



ABC

for a
Gender Sensitive Constitution

Handbook for engendering constitution-making



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HANDBOOK FOR ENGENDERING CONSTITUTION MAKING

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Euromed Feminist Initiative IFE-EFI advocates for gender equality and women's universal human rights as inseparable from democracy building and citizenship, for political solutions to all conflicts, and for the right of peoples to self-determination.

ABC for a Gender Sensitive Constitution

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All over the world women remain second rank citizens due to the weight of gender power relations that structure our societies, of culture, religion, and traditions. Indeed, all societies and political systems are framed and shaped by discriminatory patriarchal values and structures, as well as social and cultural attitudes, which pose significant barriers to women's achievement and enjoyment of their fundamental human rights. Moreover, whatever rights women have been able to secure for themselves are constantly being questioned. Democracy requires equal participation and sharing of power, duties and responsibilities. Therefore a broader debate on defining it is needed, alongside with mobilization for transformative changes, placing women's rights and gender equality among the highest priorities for States, political parties and civil society.

During political transitions it is important to put emphasis on women's rights and gender equality in order to take the opportunity to correct the historical exclusion of women from the political sphere. History has shown that women's rights are at the core of national struggles for liberation and of political transition processes. Women are at the front line of these struggles, but they often find themselves excluded from decision making for the future of their countries and from constitution building. Thus, a reform process towards democracy can only be successful if human rights for both women and men are considered and respected.

In this regard constitutions are of crucial importance. They structure power arrangements, recognize individual rights and freedoms, and provide the basis for the judicial protection against abuses of power and rights violations. Enshrining women's rights, gender equality, and the principle of non-discrimination based on gender in constitutions recognizes women's equal status and enables legislative changes addressing existing discrimination. Therefore, affirming constitutional equality is a basic requirement to make women and men full citizens, by defining gender equality as a key feature of the State. Consequently, harmonizing constitutional provisions and national legislation with international law and standards for women's rights, grounded in the latter's universality, is a major asset for democracy.

Constitution building is a fight, from the early phases of preparation, throughout drafting and ratification, and continuing during implementation. This struggle is worthwhile if the end result is adopting and enforcing a constitution which recognizes all citizens as having equal worth and being equal before the law and in law, which prohibits all forms of oppression, violence, and discrimination. Therefore, all democratic movements should keep gender equality considerations at the forefront of their action.

Paris, March 2016

Lilian Halls French

Co-President Euromed Feminist Initiative IFE-EFI

The guide *ABC for a Gender Sensitive Constitution* is the result of a fruitful collaboration between the Euromed Feminist Initiative IFE-EFI, researchers and activists from Syria, Europe and the Maghreb. The handbook is written by Silvia Suteu, a constitutional law researcher at the University of Edinburgh and Ibrahim Draji, professor in international law at Damascus University. The process was supported by a reference group composed of: Faek Hwajeh, Syrian human rights lawyer and civil activist; Maya Al Rahabi and Sabah Al Hallak, Syrian women's rights activists; Salwa Hamrouni and Salsabil Kelibi, constitutional experts from Tunisia; Lilian Halls-French and Boriana Jonsson, from the Euromed Feminist Initiative. The common work benefited from the advice of Professor Christine Bell from the University of Edinburgh.

The reference group provided the writers with guidance and feedback throughout the different phases of preparation and writing. The dialogue established between activists and researchers, women and men, North and South, experts and practitioners was an asset and a shared source of experience and knowledge. The handbook was written in the frame of the project "Supporting transition towards democracy in Syria through preparing for an engendered constitution building process" funded by the European Union Tahdir Program and Sweden.

In Syria, the ongoing conflict at the time of writing of this handbook, with its unending climate of violence, oppression and repression, has limited attempts to ensure basic needs and freedoms and has created huge challenges on organizing. However, women's rights defenders, women and men, are playing an active part in the struggle for a political solution, preparing a transition towards democracy inclusive of women's rights and gender equality. Lessons learned from their mobilization also inform the handbook.

The *ABC for a Gender Sensitive Constitution* aims to provide a feminist perspective on democratic constitution making in a systematic and accessible way. It answers the questions of how and why a constitution that is inclusive of women's rights and gender equality is needed. What are the entry points? How to debate them? The handbook combines academic research and constitutional expertise with a feminist theoretic approach, substantiated by the experiences of the women's rights activists in the Euromed region and examples from different constitutions and processes across the world. This *ABC* does not only support future constitution building in transitional political processes and post-conflict situations, but also strives to inspire a critical review of existing constitutions, many of which still lack a genuine commitment to women's rights and gender equality.

The *ABC* endeavors to become a tool and a reference for constitution drafters, lawyers, practitioners, students, as well as human rights activists in order to reach also grassroots and local communities. One of its major purposes is to bring insights, raise awareness, and stimulate debate on the future of countries seeking to transition to democracy or to boost their democratic commitments by strengthening their constitutional commitment to gender equality and women's rights. Furthermore, the *ABC* will be a useful tool for journalists, teachers, students, and indeed

any member of the broader public who takes an interest in constitution making. We wish that this handbook becomes a reference in educational curricula in all countries in the Euromed region and a resource for students of law and politics.

The collaborative elaboration of the *ABC for a Gender Sensitive Constitution* highlighted the crucial role of constitutions, the role played by women's rights activists in political transformation processes and the major force they represent for democratic change. In the present global context, this work emphasizes the importance of and the need to promote, both in law and in practice, equality between women and men in exercising and enjoying their civil, political, economic, social and cultural rights.

This *ABC* identifies simple and direct entry points for constitution making from a gender equality perspective by drawing attention not only to provisions on gender equality but also to the inclusiveness of the whole approach.

The handbook is structured as follows:

A Glossary is included at the start, with working definitions of key terms used throughout the *ABC*.

Chapter 1 explains the role of constitutions in advancing gender equality and provides concrete arguments in favor of women's equal participation and recognition in constitution making.

Chapter 2 identifies the international and regional legal texts binding on States which call upon them to promote gender equality and non-discrimination and to engender their constitutions.

Chapter 3 presents the main principles, rights, and institutions of a democratic, gender sensitive constitution.

Chapter 4 explains why constitutional language itself should be gender sensitive and presents concrete strategies for achieving this.

Chapter 5 describes constitutional provisions, strategies and institutions which can be relied on to ensure that the constitution will be enforced. The focus is on rights limitation clauses, individuals' access to courts, the independence of the judiciary, judicial interpretation, and restrictions on constitutional amendment.

Chapter 6 provides advice on how to maximize the equal participation of women in all stages of the constitution making process: before drafting, during drafting, and during and after ratification of the constitution.

The information is offered in plain language and examples serve to illustrate both good and bad practice. The reader will find at the end of each chapter a checklist of the main lessons drawn from the chapter and also a "further reading" list of widely accessible references relevant to that chapter.

An annex is added at the end of this *ABC*, containing cross-cutting strategies for mobilizing and advocating for a gender sensitive constitution, with examples of where these have been used successfully.

- Affirmative Action:** Deliberate measures and actions to improve the rights, opportunities and access to resources and responsibilities of women in order to compensate for structural gender imbalances and overcome exclusion of women in public and political space.
- Civil State:** This has two meanings: (1) State in which military forces do not interfere with State affairs and are accountable to civilian control. (2) Secular State or State in which religion is clearly separated from public affairs.
- Constitution:** A set of fundamental principles and values, typically contained in a single document, which establishes and regulates the division of powers within the State, as well as the rights, freedoms, and obligations enjoyed by individuals in that State.
- Culture and tradition:** Culture and tradition characterize differently all communities. They often serve as justification violations of women's rights or for not addressing women's discrimination and violence against them. The Beijing Platform for Action, 1995 affirms that: "No State may refer to national custom as an excuse for not guaranteeing all individuals human rights and fundamental freedoms."
- Democracy:** Political system, or system of decision making involving periodic elections and a plural party system, in which all individuals have an equal access to power, duties and responsibilities. Democracy implies freedom, dignity, physical and psychological integrity, equal access for all genders to resources and opportunities, health, education, and decision making. It implies also the elimination of any discrimination based on gender, ethnic origin, belief or other characteristic, as well as a comprehensive approach to women's rights as universal human rights.
- Democratic constitution:** A constitution based on democratic principles which combine the rule of law, respect for human dignity and human rights of women and men alike, gender equality and the principle of non-discrimination. A democratic constitution sets out the principles, values, and political and legal institutions necessary to democracy.
- Gender:** Gender is the social construct of what is "masculine" and "feminine". Gender is used to describe those characteristics of women and men which are socially constructed, while sex refers to those which are biologically determined. People are born female or male but learn to be girls and boys who grow into women and men. This learned behavior makes up gender identity and determines gender roles." (World Health Organization, 2002)

Discrimination against women:	“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” (CEDAW, Article 1)
Gender based violence:	Gender based violence stems from gender inequality. This term qualifies gender inequality as a cause of violence, without identifying the victim or the perpetrator.
Gender equality:	The principle of gender equality refers to women and men enjoying the same opportunities, rights and responsibilities in all areas of life. Everyone, regardless of gender, has the right to work and support themselves, to balance career and family life, to participate in political and public life on equal footing and to live without the fear of abuse or violence. Gender equality also means that women and men are of equal worth and are equally protected before law and in law, and practice.
Gender mainstreaming:	Gender mainstreaming is a political and legal strategy to tackle formal and informal barriers to achieving gender equality by integrating the gender equality and gender power perspective in all areas and at all levels of society. “The process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetrated.” (ECOSOC, 1997)
Gender power relations:	A system of socially created relations that reflects the way in which power is shaped by considerations of gender and provides men with privileged access to power and material resources as well as status in society. Gender power relations cross all categories such as class, ethnicity, color, age etc., and contribute to other forms of inequality.
Gender power structures:	Prevailing patriarchal order of power structures in society which determine how power is held according to gender roles and expectations in which men are generally placed above women and which sustain and reproduce barriers to gender equality. Understanding these structures is a point of departure for approaching legislation and exploring fair treatment.

Gender sensitive constitution:	A gender sensitive constitution combines the establishment of the rule of law, equality between women and men and respect for the human rights and dignity of both women and men alike. Such a constitution adopts a gender perspective and pays attention to how issues of gender are dealt with and how provisions of the constitution impact on gender. It adopts gender sensitive language and specific gender equality provisions. Although social, political and cultural contexts are different, a gender sensitive constitution is framed by norms and standards that are grounded in the universality and indivisibility of the human rights of women and men.
Secularism:	The principle of the separation of the public, political and legal spheres from religion, where decision making should be determined by the public good, and through political and legal institutions whose decision making is not controlled or influenced by religious institutions or positions. Secularism is the only way to respect religious diversity and preserve the freedom of all beliefs.
Sexual and reproductive rights:	Sexual and reproductive rights are indivisible and undeniable universal human rights grounded in the values of freedom, equality and dignity of all human beings. These rights include the “right to health, to be free from discrimination, the right to determine the number of children, the right to be free from sexual violence, the right to prevention and violence against women, sexual health information, education and counseling, the right to personal relationships and quality of life”. (ICPD Program of Action, Cairo, 1994)
Violence against women:	All forms of violence perpetrated against women. “Any act of gender based violence that results in, or is likely to result in discrimination physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberties whether occurring in public or private spheres.” (UN Declaration on the Elimination of Violence against Women 1993) While the term violence against women puts the spotlight on the victims, the term “male violence against women” is also used to highlight the perpetrator, in acknowledgement of the fact that 90% of its perpetrators are men. (World Health Organization)

CEDAW	Convention on Elimination of All forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedom
EU	European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSCR:	United Nations Security Council Resolution

WHY ADOPT A GENDER SENSITIVE CONSTITUTION?

“It is vitally important that all structures of Government, including the President himself, should understand this fully that freedom cannot be achieved unless the women have been emancipated from all forms of oppression.”

(State of the nation address by the President of South Africa, Nelson Mandela, Houses of Parliament, Cape Town, 24 May 1994)

“Not having women at the negotiating table would mean a settlement, and society, which women had no meaningful part in shaping. Something had to be done. And it was.”

(Marie Abbott, Member of the Executive Committee of Northern Ireland Women’s Coalition, “Women’s Political Role in the Northern Ireland Peace Process” speech, 2001)

This chapter sets out key arguments as to why a gender sensitive constitution is worth pursuing. It explains not just the benefits for democracy, development, and post-conflict transitions of pursuing gender equality, non-discrimination, and women’s rights, but also the value of constitutions themselves as tools for the legal empowerment of women.

1. A gender sensitive constitution is a democratic constitution

There can be no full democracy without the equal participation of women in all aspects of public life and this extends to the constitution. At present, women are underrepresented in democratic decision making throughout the world:

- Only one in five members of parliaments are women;
- Only 19 heads of State or government were women in 2015;
- Only 18% of cabinet ministers are women, and they are most often assigned social issues portfolios rather than portfolios such as economy, finance, defense or justice;
- In 50% of countries, men outnumber women as judges and magistrates, and women’s representation declines drastically higher up the judicial hierarchy;
- Only 19% of supreme courts have a female President; and
- Women are severely underrepresented in positions of leadership in political parties and local government.¹

[1] United Nations, The World’s Women 2015: Trends and Statistics, Chapter 5 “Power and Decision-making”, 2015,

While these figures reflect gains for women compared to the past, it is only through sustained effort that they can continue to be improved. Otherwise, in the words of the UN Secretary-General, keeping the current pace will mean “it will take decades to reach gender parity in parliaments around the world” and, one may add, in politics more generally.²

A democratic constitution draws its legitimacy from popular sovereignty and women must be recognized as equal members of “the people” in whose name the constitution speaks. A commitment to democracy must therefore also be a commitment both to women’s participation in the process of drafting the constitution and to ensuring that their rights are adequately addressed by the constitutional text. In short, there can be no true democracy without gender equality.

“If a political system neglects women’s participation, if it evades accountability for women’s rights, it fails half of its citizens. Indeed, true democracy is based on the realization of human rights and gender equality. If one of these falters, so do the others.”

See Vivien Hart, “Democratic Constitution Making”, United States Institute for Peace, Special Report No. 107, July 2003, p. 11, <http://www.usip.org/sites/default/files/resources/sr107.pdf>.

Committing to a gender sensitive constitution on democratic grounds also has an impact on the resulting constitutional culture and practices in the longer term. Women can “bring attitudes and experience highly appropriate to democratic constitution making and...their increasing participation will give impetus and depth to developing practice.”³ Harnessing the potential of women during the founding of a new constitutional order and setting in place mechanisms to correct and prevent their alienation from public life should also enable their subsequent involvement in politics and as such enrich democratic practice. In time, constitutional recognition of women as equal citizens will also change mentalities, both of women themselves and of men in society. Evidence from South Africa suggests that, following the country’s adoption of its 1996 constitution, its guarantee of gender equality began “to inform the intimate relationships even of individuals living with little formal attachments to courts or legal culture”—even in subcultures that generally rejected gender equality, the men understood that their status was changing and the women that they were to be treated differently.⁴

Furthermore, States’ reports to the CEDAW Committee has suggested that “where there is full and equal participation of women in public life and decision-making, the implementation of their rights and compliance with the Convention improves.”⁵ Moreover, “where women are underrepresented in public office or women’s and girls’ rights can be violated with impunity, political legitimacy suffers.”⁶ This in turn results in lower trust in the government, deteriorates the rule of law, and makes enlisting public support for collective action more difficult. Therefore,

<http://unstats.un.org/unsd/gender/worldswomen.html>.

[2] UN Secretary-General Report S/2014/693 on women and peace and security, 23 September 2014, para. 25.

[3] Vivien Hart, “Democratic Constitution Making”, United States Institute for Peace, Special Report No. 107, July 2003, p. 11, <http://www.usip.org/sites/default/files/resources/sr107.pdf>.

[4] Tracy E. Higgins, “Constitutional Chicken Soup”, *Fordham Law Review* (2006), p. 719.

[5] CEDAW General Recommendation No. 23 on women in political and public life, A/52/38 (1997), para. 14.

[6] “Women’s Participation in Peacebuilding”, Report of the UN Secretary-General, A/65/354–S/2010/466, 7 September 2010, para. 7.

any State which wishes to maximize the chances of the rule of law taking root in its society should ensure from the outset that its constitution guarantees the equal participation and rights of all its members. There is reason to believe that combatting gender discrimination and ensuring equality cannot be achieved solely through piecemeal legislation, but requires “a firm constitutional basis for equal rights on the basis of gender”.⁷ While not all women will be equally concerned with advancing women’s rights, on average having more women participate on equal terms in processes of decision making will ensure a higher likelihood that gender equality considerations pervade democratic governance in the long run, as well as being a requirement of equality in and of itself.

