ON THE ROAD TO EQUALITY? ENGENDERED CONSTITUTIONS IN MOMENTS OF CONSTITUTIONAL CHANGE

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I. INTRODUCTION

In the last decade, a number of countries have amended and rewritten their constitutions to incorporate provisions on women’s rights and gender equality. Most constitutions today contain some commitment to gender equality\(^1\) and many have gone well-beyond umbrella non-discrimination and equality provisions to promoting women’s equality, access and entitlements in a wide range of areas. Today, women are constitutionally guaranteed sexual and reproductive rights in Kenya, access to health care without discrimination in Bolivia, paid maternity leave in Armenia, freedom from discrimination in the context of marriage in South Sudan, protections from domestic violence in Niger, equal pay and equal benefits for women in Rwanda, and elimination of sex and labor trafficking in Somalia.\(^2\)

These gains are undoubtedly a result of a number of factors, not least among them advocacy by women in civil society, government, academia and the private sector. Domestic women’s movements have seized upon international obligations generated by international and regional human rights agreements and advocated, often successfully, for progressive language in

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\(^1\) This paper summarizes data collected by the International Human Rights Clinic at the University of Chicago Law School, the complete results of which will be presented in an IHRC report forthcoming in 2018. Student researchers included Dylan Cowart, Brittany Ellenberg, Nathan Maxwell, Joseph Nunn, Eileen Prescott, Salwa Shameem, and Shelbi Smith. Special thanks to Nino Guruli and Brian Citro for their contributions in study design and data review and to Molly Blondell for her work on the final draft.


their constitutions during moments of change.

This paper reviews how constitutional reforms and revision, in recent history, have led to increasingly gender-responsive texts. Relying on data collected by the International Human Rights Clinic on constitutions made responsive to women through reform or revision from 2003-2013, I review how choices made during these processes have produced texts reflecting some common and some distinct approaches to women’s constitutional rights, entitlements and protections. I will then suggest how emerging trends and areas of engendered constitutional interest may impact efforts to promote women’s equality globally.

II. FRAMEWORKS FOR THE ENGENDERED CONSTITUTION

Law on women’s equality always exists against a backdrop of gender discrimination and inequality.\(^4\) In fact, for many women, their advocacy for equal rights takes place in contexts in which the social and political infrastructure have neither the commitment nor the ability to truly engage in the kind of social transformation in power relations and access to resources actual gender equality would require.

Against this backdrop, scholars and practitioners have asked how a constitution can provide optimal language to promote and protect women’s equality. While recognizing a uniform approach would be misguided, feminist scholars have discussed how choices in design and drafting may impact the ability of a constitution to effectively serve women.\(^5\) Kathleen Sullivan has proposed some core drafting considerations: generality vs. specificity; symmetry vs. asymmetry (prohibiting discrimination based on classifications such as sex or race vs. identifying protected classes); private action vs. state action; negative rights vs. positive rights; and judicially enforceable standards vs. horatory norms.\(^6\) Helen Irving has encouraged attention to fundamental design choices, such as those relating to federalism and state representational structures, and their impact on the efficacy of a constitution in addressing women’s needs.\(^7\)

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6 Sullivan, supra note 5 at 735-764; 747-764.

7 Irving, supra note 5 at 8.
In the policy sphere, international agencies and institutions have sought to support countries engendering constitutions by offering resources and guidance on constitution-making, often with a focus on incorporation of human rights frameworks. The Institute for Democracy and Electoral Assistance (IDEA), for example, has put forth guidelines for gender-mainstreaming in constitution-making that provide counsel on how to “analyse a constitution or draft constitution from the perspective of the substantive equality of women,” proposing 55 questions reflecting various areas relevant to women’s equality.\(^8\) Similarly, UN Women, the UN entity responsible for advancing women’s rights and equality, has developed a constitutional database that highlights the gendering of constitutions as evidence of state realization of the Convention on All Forms of Discrimination Against Women, the primary human rights treaty addressing women’s equality.\(^9\)

In the meantime, many countries have engaged in reform and revision processes that have addressed women’s rights and equality to varying degrees. In many countries, the choices have been made through debate, negotiations and consultations among stakeholders with competing interests and influence. A review of those actual choices and the patterns and trends that emerge presents its own proposal of sorts for a contemporary approach to women’s constitutional rights.

III. ENGENDERING A CONSTITUTIONAL TEXT

To better understand how constitutional language on gender equality has evolved recently, the International Human Rights Clinic conducted a review of constitutions engendered through reform or amendment between 2003-2013.\(^{10}\) This review sought to illuminate the particular choices made on gender equality from one text to another, targeting the moment of transition caused by reform and revisions. By focusing only on the gender-related transformation of a text in reform or revision, this analysis aimed to capture a snapshot of change and evolution around women’s constitutional rights.

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\(^{10}\) To date, the only other study to compile and review constitutions to determine how women’s rights are being addressed has focused on present day constitutions, Isabel Latz, Amy Raub, Adele Cassola et. Al, *Equal rights for women and girls in the world’s constitutions*, World Policy Analysis Center, UCLA Fielding School of Public Health, 2014.
Thirty-six countries were identified as having engaged in reform or revisions that had some significant impact on women’s equality. The overwhelming majority of countries in the data set produced new constitutions, often through a process of reform, but a few countries were included because they engaged in substantial revisions that addressed gender related issues.\(^{11}\) The data set contains four countries in the Americas (Ecuador, Costa Rica, Dominican Republic and Bolivia), thirteen countries in Africa (Angola, Burundi, Kenya, Guinea, Madagascar, Mozambique, South Sudan, Swaziland, Morocco, Niger, Montenegro, Rwanda and Zimbabwe), two countries in the Middle East (Qatar and Iraq), four countries in Asia (Kyrgyz Republic, Turkmenistan, Armenia and Azerbaijan), four countries in South East Asia (Laos, Myanmar, Thailand and Vietnam), three countries in Europe (Hungary, Kosovo and Montenegro), two countries in Polynesia (Fiji and Samoa) and four countries in South Asia (Nepal, Bhutan, Afghanistan and Maldives). These thirty-six countries were not intended to be a global assessment of constitutional movement around gender in the relevant decade but a selection of countries with a gender-responsive approach to constitutions as reflected by their textual choices. By focusing on this set of “gender-responsive” countries, the analysis can highlight patterns, movements and recent best efforts to promote gender equality through constitutional change.

