and should enjoy the same rights, freedoms and chances without any discrimination based on race, sex, nation of origin, family, language, religion, political or philosophical views.”

IV. Political Participation

Article 76 of the Rwandan Constitution and its second subdivision stipulate that 24 of the 80 members of the House of Representatives of the Parliament must be women.

Article 82 of the third subdivision of the Constitution stipulates that 30% of the members of the Senate must be women.
Article 78 of the Ugandan Constitution stipulates: that each locality should be represented by at least one woman in the parliament; and article 180 stipulates that women representation must be one third of each local council.

- The Afghan Constitution:

The new (post-Taliban) Afghan Constitution provides for the quota system, both in the People’s Assembly and in the Senate. The People’s Assembly shall consist of between 220 to 250 elected members proportionate to the population in each of the thirty two provinces, of which at least two women should be elected from each province, to ensure the representation of women by 26% in the parliament (64 out of 250). With regard to the Senate, the President shall appoint one-third of the members of the Council provided that 50% of those appointed members are women. However, the implementation of the quota system follows the holding of the primary elections.

As for Iraq, the Transitional Administrative Law stipulates that: “The National Assembly is elected in accordance with the electoral law and the political parties’ law. The electoral law should aim at achieving the required objective concerning women’s representation which should be at least one fourth of the members of the popular council, and to achieve a fair representation of all factions in Iraq, including the Turkmen, Chaldo-Assyrians and others.”

V. The Right to Equal Pay for Work

Article 40 of the Ugandan Constitution of 1995: the Parliament issues laws that ensure equal pay for the same work without any discrimination. In addition, Article 37 provides that: persons with the same efficiency and capabilities have the right to receive equal pay for work without any discrimination.

VI. Women’s Rights

The Ugandan Constitution also contains a special text dedicated to women’s rights which states that:
1) Women have full dignity equal to that of men.

2) The State shall provide all the necessary facilities and opportunities to promote the welfare of women and enable them to achieve their full potential and advancement.

3) The State shall protect women and their rights in the community, taking into account their status and natural unique roles as mothers.

4) Women and men shall be treated equally, including equal opportunities in political, economic and social activities.

5) Without prejudice to the provisions of Article 32 of this Constitution, women have the right to affirmative action for the purpose of redressing the imbalances resulting from traditions, history or customs.

6) The law shall prohibit cultural practices, customs or traditions that are in conflict with the welfare, dignity or interest of women or which, by any means, undermine the rights of women provided for in this Constitution.

- Iranian Constitution Article (21):

The government is responsible - within the context of Islam - for securing the rights of women in all fields and is required to provide the following:

1) Create the conditions to help women achieve their full accomplishment and to restore their material and moral rights.

2) Protect mothers, especially during pregnancy and child custody, and provide child care to those with no breadwinner/provider.

3) Establish suitable courts that protect the family and its stability.

4) Provide special insurance for widows, elderly women, and those who lost their provider.

5) Grant worthy mothers custody and guardianship of their children in case of loss of their legal guardian.
- **Domestic Violence:**

Article 42 of the Colombian Constitution stipulates that: “Any form of violence in the family shall be considered destructive to its harmony and unity, and is punishable by law.” Law No. 294/1990 puts into force this stipulation by stating that: “anyone who mistreats a member of his family, whether physically or sexually shall be sentenced to imprisonment for a period between one to two years”.

- **Women Heads of Households:**

Article 42 of the Colombian Constitution stipulates that: “the state shall give special support to women heads of household.”

- **Pregnancy:**

The Colombian Constitution stipulates in article 43 that: “Men and women have equal rights and opportunities. Women shall not be subjected to any form of discrimination during and after pregnancy; they shall benefit from the care and protection provided for them by the state during that period and will receive thereafter a subsistence allowance if afterwards they become unemployed.”

**VII. Special Measures - Affirmative Measures**

Section IX, paragraph (2) of the item on equality in the South African Constitution stipulates that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures should aim to that.

Article 32 of the Ugandan Constitution does not only allow taking affirmative measures, but also penalizes, and allows for the creation of committees to ensure equal opportunities as follows:

1) Notwithstanding the contents of this Constitution, the State must take affirmative action in favor of marginalized groups, whether on
the basis of sex, age or disability, or any other reason, historic, traditional or customary, in order to address issues and imbalances against them.