A gender sensitive constitution is especially beneficial during transitions to democracy. Women can be crucial in bringing about the fall of authoritarian regimes and facilitating the transition to democracy itself. For example, women’s rights organizations in Latin America have been credited with being among the first protesters against authoritarian rule and with helping

Periods of transition to democracy offer the opportunity to promote women’s equal participation and to more radically transform society into a gender sensitive one.

to resurrect civil society in the 1980s transitions to civilian rule in the region.⁸ Moreover, such transitions offer the opportunity for a more radical transformation of society, which may also comprise the betterment of the status of women. For example, South Africa’s “drafting of a new constitution provided a prime opportunity for women to deploy gender pragmatically, as both a political and moral benchmark.”⁹ This included enshrining gender in the new constitution and developing new modes of democratic governance, which were then correlated with high levels of civil society activity and representation in government. Another example is Tunisia, where women were both organizers of and demonstrators in protests during the Jasmine Revolution in 2011, after which they demanded full recognition during the constitution making process.¹⁰ Such gains need to be constantly safeguarded against backsliding, but they can be important benefits of strong gender commitments from early on in the constitution making process.

[7] Mary Frances Berry, former chairwoman of the United States Commission on Civil Rights, Testimony to 1983 US Congressional hearing on the Equal Rights Amendment.

[8] Georgina Waylen, “Women and Democratization: Conceptualizing Gender Relations in Transition Politics”, *World Politics*, Vol. 46, No. 3 (1994), p. 352.

[9] Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives*, Palgrave Macmillan, 2003, p. 4.

[10] Mounira M. Charrad and Amina Zarrugh, “The Arab Spring and Women’s Rights in Tunisia”, *E-International Relations*, 4 September 2013, <http://www.e-ir.info/2013/09/04/the-arab-spring-and-womens-rights-in-tunisia/>.

2. A gender sensitive constitution corrects the historic and economic invisibility of women

A gender sensitive constitution will correct the historic absence of women from the constitutional sphere: both as constitution makers and as bearers of constitutional rights and duties. Their invisibility from the constitutional text has stigmatized women, both at a symbolic level and in practice. An example of this is the absence of American women from the text of the United States constitution, which does not explicitly refer to them by name even while declaring itself to be written in the name of “the people”. This initial erasure of women (as well as African Americans and indigenous people) left the American constitution with long-term problems and later accentuated the gap between the constitutional text and the reality of ordinary politics. Another example would include France’s first constitutions, which considered women to be nature’s “passive” citizens and, like domestic servants, not to be autonomous beings.¹¹ While some cases of such invisibility can be explained by their distance back in time, there is no reason for newer constitutional texts not to overtly and forcefully also speak in the name of women as full members of the political community.

A further remedial function played by a gender sensitive constitution has to do with correcting the economic consequences of the exclusion of women from the public sphere. The UN has recognized the key role of women in the economic reconstruction of societies, declaring that their empowerment leads improves economic recovery and sustainable development.

Even beyond post-conflict reconstruction, however, societies in which women can participate in working life on equal terms with men will likely see an increase in their prosperity. Thus, women’s equal access, responsibilities and privileges in the labor market is not only an indisputable human right, but leads to increased economic performance and development. For example, there are estimates that, were women to enter the workforce in the United Arab Emirates, this would lead to an increase of the GDP by 12%; that figure would be 34% were the same thing to happen in Egypt.¹² Such change would require measures not only to allow women access to the workforce, but also: to prevent that they be the target of discrimination and that they be relegated to low-income jobs; to facilitate their mobility outside the home so they can benefit from job training and networking; and to combat traditional notions of women’s roles as being confined to the

“The economic empowerment of women greatly contributes to the effectiveness of post-conflict economic activities and economic growth, and leads to improving the quality and social outcomes of economic recovery measures and policies as well as to sustainable development; and underscore the importance of integrating, as appropriate, a gender perspective when undertaking post-conflict economic activities.”

See General Assembly/Security Council Peacebuilding Commission, “Declaration: Women’s economic empowerment for peacebuilding”, PBC/7/OC/3, 26 September 2013, para. 4.

[11] James F. McMillan, *France and Women, 1789-1914: Gender, Society and Politics*, Routledge, 2000, p. 16.

[12] BBC Capital, “Unleashing the Power of Women in Work”, 11 December 2014, <http://www.bbc.com/capital/sponsored/story/20141202-unleashing-the-power-of-women-in-work>.

domestic sphere.¹³ Other factors which contribute to the economic disempowerment of women and societies generally also need to be addressed.

The role of a gender sensitive constitution in facilitating the economic empowerment of women is significant. It can trigger wider societal reform of legal barriers to women's participation in the workforce, including equal rights of property, inheritance, and contract, prohibiting discrimination, and mandating the equal allocation of resources to women's training. It can also address indirect factors which create gender based economic disparities, such as gender based violence, customs and traditions which confine women to the home, or unequal child and family care responsibilities. In fact, according to the World Bank, the trend in the past five decades has been precisely towards removing legal barriers. It found that "half of the legal constraints documented in 100 countries in 1960 on access to and control over assets, ability to sign legal documents, and fair treatment under the constitution had been removed by 2010" but indicated that such advances needed to accelerate.¹⁴ They are especially needed in those regions where discrimination is most explicit and persistent in legislation: the Middle East and North Africa, South Asia, and Sub-Saharan Africa.¹⁵ As Chapter 2 details, States have an international obligation to ensure women enjoy equal social, economic, and cultural rights. Moreover, as discussed in Chapter 3, the socioeconomic empowerment of women also facilitates their enjoyment of other rights, for example, by facilitating their access to the courts and to legal advice. The concrete economic benefits resulting from a gender sensitive constitution thus favor constitutional drafting that seeks to also empower women in the economic sphere, proving that sustainable economic growth and development can only be grounded in democracy and social justice.

3. A gender sensitive constitution will provide the legal basis for women's empowerment

Skeptics of the potential of constitutions to bring about social change will also dismiss the importance of paying much attention to gender in constitution making. However, this *ABC* starts from a belief in the very real impact of constitutions. On the one hand, it acknowledges their role as symbolic embodiments of society's fundamental values, as representations of the highest aspirations of a political community:

"The symbolic or expressive function of constitutions emphasizes the particularity of constitution making. It is We the People that come together, and so the constitution embodies our nation in a distinct and local way different from other polities."¹⁶

There is an ethical imperative to ensure that the constitution represents women as equal members of the political community of which they are part.

[13] World Bank, *Gender at Work: A Companion to the World Development Report on Jobs*, pp. 42-44, http://www.worldbank.org/content/dam/Worldbank/Event/Gender/GenderAtWork_web2.pdf.

[14] *Ibid.*, pp. 19, 43.

[15] *Ibid.*, p. 43.

[16] Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law", in Susan Rose-Ackerman and Peter L. Lindseth, eds., *Comparative Administrative Law*, Edward

If this “we the people” is to be more than rhetorical flourish, it must be framed by the principle of gender equality. There is thus an ethical imperative to ensure that the constitution represents women as equal members of the political community of which they are part.

On the other hand, the *ABC* subscribes to the view that constitutions, while not panaceas for societal transformation, have the potential to play a significant role in such processes of change. They do so by way of their symbolic resonance, but also by entrenching basic rights and thus offering real avenues for contestations of power:

“From experience, many women are sceptical about constitutionalism, conventional political structures, and lofty promises of democracy, representation, accountability and equality. But when windows of reform have opened women have felt compelled to seize these political opportunities and, wherever they can, to shape them. They have done so because constitutions matter and they matter fundamentally. Constitutions are not only about crafting and entrenching political rules, rights, and institutions, although these are typical features. Constitutions are also about encapsulating a country’s highest ideals and emphasizing its most significant identities. And thus, constitutions are of great consequence. A constitution is intended to stand above everyday politics, authorizing the rules of the game and legitimating the processes and outcomes of government. Constitutions are also, at their core, about power – laying out its distribution, exercise and limits, imposing obligations as well as granting rights. And so constitutional settlements are continually contested, amended or entirely reframed in a process every bit as political as the daily business of elections and policy-making.”¹⁷

These last two points are crucial. The first emphasizes the special status of constitutions within the legal order: they are the supreme law and as such take precedence over ordinary legislation. Furthermore, they are entrenched and as such more difficult to change (typically, higher thresholds are in place for passing constitutional amendments, thus making them less prone to majoritarian tinkering). The recognition of women’s rights and interests at the constitutional level therefore carries greater weight and, moreover, will be less vulnerable to the vagaries of majoritarian law making.

The second point is important in a different way. It draws out the power politics inevitably involved in constitution making and the potential for a gender sensitive constitution to unsettle long-standing patriarchal hierarchies in the constitutional order. Once given a voice in constitutional politics, women’s rights defenders will be far more difficult to silence in the future, including in everyday legislating. Their involvement in decision making about the design of constitutional structures of power will also afford them the opportunity to reshape those structures in a more inclusive manner—not just for women, but potentially for previously marginalized sectors of society.

It is true that a constitution “cannot in itself secure rights for women”¹⁸ and that “both

Elgar Publishing, 2010, p. 118.

[17] Dobrowolsky and Hart 2003, p. 2.

[18] Saras Jagwanth and Christina Murray, ““No Nation Can Be Free When One Half of It Is Enslaved”:

constitutional provisions and activism are necessary” if initial constitutional promises are to become reality.¹⁹ Nevertheless, women would be worse off without a constitution reflecting their interests and guaranteeing their rights, even while their struggle for the realization of those rights continues after the constitution making moment. It is likely that “many years of refining and challenging laws” will be necessary in order to bridge the gap between the promise and the reality of gender

Law is more than a mirror of society: it also holds the tools for reshaping society towards more democracy and social and economic justice or, where law is itself discriminatory, for rendering society less democratic and more unjust.

equality and to achieve successful enforcement.²⁰ However, once included in the constitution, “gender-equality provisions provide a legal basis for women’s rights advocacy and inspire the content of subsequent legislation and judicial interpretation of laws and constitutional rights.”²¹ In other words, the constitutionalization of gender equality and non-discrimination will offer the legal grounds upon which to call for further gender sensitive policy-making, legislation and adjudication. This legal empowerment complements the recognition of the moral imperative behind adopting a gender sensitive constitution.

4. A gender sensitive constitution addresses the different interests of women

The interests of women have historically been ignored both during peace and constitution building processes. This has been either due to a disregard for women’s different needs and concerns or else due to an incorrect assumption that neutral procedures and constitutional language will suffice to ensure the constitution will be gender sensitive. Addressing both of these blind spots will ensure the constitution reflects society in its entirety.

In terms of the constitution making processes, these must be designed with the awareness that women have different needs in order to be able to participate, such as special security or facilities (more on these in Chapter 6). These needs are a direct consequence of the position women are assigned in society. Therefore, constitution making processes should themselves address the patriarchal norms which put women in an inferior position and exclude them a priori from political and public life.

With regard to the different needs and concerns of women to be incorporated in the constitution’s text, these differ according to their level of generality. Broad constitutional structures which may have gendered impacts include the choice between republic and monarchy (both of which are traditionally male in different ways) or between a federal and a unitary State (with federations

Constitutional Equality for Women in South Africa”, in Beverley Baines and Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence*, Cambridge University Press, 2005, p. 231.

[19] Dobrowolsky and Hart 2003, p. 3.

[20] Rangita de Silva de Alwis, *Women’s Voice and Agency: The Role of Legal Institutions and Women’s Movements*, Women’s Voice and Agency Research Series 2014 No.7, The World Bank, 2014, p. 39, <http://www.worldbank.org/content/dam/Worldbank/document/Gender/de%20Silva%20de%20Alwis%202014.%20Women’s%20voice%20and%20agency.%20The%20role%20of%20legal%20institutions%20and%20women’s%20movements.pdf>.

[21] Druscilla Scribner and Priscilla A. Lambert, “Constitutionalizing Difference: A Case Study Analysis of Gender Provisions in Botswana and South Africa”, *Politics & Gender*, Vol. 6, No. 1 (2010), p. 40.

possibly allowing for more local decision making and thus potentially also a greater role for women).²² While these tend not to be considered according to their gendered implications, most constitutions do include commitments to equality, both formal and substantive, and to the principle of non-discrimination. Even in those countries which do not have such explicit commitments in their constitutions, a doctrine of equality has been developed by their courts.²³ Such commitments, in conjunction with other rights provisions in the constitution, can provide the foundations for women's empowerment, such as through constitutional litigation and rights claims. A further category includes provisions on the political status of women, such as on their right to participate in public life and more generally citizenship provisions. Although few, there are constitutions which explicitly list both genders as holders of rights to vote (the United States of America) or to become members of parliament (South Africa). With regard to citizenship, this is sometimes defined so as to limit women's rights to pass on membership to her descendants or to serve in certain public capacities such as in the military or on juries. Finally, the constitutional status of customary or traditional law, as well as of religion and culture, can also have a negative impact on women.²⁴

There are also more specific interests which stand to be tackled constitutionally, notably to do with reproductive rights and sexual autonomy (such as abortion, in vitro fertilization, contraception, and sterilization). Despite their centrality to women's lives, these issues are seldom addressed in constitutional texts and are instead left to the legislatures and to courts to demarcate. Constitutional silence on these matters has meant that they are more vulnerable to legislative pushback. Examples of such pushback are efforts to reverse progress on the liberalization of abortion by impeding access to legal abortion services (such as through mandatory waiting periods, biased counseling requirements, and the unregulated practice of conscientious objection).²⁵ Sexual offences (such as rape, trafficking for sexual exploitation, pornography, honor killings, sexist speech, and sexual harassment) have also become constitutional battlegrounds, even while these issues have tended to be regulated by criminal or other laws and not by the constitution itself.²⁶

Another category of issues having a gendered impact includes such aspects as the constitutionalization of the family and of marriage, as well as the socioeconomic status of women. For instance, the recognition of non-traditional families (such as de facto or common law families, single-parent families, and others), the distribution of gender roles and rights within the family, adoption, custody and support of children, and domestic violence are only a few examples of the types of questions women will want answered by their constitution. In socioeconomic terms, these will further include such issues as the equal distribution of domestic labor between the

[22] Baines and Rubio-Marin 2005, pp. 9-10 and Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Chapter 3 "Federalism", Cambridge University Press, 2008, pp. 65-89.

[23] Baines and Rubio-Marin 2005, p. 13.

[24] Baines and Rubio-Marin 2005, p. 12 and Vivien Hart, "Constitutions", in Cheri Kramarae and Dale Spender, eds., *Routledge International Encyclopedia of Women: Global Women's Issues and Knowledge*, vol. 1, Routledge, 2000, p. 206.

[25] Louise Finer and Johanna B. Fine. "Abortion Law Around the World: Progress and Pushback", *American Journal of Public Health*, Vol. 103, No. 4 (2013), pp. 585-89.

[26] Baines and Rubio-Marin 2005, p. 18.

spouses, the recognition of women heads of families, property and inheritance law.

Advocating for a gender sensitive constitution does not imply calling for the explicit inclusion of all these issues in the constitution. Indeed, in some cases, certain gender based protections have inadvertently led to the restriction of women's freedoms. An example would be the special protection of women workers. Turkey's constitution, for instance, includes in Article 50 the requirement that "No one shall be required to perform work unsuited to his/her age, sex, and capacity." and lists women alongside minors and physically and mentally disabled persons as enjoying "special protection with regard to working conditions." Besides this unfortunate comparison to children and those with reduced mental or physical capacity, the Turkish provision was also previously interpreted to keep women from certain jobs deemed to "traditionally belong to men", such as bus or truck drivers or heavy factory jobs.²⁷

Instead of such approaches, it is important to recognize that women have different needs and interests which are worthy of equal respect in a constitution. It may lead to the inclusion of additional rights and duties or to the recasting of existing structures. Moreover, it should lead to an awareness of the need to avoid a gendered and sexist constitutional language, an issue detailed in Chapter 4.

5. A gender sensitive constitution is an international obligation for States

Women's right to participate in public life and in political and economic decision making is guaranteed by numerous international instruments (the full list of international treaties relating to gender equality and non-discrimination is discussed in Chapter 2). Among these are:

- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), whose Article 7 stipulates that States must ensure women's rights, on equal terms with men, to vote in all elections and referendums, to participate in the formulation and implementation of government policy, and hold public office at all levels;
- the 1995 Beijing Platform for Action, which calls for "women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power" (Point 13);
- UN Security Council Resolution 1325 (2000), which calls on States to increase the representation of women at all decision making levels;
- UN General Assembly Resolution on Women's Political Participation (A/RES/66/130) of 2011, which reaffirms that "the active participation of women, on equal terms with men, at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy."

More generally, States have an international obligation under CEDAW:

- to abolish discriminatory legislation, replace it with legislation prohibiting discrimination against women, and ensure its enforcement;

[27] Hilal Elver, "Gender Equality from a Constitutional Perspective", in Baines and Rubio-Marín 2005, p. 289.

- to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms;
- to protect the reproductive and citizenship rights of women and to protect them against trafficking and exploitation;
- and to work towards changing social and cultural patterns of conduct based on prejudices about the traditional role of women and men in society and in the family.