\(\text{A. General Methodology}\)

Texts were analyzed to determine the presence of language relating to women’s equality in fourteen spheres of women’s rights. The spheres were developed by IHRC with reference to international standards as reflected in the Convention on All Forms of Discrimination Against Women (CEDAW)\(^{12}\). The fourteen spheres are formal equality, substantive equality, right to health, sexual and reproductive health, right to education, right to food and water, status of international law in domestic law, equality in family life, protection of women’s employment rights, violence against women, general human rights guarantees, women’s political rights, right to property and constitutional supremacy over customary and religious practices.

Each sphere is composed of two to ten possible criteria that represent possible components of rights, entitlements or protections. For example, the right to education is

\(^{11}\) See Chart 1 in the Appendix for the list of countries and constitutions analyzed.

composed of five possible criteria: the general right to a basic education; the right to free primary education; specific non-discrimination language on access to education; rights to post-primary or secondary education; and positive language on government obligations or action. Similarly, the sphere on employment rights is composed of 10 criteria: elimination of discrimination in employment; elimination of discrimination on grounds of marriage or maternity; free choice of profession or employment; equal pay and equal benefits for equal work; social security and retirement; health and safety in the workplace; maternity leave; paid maternity leave; social services to enable parents to combine work and parenting responsibilities; and language mandating positive action.

The fourteen spheres were broadly conceived to capture areas of particular relevance to women’s rights and equality. While arguably all constitutional provisions are relevant to women, the criteria within the spheres are meant to identify language that has a significant impact on women or is explicitly targeted to women. Where a right or entitlement has a significant impact on women such as education, health, and constitutional supremacy over customary and religious practices - the criteria captured the right (or mandate) as well as language addressing discrimination in (or limitations on) access or enjoyment of that right. In other criteria, such as gender equality provision or prohibitions on employment discrimination based on maternity, language is gender-specific or attends to an area clearly aimed at women.

The criteria do not necessarily represent separate provisions or articles in a constitution – one provision could satisfy multiple criteria. The criteria can also overlap to capture different approaches to the sphere. Presence of all criteria within a sphere is not intended to be a “perfect score” but more indicate the presence of various aspects of a sphere that, taken together, would address basic elements of the sphere. A constitution could potentially satisfy all 56 criteria, though no single constitution did and none were expected to. The country with the highest level of criteria fulfillment in the revised constitution was Ecuador, with 52 of the 56 criteria present, 42 of which had been added or improved upon. Zimbabwe followed with 45 criteria (40 of which had been added or improved upon). Bolivia, with 44 criteria (38 of which had been added or improved upon), and Dominican Republic with 41 criteria (37 of which had been added or improved upon), were third and fourth respectively (see Figure 2).

Criteria were scored against seven classifications designed to capture changes in the relevant language. For each criteria, the pre-reform and new or amended constitutions were
reviewed and coded as follows:

(0) The criteria was absent in both the original and revised text.
(-) The criteria was eliminated from the revised text but present in the original.
(W) The criteria was worsened. This meant the both the original and revised text had language satisfying the criteria but the language in the revised text was weaker and less protective.
(X or %) The criteria in both was identical or edited in a manner irrelevant to the strength of the provision as it relates to women’s rights.
(I) The criteria was improved. Language was present in the original text but the revised text demonstrated some improvement.
(+) The criteria was added. Language absent in original text and added to the revised constitution.

Guidelines for satisfying the criteria were developed and used but determinations were necessarily nuanced. Thus, coding was subjected to multiple reviews and all student determinations were confirmed by faculty. Criteria was marked as improved or worsened when the language had been altered in a way as to make the language more or less robust, altering the strength of the right, entitlement or commitment. While more language did not necessarily lead to a classification of improvement, clarifications and specificity were assumed to entrench and improve constitutional mandates. Similarly, language marked as added or deleted reflected absence or presence of the right or entitlement.

Changes were only captured through December 2013. The textual comparisons were always made to the text that immediately preceded the reform or revision process including all amendments made until the identified revision or reform (see Chart 1). For South Sudan, there was no pre-reform constitution so all provisions present in the new constitution are marked as added to capture decision-making in the reform process.

While some countries amend their constitutions often, others do so rarely. Thus, some constitutions in the data set were compared to prior constitutions that had not been revised for a decade or more while others were compared to constitutions amended only the year before. As a result, the textual changes captured by the analysis are not strictly chronological. The 10-year period is treated as one event, representative of recent attempts by interested actors to engender constitutional text.

B. Highlights of Results

General Equality and Non-Discrimination: All revised constitutions in the data set contained basic equality language and non-discrimination language. In fact, all constitutions,
with the exception of Costa Rica, contained a non-discrimination guarantee that listed gender or sex (or both) as prohibited grounds for discrimination.

Most original texts already contained non-discrimination guarantees that were then revised and strengthened during revision. Only Bhutan, Maldives, Montenegro, Morocco, and South Sudan added new non-discrimination language. In twenty-one other countries, non-discrimination language was improved-upon through additional grounds or more protective language. For example, the Kenyan Constitution added pregnancy and marital status to its gender-related grounds for non-discrimination.13

Gender Equality: Gender equality guarantees are affirmative statements that men and women are equal before the law. Typical language states: “[m]en and women shall be equal before the law in all spheres of political, economic, social and cultural life.”14 Gender equality guarantees were present in sixteen of the pre-reform constitutions and twenty-eight of the revised constitutions. Twelve of these were new additions. Of the sixteen countries with existing language prior to the relevant revisions, six improved the language, three worsened it and four did not make relevant changes.