2) The Parliament shall pass relevant laws, including laws for the establishment of the Equal Opportunities Commission, for the purpose of full implementation of paragraph (1) of this Article.

- The 1994 Amendment of the German Basic Law:

The law of 1994 further provides for affirmative action. Article 3.2 stipulates that: “The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate negativities that now exist.”

A Model of Gender Equality in the New Egyptian Constitution

Why are we in need of constitutional provisions that guarantee equality between men and women in our new Constitution?

All Egyptian constitutions adopted after the 1952 Revolution established the principle of citizenship as the full basis for its general and detailed provisions and stipulate the principle of equality among all citizens without discrimination. Consequently Egyptian women are considered to be constitutionally equal to men in all rights and all duties including the right to hold public office.”

Despite these clear and unequivocal texts, which prohibit any gender based discrimination, there is another aspect to the constitutional texts that open gaps for the possibility of gender-based discrimination. In particular, the second Article of the 1971 Constitution and the second Article of the Constitutional Declaration, which state that the principles of Islamic Sharia’ are the main source of legislation. In our opinion, we find no problem regarding this stipulation, especially after its interpretation by the Constitutional Court that considered the mentioned principles to be limited to the unequivocal constancy and significance related to the Sharia’ and its final goals as a whole, thus leaving no room for disagreement over its interpretation.
But the real problem is manifested in Article (11) of the 1971 Constitution— which we hope will be abolished in the new constitution— which stipulates that “The State shall guarantee reconciliation between the duties of women towards the family and their work in society, ensuring their status as equal to men in political, social, cultural and economic fields, without violation of the rules of Islamic jurisdiction.”

In this context, the constitutional legislator may tend to think that the rules of Islamic Sharia’ - and not just its principles, (as stated in the second Article) - implicitly refute absolute equality between men and women, and may even involve aspects that prevent reconciling the duties of women towards their families and their work in the community, thus preventing their equality with men in the fields mentioned in this article. Consequently, we find ourselves confronted with a clear potential for discrimination based on interpretations that may be subject to political considerations rather than doctrinal views, as all these expressions in general are elastic and may permit all kinds of interpretations. It also puts the burden of the responsibility for the family on women alone, while it is a social responsibility supposed to be borne by men and women alike. The most obvious use of this article for discrimination against women, is that the Council of State—which is the custodian of the implementation of the Constitution – has prevented women from holding judicial offices in the 2010 Council of State, based on this article and on the common understanding that Islamic laws do not permit the appointment of women in the judiciary on the grounds that they are not allowed to hold positions of public responsibility which includes the judiciary. However, women in the judiciary in Egypt and in most Arab and Islamic countries have proven their efficiency and sturdiness in facing many challenges. Therefore, it is important that the new constitution be concerned with emphasizing equality on the basis of citizenship, avoiding flexible phrases that make room for discrimination, and stressing that discrimination is a crime that must be abolished.

The Most Important Principles that Must Be Observed in the Constitution

After reviewing the status and rights of women in the Egyptian Constitutions, we can conclude the extent of our need to formulate
constitutional provisions that guarantee equality between men and women in the new Egyptian constitution and the importance of avoiding past errors. Consequently, it is important to emphasize the principles that must be taken into account when drafting the new constitution in order to finalize a Constitution that supports the objectives and principles of the Revolution and represents both men and women.

First: Using the words (men and women) is more accurate and clearer, as it emphasizes the need to observe equality between both men and women and conveys the sense that the constitutional rights are not intended for men only. Broad terminology such as “citizens” or “persons” or “individuals”, in the Arabic language, does not support the idea of equality.

Second: It is imperative- by all means – to take into account limiting the use of the pronoun (him), because even though some see that linguistics confirm that this reference includes both men and women, yet one way or another- with the passage of time- its social and cultural impact gives the opportunity to expand its interpretation by the court towards gender-based discrimination.

Third: The necessity to stipulate for addressing the cultural and legislative distortions that are carried over from one generation to the next, which discriminate against women. A good example for that is to stipulate that women shall be represented by at least 30% in all decision-making positions and elected councils such as parliament and local councils and boards of trade unions and others.

Fourth: To state some positive measures and affirmative actions to be taken by the government to strengthen and confirm the equality between men and women in all spheres of life.

Fifth: The need to state the right to shelter and housing. This provision is very important for women who find themselves homeless after the absence of the family provider, whether through divorce, death or abandonment.

Sixth: To explicitly criminalize discrimination between men and women.