The obligation to address gender based violence exists in both international and regional instruments, applicable both during peacetime and wartime. Under CEDAW, it is recognized as “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”²⁸ Other relevant instruments include: Security Council Resolutions 1325 (2000), 1820 (2008), 1888 (2009) and 1960 (2010), which recognize gender based violence as a tactic of war and demand appropriate measures to protect victims; General Assembly Resolutions 58/147 of 19 February 2004 on the “Elimination of domestic violence against women” and A/RES/62/134 of 18 December 2007 on “Eliminating rape and other forms of sexual violence in all their manifestations, including in conflict and related situations”; and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), among others.

Trafficking of women and children has also been prohibited, both internationally and regionally (see the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the 2000 UN Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children (Palermo Protocol); and the Council of Europe Convention on Action against Trafficking in Human Beings). The Rome Statute of the International Criminal Court also lists it as a crime against humanity (Article 7(2)(c)).

Furthermore, the Convention on the Rights of the Child guarantees the rights of all children, girls and boys, without discrimination in any form. In implementing the Convention, UNICEF has also strived to address the denial of girls’ rights in many countries and cultures, including of their rights to education and to access to nutrition, health care and immunization; female genital mutilation; early marriage; trafficking; domestic abuse; and targeting during wartime.

International instruments also address the potentially detrimental impact of traditional and customary laws on women. For example, General Assembly Resolution 56/128 of 30 January 2002 reaffirmed “that harmful traditional or customary practices, including female genital mutilation” constituted a serious (potentially fatal) threat to the health of women and girls which amounted to “a definite form of violence against women and girls and a serious violation of their human rights”. It also called upon States to “develop, adopt and implement national legislation, policies, plans and programmes that prohibit traditional or customary practices affecting the health of women and girls, including female genital mutilation, and to prosecute the perpetrators of such practices.” The UN Declaration on the Rights of Indigenous Peoples calls

[28] CEDAW General Recommendation No. 19 on violence against women, CEDAW/C/GC/19 (1992), para. 1.

on States to “take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination” (Article 22(2)).

The full spectrum of international and regional instruments which stipulate the obligation of States to ensure the equal rights of women and protect them from discrimination will be discussed in Chapter 2 below. The short incursion into the vast international framework on this matter here serves to highlight its high priority as a global problem, not just a concern for States. Although the more detailed implementation required by these international commitments will only be possible at the level of legislation, one should not underestimate the role constitutions can play. For example, Somalia’s 2012 constitution explicitly prohibits the “circumcision of girls” as “a cruel and degrading customary practice... tantamount to torture” (Article 15(4))—a crucial step towards eradicating the practice of female genital mutilation which is estimated to affect 96% of Somali women. Such constitutional provisions, together with targeted legislation and public campaigns aimed at education and prevention, can bring a society closer to eradicating harmful traditional practices. Where strictly enforced by the State, such measures have indeed been proven successful.²⁹

“Implementing these commitments would be a first step toward utilizing all available resources to establish and sustain peace. When approaching the difficult task of ending war, the stakes are too high to neglect the resources that women have to offer. Examples from around the world illustrate their contributions.”

See United Nations Development Fund for Women (UNIFEM), *Securing the Peace: Guiding the International Community towards Women’s Effective Participation throughout Peace Processes*, October 2005, p. 25, <http://www.unwomen.org/en/digital-library/publications/2005/1/securing-the-peace-guiding-the-international-community-towards-women-s-effective-participation-throughout-peace-processes>.

Even beyond the post-conflict context, however, a State’s international obligations comprise the need to adopt and implement laws, including the constitution, protecting women’s rights and prohibiting discrimination. Moreover, as discussed in Chapter 6, there is growing international consensus that the process of constitution making should itself be democratic, which also means as inclusive as possible – thus also ensuring the equal participation of women (see Chapter 6 on this issue).

6. A gender sensitive constitution is especially important in post-conflict contexts

Post-conflict peace processes and constitution making must ensure the participation of women on equal terms. On the one hand, this is because these processes must take into account society in its entirety when setting up the conditions for peaceful transition and reconstruction. On the other hand, there are reasons specific to women and the impact war has upon them which make their participation in these processes necessary. Conflicts exacerbate existing gender

[29] See UN Secretary-General Report on “Traditional or customary practices affecting the health of women and girls”, A/58/169, 18 July 2003, para. 4, mentioning Lebanon reporting that strict enforcement of its existing laws had resulted in the elimination of traditional or customary practices in the country.

inequalities and gender based violence. Moreover, gender based violence has been used as a tactic of war and sometimes after conflict as well, when it may even increase.³⁰ However, women's involvement in conflict is not homogenous and as such their post-conflict priorities and capacities will also differ: the needs of female ex-combatants, widows, survivors of gender based violence, displaced women, and those with disabilities or sexually-transmitted diseases will all require a differential approach.³¹ Moreover, women tend to assume new and vital roles during conflicts, such as becoming heads of families, caring for the wounded, or owning and managing property and natural resources.³² Any transitional process, including of constitution making, which does not adequately address the different impact war has on women will risk victimizing them anew and excluding them from new State structures.

Post-conflict transitions present both challenges and opportunities for women. In terms of challenges, the main one is the low priority afforded to gender in post-conflict processes, in which it is often seen as incompatible with stabilization and with reaching political peace.³³ Moreover, despite the sometimes key role women's initiatives play in bringing about peace, they tend to be excluded from the formal peace negotiations once these are set in motion. For example, women were key in brokering the Belfast Agreement of 1998 in Northern Ireland, having spent a decade building trust between Protestants and Roman Catholics and creating the foundation upon which peace negotiations were eventually carried out.³⁴ Another such example is that of Rwanda, where women formed the first cross-party parliamentary caucus, composed of both Hutus and Tutsis, which set the precedent for other cross-party caucuses to be established.³⁵ Despite such effectiveness as peacemakers, women are consistently underrepresented amidst the negotiators, mediators, witnesses, and signatories of peace agreements.³⁶ A study of peace agreements before 2015 has indicated that only 18% have mentioned women at all, and many of the ones that did only made a one-off reference to gender, were drafted in general terms, and often included in footnotes or annexes rather than the main text.³⁷ This exclusion extends also to the period of reconstruction, when "alarmingly low levels of peacebuilding and recovery spending target the economic empowerment and livelihoods of women."³⁸ There is also a risk

[30] CEDAW General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30(2013), paras. 34-38.

[31] UN Secretary-General report on "Women's participation in peacebuilding", A/65/354-S/2010/466, 7 September 2010, para. 12.

[32] *Ibid.*, para. 10.

[33] CEDAW General Recommendation No. 30, para. 43 and Christine Bell, *Women and Peace Processes, Negotiations, and Agreements: Operational Opportunities and Challenges*, Norwegian Peacebuilding Resource Centre, March 2013, p. 2, http://www.peacebuilding.no/var/ezflow_site/storage/original/application/b6f94e1df2977a0f3e0e17dd1dd7dcc4.pdf.

[34] Hart 2003, p. 10.

[35] UNIFEM, *Securing the Peace*, p. 2.

[36] United Nations Development Fund for Women (UNIFEM), *Women's Participation in Peace Negotiations: Connections between Presence and Influence*, 2012, http://www.unwomen.org/~media/headquarters/media/publications/unifem/0302_womensparticipationinpeacenegotiations_en.pdf?v=1&d=20140917T101001.

[37] Christine Bell, "Text and Context: Evaluating Peace Agreements for their 'Gender Perspective'", Political Settlements Research Programme, October 2015, <http://www.politicalsettlements.org/files/2015/10/Text-and-Context-11-October-2015.pdf> and Christine Bell and Catherine O'Rourke, "Peace agreements or 'pieces of paper'? The impact of UNSC Resolution 1325 on peace processes and their agreements", *International and Comparative Law Quarterly*, Vol. 59 (2010), pp. 941-80.

[38] UN Secretary-General Report S/2014/693, para. 49.

that, rather than capitalizing on the new roles women took up during the conflict, post-conflict processes will relegate women to the roles traditionally considered acceptable for them.

Post-conflict contexts are also periods of opportunity for women, however. They offer the chance to “build back better” by adopting legislation and policies to eliminate discrimination and promote equality.³⁹ As the United Nations has admitted, “During the transition to peace, a unique window of opportunity exists to put in place a gender-responsive framework for a country’s reconstruction.”⁴⁰ This must translate into formal participation in peace negotiations; in designing conflict-prevention and trust-building initiatives; in peace building efforts including elections, justice and security sector reforms, and economic recovery; as well as in transitional justice mechanisms, whether judicial or non-judicial.⁴¹ Constitution making will thus be only one of a vast array of transitional activities in which women’s involvement will not only be required, but also will be advantageous.⁴²

[39] Ibid. and UN Secretary-General report, A/65/354–S/2010/466, para. 10.

[40] United Nations Development Fund for Women (UNIFEM), CEDAW and Security Council Resolution 1325: A Quick Guide, 2006, p. 25, <http://www.unwomen.org/en/digital-library/publications/2006/1/cedaw-and-security-council-resolution-1325-a-quick-guide>.

[41] UN Women, UN Women Sourcebook on Women, Peace and Security, October 2012, <http://www.unwomen.org/en/digital-library/publications/2012/10/un-women-sourcebook-on-women-peace-and-security>.

[42] Michele Brandt, Constitutional Assistance in Post-Conflict Countries: The UN Experience: Cambodia, East Timor & Afghanistan, United Nations Development Programme (UNDP), June 2005, p. 1, http://www.unrol.org/doc.aspx?n=constitution+making+and+UN+Experience+Report_Michele+Brandt.doc

Constitutional drafters and women's rights advocates engaged in the process of writing a new constitution can appeal to a range of arguments in favor of making it gender sensitive. These will include arguments that:

1. A GENDER SENSITIVE CONSTITUTION IS A DEMOCRATIC CONSTITUTION

- There can be no full democracy without a gender sensitive constitution.
- The constitution is based on popular sovereignty and as such must ensure that women are represented among “the people” in whose name it is adopted.
- The equal participation of women in public life results in better rights protection and a stronger rule of law.
- The equal participation of women is necessary in and facilitates democratic transitions.

2. A GENDER SENSITIVE CONSTITUTION CORRECTS THE HISTORIC AND ECONOMIC INVISIBILITY OF WOMEN

- The historic invisibility of women from constitutions has stigmatized them and must be corrected.
- The economic exclusion of women from public life has served to disempower women and society at large and must be reversed.
- A gender sensitive constitution will build on the untapped potential of women and will bring socioeconomic benefits to society in its entirety.

3. A GENDER SENSITIVE CONSTITUTION WILL PROVIDE THE LEGAL BASIS FOR WOMEN'S EMPOWERMENT

- The symbolic role of constitutions is important in signaling the recognition of women as equal members of society and that their rights are universal human rights.
- Constitutions can also have a very real impact on society due to their status as supreme law.
- A gender sensitive constitution can unsettle long-standing patriarchal hierarchies in the constitutional order.
- A gender sensitive constitution will provide the legal grounds upon which to call for further gender sensitive policy-making, legislation and adjudication.

4. A GENDER SENSITIVE CONSTITUTION ADDRESSES THE DIFFERENT INTERESTS OF WOMEN

- All State structures, including the system of government and of territorial division, political rights and citizenship, and rules of customary, traditional, or religious law, have a gendered impact on women and men which should be reflected in their design.
- Women's needs and interests include reproductive rights and rights of sexual autonomy, the criminalization of sexual offences, all of which should be enshrined in the constitution.
- Certain constitutional protections, such as of the family and of marriage, or of women's different needs in the workforce, can be interpreted so as to diminish women's rights so they should only be constitutionalized with care.

5. A GENDER SENSITIVE CONSTITUTION IS AN INTERNATIONAL OBLIGATION FOR STATES

- There is an international legal obligation to ensure women's equal participation in public life.
- There is an international legal obligation to abolish discriminatory legislation and to take all appropriate measures so that women can enjoy all their rights.
- There is an international legal obligation for States to legislate on gender based violence, both in peacetime and during conflict.
- International law prohibits the trafficking of women and children.
- There are international obligations on the rights of children, including specific provisions on girls.
- There are international obligations to prevent traditional or customary laws from harming women.

6. A GENDER SENSITIVE CONSTITUTION IS ESPECIALLY IMPORTANT IN POST-CONFLICT CONTEXTS

- Post-conflict constitutions must address the different impact war has on women and men.
- Periods of transition present both challenges and opportunities for women, including to their participation in peace negotiations and implementation and in constitution making.
- Lessons learned show that an inclusive constitution building process is both a tool and a goal towards improving women's rights and gender equality and is central to democracy building.

Beverley Baines and Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence*, Cambridge University Press, 2005.

Christine Bell, *Women and Peace Processes, Negotiations, and Agreements: Operational Opportunities and Challenges*, Norwegian Peacebuilding Resource Centre, March 2013, http://www.peacebuilding.no/var/ezflow_site/storage/original/application/b6f94e1df2977a0f3e0e17dd1dd7dcc4.pdf.

Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives*, Palgrave Macmillan, 2003.

Vivien Hart, "Democratic Constitution Making", United States Institute for Peace, Special Report 107, July 2003, <http://www.usip.org/sites/default/files/resources/sr107.pdf>.

Rangita de Silva de Alwis, *Women's Voice and Agency: The Role of Legal Institutions and Women's Movements*, Women's Voice and Agency Research Series 2014 No.7, The World Bank, 2014, <http://www.worldbank.org/content/dam/Worldbank/document/Gender/de%20Silva%20de%20Alwis%202014.%20Women's%20voice%20and%20agency.%20The%20role%20of%20legal%20institutions%20and%20women's%20movements.pdf>.

United Nations Development Fund for Women (UNIFEM), *Securing the Peace: Guiding the International Community towards Women's Effective Participation throughout Peace Processes*, October 2005, <http://www.unwomen.org/en/digital-library/publications/2005/1/securing-the-peace-guiding-the-international-community-towards-women-s-effective-participation-throughout-peace-processes>.

United Nations Development Fund for Women (UNIFEM), *CEDAW and Security Council Resolution 1325: A Quick Guide*, 2006, <http://www.unwomen.org/en/digital-library/publications/2006/1/cedaw-and-security-council-resolution-1325-a-quick-guide>.

UN Women, *UN Women Sourcebook on Women, Peace and Security*, October 2012, <http://www.unwomen.org/en/digital-library/publications/2012/10/un-women-sourcebook-on-women-peace-and-security>.

WHY ARE STATES LEGALLY OBLIGED TO ENGENDER THEIR CONSTITUTIONS?

“Women are born free, and they enjoy the rights of equality with men in all aspects”

This is Article 1 of the Declaration of the Rights of Woman and Citizenship, which was written by the French women’s rights activist Olympe de Gouges in 1791, and was one of the reasons for driving her to guillotine, where she was killed.

The struggle for gender equality had started long before Olympe de Gouges’s Declaration, and continued after it. It knew milestones and witnessed many successes and achievements, as well as many failures and frustrations until women attained what they have attained so far. Today, many people, women and men, support gender equality from different viewpoints: some believe in and adopt gender equality as a human right of all genders, others for ethical and religious reasons, others for ideological and political reasons, or for intellectual and philosophical reasons. Some see gender equality as a manifestation of the advancement of civilization. However, regardless of these different starting points, it is necessary to also investigate the legal obligation incumbent upon States to engender their constitutions.

This chapter looks at the legal basis for engendering the constitution and discusses the extent to which States have a legal obligation to respect the principles of equality and non-discrimination between women and men. It covers the major international and regional conventions that deal with engendering the constitution. The chapter also addresses the consequences of States ratifying these international and regional conventions, as well as the importance of these treaties in the legal systems of States.

The provisions contained in international and regional treaties presented in this chapter confirm that the obligation to engender the constitution is a firm legal obligation under international law. International law confirms that when States ratify treaties, whether international or regional, they are legally obliged to implement them in their entirety in accordance with rule of *pacta sunt servanda* stipulated by Article 26 of the Vienna Convention on the Law of Treaties of 1969, which states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” A majority of countries have already ratified treaties which included the imposition of an obligation to amend their constitutions and other

Women’s rights, obligations to ensure gender equality and non-discrimination, and States’ commitment to engendering their constitutions are not optional, nor captive to interpretations of religious or moral texts, nor subject to political polarization, but are legally binding under international law.

national legislation in order to ensure women's rights, gender equality, and non-discrimination. States are thus obligated to meet this commitment and implement it "in good faith": this means to abide by all obligations, both formal and substantive.

International law does not permit States to evade the implementation of their international obligations under the pretext that their existing domestic laws do not allow it or are incompatible with these obligations. This is made clear by Article 27 of the Vienna Convention on the Law of Treaties of 1969, which states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Women's rights activists should therefore invoke the State's obligations under international law, including the obligation to fully implement international treaties in good faith and the prohibition on using the pretext of the incompatibility of national law to deny women's rights and gender equality.