Affirmative Measures and Enforcement Mechanisms: Affirmative measures contemplate state action that remedies and addresses inequality and discrimination. The affirmative measures criteria captured both permissive language that allows the state to take affirmative action (affirmative measures on behalf of certain groups is not considered discrimination) and mandatory language that requires the state to take such action. The Kenyan revised constitution contained a typical example of this language, the “[s]tate shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”15 Twenty-two countries had language on affirmative measures in their revised constitutions, of these, fifteen had added it and five had improved upon it and two had kept the original language. Relatedly, language establishing gender commissions or human rights commissions with a gender mandate were entirely new in four countries (Kenya, Morocco, Rwanda, Zimbabwe).

Right to Education and Equality in Access to Education: A general right to basic

education was present in the majority of revised constitutions (34 of the 36) with twenty-two of those as new additions or improvements. However, several countries supplemented this general right to education with more specific language on non-discrimination (10 countries adding this right) and free primary education (12 countries adding this right). Some constitutions contained general non-discrimination language, such as the Maldives Constitution, which stated “[e]veryone has the right to education without discrimination of any kind.”16 In others, like South Sudan, gender was listed as a specific ground of non-discrimination, “[e]ducation is a right for every citizen and all levels of government shall provide access to education without discrimination as to religion, race, ethnicity, health status including HIV/AIDS, gender or disability.”17 Still others included affirmative language on equal access to education for girls, such as Zimbabwe, which stated “[t]he State must take measures to ensure that girls are afforded the same opportunities as boys to obtain education at all levels.”18

Right to Health and Equality in Access to Health: Most revised constitutions contained a general right to health. While twenty-two countries in the data set had an existing right to health in the pre-revision constitutions, fourteen improved upon this right as part of the revision or reform. Mozambique, for example, improved upon the right to health by adding language requiring the government to determine how a national health system would be developed to ensure universal access.19 Twelve more added language creating a right to health. Six countries added language preventing discrimination in access or delivery of health care (Bolivia, Kenya, Kyrgyz Republic, Laos, Morocco, Mozambique). Only Laos and Morocco mentioned women’s access to health specifically. The revised constitution in Laos states “[t]he State and society attend to building and improving disease prevention systems and providing health care to all people, creating conditions to ensure that all people have access to health care, especially women and children, poor people and people in remote areas, to ensure the people’s good health[.]”20

South Sudan, Ecuador and Burundi added specific provisions on HIV/AIDS and about half of the data set added a positive duty mandating the government provide healthcare to

17 The Transitional Constitution of South Sudan of 2011, Art. 29(1) (with amendments through 2013) (English translation quoted from https://www.constituteproject.org/).
18 The Constitution of Zimbabwe of 2013, Sec. 27(2) (English translation quoted from https://www.constituteproject.org/).
supplement the right to health. In the revised Ecuadorian constitution, for example, Article 32 required that “the state shall guarantee this right by…permanent, timely and non-exclusive access to programs, actions and services promoting and providing integral healthcare.”\textsuperscript{21} Even more comprehensive is the Kyrgyz Republic’s constitution which added all three criteria – right to health (Art. 9(2)), with equal access (Art. 9(3)) and a specific state mandate for implementation (Art. 47(1)).\textsuperscript{22}

**Sexual and Reproductive Health:** Language on sexual and reproductive health and special protections relating to pregnancy and childbirth were rare in the data set but most were newly added provisions with a few countries worsening language or eliminating it. Six countries added reproductive and sexual health provisions (Bolivia, Fiji, Kenya, Nepal, Swaziland and Zimbabwe) and three improved upon existing provisions (Vietnam, Kosovo and Ecuador).

Language ranged from a reference to reproductive health as a type of healthcare (e.g. Constitution of the Republic of Fiji, Article 38) to a standalone right to reproductive health in Nepal, which states “[e]very woman shall have the right to reproductive health and other reproductive matters.”\textsuperscript{23} In four countries, Kenya, Swaziland, Ecuador and Zimbabwe, reproductive rights language was accompanied by restrictions on the right to abortion or extension of the right to life to the time of conception.\textsuperscript{24}

On pregnancy and childbirth, Bolivia and South Sudan added new language, Ecuador improved existing language and Angola kept its pre-existing language. Three countries worsened the language (Dominican Republic, Hungary and Vietnam) and one eliminated it (Kosovo). Bolivia’s newly added language stated “[w]omen have the right to safe maternity… [and] shall enjoy the special assistance and protection of the State during pregnancy and birth and in the prenatal and postnatal periods.”\textsuperscript{25} South Sudan added language creating a state duty to “provide maternity and child care and medical care for pregnant and lactating women.”\textsuperscript{26} Perhaps the most

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\textsuperscript{22} The Constitution of the Kyrgyzstan Republic of 2010, Art. 9(2)(3) and Art. 47(1) (English translation quoted from https://www.constituteproject.org/).

\textsuperscript{23} The Interim Constitution of Nepal of 2007, Art. 20(2).


\textsuperscript{25} Constitution of the Plurinational State of Bolivia of 2009, Art. 45(v).

\textsuperscript{26} The Transitional Constitution of South Sudan of 2011, Art. 16(c) (with amendments through 2013).
comprehensive language was in Ecuador’s revised constitution which replaced general commitments to protect maternity\(^\text{27}\) with the following language, “[t]he State shall guarantee the rights of pregnant and breast-feeding women to: (1) [n]ot be discriminated for their pregnancy in education, social, and labor sectors, (2) [f]ree maternal healthcare services, (3) [p]riority protection and care of their integral health and life during pregnancy, childbirth and postpartum, (4) [t]he facilities needed for their recovery after pregnancy and during breast-feeding.”\(^\text{28}\)

**Equality in Family Life:** A significant portion of revised constitutions in the data set had language eliminating discrimination and inequality in the context of family life as it relates to marriage, divorce, and parenting responsibilities. Of the twenty-one revised constitutions with such provisions, seventeen countries either added or improved upon the language in about even proportions. Most common was language guaranteeing women’s free and full consent in marriage and equality of spouses in decision-making. For example, Costa Rica’s revised constitution stated that marriage “rests on the equality of the spouses”\(^\text{29}\) and Angola stated “[m]en and women shall be equal within the family, in society and before the state, enjoying the same rights and being responsible for the same duties.”\(^\text{30}\)

Many countries also included equal rights and duties of parents regardless of their marital status. As one example, Kenya’s reformed constitution stated “[p]arties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”\(^\text{31}\) and “[e]very child has the right … (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”\(^\text{32}\) Similarly, Fiji’s revised constitution protected parental rights outside marriage “(e)very child has the right: (c) to family care, protection and guidance, which includes the equal responsibility of the child’s parents to provide for the child— (i) whether or not the parents are, or have ever been, married to each other; and (ii) whether or not the parents are living together, have lived together, or are separated.”\(^\text{33}\)

\(^{32}\) Id. at 53 (I)).
\(^{33}\) Constitution of Fiji of 2013, Art 41(1(c)).
Notably, in the majority of countries with spousal equality language, constitutions also limited marriage to unions between men and women. Zimbabwe and Burundi went furthest with explicit prohibitions against same sex marriage.\(^{34}\) Only Mozambique, Laos, Azerbaijan, Costa Rica and Kosovo had marriage equality provisions with neutral language that either generally provided for equal rights in the family or did not specify the genders of individuals with equal rights to marry. For example, Costa Rica stated, “[m]arriage is the essential basis of the family and rests on the equality of rights of the spouses.”\(^{35}\)

**Equality in Employment:** Within employment rights, language that prohibited discrimination in employment generally or specifically against women was present in about half of the resulting constitutions, having been added by eight countries and improved upon by five. Three countries, Armenia, Bolivia and Myanmar, added language that prohibited discrimination in hiring or in termination of women due to their marital status or maternity. Armenia’s provision prohibited dismissal of “an employee on grounds related to motherhood.”\(^{36}\) Equal pay for equal work language was present in seventeen resulting constitutions, nine of which were newly added and four improved upon. One was worsened (Vietnam) and two were eliminated (Afghanistan and Hungary). The Dominican Republic and Bolivia identified housework as compensable.\(^{37}\)

Language constitutionally mandating *maternity leave* was added in two countries, Armenia and Zimbabwe. No pre-reform/revised constitutions had constitutional guarantees of maternity leave. Armenia’s provision guaranteed that “every female employee, in the case of pregnancy and childbirth, shall be entitled to the right for paid maternity leave and the right of parental leave following the birth or adoption of a child.”\(^{38}\) Zimbabwe specified that leave must be for three months.\(^{39}\) Bolivia’s revised constitution, while not providing an explicit right to

\(^{34}\) The Constitution of Zimbabwe of 2013, Sec. 78(3) (English translation quoted from https://www.constituteproject.org/); Burundi’s Constitution of 2005, Art. 29 (English translation quoted from https://www.constituteproject.org/).


\(^{39}\) The Constitution of Zimbabwe, Sec. 65(7) (2013) (English translation quoted from https://www.constituteproject.org/).
maternity leave, did provide for paternity leave and a social security system that protects women during maternity.\textsuperscript{40} 

In two countries, provisions aimed at enabling parents to combine family and work responsibilities were added or improved upon. In Ecuador, the state committed to “striv[ing] towards a labor system that works in harmony with the needs for human care-giving … in particular, [by] provid[ing] services for child care.”\textsuperscript{41} Zimbabwe declared that “[t]he State and all institutions and agencies of government at every level must endeavour to secure…the implementation of measures such as family care that enable women to enjoy a real opportunity to work.”\textsuperscript{42} 

Violence Against Women, Child Marriage and Human Trafficking: Language directed at prohibiting forms of violence against women, including human trafficking, child marriage, protections against spousal abuse and gender-based violence, though rare in the overall data set, were significant new additions. Gender-based violence or violence against women language was added by seven countries (Bhutan, Bolivia, Dominican Republic, Nepal, Niger, Somalia, and Thailand) and improved upon by one (Ecuador). Ecuador’s language is worth mentioning. Prior to reform Ecuador had a provision that guaranteed that “[t]he State shall adopt the necessary measures to prevent, eliminate and punish, especially, violence against children, adolescents, women and senior citizens.”\textsuperscript{43} After reform, Ecuador’s constitution contained three separate provisions that created a right, mandated positive action and spelled-out specific proscriptions for accountability:

Elderly persons, girls, children and adolescents, pregnant women, … shall receive priority and specialized care in the public and private sectors. The same priority care shall be received by persons in situations of risk, victims of domestic and sexual violence, child mistreatment, natural or manmade disasters. (Art 35).

The following rights of persons are recognized and guaranteed: ...a life without violence in the public or private sectors. The State shall adopt the measures needed to prevent, eliminate, and punish all forms of violence, especially violence against women, children and adolescents. (Art. 66 (3)).

\textsuperscript{40} Constitution of the Plurinational State of Bolivia of 2009, Arts. 332 and 369. 
\textsuperscript{42} The Constitution of Zimbabwe of 2013, Sec. 24(2)(d) (English translation quoted from https://www.constituteproject.org/). 
\textsuperscript{43} Republic of Ecuador Political Constitution of 1998, Art. 23(2) (English translation quoted from https://www.constituteproject.org/).
The law shall establish special and expeditious procedures for bringing to trial and punishing the crimes of domestic violence, sexual offenses, crimes of hate and crimes perpetrated against children, adolescents, young people, persons with disabilities, elderly persons and persons who, because of their specific characteristics, require greater protection. Specialized prosecutors and defense attorneys shall be appointed for dealing with these cases, in accordance with the law. (Art. 81).  

Ten countries added specific spousal abuse language. Spousal abuse language includes prohibitions on violence in spousal relationships, the family or private sphere. Iraq’s provision takes this approach stating “[a]ll forms of violence and abuse in the family, school, and society shall be prohibited.” It also includes prohibitions on violence against women generally, though some countries distinguished between the two. As an example of this, the Dominican Republic mandated that “[i]nter-family and gender violence in all its forms is condemned. The State shall guarantee through the law the adoption of the necessary measures to prevent, sanction and eradicate violence against women.”