1. International instruments mandating gender equality, non-discrimination and engendering the constitution

International law enshrines gender equality as a right and a principle of human rights. The many international documents relevant to gender equality and non-discrimination reflect the attention paid to this issue, on the one hand, and the extent to which this right is violated, on the other. We outline here, in brief, the major international and regional instruments (conventions, declarations and resolutions) which address the issues of gender equality, non-discrimination on the basis of gender and engendering the constitution.

A. United Nations Charter (1945)

Although the Charter was primarily concerned with the legalization of the international order and the creation of a new international organization to lead the world towards peace after World War II, it did not neglect gender equality and women's equal enjoyment of all rights, without discrimination. These rights have been tackled in three different places of the Charter:

International law imposes a general obligation on States that ratify or join international conventions to implement these conventions in "good offices" and incorporate them into their national legislation, which may not be taken as an excuse or pretext to evade the implementation of the obligations set forth in these conventions. This has been clearly set forth in Articles 26 and 27 of Vienna Convention on the Law of Treaties (1969).

However, many international and regional conventions in connection with women's rights and human rights in general have not left the issue of their implementation and incorporation into national legislation to the general rules of international law. Instead, they include express provisions obliging the contracting States to amend their constitutions and all other national legislation in accordance with the obligations included in these conventions in order to ensure women's rights and to guarantee gender equality and non-discrimination in the exercise of these rights and enjoyment of the freedoms set forth. This is the essence of "engendering the constitution": to include in the constitution the necessary provisions for women to exercise their rights without derogation or discrimination, and to overcome any impediments preventing that.

- Firstly, in the Preamble, which states: “We, the peoples of the United Nations... reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...”
- Secondly, in Chapter I on the Purposes and Principles of the United Nations, where Article 1(3) states: “...promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to... sex...”
- Thirdly, in Chapter IX on International Economic and Social Cooperation, where Article 55(C) reaffirms that the United Nations works towards “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to... sex...”

B. Universal Declaration of Human Rights (UDHR) (1948)

The UDHR reaffirms the right to equality for “all human beings”. Article 1 states that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁴³

It also clearly emphasizes the commitment to prohibiting discrimination in Article 2, which states that: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as... sex...or other status.”

C. International Covenant on Economic, Social and Cultural Rights (1966)

a. Obligation to ensure gender equality and non-discrimination

The Covenant reaffirms the right to equality between women and men. Article 3 states that: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

As for non-discrimination, Article 2(2) of the Covenant states that: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to... sex...or other status.”

b. Obligation to engender the constitution

In Article 2(1), the Covenant refers to the obligation to engender both the constitution and national legislation. This article obliges States to adopt the necessary “legislative measures” to guarantee the enjoyment of the rights enunciated in the Covenant. It states: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

It is noticeable here that the Covenant, after talking about the obligation of States to take “all means” to realize these rights, focuses particularly on “legislative measures”. This reflects the priority given to these measures in implementing the rights and principles of the Covenant.

[43] The UDHR’s reference to “brotherhood” is itself a reflection of the period during which the document was drafted and the lack of awareness among its drafters of the gendered implications of this term.

Legislation, in its general understanding, here includes any law enacted and issued by the State, including the constitution as the State's supreme law.

D. International Covenant on Civil and Political Rights (1966)

Some constitutions reaffirm that their provisions on rights and freedoms must be interpreted in accordance with international human rights conventions.

EXAMPLES:

Spanish constitution, Section 10(2):

"Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain."

Portuguese constitution, Article 16(2):

"The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights."

Such texts enhance judges' capacity to interpret the constitution in accordance with international standards and legitimize their reliance on these standards in their rulings.

a. Obligation to ensure equality and non-discrimination

The Covenant states the right to equality in Article 3, which reads as follows: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

It reaffirms non-discrimination by virtue of Article 2(1), which states that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as...sex... or other status."

b. Obligation to engender the constitution

The covenant emphasizes the need to adopt the necessary legislation in order to guarantee that everyone enjoys the rights stipulated. This is stated in Article 2(2) which reads as follows: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

E. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979)

This Convention is deemed an international bill of women's rights; it defines decisively the actions considered as discriminatory against women and the measures to be taken to eliminate that discrimination.

In order to confront discrimination, CEDAW provides a set of affirmative action measures, which should not be considered discriminatory according to the definition of the Convention. This is set forth clearly in Article 4(1), which states that: "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

a. Obligation to equality and non-discrimination

CEDAW reaffirms the principle of equality between women and men throughout its provisions. For example, Article 3 states that: "States Parties shall take in all fields...all appropriate measures...to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men." Also, Article 15(1) states that: "States Parties shall accord to women equality with men before the law." This is repeated with regard to all other rights enunciated in the Convention.

As for non-discrimination, CEDAW has not only used the general language on "non-discrimination" included in all other conventions. It instead went further and defined the concept of prohibited discrimination and set forth positive steps, such as temporary measures to remove previous discrimination, which has become entrenched through decades of discriminative practices.

CEDAW prohibits discrimination by virtue of Article 2, which states that: "States Parties condemn discrimination against women in all its forms..."

b. Obligation to engender the constitution

CEDAW imposes many obligations on States to incorporate women's rights, gender equality and the prohibition of discrimination between women and men in their national constitutions and legislation. It also imposes an obligation for States to amend their national legislation and penal provisions that contradict these rights and principles. This is clearly stated in Article 2 (a), (b), (c), (f), (j) and (g):

"States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law

and other appropriate means, the de facto realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.”

“The Committee on the Elimination of Discrimination against Women recommends that States parties:

(a) Ensure women’s equal participation in constitution-drafting processes and adopt gender-sensitive mechanisms for public participation and input into constitution-drafting processes;

(b) Ensure that constitutional reform and other legislative reforms includes women’s human rights under the Convention and the prohibition of discrimination against women, which encompasses both direct and indirect discrimination in the public and private spheres, in line with article 1 of the Convention, and also includes provisions prohibiting all forms of discrimination against women;

(c) Ensure that new constitutions provide for temporary special measures, apply to citizens and non-citizens, and guarantee that women’s human rights are not subject to derogation in states of emergency;”

See CEDAW Committee General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 1 November 2013.

It is noticeable that the Convention asks States to take all appropriate measures to modify the social and cultural patterns of conduct of women and men, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes (Article 5(a)).

The Committee on the Elimination of Discrimination against Women reaffirmed in its General Recommendation No. 30 of 2013 that:

“During the constitution-drafting process, the equal and meaningful participation of women is fundamental for the inclusion of constitutional guarantees of women’s rights. States parties must ensure that the new constitution enshrines the principle of equality between women and men and of non-discrimination, in line with the Convention. In order for women to enjoy their human rights and fundamental freedoms on an equal basis with men, it is important that they be given an equal start, through the adoption of temporary special measures to accelerate de facto equality.”⁴⁴

[44] CEDAW General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30 (2013), para. 71.

Significantly, a monitoring mechanism was set in place to ensure State compliance with the Convention. Thus, CEDAW states in Article 17 that a Committee shall be established “for the purpose of considering the progress made in the implementation of the...Convention.” By joining the Convention, State Parties undertake to submit to the Committee periodical reports “on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.” These reports must be official reports prepared by State governments, which undertake to submit them to the Secretary-General of the United Nations (Article 18). It is worth mentioning that the report submission is an official exercise and is not only a procedural issue; the obligation to submit them shows the extent of the States’ fulfillment of their obligations, which enables the Committee to evaluate the progress achieved.

Thus, the reports are an opportunity to review the laws, policies and practices with a view to assessing the extent to which the criteria set forth in the Convention have been met

F. Security Council Resolution 1325 (2000)

The CEDAW Committee has mentioned that “... women often take on leadership roles during conflict as heads of households, peacemakers, political leaders and combatants, the Committee has repeatedly expressed concern that their voices are silenced and marginalized in post-conflict and transition periods and recovery processes.”⁴⁵ In order to overcome this reality, in 2000 the Security Council adopted Resolution 1325. It reaffirmed the important role of women in the prevention and resolution of conflicts and in peace-building, as well as the need for their equal participation and to increase their role in decision making with regard to conflict prevention and resolution. Moreover, the Security Council has adopted several follow-up resolutions—Security Council Resolutions 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013)—recognizing further aspects of the link between women and peace and security: the use of sexual violence as a tactic of war; its status as a war crime; the obligation of parties to armed conflict to take measures to prevent it; the duty

In a research project carried out in five countries that have witnessed conflict (Burundi, Guatemala, Kosovo, Sierra Leone and Sudan), three questions were addressed:

- (1) What is the role played by women in state building?
- (2) How does the state building process affect women’s political participation?
- (3) How does state building affect women’s rights?

The result revealed that women have been largely excluded from the negotiations concerning the political post-conflict settlement in these countries. Women were marginalized in the political settlements, even in a context where women had played an important political role, such as peace activities in Sierra Leone or through the revolutionary forces in South Sudan. Kosovo was an example of a lost opportunity, as women were excluded from the peace negotiations. This not only meant that the framework of the State of Kosovo was established without the participation of women, but it created a deep confidence gap among women’s civil society organizations towards the international community, as well.

See Clare Castillejo, “Building a State That Works for Women: Integrating Gender into Post-conflicts State Building”, Fríde Foundation, Working Paper No. 107, March, 2011, pp. 7-8.

[45] Ibid, para. 6.

of peacekeeping missions to protect women and children from sexual violence during armed conflict; and setting up a roadmap for the implementation of Member States' commitments in this area.

a. Obligation to ensure equality and non-discrimination

The major issues stated in Resolution 1325 include, among others, that the Security Council:

“Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict; Encourages the Secretary-General to implement his strategic plan of action calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes; Urges the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf [...]; Expresses its willingness to incorporate a gender perspective into peacekeeping operations; Calls on [...] Measures that support local women’s peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements.”

The importance of this Resolution lies in the fact that it promotes equality of opportunity for women and men in a field that has never been addressed before by any international or regional convention: conflict resolution and peace processes, women’s presence as special representatives and envoys to pursue good offices, incorporating a gender perspective into peacekeeping operations, and the involvement of women in the making and implementation mechanisms of the peace agreements. While novel, there is also synergy between Resolution 1325 and CEDAW, and the United Nations has explained the complementarity between the goals they pursue and the standards they set for States. Both documents have a gender equality agenda and demand women’s full participation at all levels of decision making, both call for legal equality between women and men, and both seek to ensure that women’s experiences, needs and perspectives are incorporated into political, legal and social decisions.⁴⁶

b. Obligation to engender the constitution

Resolution 1325 explicitly mentions the States’ obligation to engender their constitutions. This is stated in clause 8(c), which reaffirms the State Parties’ commitment to take:

“Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.”

This obligation was reaffirmed by the Committee on the Elimination of Discrimination against Women in its General recommendation No. 30 of 2013, which stated that: “the inclusion of a critical mass of women in international negotiations, peacekeeping activities, all levels

[46] United Nations Development Fund for Women (UNIFEM), CEDAW and Security Council Resolution 1325: A Quick Guide, 2006, p. 7, <http://www.unwomen.org/en/digital-library/publications/2006/1/cedaw-and-security-council-resolution-1325-a-quick-guide>.

of preventive diplomacy, mediation, humanitarian assistance, social reconciliation, peace negotiations at the national, regional and international levels as well as in the criminal justice system, can make a difference.”⁴⁷ It also affirmed that: “The immediate aftermath of conflict can provide a strategic opportunity for States parties to adopt legislative and policy measures to eliminate discrimination against women in the political and public life of the country and to ensure that women have equal opportunities to participate in the new, post-conflict structures of governance.”⁴⁸

For that, the Committee recommended

“that States parties:

(a) Ensure that legislative, executive, administrative and other regulatory instruments do not restrict women’s participation in the prevention, management and resolution of conflicts;

(b) Ensure women’s equal representation at all decision-making levels in national institutions and mechanisms, including in the armed forces, police, justice institutions and the transitional justice mechanisms (judicial and non-judicial) dealing with crimes committed during the conflict;

(c) Ensure that women and civil society organizations focused on women’s issues and representatives of civil society are included equally in all peace negotiations and post-conflict rebuilding and reconstruction efforts;

(d) Provide leadership training to women in order to ensure their effective participation in the post-conflict political processes.”⁴⁹

2. Regional instruments that mandate gender equality, non-discrimination and engendering the constitution

There are also regional instruments which set forth obligations for States to recognize the principle of gender equality, prohibit discrimination and require the engendering of national constitutions.

A. European instruments

Two sets of European instruments are especially important here: those of the Council of Europe (primarily the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950)) and those of the European Union (EU) (primarily the Charter of Fundamental Rights of the European Union (2000)).

The European human rights system is one of the most developed regional systems, mainly due to the active role taken on by the European Court of Human Rights in sanctioning violations by State Parties.

[47] CEDAW Committee Recommendation No. 30, para. 42.

[48] *Ibid.*, para. 43.

[49] *Ibid.*, para. 46.

a. Council of Europe instruments

The ECHR reaffirms the equality of individuals in the enjoyment of all rights implied in the phrase “everyone” in its Article 1, which states that: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Also, the ECHR prohibits discrimination by virtue of Article 14, which states that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex ... or other status.”

The jurisdictional reach of the ECHR is not limited to the people enjoying the nationality of one of the State Parties. Rather, it covers everyone falling under the legal jurisdiction of any of the State Parties, such as their residents. Thus, anyone who is under the jurisdiction of a State Party enjoys the protection of the Convention. The enforcement of the ECHR is the task of the European Court of Human Rights, which receives complaints from individuals, groups of individuals, and State Parties. The Court has developed a rich jurisprudence on gender equality and non-discrimination.⁵⁰

In order to ensure more protection and equality and to adopt a general principle prohibiting discrimination in the exercise of all rights included in the law, without specifying a right and neglecting another, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms was concluded, introduced for signing on 11 April 2000, and entered into effect in 2005. The Protocol contains a general prohibition of discrimination in Article 1, which states that:

“1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

The importance of this Protocol lies in the fact that it enhances the protection against discrimination afforded by the ECHR and reflects advancements in international legal protection against discrimination. Article 14 of the ECHR, contrary to other international conventions, does not include a separate prohibition of discrimination. Thus, discrimination is prohibited only with regards to “the enjoyment of the rights and freedoms” set forth in the Convention. However, when the Protocol came into effect, the prohibition of discrimination acquired “independent life” separate from other provisions of the ECHR.⁵¹

b. The European Union

[50] See Ivana Radacic, “Gender Equality Jurisprudence of the European Court of Human Rights”, *European Journal of International Law*, Vol. 19, No. 4 (2008), pp. 841-57, <http://www.ejil.org/pdfs/19/4/1663.pdf>.

[51] For more details on the evolution of anti-discrimination protections in the Council of Europe, see Council of Europe, “Legal Protection of Human Rights”, *Compass: Manual for Human Rights Education with Young People*, <http://www.coe.int/en/web/compass/legal-protection-of-human-rights>.

Gender equality is a fundamental principle of the European Union and is listed, for example, in Article 8 of the Treaty on the Functioning of the European Union (TFEU), which states that: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”.⁵²

The right to equality is referred to in two places of the Charter of Fundamental Rights of the European Union. The first is in Article 20, which mentions equality before the law in a brief and general way: “Everyone is equal before the law.” The second is in Article 23, which enunciates explicitly gender equality, as well as the possibility of adopting affirmative action measures:

“Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”

As for the prohibition of discrimination, it is reaffirmed in Article 21(1) of the Charter, which states: “Any discrimination based on any ground such as sex... shall be prohibited.”⁵³

B. African instruments

We refer here to the African Charter on Human and Peoples’ Rights (1981); to the Protocol on the Rights of Women in Africa (2003) (also known as “the Maputo Protocol”), annexed to the African Charter for Human and Peoples Rights.⁵⁴ The African Court on Human and Peoples’ Rights is the courts tasked with enforcing the Charter and receives complaints from individuals and non-governmental organizations.

a. Obligation to ensure gender equality and non-discrimination

The African Charter on Human and Peoples’ Rights has been the starting point for a new era in the area of human rights in Africa. It reaffirms the right to absolute equality in Article 3, which states that:

“1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.”

As for the principle of non-discrimination, it is reaffirmed in Article 2 of the Charter, which states that: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as ... sex ... or any other status.”

[52] See European Commission, “Gender equality in the European Union”, 2011, http://ec.europa.eu/justice/gender-equality/files/brochure_equality_en.pdf.

[53] See further European Court of Human Rights and European Union Agency for Fundamental Rights, Handbook on European non-discrimination law, March 2011, <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>.

[54] For more on using the African instruments to advance women’s rights, see Equality Now, “A Guide to Using the Protocol on the Rights of Women in Africa for Legal Action”, 2011, http://www.equalitynow.org/sites/default/files/Manual%20on%20Protocol%20on%20Women%20Rights%20in%20Africa_EN.pdf.