While only four countries had language on sex and labor trafficking in their prior constitutions, twelve countries added language, representing one-third of the data set: Bhutan, Bolivia, Burundi, Dominican Republic, Fiji, Guinea, Hungary, Iraq, Kyrgyz Republic, Myanmar, Somalia, and Zimbabwe. Bhutan, for example, added a prohibition of “exploitation against women including trafficking.” Similarly, prohibitions against child marriage, which were also nearly absent in the pre-reform constitutions, were added by seven countries in the data set: Azerbaijan, Kyrgyz Republic, Maldives, Somalia, South Sudan, Swaziland and Zimbabwe.

Equality in Political Participation, Leadership and Governance: All countries had some language on the right to political participation and freedom of association in their prior constitutions. That language was improved upon and made more gender-specific by many through the revisions and reform. Least common was language that prohibited discrimination in citizenship rights or that guaranteed equality of citizenship between men and women by eliminating, for example, distinctions based on marriage, divorce or gender. Such language was present in 14 revised constitutions, one third of which was improved language and one third new

44 Id. at Art. 66(3) and Art. 81.
47 The Constitution of the Kingdom of Bhutan of 2008, Art. 9(17).
additions. A typical provision from Angola reads “[t]he child of a father or mother with Angolan nationality, born in Angola or abroad, shall be an Angolan citizen by origin.”

Many countries guaranteeing universal and/or equal participation in government did so through general non-gender specific guarantees but seventeen revised constitutions referenced women or promised equal access to and participation in government regardless of sex or gender. In Burundi, the guarantee was situated in a broader provision: “[n]o Burundian may be excluded from the social, economical or political life of the nation because of their race, of their language, of their religion, of their sex or of their ethnic origin.” In Kosovo, the language was more targeted, “[t]he composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.”

Fourteen countries added specific language defining and mandating women’s representation in government bodies. This language ranged from requirements of women’s equal or proportional representation in parliaments and other bodies to language that created actual mechanisms to ensure the presence of women. Bolivia provides an example of language mandating equality, “[t]he equal participation of men and women shall be guaranteed in the election of the members of the assembly.” Afghanistan, on the other hand, specifically required that “[t]he President shall appoint fifty percent of these individuals [in the House of Elders] from amongst women.”

Equality in Access to Property: Bolivia, South Sudan, Swaziland, and Zimbabwe added language to their revised constitutions that addressed women’s lack of access to property specifically. Ecuador and Kenya were the only countries with pre-existing language which they both improved in the revisions. Language satisfying this criteria either ensured or promoted women’s access to property. In South Sudan, the provision read “[w]omen shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased.” Bolivia’s language was more prescriptive: “[t]he State has the obligation to … promote policies aimed at eliminating all forms of discrimination against women.

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53 The Transitional Constitution of South Sudan of 2011, Art. 16(5) (with amendments through 2013).
 Constitutional Supremacy over Customary and Religious Practices: All but five of the countries in the data set had language in their revised constitutions that stated that the constitution was supreme law, and some specifically indicated the constitution’s supremacy to religious or customary law and practices. Afghanistan, Hungary, Iraq, Qatar and Somalia did not have supremacy provisions, or made exception to their provision for religious norms, communities, customary law, or practices. Zimbabwe remedied its pre-reform claw-back clause in which it exempted matters of personal law and customary practices from its non-discrimination provision. The revised 2013 Zimbabwean Constitution stated, “[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.” In Swaziland, the supremacy clause was more general, “[t]his Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”, but was supplemented by “[a] woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.”

Overall Regressive Movement: Little regressive movement – elimination or worsening of criteria—occurred in the data set overall. (See Figures 5 and 6). This, of course, is unsurprising given that the countries were chosen for their openness to addressing women’s rights in a moment of constitutional reform or substantial revision. The countries in the data set responsible for the majority of language eliminations were: Afghanistan, the Dominican Republic, Fiji, Kosovo, Somalia, Vietnam and Myanmar. Each country eliminated language in two to four of the fifty-six possible criteria. Greatest number of eliminations occurred in the Myanmar Constitution which eliminated language satisfying four criteria, including free choice of employment, citizenship guarantees without discrimination, and equality in family life. In equality of family life, Myanmar eliminated (without replacement) a provision that stated “[w]omen shall enjoy freedoms and rights guaranteed by law as regards marriage, divorce,

55 The Constitution of Zimbabwe of 2013, Sec. 2(1) (English translation quoted from https://www.constituteproject.org/).
56 The Constitution of the Kingdom of Swaziland Act of 2005, Sec. 2(1).
57 Id. at Sec. 28(3).
partition of property, succession and custody of their children.\textsuperscript{58}

The criteria most eliminated were inheritance and property rights, equal pay and benefits and political quota or equality mechanisms, all of which were eliminated by two countries. Language on health and safety in the workplace was the only criteria eliminated by three countries.

Some regressive movement occurred as well where language was not eliminated entirely but made less protective or vague. This, too, was minor in comparison with the addition and improvement of gender-related language. The countries that experienced the most worsening of criteria were Afghanistan (10), Kosovo (6), Qatar (4) and Myanmar (5). Three countries (Afghanistan, Hungary and Kosovo) in the data set weakened their right to health and five (Afghanistan, Fiji, Montenegro, Mozambique, Myanmar) worsened language on freedom of association.

Criteria on the protection of pregnant women and during childbirth was the only criteria that saw as much regressive as positive movement. However, most of the regressive movement was not elimination but worsening of language. The Dominican Republic, Hungary and Vietnam worsened language and Kosovo eliminated it. The Dominican Republic, while preserving a provision providing pregnant women public assistance and protection, eliminated specific language creating a state duty to address conditions on infant mortality.\textsuperscript{59}

\textbf{State Duties, Action and Restrictions:} Many states in the data set added or improved language that delineated state duties and state action in various spheres. This language, rather than merely providing the existence of a right, service or entitlement, focused on defining the state’s involvement in its realization. These provisions were characterized by mandates and commitments that the state “must”, “shall”, “shall endeavor”, or “has an obligation to” provide some service or engage in some activity. This language often created a standard for government duty, defining the extent and breadth of a right or entitlement.