The Protocol on Women's Rights in Africa reaffirms the principle of the legal equality between women and men. Article 8 of the Protocol states that: "Women and men are equal before the law and shall have the right to equal protection and benefit of the law." As for the principle of non-discrimination, Article 2(1)(A) of the Protocol states that: "States Parties shall combat all forms of discrimination against women..."

b. Obligation to engender the constitution

This obligation is reaffirmed in the Protocol on the Rights of Women in Africa. It states explicitly the obligation of States to include the principles of non-discrimination and gender equality in their constitutions and legislation. It also allows for affirmative action measures to redress continuing discrimination against women. Thus, Article 2 of the Protocol states that:

"1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.
- b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
- c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
- d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
- e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women."

C. American instruments

We refer here to the American Declaration of the Rights and Duties of Man (1948), which in Article 2 refers to equality and non-discrimination: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to... sex...or any other factor."⁵⁵ The American Convention on Human Rights (1969) declares the duty of State Parties to protect the rights of all persons under their jurisdiction, without discrimination on the basis of, among other grounds, "sex"⁵⁶ and the right to equal protection of the laws for all, without discrimination (Article 24). In a separate article on the rights of the family, the Convention affirms the principle of non-discrimination with regard to marriage (Article 17(2)) and also calls upon

[55] The American Declaration was a document of its time in that it referred to "the rights and duties of man" as opposed to "persons" or "individuals", as well as to discrimination on the basis of "sex" as opposed to "gender" (see below).

[56] This and the previous reference to "sex" instead of "gender" must be read in the light of when these instruments were adopted, 1948 and 1968 respectively, which were early stages of international attention to the issues of gender equality and non-discrimination.

States to “take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution” (Article 17(4)). The Inter-American Court of Human Rights adjudicates on disputes involving State Parties accused of having violated their obligations under the Convention and has developed a rich jurisprudence on gender equality and non-discrimination.⁵⁷ The Inter-American Commission on Human Rights has also collated the legal standards applicable to gender equality in the Inter-American system emerging from the Court’s jurisprudence and State practice.⁵⁸

D. Arab instruments

States of the Arab region suffer from lack of regional sources concerning human rights in general and women’s rights in particular. This is in spite of the pressing need for such instruments, owing to the restrictions imposed on Arab women in many countries, either because of harsh discriminative constitutional and legislative provisions, or because of religious concepts and social customs. The main regional instrument is the Arab Charter on Human Rights (2004) which was adopted on 23 May 2004.

a. Obligation to equality and non-discrimination

The Charter reaffirms the principle of equality in more than one clause and in more than one form. Article 3(2) states that: “The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination...” Article 11 states that: “All persons are equal before the law and have the right to enjoy its protection without discrimination.” Article 12 also reaffirms that: “All persons are equal before the courts and tribunals.” The Charter also refers to non-discrimination and affirmative action in two separate paragraphs of Article 3. Article 3(1) declares “...the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of...sex...” and Article 3(3) states: “Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favor of women by the Islamic sharia, other divine laws and by applicable laws and legal instruments.”

However, by conditioning gender equality and women’s rights to the religious framework, the Charter appears to allow for discrimination against women. This is manifested in the fact that “positive discrimination” is attributed to religious laws, and then to the applicable legislation and instruments, which leaves open the possibility to deny women some of their rights. Therefore, the use of affirmative action in this context—linking it to divine laws—would have the same results as reservations raised with regard to international human rights conventions: both undermine women’s rights and justify discrimination against them. This “positive discrimination established in favor of women by...divine laws” differs radically from the original meaning of

[57] Patricia Palacios Zuolaga, “The path to gender justice in the Inter-American Court of Human Rights”, *Texas Journal of Women and the Law*, Vol. 17, No. 2 (2008), pp. 227-95, https://law.utexas.edu/humanrights/get_involved/writing-prize07-zuloaga.pdf.

[58] See Inter-American Commission on Human Rights, *Legal Standards: Gender Equality and Women’s Rights*, 2015, <https://www.oas.org/en/iachr/reports/pdfs/LegalStandards.pdf>.

affirmative action and the purposes for which it has been developed. Eventually, it can be said that, among all international and regional charters and conventions, the Arab Charter provides the least protection of women's rights and gender equality as per international law standards.

b. Obligation to engender the constitution

This issue is addressed in Article 44 of the Charter, which states that: "The States Parties undertake to adopt, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein."

The main weakness of this Charter is that it states that all rights and obligations placed on States shall be in accordance with the "constitution or legislation in effect". Thus, States shall take the necessary measures to fulfill the rights set forth in the Charter "in conformity with their constitutional procedures" according to the aforementioned Article 44. For example, the measures that enable a child to acquire her/his mother's nationality must be "in accordance with their domestic laws" (Article 29(2)). Another example is the enjoyment of the freedom of thought, conscience and religion, which is limited by the constraints set forth in "the law in effect" (Article 30(1)).

The risk associated with such references to "the constitution and domestic laws in effect" stems from the fact that national law may contain many shortcomings. National laws may themselves violate the simplest principles of equality and establish systematically discriminative practices. Thus, taking this national legislation as the reference to granting rights could only mean further denial of rights and could protect discriminative practices instead of abolishing them.

Based on the aforementioned, it becomes clear that the obligation to engender the constitution is a binding international legal obligation, with clear legal sources. Women's rights-related international conventions are agreements of a universal and regional nature which apply to the majority of the world's States. It must be noted that the continents are unequal in terms of their recognition of these rights, and there is an obvious lack of recognition of equality between women and men in Asia, especially in the Arab region, either through delaying the ratification of international relevant commitments or through making reservations that empty the commitments of meaning. The obligation to engender their constitutions and all national legislation is binding upon States as a means to attain the end of ensuring gender equality and protection from all forms of discrimination. Chapter 3 details the content of a gender sensitive constitution, looking at both general principles and specific rights which must be adopted in order to ensure full protection of women's rights, gender equality, and non-discrimination.

1. CONSTITUTION-MAKERS AND WOMEN’S RIGHTS ACTIVISTS HAVE TO:

- Look at all international and regional conventions ratified by their State and
- Identify the provisions on women’s rights, gender equality, and non-discrimination set forth in those conventions and references to the State’s obligation to engender its constitution and legislation.

2. CONSTITUTION DRAFTERS ARE BOUND BY THE PRINCIPLE OF LEGISLATIVE ALIGNMENT.

- This principle obliges States to incorporate their international obligations into their national legislative framework.
- Women’s rights activists should gather and review the reports submitted by the State to the monitoring committees.
- Enforcement bodies should be established by virtue of these international conventions with a view to identifying the evidence against the State regarding its fulfillment of its international obligations.

3. CONSTITUTIONAL DRAFTERS CAN MAKE SPECIFIC REFERENCE TO INTERNATIONAL LAW IN THE CONSTITUTION.

- International law will thus be a guide to judicial interpretations of the constitution and a baseline (or minimum standard) below which national rights protections should not fall

4. THE STATE’S OWN RECORD OF RATIFICATION OF INTERNATIONAL CONVENTIONS PROVIDES THE BASIS FOR ENGENDERING THE CONSTITUTION.

- This record provides the evidence that adopting a gender sensitive constitution will not place new obligations on the State, but will implement the obligations it has already committed to.

5. INTERNATIONAL ORGANIZATIONS CAN OFFER ASSISTANCE AND EXPERTISE.

- This assistance and expertise will help guide constitutional drafters in their implementation of international obligations in the area of women’s rights, gender equality, and non-discrimination.

Clare Castillejo , Building a State That Works for Women: Integrating Gender into Post-conflict State Building, Frida Foundation, Working Paper No. 107, March 2011, http://fride.org/download/WP107_Building_state.pdf.

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WHAT MUST A DEMOCRATIC GENDER-SENSITIVE CONSTITUTION CONTAIN?

“You can kill me as soon as you like, but you cannot stop the emancipation of women.”

This was the last statement uttered by Fatimah Baraghani, who lived in Iran in the 19th century.

Born in 1817 and known as Tâhiri, she advocated for equality between women and men and challenged the prevailing rules of those days, which imprisoned women in an inferior status. She was killed in 1852 and her corpse was thrown into a well that was, later on, filled with stones.⁵⁹

In the previous chapter, we concluded that states have an international obligation to make their constitutions gender sensitive. This arises from their voluntary ratification and consensual joining of many international and regional conventions that impose this obligation.

In this chapter, we present the content of a democratic gender sensitive constitution, as drawn from international law and comparative constitutional design.

1. Principles of a democratic gender sensitive constitution

In the simplest understanding, a democratic constitution is one that is democratically ratified and ensures the establishment and maintenance of a democratic system. On 20 December 2004, the United Nations General Assembly adopted a resolution in which it defined the basic elements of democracy.⁶⁰ According to this Resolution, a democratic constitution has to guarantee human rights and freedoms, to incorporate a plural political system, ensure transparency and accountability, guarantee the rule of law, the separation of powers and the independence of the judiciary. Moreover, it must take into account some basic issues concerning the process of constitution making and not only the constitution’s content.

A gender sensitive constitution is a constitution that:

- adopts a gender perspective and pays attention to how issues of gender are dealt with and how provisions of the constitution impact on gender,
- ensures substantive gender equality, theoretically and practically,
- prohibits discrimination based on gender, ethnicity, class, color, sexual orientation, age, and

[59] See United Nations Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring, Professional Training Series No. 7, 2001, <http://www.ohchr.org/EN/PublicationsResources/Pages/MethodologicalMaterials.aspx>

[60] United Nations General Assembly Resolution A/RES/59/201 (2005).

other characteristics,

- adopts gender sensitive language (more on this in Chapter 4), and
- contains rules and guarantees to activate this equality and empower women to exercise all their rights, including the possibility of having affirmative action measures to counter discriminatory practices against women.

There are basic principles that constitutions have to stand on and also clear criteria that no democratic constitution can ignore, especially if it is intended to be gender sensitive.

If the principles of freedom, dignity, equality, and non-discrimination are among the fundamental principles that any constitution must contain, there are also others closely relevant to a democratic constitution and of special importance for women's rights and gender equality. The latter provide guarantees that can be relied on in order to ensure women's enjoyment of their full rights and to abolish the discriminative practices targeting them. We address here the principles of freedom, dignity, equality, non-discrimination, separation of powers, popular sovereignty as the source of constitutional authority, as well as secularism.

A. Freedom

Ever since the French Declaration of Rights of the Man and Citizen 1789, freedom, "consist[ing] in being able to do anything that does not harm others", has been recognized as a fundamental principle on which the legal organization of States stands, and which must be included in national constitutions.⁶¹

In addition to recognizing a number of rights and freedoms (such as the freedom of thought, religion and conscience; the freedom of speech and expression; the freedom of assembly and the freedom of association etc.), the constitution should stipulate that it guarantees rights as universal and inalienable; indivisible; interdependent and interrelated. The list of rights included in the constitution should not be exhaustive. In that way, when necessary, the protection of the constitution could be extended to more rights than those listed explicitly in its text. Such an approach reaffirms that the origin of the rights included in the constitution is freedom and that any limitation of freedom must be subject to the controls set forth in the constitution itself.

Slavery and women's dignity

Slavery, in its traditional image, no longer exists in the majority of countries, but slavery-like practices still exist and affect women's rights, dignity and freedom. These take multiple and renewed forms and practices. For example, "servile marriages result from situations where women, with no right to refuse, are given in marriage in exchange for payment of money or kind; or are transferred by the husband or family to another person for value received; or are inherited 'upon the death of her husband' by another person. Another slavery-like practice, particularly affecting women and children, is that of traffic of women for sexual exploitation."

See Human Rights: Questions and Answers, UNESCO Publishing, 5th ed., 2009, p 184.

[61] The French Declaration was itself discriminatory of women, however, and the failure of the French Revolution to bring about advances in women's rights led Olympe de Gouges to publish the 1791 Declaration of the Rights of Woman and the Female Citizen.

EXAMPLE:

Venezuelan constitution, Article 2:

“Venezuela constitutes itself as a ... State ... which holds as superior values of its legal order and actions ... those of ... liberty...”

B. Dignity

Human dignity is one of the most important values that must be enunciated in national constitutions for both women and men alike. Therefore, the constitutions of many countries include this principle in their preambles or in separate provisions.

Constitution-makers must understand that the mere enunciation of gender equality in the constitution is not sufficient to overcome decades of discriminative practices against women. This equality must be “constitutionally supported” by a set of “positive measures” that are stated in Article 4(1) of CEDAW.

These measures encompass, among others, “a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as [...] allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.”

Therefore, gender sensitive constitutions must include provisions that allow for the adoption of those measures, either by stating them explicitly, or by the ratification of a general constitutional article that adopts such measures, so that they will be a mechanism to enable women to realize equality.

See CEDAW General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004).

EXAMPLES:

South African constitution, Article 1:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:
A. Human dignity...”

German constitution, Article 1(1):

“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

C. Equality

In its report of 2015, the Working Group on the Issue of Discrimination against Women in Law and in Practice indicated that “national constitutions are generally the supreme law in most States and form the foundation of the State’s institutional and legal structures. They also provide the framework for the elimination of discrimination against women. An explicit constitutional guarantee of gender equality is fundamental to combating discrimination against women and

girls in law and in practice.”⁶²

a. **Guaranteeing the principle of equality**

National constitutions adopt the principle of equality in many formulations. This principle is a central and necessary right to enjoy all other rights.

- Some constitutions enunciate it in general statements without specifying that it applies to both women and men.

EXAMPLE:

Spanish constitution, Section 14:

“Spaniards are equal before the law...”

- Other constitutions enunciate equality between women and men specifically.

EXAMPLES:

Belgian constitution, Article 10:

“Equality between women and men is guaranteed.”

Tunisian constitution, Article 21:

“All citizens, male and female, have equal rights and duties...”

- Other constitutions not only enunciate explicitly the equality between women and men, but also acknowledge that formal constitutional equality alone is not enough unless associated with affirmative action steps that must be taken by the State in order to activate this right and empower women to overcome decades of inequality and discriminatory practices against them. They oblige the State to ensure this equality and to take the necessary measures to implement it in practice.

EXAMPLES:

Canadian Charter of Rights and Freedoms, Article 15 on “Equality Rights”:

“(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

[62] Report of the Working Group on the Issue of Discrimination against women in law and in practice, A/HRC/29/40 (2015), para. 38.

Turkish constitution, Article 10:

“Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. ...”

Contrary to these good practices, there are some constitutions that disregard and ignore this right, or empty it of any meaning and restrict it in a way preventing women from benefitting from it.

EXAMPLE:

Yemeni constitution, Article 31:

“Women are the sisters of men. They have rights and duties, which are guaranteed and assigned by Sharia and stipulated by law.”

Here, the constitution makers avoided using the term “equality”, preferring instead to use “sisters of men”, which does not have a clear meaning and may be interpreted in a restrictive way. Moreover, the text further undermines gender equality by describing the source of women’s rights, as sisters of men, as being sharia and national legislation rather than any clearly defined international norm or convention. This allows for interpretations which may empty gender equality of meaning and deny women their rights. The constitution of Yemen, however, is not the only one in this regard.

EXAMPLE:

Iranian constitution, Article 20:

“All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria.”

Clearly, though this constitution uses the term “equality” between women and men, it restricts this supposed equality by subjecting it to “Islamic criteria”, which are, in turn, subject to religious men’s different interpretations and explanations.

b. Special constitutional bodies tasked with ensuring equality

Numerous constitutions have created constitutional bodies tasked with promoting gender equality and removing all forms of discrimination between women and men.⁶³ These bodies can have a positive impact on the advancement of women’s rights and gender equality, but only under certain conditions. They should have a clear mandate to deal with and follow up on equality issues, and should possess the competence and capacity to enable them to achieve the objective for which they have been established. The United Nations has adopted a set of

[63] For an overview of institutions in the Organization for Security and Co-operation in Europe (OSCE) region, see Handbook for National Human Rights Institutions on Women’s Rights and Gender Equality, OSCE-ODIHR, Warsaw, 2012, <http://www.osce.org/odihr/97756>.

minimum standards applicable to national human rights institutions which include women's rights and gender equality bodies. These principles require that the body have a broad and clear mandate, autonomy from government, independence, pluralist membership, adequate resources and adequate powers of investigation.⁶⁴

EXAMPLES:

South African constitution, Article 187 on "Functions of Commission for Gender Equality:

"(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation."

Ecuadorian constitution, Article 156:

"The National Equality Councils are bodies responsible for ensuring the full observance and exercise of the rights enshrined in the Constitution and in international human rights instruments. The Councils shall exercise their attributions for the drafting, cross-cutting application, observance, follow-up and evaluation of public policies involving the issues of gender..."