The language was common in the area of socio-economic rights, often specifying state action involved in their proper realization. In the area of education, Bolivia set forth the right to


education in its pre-reform constitution as follows: “[e]very person has the right to receive an education at all levels, which is universal, productive, free, comprehensive and inter-cultural, without discrimination.” In its revised constitution, it added the following language on how the state would realize the right to education:

“[e]ducation shall promote civic-mindedness, intercultural dialogue and ethical moral values. The values shall incorporate gender equality, non-differentiation of roles, non-violence, and the full enforcement of human rights.”

“The State shall guarantee access to education and continuing education to all citizens under conditions of full equality.”

Similarly, Afghanistan complemented its right to education with an implementation provision that committed that the “[t]he state shall devise and implement effective programs to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country.”

Ecuador’s right to health was similarly complemented by language on its realization, stating: “[t]he State shall exercise leadership of the system through the national health authorities, shall be responsible for national health policymaking, and shall set standards for, regulate and monitor all health-related activities, as well as the functioning of sector entities.”

In Bhutan, the revised constitution also contained both a right to health (Article 9) and language defining that right that committed the state to providing “free access to basic public health services in both modern and traditional medicines.” Overall, positive action delineating government obligations on socioeconomic rights accounted for significant language additions: language was added by fifteen countries on the right to health; twelve on the right to education; and nine on food and water.

A number of states added positive action language to other areas outside of socioeconomic rights: fifteen in the area of employment, ten in the area of family and marriage; eight on women’s violence and fourteen on women’s political representation. In the area of violence against women, Bhutan’s constitution stated that: “[t]he State shall endeavour to take

61 Id. at Art. 79.
62 Id. at Art. 82.
65 The Constitution of the Kingdom of Bhutan of 2008, Art. 9(21).
appropriate measures to eliminate all forms of discrimination and exploitation against women including trafficking, prostitution, abuse, violence, harassment and intimidation at work in both public and private spheres.”66 In Bolivia, in reference to land, the constitution stated “[t]he State has the obligation to: […] to promote policies aimed at eliminating all forms of discrimination against women in the access to, ownership and inheritance of land.”67

Language on state action was also added to promote specific values that limited or defined a right. This was common in the area of marriage and parenting. As noted earlier, a number of countries provided rights to equal marriage but limited marriage rights to heterosexual partnerships. The Dominican Republic’s constitution spells out the state duty to “promote and protect the family organization based on the institution of marriage between a man and a woman. The law will establish the requirements to contract it, the formalities for its celebration, its personal and patrimonial effects, the grounds for separation or of dissolution, the regime of assets and the rights and duties between the spouses”68 and “promote[] responsible paternity and maternity… [t]he law will establish the necessary and adequate measures to guarantee the effectiveness of these obligations.”69

IV. TRENDS AND EMERGING AREAS

The countries in this data set were selected for their efforts to expand and strengthen constitutional language on women’s rights during reforms or revisions. The changes made by countries in this recent round of reforms were taken to provide a useful reference point for future efforts. As summarized above, some constitutional choices appeared consistently throughout the data set (increased satisfaction of criteria in education, health, non-discrimination and women’s political representation, for example) while other areas evidenced either divergence or emerging practices (addition of language addressing maternity and pregnancy).

In making these observations, I do not wish to take up the question of how and why countries may evidence similar movement in the areas of constitutional change. As has been discussed elsewhere, there are a number of possible culprits motivating common approaches to constitutional evolution such as regional affiliation and dialogue, the global impact of

66 Id. at Art. 9(17).
69 Id. at Art. 55(10).
international treaties and enforcing bodies, and cross-border civil society organizing. In the context of women’s rights, it is also the case that the mechanisms of gender inequality - violence against women, the unequal burden of reproductive roles and social and cultural gender stereotyping - while differing in severity and scope, tend to be globally present. The impact of these contextual commonalities on constitutional responses should also not be underestimated.

A. Equality and Non-Discrimination

The first trend evident in the data set is that foundational equality provisions became more expansive, robust and mandatory in constitutions following reform and revisions. With over 2/3 of the data set improving or adding non-discrimination provisions, non-discrimination guarantees became basic constitutional elements with more expansive protection, as countries added grounds such as pregnancy and marital status to the prohibited lists. Building upon guarantees of non-discrimination, twenty-five countries also added separate affirmative commitments to equality between men and women. More than 50% of the data set bolstered non-discrimination provisions with affirmative action measures aimed at remedying past discrimination and addressing existing discrimination. Within these measures, permissive framings of affirmative measures (the state “can”) were transformed by some to mandatory ones (the state “shall”), creating mandates.

B. Ensuring Women’s Access, Participation and Benefit

The set also reflected a trend of incorporating language into cornerstone rights and benefits aimed at ensuring women and girls could access these rights and benefits. For many countries in the set, constitutional language addressing women’s equality or ensuring women’s access was incorporated into areas such as health, education and employment. For example, language ensuring girls’ access to education was added to the right to education; language ensuring health services for pregnant women was added to the right to health; language ensuring women’s political participation was added to general rights to participation of citizens. These additions, while still not common, were far more present after the relevant reforms and revisions.

C. Targeting Areas of Women’s Inequality

Building even further, a small but significant subset of countries added language directly targeting areas of women’s inequality that were not long ago considered outside the purview of legal regulation and certainly constitutional consideration.

Language addressing violence against women in its many forms, such as spousal abuse, gender-based violence and human trafficking, emerged as new additions in reformed texts. The additions and improvements on violence are notable as completely new areas of constitutional interest. The one country which improved a provision on gender-based violence, Ecuador, did so by creating a comprehensive three-part right and mandate (noted earlier). Other areas of private conduct also newly regulated included the employer-employee relationships (prohibiting gender discrimination) and the parent-child relationship (ensuring equal parenting rights and responsibilities).

Other similar additions primarily impacting women and targeted at women include violence against women, regulation of family relationships, provision of child care mechanisms, social and medical assistance to pregnant women, recognition of household work as economically compensable, encouragement of equal parenting and maternity leave entitlements. Even controversial areas of women’s equality, such as reproductive rights and health, were improved upon through reform (as newly added or improved upon language).

Finally, customary and religious practices, which can disadvantage women, were also brought into the constitutional arena by all but five countries in the data set. Some countries, such as Zimbabwe and Kenya, explicitly eliminated all exceptions made on the application of the constitution to customary law and practices.

D. An Emerging Engendered Constitution

The summary above seeks to draw some conclusions of forward motion, evidenced by the analysis of individual countries’ processes of reform and revision. These sorts of predictions, as always, are speculative but, as described above, overall motion is evident. Twenty countries in the data set, for example, added or improved language that satisfied at least twenty criteria. Six countries added or improved upon thirty-four criteria or more. (see Figure 2). All but four countries added or improved at least nine criteria. (see Figure 2).

Taking additions and improvements together with provisions already present, the resulting constitutions reflected relatively high levels of gender responsiveness as measured by the criteria. In all but four countries in the data set, the resulting constitutions satisfied at least 20
criteria and one third of the countries satisfied 30 or more of a possible 56 (see Figure 1). Focusing on country responsiveness to the various criteria, forty-one of the 56 criteria were satisfied by at least 15 reformed constitutions (see Figure 1).

The Bolivian constitution, an extremely high performing country in this review, provides a model for the full constitutional package. In all major areas of the constitution, rights, entitlements and protections are either guaranteed to women and men equally or special provisions are made for women’s access and advancement to ensure equality. Interestingly, the constitution does not contain a stand-alone provision on women’s equality like many of its peers. Instead, the text addresses women’s equality, access and representation in the various areas of constitutional coverage. Article 15(II) on fundamental rights is representative of its approach: “[e]veryone, in particular women, have the right not to suffer physical, sexual or psychological violence, in the family as well as in the society.”71 The prevalence of violence against women is noted and given special status within a larger provision protecting all from violence in the family and beyond.

Bolivia’s constitution also contains the set’s most expansive non-discrimination clause prohibiting discrimination on the basis of “sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination.”72 It does not, however, contain a companion affirmative action provision to remedy and address discrimination, again unusual in this data set. This is especially interesting as it does contain an affirmative action provision for those with disabilities.73

This level of holistic incorporation of language that targets women’s equality throughout major areas of constitutional coverage raises interesting questions about whether, eventually, future reforms will adopt a gender-equality package of sorts. As more countries reform and revise constitutions, will they continually supplement or replace already existing non-discrimination provisions with language specific to women’s access or equality in all major areas of rights, benefits and entitlements?

72 Id. at Art. 14.
73 Id. at Art. 70.
If the changes made in this recent round of reforms is any indication, future reforms could move in that direction. For advocates of gender equality, incorporation of gender issues throughout the text is desirable in that it results in a constitutional text that gives advocates much to work with. Moreover, to the extent a constitution initiates social transformation towards a change of the status quo, a full coverage approach could send the strongest message and introduce a robust understanding of gender equality. Moreover, a text that acknowledges the importance of gender in the context of different constitutional rights, duties and entitlements better reflects the many social, cultural, political and economic barriers to women’s equality.

In fact, accounts from women’s groups that played significant roles in engendering reforms indicate that this model is often the goal of their advocacy during reform processes. Women’s groups in Zimbabwe and Bolivia, both countries with two of the most engendered constitutions in the set, developed platforms aimed at providing a holistic incorporation of women’s issues into the new constitution (as opposed to setting one or two priorities as a basis for advocacy). Both were quite successful and the resulting texts reflect the majority of their initial asks.

While a “full coverage” approach is like advantageous, overall, for women, it may also have some consequences for implementation that are worth noting. If, in future reforms, language that promotes gender equality is adopted wholesale, the resulting text of a reform may not reflect the reality of varying levels of social and political commitment to different areas of women’s equality. This is not to suggest that constitutional text is normally only added when there is full agreement as to its adoption, but if gender equality language increasingly comes as a package, the kinds of dialogue and negotiations that take place during reform and revision processes, could be sidestepped. Consequently, efforts to subsequently implement equality in

74 In support of the argument that constitutions are forward thinking or “aspirational” in seeking to transform existing legal relationships see Michael C. Dorf, The Aspirational Constitution, George Washington Law Review Vol. 77, 2009, p. 1631-1672.

75 Zimbabwe Women’s Parliamentary Caucus, Constitutional Engagement Workshop, 19-21 June 2011 (Report by Zimbabwe Women’s Lawyers Association) (summary of women’s issues for inclusion in the new constitution under each of the18 thematic areas).

76 CCIMCA, Women and Bolivia’s New Constitution, Inter-American Foundation, available at http://www.iaf.gov/resources/publications/grassroots-development-journal/2009-40th-anniversary/women-and-bolivia-s-new-constitution [accessed 2 October 2017 (explaining that the 33 articles relating to women released by the drafting committee was responsive to the Women’s Coalition’s list of demands).]

77 For an account of the influence of social groups on mobilization for human rights see Beth A. Simmons Mobilizing for human rights: international law in domestic politics, Cambridge University Press, 2009.
some spheres may encounter more resistance because while some provisions were put through a negotiation and review process, others were free-riders. While less likely to happen on polarizing issues such as reproductive rights, many women’s equality issues do not generate resistance during reforms often because they are either not understood or not taken seriously.