It should be highlighted that these bodies are not ends in themselves. Rather, they are means to realize a higher end, which is both formal and substantive equality between women and men. Thus, it is not sufficient to stipulate in the constitution the creation of these bodies and then leave them inactive and powerless, as experience in many countries reveals. Their financial and administrative independence must be set forth in the constitution in order for these bodies not to be manipulated or suppressed by political authorities. They should also not be left vulnerable to budgetary cut-backs, as experience shows that in times of austerity, cuts to public spending disproportionately affect gender equality institutions.⁶⁵ It may also be best not to go into detail in the constitution itself about the competences and procedures guiding the operation of these bodies in order for them to have necessary flexibility to perform their tasks. (For more on whether using general or specific constitutional language to maximize the gender-sensitivity of the constitution, see Chapter 4 in this *ABC*.) Such detail will be mandated in implementing legislation and is not what will guarantee the proper operation of these bodies. This will be guaranteed by the political will behind creating such bodies and enabling them to work under the best circumstances. Otherwise, they will remain mere bureaucratic structures created in response to international pressure, with no political commitment behind them. This has been the case of Morocco, where the creation of such a body was set forth in law, but the institution has not been actually created.

[64] Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly Resolution 48/134, 20 December 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

[65] See The price of austerity - The impact on women's rights and gender equality in Europe, European Women's Lobby, 2012, http://www.womenlobby.org/IMG/pdf/the_price_of_austerity_-_web_edition.pdf.

D. Non-discrimination

Constitutions must explicitly forbid discrimination. This is a basic principle that may not be ignored or disregarded. For example, the constitution of South Africa prohibits all forms of discrimination, whether exercised by the state or individuals. It also obliges the state to make legislation to combat it.

EXAMPLE:

South African constitution, Article 9(3):

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex... 4. No person may unfairly discriminate directly or indirectly against anyone ... National legislation must be enacted to prevent or prohibit unfair discrimination.”

Other constitutions adopt another option by shedding light on the most common practices of discrimination against women and prohibiting them explicitly. They not only prohibit discrimination generally and explicitly, but prohibit certain practices by name as well. This is the case of the Portuguese constitution, which concentrates, in Article 109, on discrimination against women in the field of “access to political office”. The constitution of Ecuador guarantees, in Article 43(1), freedom from discrimination to pregnant and breast-feeding women in “education, social, and labor sectors”.

Gender sensitive constitutions have to avoid the defect that some constitutions suffer from when they prohibit certain forms of discrimination and ignore specifically the discrimination based on gender.

EXAMPLE:

Jordanian constitution, Article 6(i):

“Jordanians shall be equal before the law. There shall be no discrimination between them as regards to their rights and duties on grounds of race, language or religion.”

The repercussions of such provisions are not alleviated by the existence of other clauses in the constitution stating the equality between women and men and enunciating women’s rights. Experience always reveals that contradictory or vague texts allow for the perpetration or continuation of discriminatory practices, owing to the existence of explicit or implicit legal support for such discrimination. (For more on the best choice between clear and more ambiguous constitutional language for advocates of gender equality, see Chapter 4 in this *ABC*.)

Additionally, gender sensitive constitutions have to clearly prohibit both direct and indirect discrimination. Sometimes, indirect discrimination can be more serious as it is hidden and not enough attention is paid to it. This happens “when laws, public policies and programs are built on seemingly gender-neutral criteria, while in practice they have a detrimental impact on women. The risk here is that these laws, policies and programs unintentionally may perpetuate the

consequences of past discrimination. They may be inadvertently modeled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behavior directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men."⁶⁶ Examples of indirect discrimination include unnecessary requirements in the workplace which place one gender at a disadvantage compared to the other (such as by discriminating against women who have taken maternity leave or are the primary caregivers in their family). Therefore, constitution makers must address both direct and indirect discrimination when drafting the prohibition of gender based discrimination in the constitution. This will enable them to also combat existing hidden discriminatory practices.

E. Separation of powers

The separation of powers is considered one of the fundamental constitutional principles on which democratic systems are based. It implies that the basic functions of government are distributed among three branches of power: the legislative, the executive, and the judicial powers, each of which performs its functions independently. The legislative power enacts the laws; the executive one governs, administrates and runs state affairs according to those laws; and the judicial power settles disputes through the application

The principle of separation of powers aims to organise the relationship among the State's public powers and to prevent autocracies, which gather all powers in their hands. This is why it is considered a major prerequisite for the existence of any constitutional democratic system.

of the law, ensures the law is respected by everyone, including the political authority and protects rights and liberties. The separation of powers is intended to avoid the abuse of power by distributing it to different bodies and enabling each body to monitor the other ones. In this way public authority is held accountable and abuses of power are less likely.

Respect for the separation of powers principle also has positive implications for women's rights and gender equality because it prevents the different branches of power from cooperating to restrict or ignore them. For example, if the legislative power failed to enact laws related to women's rights, or if the executive power insisted on ignoring the application of these rights, the independent judicial power would be the real guarantor to resort to.

The principle of the separation of powers is set forth in most constitutions of the states of the world.

EXAMPLES:

Portuguese constitution, Article 2:

"The Portuguese Republic shall be a democratic state based on the ... and the separation and interdependence of powers...."

[66] CEDAW General Recommendation No. 25, Note 1.

Ukrainian constitution, Article 6:

“State power in Ukraine is exercised on the principles of its division into legislative, executive and judicial power.”

Some constitutions even include the separation of powers among principles not open to amendment. (For more on unamendable clauses as potential guarantees of the implementation of the constitution, see Chapter 5 in this *ABC*.)

EXAMPLE:**Brazilian constitution, Article 60(4):**

“No proposal of amendment shall be considered which is aimed at abolishing: III – the separation of the Government Powers.”

F. Popular sovereignty as the source of constitutional authority

Constitutions must address the source of sovereignty, meaning they must clarify the authority from which the branches of power derive their jurisdictions and manifestations of power. It is a matter of consensus that “in order for a constitution to play its role as a supreme legal standard of society, it must be fair, i.e. it must be built on a basis of full equal citizenship and on the acknowledgement that the people is the source of authority, and that no individual or group of individuals have sovereignty on it.”⁶⁷ It is worth mentioning that recognizing popular sovereignty as the source of constitutional authority is not only a basis of equality among all citizens, but allows for the removals of the guardianship of clerics, regardless of their creed, over societal affairs and subsequent discrimination on the basis of religious belief.

The principle of popular sovereignty is a major feature of modern democratic constitutions. This principle means that the people is “the sovereignty-holder and source of powers; the subjects choose the ways of expressing their sovereignty, in accordance with their general circumstances and conditions. People’s sovereignty is realised when individuals are capable of self-determination without pressure, fear or restraint of their will. In this meaning, the people is the aim and the source of powers; no individual or elite may have power over it. The aim of recognizing and projecting this principle, as a cornerstone of any constitution that pretends or seeks to be democratic, is to build power legitimacy on the principle of participation and voluntary acceptance. When such a thing is realised, the authority will be free from all forms of capturing power by force.”

See Mohammad Malki, *On a Democratic Constitution, Project of Democratic Studies in Arab Countries, the 15th Annual Meeting, “Towards the Enhancing of Democratic Efforts in Arab Countries”, 2005*, <http://www.mokarabat.com/s727.htm>.

The overwhelming majority of constitutional and political systems throughout the world tend to adopt the popular sovereignty as the basis of constitutional authority. This is a requirement of democracy itself.

[67] Fayek Huwijeh, *Of Constitutional Principles and the Necessity of Reaching Consensus on the Future Syria*, 30 September 2012, <http://www.mouatana.org/?p=996> (in Arabic).

EXAMPLES:

French constitution, Article (3):

“National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.”

Italian constitution, Article 1:

“...Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution.”

Portuguese constitution, Article 3(1):

“Sovereignty shall be single and indivisible and shall lie with the people, who shall exercise it in the forms provided for in this Constitution.”

Spanish constitution, Article 1(2):

“National sovereignty belongs to the Spanish people, from whom all State powers emanate.”

Moreover, the constitution of Bolivia immunizes this popular sovereignty against any inalienability or prescription.

EXAMPLE:

Bolivian constitution, Article 7:

“The sovereignty resides in the Bolivian people; it is exercised directly, or in a delegated form. From sovereignty emanates, by delegation, functions, and entitlements of the organs of public power; it is inalienable and does not prescribe.”

Conversely, there are constitutions that attribute sovereignty to God and not to the people or the nation.

EXAMPLES:

Pakistani constitution, Preamble:

“Whereas sovereignty over the entire Universe belongs to Almighty Allah alone...”

Iranian constitution, Article 56:

“Absolute sovereignty over the world and man belongs to God.”

Saudi Arabian constitution, Article 7:

“Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.”

The risk in adopting such notions of constitutional authority is that sovereignty on earth will be seen to be exercised “on behalf” of God by “His agents” who shall govern in “His name” and, thus, will be free from any control or accountability.

G. Secularism

Secularism refers to the separation of religion and religious institutions from the decision making processes of the government and the legislature and judiciary, so that political and legislative institutions are independent of religious institutions. Thus, religious affairs should be viewed as personal matters by the State. The link between individuals and their State should be solely based on their citizenship, and not on any religious belonging.

The adoption of a secular constitution becomes more important in countries and geographical areas where the religion is mixed with inherited traditional and social rituals and practices and with the political and legislative sphere and is subject to interpretations that deny women their universal human rights to freedom, dignity and equality.

This issue is very important and has serious repercussions for women's rights and freedoms. Women also differ in terms of religion and beliefs, which makes them subject to different, and sometimes contradictory, legal systems in countries where religious or traditional authorities also exercise legal and political power.

Additionally, refusing the principle of secularism would lead to a confused formulation of the constitutional text and incongruity between the adoption of the principle of equality and the subjection of individuals to different personal status laws according to their religious belonging (which in itself amounts to discrimination). This is the case with the Iraqi constitution.

EXAMPLE:

Iraqi constitution, Article 41:

"Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law."

This makes the citizens subject to different laws differentiating them on the basis of religion and sect, to the contrary of Article 14 of the same constitution, which reaffirms that: "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status."

Constitution-makers have to deal with the fact that there is no one ideal model of secular systems. There are many forms which such a system may take. However, whatever the form adopted, it must ensure complete protection for women against any discrimination or oppression in the name of religious or other texts.

Many constitutions in the world affirm explicitly the State's secularism, and enunciate this in different ways. The French constitution, for example, stipulates the secularism of the French Republic, reaffirming in the same article the "respect to all beliefs".

EXAMPLE:

French constitution, Article 1 of the Preamble:

“France shall be a ... secular ... It shall respect all beliefs...”

Other constitutions adopt a clearer way to reinforce that the State must not ascribe to a religion and must not interfere with or oblige anyone to follow any religion. They also affirm the equality among religious associations representing all religions, which must be separate from the state.

EXAMPLE:

Russian constitution, Article 14:

“1. The Russian Federation is a secular state. No state or obligatory religion may be established. 2. Religious associations shall be separate from the State and shall be equal before the law.”

The constitution of Ecuador not only reaffirms state secularism in Article 1, but makes it obligatory for the State to guarantee “secular ethics”, which it considers one of the state’s main obligations.

EXAMPLE:

Ecuadorian constitution, Article 1:

“The State’s prime duties are: 4. Guaranteeing secular ethics as the basis for public service and the legal regulatory system.”

It is also necessary for a secular constitution to be a democratic one, as each has its own foundations and principles that must be realized. A secular constitution can also be undemocratic—an example of which is the Turkish constitution which adopts secularism clearly but also includes many provisions that violate democratic principles. Supporters of gender equality and non-discrimination should not barter a democratic constitution for a secular one; instead, they should work to ensure that the gender sensitive constitution they seek to bring about is democratic and secular at the same time.

Incorporating these principles into the constitution will significantly serve women’s rights and gender equality. Women are still denied their fundamental rights in many countries, either owing to clear discriminative legal texts, or because of religious beliefs and discriminatory social practices. Therefore, the inclusion and protection of these principles in the constitution will have a significant positive impact on women’s rights and gender requirements, as it will provide a constitutional basis that can be legally relied on to forbid many unjust practices that target women and deny them their individual rights. (For more on constitutions providing a legal basis for women’s empowerment, see Chapter 1 in this *ABC*.)

2. Rights and freedoms in a gender sensitive constitution

Rights and freedoms occupy a high status in most constitutional documents. A constitution is not

a mere document describing the form of the State and its system of governance and regulating the relations among the branches of power. It is also a document that guarantees individual rights and freedoms.⁶⁸

In addition to the clear protection of individual rights in general, gender sensitive constitutions must contain specific provisions ensuring women’s human right to protection against abuse and discrimination. Constitutions must provide women with an enabling environment in which to exercise their rights and overcome the obstacles restraining them.

A. The content of constitutional rights

A constitutional document must state, in clear, precise and detailed terms, all of the civil, political, economic, social, and cultural rights it protects, up to what has become to be known as “the third generation of rights”, which include, among others, the right to safe environment and sustainable development. Among the constitutions that follow this approach is the constitution of Brazil, which contains 78 articles on rights and freedoms. The same is true for the Colombian constitution, which contains 76 articles on rights on freedoms. This is also the case of the constitution of South Africa, which allocates Chapter II completely to rights and freedoms, under the title of “Bill of Rights” and covers the rights in detail. Of course, it is not just the list of rights included in the constitution which is important, but the extent to which they are enforced. Nevertheless, having a comprehensive bill of rights in the constitution can provide the legal basis for women’s empowerment and for achieving further protections in the future. (On the question of guarantees of enforcement, see Chapter 5 in this *ABC*. On the level of detail a gender sensitive constitution should go into, see Chapter 4.) In addition to the drafting of an accurate text containing clear statements of the general individual rights to be included in the constitutional document, there are other measures that must be included in the constitution to strengthen the constitutional rights of women and ensure their actual enjoyment thereof. This includes clearly enunciating women’s right to exercise the freedoms that they have traditionally been denied, such as their sexual and reproductive rights, the right to hold political and judicial positions, labor-related rights, rights of inheritance, freedom within marriage, and the freedom to choose a partner. Therefore, certain constitutions, despite their assertion that “all citizens” enjoy “all rights”, reaffirm in clear terms the equality between women and men in their enjoyment of certain rights.

Modern constitutions, especially those of the countries undergoing a transitional democratic process, tend to include bills of rights and freedoms. Such bills reflect their desire to shake off the legacy and practices of the past.

Moreover, States going through a transitional process have a historic opportunity to engender their constitutions as they set forth on a path towards a democratic system of government respectful of the rights and freedoms of all its members.

EXAMPLES:

Belgian constitution, Article 10(3):

Equality between women and men is guaranteed.

[68] Dżidek Kedzia, ed., *Guidelines for Human Rights and Constitution-Making*, Social Contract Center Publications, 2013, p. 8 et seq.

Belgian constitution, Article 11bis:

“The law, federate law or rule referred to in Article 134 guarantees that **women and men** may equally exercise their rights and freedoms, and in particular promotes their equal access to elective and public mandates.

The Council of Ministers and the Governments of the Communities and the Regions include both **women and men**.

The law, federate law or rule referred to in Article 134 provides for **women and men** to sit on the permanent deputations of the provincial councils, the colleges of the burgomasters and aldermen, the councils and permanent committees of the public centres for social welfare and on the executives of any other inter-provincial, supra-municipal, inter-municipal or intra-municipal territorial body.”

Many constitutions also contain texts concerning the creation of agencies aiming to ensure the activation of the rights enshrined in the constitutions. These are given different names: Ombudsman, Gender Equality Ombudsman, Human Rights Commission, Human Rights Ombudsman, Human Rights Protection Committee etc. Regardless of the name, they have to possess real powers and not be merely supervisory or consultative bodies. (See more on these bodies in section C.b. above.)

B. Rights to sexual and reproductive health and to bodily integrity and autonomy

A gender sensitive constitution must provide for women’s health, including for their sexual and reproductive health. A good starting point is recognizing reproductive rights as human rights as the United Nations has done.⁶⁹ As declared in the 1995 Beijing Platform for Action: “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.” (para 96).

“Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community.”

See United Nations Population Division, International Conference on Population and Development in Cairo 1994, <http://www.un.org/en/development/desa/population/theme/rights/>.

Women’s sexual and reproductive health is connected with many human rights, including the

[69] Reproductive Rights Are Human Rights: A Handbook for National Human Rights Institutions, UN Population Fund, Office of the UN High Commissioner for Human Rights, and Danish Institute for Human Rights, HR/PUB/14/6, 2014, <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>.

right to life, the right not to be exposed to torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination. This places specific obligations on States, as reaffirmed by the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, who refers to women's right to access reproductive healthcare services, goods and facilities that are:

- available in adequate numbers;
- accessible physically and economically;
- accessible without discrimination and
- of good quality.⁷⁰

Violations of women's reproductive rights take numerous forms and include: "denial of access to services that only women require, or poor quality services, subjecting women's access to services to third party authorization, and performance of procedures related to women's reproductive and sexual health without the woman's consent, including forced sterilization, forced virginity examinations, and forced abortion"; female genital mutilation and early marriage also constitute risks for women's sexual and reproductive rights.⁷¹

Acknowledging differences in reproductive biology between women and men is not akin to endorsing paternalism or the view that "biology is destiny".⁷² Instead, "a gendered perspective on health includes, besides examining differences in health needs, looking at differences between women and men in risk factors and determinants, severity and duration, differences in perceptions of illness, in access to and utilization of health services, and in health outcomes."⁷³ The constitutional recognition of the particular needs and vulnerability of women when pregnant, during childbirth, and when caring for their children is a duty incumbent upon the State and is based on the needs associated to that vulnerability, not on the assumption of incapacity.⁷⁴

Despite rights to sexual and reproductive health being seldom included in constitutional texts, newer constitutions have begun to recognize their special importance.