The reform processes in Zimbabwe and Bolivia provide an illustration of how a holistic approach to the texts could yield similar textual results while actually reflecting very different environments for women. Both countries ranked in the top five countries in the set with the highest overall scores in both presence of criteria in the reformed constitution and change in criteria as a result of reform. However, the conditions in-country for women’s rights advocacy were quite different. In Zimbabwe, women advocates described the constitution-making environment as a “heavily polarized” one in which women’s issues were “trivialized”.

Only one woman served on the 10-person COPAC management committee, the body of high level officials supervising the reform process and the site of most major decisions in the process. Much of the advocacy on women’s issues occurred “on the sidelines.” As the women involved understood it, “women’s issues were gotten ‘out of the way’ so the committee could talk about the real issues.” In this environment, women adopted tactics of making their submissions through high level female political party leaders through informal means.

This strategy worked on most issues but it did not, however, work in the area of political leadership – a potential gain which aimed directly at the power structures women sought to challenge. On this issue, the predominantly male constitutional management committee members refused to make concessions. Ultimately, the very public women’s campaign for a 50% quota in parliament failed. As Priscilla Misishairambwi-Mushonga, a female parliamentarian and the only female member of the management committee for the reform process, recalled, a political party leader quite plainly stated “as long as it doesn’t challenge my present hold on a particular seat, I can freely give it to you. But at this time, if you put it initially on the table as

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79 Id. at 12.

80 Id. at 20 (quoting Hon. Priscilla Misihairambwi-Mushonga, only female member of COPAC management committee).

81 Id.

82 Id. at 19-20.
something that dislocates where I am and my position, then you are assured you are not going to win.”

The final constitutional provision mandated gender balance in the senate (the less powerful house in the parliament) but required only 30% of women in the House of Assembly and did so by creating 60 additional temporary seats that expire after two terms.

Bolivia, in contrast, conducted a constitutional reform process in which women, especially indigenous women, held significant political clout. The constitutional reform process was instigated by the election of Evo Morales, the country’s first indigenous president. One of his core campaign promises was a new constitution that addressed indigenous rights. The constitutional assembly was composed of 33% women and 27.7% indigenous Bolivians by law.

A national women’s civil society network, Coordinator of Women, monitored deliberations during the negotiation and drafting process of the constitutional assembly. The Center for the Capacity and Integration for the Rural Woman (CCIMCA), a member of the Coordinator of Women coalition, recounts extensive levels of women’s involvement and advocacy both within and outside the assembly. Coalition members, among their many activities, recorded promises of constitutional assembly members and had them document in writing their adherence to a gender agenda.

During the reform process, the areas of complex negotiation around women’s rights, were not due to resistance of leaders but due to negotiations and differences of opinion between leaders in the women’s rights community and those in the indigenous women’s community. This process yielded a very different dynamic, arguably setting the stage for women’s constitutional rights to be realized in a significantly different way than Zimbabwe, despite the evident similarity in their holistic textual approach.

V. CONCLUSION

Recent reforms and revisions have yielded a relatively new textual landscape for women’s constitutional rights. Through these processes, women’s constitutional rights and

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83 Id. at 31 (quoting Priscilla Misihairambwi-Mushonga).
84 Id. at 30.
86 CCIMCA, supra note 77.
protections appear to be evolving, expanding, being refined and potentially strengthened. Today’s constitutions are overall far more engaged with gender than texts a decade ago and, for countries that have actively engendered their constitutions within this last decade, a holistic gender mainstreaming approach may be emerging.

This is likely good news on the advancement of women’s rights. Constitutions may, more and more, reach into the areas where women experience the greatest barriers to equality – violence, reproduction and a lack of sufficient political and economic power. But, these changes should also be viewed with some caution and an eye towards ensuring an emerging “engendered package” does not conceal real world inequalities and inadvertently undermine one of the great benefits of a reform processes for women – motivating dialogue and discussion on women’s rights in an important moment of social transformation. As these countries move to implement their new constitutions (or new constitutional language), advocates of women’s rights would do well to remember, that in some circumstances, further dialogue, education, and persuasion may be needed for these parchment promises to move off the page.87

87 For accounts on the implementation of gender equality language of more long-standing constitutions which yielded gender-focused texts see Colombia or South Africa, as examples. E.g., Morgan, Martha I. "Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court." 30.2 U. Miami Inter-Am. L. Rev. 253, 342 (1999) (describing women’s leadership during constituent assembly and use of the tutela system to promote women’s constitutional rights).
REFERENCES


### APPENDIX

Table 1: Pre- and Post-Reform Constitutions

<table>
<thead>
<tr>
<th>Country</th>
<th>Pre-Reform Constitution</th>
<th>Post-Reform Constitution</th>
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<td>1992</td>
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<td>1995</td>
<td>1995, as amended through 2005</td>
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<tr>
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<tr>
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<td>2009</td>
</tr>
<tr>
<td>Burundi</td>
<td>1992</td>
<td>2005</td>
</tr>
<tr>
<td>Costa Rica</td>
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<td>1949, as amended through 2011</td>
</tr>
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<td>2008</td>
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<tr>
<td>Fiji</td>
<td>1997</td>
<td>2013</td>
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<td>Guinea</td>
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<tr>
<td>Hungary</td>
<td>1949, as amended through 2010</td>
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<td>Kenya</td>
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<td>2008</td>
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Figure 1: Criteria Present, Improved or Added By Criteria - Range All Countries (36)
Figure 2: Criteria Present, Improved or Added By Country - Range 11-51
Figure 3: Criteria Improved or Added By Criteria - Range 2-26 Countries

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<td>P5: Positive Action (e.g. Quotas)</td>
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<td>P2: Right to Vote</td>
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<td>P1: Eliminate Discrim. in Citizenship</td>
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<td>HR6: Positive Action</td>
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<tr>
<td>HR5: HR Commissions and/or Ombudsanans</td>
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<td>HR4: Non-Suspension Guaranteans</td>
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<td>HR3: Abolition of Slavery and/or Forced Labor</td>
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Figure 4: Criteria Improved or Added By Country - Range 1-41 Criteria

Figure 5: Criteria Worsened or Eliminated By Country - Range 0-12 Criteria