EXAMPLES:

Ecuadorian constitution, Article 32:

"Health is a right guaranteed by the State ... by means of economic, social, cultural, educational, and environmental policies; and the permanent, timely and non-exclusive access to programs, actions and services promoting and providing integral healthcare, sexual health, and reproductive health. The provision of healthcare services shall be governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency, effectiveness, prevention, and bioethics, with a gender and generational approach."

[70] Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, A /61/338, 13 September 2006, para. 17.

[71] UN Office of the High Commissioner for Human Rights, Sexual and reproductive health and rights, <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>.

[72] Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge University Press, 2008, pp. 192-93.

[73] Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource, Module 4: Economic, Social and Cultural Rights of Women, International Human Rights Internship Program, 2000, <https://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module4.htm>

[74] Irving 2008, p. 194.

Ecuadorian constitution, Article 363(6):

“The State shall be responsible for:

...Ensuring sexual and reproductive health actions and services and guaranteeing the integral healthcare and the life of women, especially during pregnancy, childbirth and postpartum.”

Constitution-makers have also become increasingly aware of the need to constitutionalize the recognition and protection of bodily integrity and autonomy. These protections are especially important to women and serve, among others, to guard their right to decide on and access contraception and abortion and to protect them against unwanted procedures such as forced sterilizations.

EXAMPLE:

South African constitution, Article 12(2) on the “Freedom and Security of the Person”:

Everyone has the right to bodily and psychological integrity, which includes the right:

- a. to make decisions concerning reproduction;
- b. to security in and control over their body; and
- c. not to be subjected to medical or scientific experiments without their informed consent.

C. Right to protection from gender based violence

Gender based violence is a major challenge hindering women’s ability to exercise many rights and a major violation affecting their rights to life, physical integrity, and human dignity. It occurs all over the world and is used to deny women and girls security, freedom, and the right to life. It is important to take into consideration that not only actual violence constitutes a barrier to freedom but also the threat of violence. Thus, constitution makers must pay attention to this issue and devote resources to combatting it.

“Men’s violence against women is based on the assumption of male superiority and female subordination and not linked to any specific religion, ethnicity or culture, but to the degree of patriarchy.”

Jens Orback, Swedish Minister for Integration and Gender Equality, in his opening statement at the conference “Combating Patriarchal Violence Against Women – Focusing on Violence in the Name of Honour”, Stockholm, 7-8 December 2004.

EXAMPLES:

Tunisian constitution, Article 46:

“The state takes all necessary measures in order to eradicate violence against women.”

Ecuadorian constitution, Article 66:

The following rights of persons are recognized and guaranteed: [...] 3. The right to personal well-being, which includes: [...] b. A life without violence in the public and 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, elderly persons, persons with disabilities and against all persons at a disadvantage or in a vulnerable situation; identical measures shall be taken against violence, slavery, and sexual exploitation.

When formulating the constitutional provisions relevant to the right to protection against gender based violence, this issue should be stated clearly in a separate article and not incorporated into other rights, such as the right to life, physical integrity, or into the provisions of other articles. It will be useful to emphasize it in a clear, accurate and separate article, as in the case of the Tunisian constitution.

Also, the text of the proposed article must clearly state both women’s right not to be subjected to this violence, and the State’s duty to take all necessary measures to ensure this right and to protect victims of gender based violence. (For clarification on the terminology of “gender based violence”, and how it differs from references to “violence against women”, see the Glossary included at the beginning of this ABC.)

D. Preventing women’s rights violations under the pretext of religion or social customs

The violation of women’s rights under the pretext of religion, culture or customs/traditions also hinders women’s enjoyment of their human rights. Whereas gender based violence is often prohibited by the constitution or ordinary legislation (even if the latter may be poorly enforced), violating women’s rights under the pretext of religion or customs is often justified and legitimized by many who may view it not as a violation but as compliance with religious or customary law. This is often the view taken in countries where sharia is a source of law or the basic or exclusive source of law. This risk is even higher when constitutions explicitly restrict women’s rights by stating that they must not contradict religion or custom, or when they make religion and custom, rather than the constitution, the basis for such rights. Therefore, great caution must be exerted when including any reference to existing customs in the constitution.

For example, the constitution of South Africa recognizes the roles and rights of religious, cultural and linguistic communities, but it ensures that their exercise of these rights may not contradict the constitutional bill of rights (Article 31). Then, the same constitution recognizes traditional leaders (Chapter 12), allows their legislation to be applied, and mandates that courts apply customary law but only “subject to the Constitution” (Article 211).

The Working Group on the Issue of Discrimination against Women in Law and Practice considered, in its Report to the Human Rights Council in April 2013, that: “The inclusion of any clause in the constitution that derogates from the guarantee of gender equality, by deferring to contradictory precepts in other orders of justice such as traditional and religious principles, undermines the equality standards of international human rights law. Similarly, constitutions that have an override clause, which excludes plural legal systems, religious or customary courts or alternative dispute settlement procedures from the obligation to respect the gender equality guarantee, violate the equality standards of the Convention.”

See Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice, A/HRC/23/50 (2013).

The constitution of Venezuela, after recognizing rights of religious communities, restrains the exercise of their beliefs in Article 59, which states that: “...no one shall invoke religious beliefs or discipline as a means of evading compliance with law or preventing another person from

exercising his or her rights.”

The constitution of Ecuador also emphasizes this point by recognizing local communities and indigenous nations and by allowing them to apply their laws and regulations provided that these do not contradict constitutional rights, especially women’s rights (Article 57).

The essential point that constitution makers have to highlight is that the application of religious and customary law depends on their compatibility with the constitution, especially the constitutional bill of rights, and not the opposite. This has to be projected in explicit and clear statements. This is also the position of the Working Group on the Issue of Discrimination against Women in Law and Practice. In its report of 2015, it recommended that States “recognize and enshrine, in their constitutions and laws, the right to equality, which should apply in all areas of life and have primacy over all religious, customary and indigenous laws, norms, codes and rules, with no possibility of exemption, waiver or circumvention.”⁷⁵

This subject is especially important in societies that are still under religious or customary authority. There, the interpreters of religious texts, and not the texts themselves, wield public authority, and their interpretations supersede the constitution. It must be highlighted that all legal texts require an authority to interpret them. The problem is not this openness to interpretation, but who has the power to interpret and give the final say with regard to legal texts: a religious power or a civil one, i.e. a judge. A gender sensitive constitution requires a secular authority interpreting its provisions; otherwise, the protections it offers women risk being undermined in the name of religion. (For more on an independent judiciary as a necessary guarantee for the constitution’s implementation, see Chapter 5 in this ABC.)

The importance of the above is not limited to the protection of women from the violation of their rights under the pretext of religion or customs. It also ensures that no legislation will be enacted later on based on religion or customs, regardless of its contradiction with women’s constitutional rights and gender equality. This occurs specifically with regard to regulations on the family, eligibility for public office, inheritance, and personal status laws.

E. Women’s right to participate in public and political life

Constitutions have to ensure all women’s political rights, especially the right to popular participation in the administration of public affairs, the right to candidacy and voting in periodic elections through public, equal and secret ballot, and the right to hold public offices and exercise all public functions created pursuant to national legislation, including women’s enjoyment of their right to get opportunities to represent their governments at the international level and to take part in the activities of international organizations.

The Beijing Platform of Action adopted at the Fourth International Women’s Conference (1995) urged the governments of the world to increase women’s participation in decision making positions so as to reach not less than 30%—the goal set by the Economic and Social Council. The purpose is

[75] Report by the Working Group on the Issue of Discrimination against Women in Law and Practice, A/HRC/29/40 (2015).

to reach parity between women and men as a mechanism to realize complete equality. However, international progress on the realization of women's political representation goals, as set by the international community, is still very slow and far from meeting these objectives. Thus, a gender sensitive constitution should stipulate an obligation to address women's exclusion and enable women to hold public office and to participate in elected bodies, including participation in the State's political and public life; the exercise of legislative, juridical, executive and administrative powers; as well as participation in all aspects of public administration and policy formulation and implementation at international, national, regional and local levels. This participation must also extend to civil society, including general assemblies and boards, as well as to organizations such as political parties, trade unions, professional or industrial associations, women's organizations, community organizations, and other organizations active in public and political life.

However, constitution makers have to take into account that the mere recognition of the equality principle is not sufficient to redress women's exclusion and to enable them to actually participate in the political and public life of the country. That is why the CEDAW Committee has stated that: "the principle of equality of women and men has been affirmed in the constitutions and laws of most countries and in all international instruments. Nonetheless, in the last 50 years, women have not achieved equality, and their inequality has been reinforced by their low level of participation in public and political life."⁷⁶ Therefore, the Committee affirmed that, while it is necessary to remove impediments in law, this is not sufficient; affirmative action measures must be adopted so as to realize equality of participation.

For example, the Italian constitution affirms the right of citizens of both sexes to hold public office and obliges the State's authorities to adopt specific measures to promote equal opportunities between women and men.

Practice has shown that merely stating a constitutional quota for women's representation is not sufficient on its own. This must be associated with other binding measures to achieve the real objective of the quota. These measures include:

- selecting the best electoral system for women (most likely to result in their highest representation);
- ensuring the existence of a skilled electoral management body which to inform political parties about the electoral system, and to apply the special temporary measures of women's participation in elections (such as exemptions from candidacy fees, access to official media, access to public resources, imposing sanctions on the political parties that fail to comply, including elimination of lists that exclude women);
- determining the extent of centralizing or decentralizing candidacy procedures,
- ensuring a significant and effective presence of women in the voter registration committee and in the election supervising committee.

See Stina Larserud and Rita Taphorn, "Designing for Equality: Best-fit, medium-fit and non-favourable combinations of electoral systems and gender quotas", International IDEA, March 2007, http://www.idea.int/publications/designing_for_equality/index.cfm.

[76] CEDAW Committee General Recommendation No. 23, A/52/38 (1997).

EXAMPLE:

Italian constitution, Article 51:

“Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law. To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men.”

A broad set of such measures exists, including:⁷⁷

- appointing female candidates,
- modifying the electoral procedures,
- enacting binding laws for political parties to include women on their lists, and
- specifying numeric objectives and quotas in elected bodies, executive bodies and judicial organs.

For example, the constitution of Ecuador states explicitly that women must be able to hold judicial offices, including membership of the Constitutional Court on a basis of “parity with men.”

EXAMPLE:

Ecuadorian constitution, Article 434:

“Members [of the Constitutional Court] shall be elected [...] through a public examination process, with citizen oversight and option for challenging the process. In the membership of the Court, efforts shall be made to ensure parity between men and women.”

A constitution may also contain a rule stating that no gender may constitute less than a certain percentage of any public body’s membership, for example stating that “neither gender should occupy more than 60% or less than 40% of the positions on a party list or in a decision-making body.”⁷⁸ An example of this is the constitution of Kenya, which states that no more than two-thirds of the members of elective or appointed bodies shall be of the same gender. This ensures that at least one third of a body’s members will be of the “other gender”. The Kenyan constitution makes it obligatory, in Article 27(8), for the State “to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.” This is reaffirmed in Article 81, which states that: “The electoral system shall comply with the following principles— (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;”

The purpose of affirmative measures is to achieve parity between women and men on the way to realizing complete equality. As such, they are meant to address existing democratic deficits and

[77] For an overview of the use of electoral quotas in Europe, see Electoral Gender Quota Systems and Their Implementation in Europe, European Union Directorate-General for Internal Policies, Department C, Citizens’ Rights and Constitutional Affairs, PE 408.309, September 2008, <http://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf>.

[78] Drude Dahlerup, “Increasing Women’s Political Representation: New Trends in Gender Quotas”, in Julie Ballington and Azza Karam, eds., *Women in Parliament: Beyond Numbers*, International IDEA, 2005, p. 142, <http://www.idea.int/publications/wip2/index.cfm>.

to be transitory towards ensuring women's equal participation in economic decision and policy-making and implementation.⁷⁹ In addition to the fact that it is a right for women, women's equal participation in public and political life constitutes a benefit for society as a whole. Studies have shown that women working in politics are no less competent than their male peers.⁸⁰ Moreover, it has been shown that "not only are women leaders needed to reflect the policy preferences of women voters, but that they may be more effective in doing so."⁸¹ Women participating on equal terms in public and political life thus ensures that they can pursue policies and decision making which reflects their needs and interests.

[79] Euromed Feminist Initiative (IFE-EFI), "Women's Rights and Democracy Building, Promoting a Common Agenda for Equality between Women and Men", Recommendations from Euro-Med conference, Amman, Jordan, 7-8 June 2013, <http://www.efi-ife.org/sites/default/files/003%20Recommendations%20of%20Euro-Med%20Women's%20Rights%20Conference%2C%20Women's%20Rights%20and%20Democracy%20Building%2C%20Promoting%20a%20Common%20Agenda%20for%20Equality%20between%20Women%20and%20Men%20%287-8%20June%202013%29.pdf>.

[80] Esther Duflo and Petia Topalova, "Unappreciated Service: Performance, Perceptions, and Women Leaders in India," Poverty Action Lab, 2004, <http://economics.mit.edu/files/793>.

[81] Rohini Pande and Alexandra Cirone, "Women in Politics: Quotas, Voter Attitudes and Female Leadership", Dubai School of Government, Policy Brief No. 10, February 2009, <http://www.mbrsg.ae/getattachment/6c937da2-739f-4a01-b7a4-e98fd902f8b3>.

1. WHEN DRAFTING EQUALITY-RELATED PROVISIONS, CONSTITUTION MAKERS SHOULD:

- Clearly endorse substantive gender equality as a constitutional principle.
- Refer to “equality between women and men” and not to “equality with men.” The latter assumes that men represent the norm, whereas a gender sensitive constitution should recognize the equal status of women and men.
- Adopt affirmative action measures such as parliamentary quotas in recognition of the persistence of exclusion and other forms of discrimination against women in the political sphere, and as a means to eliminate the barriers to their full participation in political life. Such measures are in full compliance with CEDAW and other international legal norms.
- Consider establishing separate bodies specially tasked with promoting gender equality. These bodies should be clearly regulated, empowered to take real measures, and adequately funded; their existence and conditions of operation should not be vulnerable to the whims of the political majority of the day.

2. WHEN DRAFTING PROVISIONS ON THE PROHIBITION OF DISCRIMINATION BASED ON GENDER, CONSTITUTION MAKERS SHOULD:

- Clearly and specifically endorse the prohibition of discrimination based on gender as a constitutional principle.
- Where the grounds for prohibited discrimination are enumerated in a provision, not make the list exhaustive so as to allow its expansion to grounds not initially envisioned. The use of illustrative lists, marked by “such as”, “for example”, or ending with “and any other form of discrimination” will leave open the possibility of other grounds of discrimination being identified in the future.
- Ensure that the prohibition on gender based discrimination does not preclude the adoption of affirmative action measures where needed.
- Clarify that the prohibition on gender based discrimination extends to indirect discrimination—discrimination resulting from policies which are on their face neutral but in practice disadvantages a particular gender.

3. WHEN DRAFTING RIGHTS-RELATED PROVISIONS IN THE CONSTITUTION, CONSTITUTION MAKERS SHOULD:

- State in clear, precise and detailed terms all of the civil, political, economic, social and cultural rights which the constitution protects.

- Clearly state women’s rights to exercise the freedoms they have traditionally been denied, such as their sexual and reproductive rights, the right to hold political and judicial positions, labor-related rights, rights of inheritance, freedom and equality within marriage, and the freedom to choose a partner.
- Ensure that constitutional rights provisions reflect and do not provide lesser protection than the protections incorporated in the international and regional rights conventions that the State has ratified.
- Formulating the texts that ensure any natural or legal person the possibility to resort directly to the constitutional court to challenge any legislation with provisions that are in contradiction with the constitutional texts, would belittle the rights and freedoms mentioned in it, in general, and women’s rights and freedoms, in particular.

4. WHEN DRAFTING SECULARISM-RELATED ARTICLES, CONSTITUTION MAKERS SHOULD:

- Review successful democratic secular constitutional models and the gains and protection they provide to all individuals in the State, both women and men alike.
- Endorse and promote the view that a secular constitution does not mean non-respect to religion, but the separation of religion from the public, political and legal spheres.
- Prevent efforts to undermine gender equality provisions via recourse to religious or traditional authorities and interpretations. (Useful instruments to guarantee against this subversion of the gender sensitive constitutions are elaborated in Chapter 5.)
- Refer to the State’s international legal obligations (see Chapter 2), which oblige it to prevent gender based oppression or rights derogations under the pretext of religion, culture, or traditions.

5. WHEN DRAFTING PROVISIONS CONCERNING WOMEN’S RIGHTS TO PARTICIPATE IN PUBLIC AND POLITICAL LIFE, CONSTITUTION MAKERS SHOULD:

- Insist on the use of texts that guarantee women’s right to participate in all aspects of political and public life, and not in the elected legislature only. This will extend to public office, the judiciary, the diplomatic corps etc.
- Strive for parity between women and men, regardless of the precise formula or limits on quotas, with the ultimate aim being to achieve substantive gender equality.
- Ensure the constitution encourages or stipulates the adoption of further legislation promoting women’s participation in public and political life, such as on quotas in political parties or among candidates for elections.

Julie Ballington and Azza Karam, eds., *Women in Parliament: Beyond Numbers*, International IDEA, 2005, <http://www.idea.int/publications/wip2/index.cfm>.

Markus Böckenförde et al., *A Practical Guide to Constitution Building*, International IDEA, 2011, www.idea.int/publications/pgcb/index.cfm.

Nathan J. Brown with the assistance of Marian Messing and Scott Weiner, “Constitutional Rebirth: Tunisia and Egypt Reconstruct Themselves”, United Nations Development Program, August 2011, <http://arab-hdr.org/publications/ahdr/Tunisia&Egypt.pdf>.

Coalition of Syrian Women for Democracy, “Gendered Constitution Building Process for Syria: Gender Entry Points to a Democratic Constitution in Syria and Lessons Learned from Constitution Making Processes in the Middle East and North Africa”, November 2014, <http://www.efi-ife.org/sites/default/files/001%20Gendered%20Constitution%20Building%20Process%20for%20Syria%20Report%20%28November%202014%29.pdf>.

Drude Dahlerup and Lenita Freidenvall, “Gender quotas in politics: A constitutional challenge”, in Susan H. Williams, ed., *Constituting Equality Gender Equality and Comparative Constitutional Law*, Cambridge University Press, 2011, pp. 29-52.

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Keila Gonzalez and Kristen Sample, “One Size Does Not Fit All: Lessons Learned from Legislative Gender Commissions and Caucuses”, National Democratic Institute and International IDEA, July 2010, http://www.idea.int/publications/lessons_learned/.

Salwa Hamrouni, “Equal Citizenship in Tunisia: Constitutional Guarantees for Equality between Citizens”, Arab Forum for Citizenship in Transition, September 2012, <http://www.ipinst.org/images/pdfs/women-and-constitution-tunisia-english1.pdf>.

Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Chapter 4 “Citizenship”, Chapter 5 “Representation”, Chapter 7 “Equality Rights”, and Chapter 8 “Reproductive Rights”, Cambridge University Press, 2008.

Stina Larserud and Rita Taphorn, “Designing for Equality: Best-fit, medium-fit and non-favourable combinations of electoral systems and gender quotas”, IDEA International, March 2007, http://www.idea.int/publications/designing_for_equality/index.cfm.

HOW TO ENGENDER CONSTITUTIONAL LANGUAGE?

*“To those asking why the word [person] should include females,
the obvious answer is why it should not.”
(Edwards v Canada (Attorney General) (1928) S.C.R. 276)*

The gender sensitive nature of a constitution is also reflected in its language. The choice of words is not neutral but may instead reflect gender stereotypes which are then perpetuated by the constitutional text. Feminists have long advocated for laws to be drafted in language which is “gender neutral”, “gender-inclusive” or “non-sexist”. They have also advocated for recognition that the so-called “masculine rule”—the assumption that the masculine pronoun he subsumed the feminine she—has not come about as an accident but has served to perpetuate the invisibility and inferiority of women and therefore should be renounced.⁸² Constitutions and legislation are especially important sites where “speech is usually framed by the masculine voice, thus making women absent” from both their texts and the protection of the law.⁸³ In this section, we look at why the choice of language should be on the agenda of any gender-conscious constitutional drafters, as well as at good practice examples of gender sensitive drafting with illustrations from a number of constitutional texts.

1. Why should drafters consider their choice of language?

It is important to pay the issue of language due attention during the drafting process for two reasons.

First, the constitution is meant to reflect the society’s commitment to a set of values, whether explicitly or implicitly, and these values should be expressed in language which takes gender considerations into account. The constitution can thus send a strong signal to current and future law-makers that they should consider the gender implications of legislation.

Secondly, the constitution is by its nature more difficult to amend and as such, a sexist text may solidify over time. For both these reasons then, choices in terminology carry more meaning than as a purely technical or cosmetic exercise. In the words of constitutional scholar Helen Irving: “attempts at gender-inclusive language are not merely a matter of legal precision and

[82] Sandra Petersson, “Locating Inequality—The Evolving Discourse on Sexist Language”, UBC Law Review, Vol. 32, No. 1 (1998), pp. 55-90.

[83] Coalition of Syrian Women for Democracy, “Looking for a Democratic Constitution”, 2012, p. 6, http://wunrn.com/wp-content/uploads/syria_1.pdf.

formal inclusion. This involves the recognition of language as a form of representation.”⁸⁴ Thus, advocates for gender sensitive constitution making should also attempt to influence the language of a new constitution and not merely substantive provisions on equality and non-discrimination.

2. What techniques should drafters employ when considering constitutional language?

There are two main strategies constitution makers can pursue when drafting constitutional provisions in a gender sensitive manner. The first is to ensure the implicit neutrality of the constitutional language they use, which can be achieved by avoiding certain gender-specific terms and replacing them with gender sensitive ones.

The second strategy is to seek the explicit neutrality of language by alternating between the feminine and masculine or consistently using both. This second technique is useful where gendered pronouns are unavoidable, but also as a corrective strategy. It is thus a strategy which takes into account the implications of word choices. Research has shown that people hold gendered assumptions about words denoting certain professions which have historically been male-dominated. References in constitutions to official positions such as those of “President”, “Prime Ministers”, “Ministers”, or “judges” will be neutral on their face but will likely be read to imply the masculine. Correcting such assumptions will be possible by the explicit reference to these positions as being held by “men or women”, and the explicit use of both female and male pronouns: “she/he”.

Another set of gendered assumptions attaches to words which connote institutions and practices which have historically been discriminatory towards women. Examples may include references to “marriage” or to “family”, which are linked to societal practices which may subordinate women. The point here is not that referring to these in the constitution will always lead to discrimination. Instead, drafters should take into account societal practices which will influence the interpretation of such words and either avoid them for that reason or else provide definitions for them that will be explicitly gender sensitive.

3. Specific techniques for drafting gender sensitive constitutional language

There are several options available to constitution makers to draft provisions in a gender sensitive manner:

[84] Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge University Press, 2008, p. 42.

A. Avoiding gender-specific terms, which can be achieved by:

- a. Using certain gender-neutral terms such as person or individual
- b. Repeating certain nouns so as to avoid pronouns
- c. Using the passive voice
- d. Using gender-neutral alternatives for masculine-based nouns, such as chairperson instead of chairman
- e. Using the plural they instead of singular pronouns

B. Where pronouns are unavoidable, inserting both female and male pronouns should be used by:

- a. Either alternating between the masculine he/his and the feminine she/her or
- b. By including them both in all provisions, preferably giving precedence to the feminine pronoun as a clear indication of the text's gender commitments (she/he)

C. Where there is a need to correct gendered historical assumptions:

- a. About certain official positions such as of 'President', 'Prime Ministers', 'Ministers' or 'judges', the post-holders should be explicitly referred to as 'women or men' and 'she/he'
- b. About certain words or institutions which are on their face neutral, such as 'family' or 'marriage', these should either be avoided entirely or defined in a gender-inclusive manner

What follows are examples of each of these drafting techniques, taken from an array of constitutions whose drafters attempted to ensure they used gender sensitive language.

A. Avoiding gender-specific terms by:

- a. Using certain gender neutral terms such as *person* or *individual*

EXAMPLES:**South African constitution, Article 47(3) on losing membership to the National Assembly:**

A **person** loses membership of the National Assembly if that **person**-

- a. ceases to be eligible;
- b. is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or
- c. ceases to be a member of the party that nominated that person as a member of the Assembly.

Ugandan constitution, Article 10 on "Citizenship by birth":

The following **persons** shall be citizens of Uganda by birth-

- a. every **person** born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926 and set out in the Third Schedule to this Constitution; and
- b. every **person** born in or outside Uganda one of whose parents or grandparents was at the time of birth of that person a citizen of Uganda by birth.

Tunisian constitution, Article 100 on "Vacancy" of the office of the Head of Government:

If the office of Head of Government becomes permanently vacant for any reason except for resignation and withdrawal of the confidence of the Assembly, the President of the Republic shall

ask the **candidate** of the ruling party or coalition to form a government within one month. If this period expires without forming a government, or if the government formed fails to receive a vote of confidence, the President shall ask the **individual** deemed most capable to form a government which presents itself before the Assembly for the purpose of obtaining a vote of confidence in accordance with the provisions of Article 89. [...]

However, even these seemingly neutral terms may be read as gendered. For example, in societies where women’s citizenship has historically been more restricted than men’s, constitutional references to “citizens” may not be in fact neutral. Where that is the case, drafters can attempt to correct implicit understandings of such neutral words by making explicit references to women (see examples in sub-section 3 below). Moreover, there are languages in which the very names of certain public offices are gendered, such as in Hindi and Nepali, in which the word “President” literally means “husband of the nation”.⁸⁵ This makes the references to the holder of the office as “he/she” in the 2015 Nepali constitution especially significant.

b. Repeating certain nouns so as to avoid pronouns

Repeating certain nouns, such as referring to “the President” throughout articles detailing the office of the presidency, instead of using pronouns will ensure the articles can be read as gender neutral.

EXAMPLES:

South African constitution, Article 79 on “Assent to bills”:

1. **The President** must either assent to and sign a Bill passed in terms of this Chapter or, if the **President** has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
2. The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.
3. The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if-
 - a. **the President’s** reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
 - b. section 74 (1), (2) or (3) (b) or 76 was applicable in the passing of the Bill.
4. If, after reconsideration, a Bill fully accommodates **the President’s** reservations, **the President** must assent to and sign the Bill; if not, the President must either-
 - a. assent to and sign the Bill; or
 - b. refer it to the Constitutional Court for a decision on its constitutionality.
5. If the Constitutional Court decides that the Bill is constitutional, **the President** must assent to and sign it.

c. Using the passive voice

This technique is especially suitable to provisions declaring certain rights, which can thus be declared in a “disembodied” language which embraces everyone and does not refer to a

[85] Michele Brandt et al., *Constitution-making and Reform: Options for the Process*, Interpeace, November 2011, p. 215, <http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>.

particular person as the rights-holder.⁸⁶

EXAMPLE:

Australian constitution, Article 80 on “Trial by jury”:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence **was committed**, and if the offence **was not committed** within any State the trial shall be held at such place or places as the Parliament prescribes.

- d. Using gender neutral alternatives for masculine-based nouns, such as *chairperson* instead of *chairman*

There are words which incorporate gender assumptions into their very structure, such as the use of the suffix –man in English: “chairman”, “businessman” etc. These should be replaced with gender sensitive alternatives such as “chair” or “chairperson”, “businesspeople” etc.

EXAMPLES:

South African constitution, Article 64 on “Chairperson and deputy chairpersons” of the National Council of Provinces:

1. The National Council of Provinces must elect a **Chairperson** and two **Deputy Chairpersons** from among the delegates.
2. The **Chairperson** and one of the **Deputy Chairpersons** are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.
3. The other **Deputy Chairperson** is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.
4. The Chief Justice must preside over the election of the **Chairperson**, or designate another judge to do so. The **Chairperson** presides over the election of the **Deputy Chairpersons**.
5. The procedure set out in Part A of Schedule 3 applies to the election of the **Chairperson** and the **Deputy Chairpersons**.
6. The National Council of Provinces may remove the **Chairperson** or a **Deputy Chairperson** from office.
7. In terms of its rules and orders, the National Council of Provinces may elect from among the delegates other presiding officers to assist the **Chairperson** and **Deputy Chairpersons**.

Nepali constitution, Article 86 on the “Constitution of National Assembly and terms of members”:

- (1) National Assembly shall be a permanent house.
- (2) There shall be fifty-nine members in the National Assembly as follows:-
 - (a) Fifty six members elected from an Electoral College comprising members of Provincial Assembly and chairpersons and vice-chairpersons of Village councils and Mayors and Deputy Mayors of Municipal councils, with different weights of votes for each, with eight members from each province, including at least three women, one Dalit, one person with disability or minority;
 - (b) Three members, including at least one woman, to be nominated by the President on the recommendation of Government of Nepal. [...]

[86] Irving 2008, p. 46.

- e. Using the plural *they* instead of singular pronouns

Recasting a sentence in the plural can help avoid gendered pronouns (using “they” and “their” instead of “he” or “his”).

EXAMPLES:

South African constitution, Article 10 on “Human dignity”:

Everyone has inherent dignity and the right to have their dignity respected and protected.

B. Where pronouns are unavoidable, inserting both female and male pronouns should be used by:

- a. Either alternating between the masculine he/his and the feminine she/her or
- b. By including them both in all provisions, preferably giving precedence to the feminine pronoun as a clear indication of the text’s gender commitments

There might be objections that this method will render the text more cumbersome and as such that it should be used sparingly.⁸⁷ However, in combination with the use of gender neutral terms, it can be employed to great effect without making the constitutional text unwieldy.

EXAMPLES:

Bolivian constitution, Article 169.I:

In the event of an impediment or definitive absence of the President, **he or she** shall be replaced by the Vice President and, in the absence of the latter, by the President of the Senate, and in **his or her** absence by the President of the Chamber of Deputies. In this last case, new elections shall be called within a maximum period of ninety days.

Nepali constitution, Article 89 on “Vacation of seat” of members of parliament:

The seat of a Member of Parliament shall be vacant in the following circumstances:-

- (a) if **he or she** resigns in writing to the Speaker or Chairperson,
- (b) if **he or she** does not meet the requirements under Article 91,
- (c) if **his or her** term of office expires or if the term of the House of Representatives and National Assembly expires,
- (d) if **he or she** remains absent from ten consecutive meetings without notification to the House,
- (e) if the party of which **he or she** was a member when elected provides notification in the manner set forth by law that he or she has abandoned the party.
- (f) if **he or she** dies.

C. Correcting gendered assumptions:

- a. Correcting gendered assumptions about holders of political office

[87] Christopher Williams, “The End of the ‘Masculine Rule’? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland”, *Statute Law Review*, Vol. 29, No. 3 (2008), pp. 140-41.

The danger in opting for neutral constitutional language is that, at the same time as it eliminates the discredited “masculine rule”, it again erases women from the text. Thus, in order to combat “stereotypical assumption that the actors in politics must be men”,⁸⁸ the text can make explicit references to women and use the female pronouns in relation to appointments to official positions typically assumed to be held by men. As the examples below show, this can be done within one general provision or, sending an even stronger message, in each provision dealing with such official appointments.

EXAMPLES:

French constitution, Article 1:

[...] Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility.

South African constitution, Article 174 on “Appointment of judicial officers”:

1. Any appropriately qualified **woman or man** who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
2. **The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.** [...]

South African constitution, Article 207 on “Control of police service”:

1. The President as head of the national executive must appoint a **woman or a man** as the National Commissioner of the police service, to control and manage the police service.

Ugandan constitution, Article 108A on the “Prime Minister”:

1. The Prime Minister shall-
[...] b. perform such other functions as may be assigned to **him or her** by the President, or as may be, conferred on him or her by this Constitution or by law.
2. The Prime Minister shall, in the performance of **his or her** functions, be individually accountable to the President and collectively responsible for any decision made by the Cabinet.

Morocco constitution, Article 38:

All the **citizens [feminine] and the citizens [masculine]** contribute to the defense of the Country and of its territorial integrity against any aggression or threat [menace].

Tunisian constitution, Article 74 on “Candidacy for the position of President”:

Every male and female voter who holds Tunisian nationality since birth, whose religion is Islam shall have the right to stand for election to the position of President of the Republic. [...]

Nepali constitution, Article 61 on the “President”:

(2) The President shall be the head of the State. **He/she** shall perform **his/her** duties according to this Constitution and Federal laws. [...]

[88] Christina Murray, “A Constitutional Beginning: Making South Africa’s Final Constitution”, UALR Law Review, 23 (2001), pp. 828-29.

b. Correcting gendered assumptions about certain institutions and practices

There are certain institutions or practices which will carry with them gendered meanings, such as “family” or “marriage”. Drafters should be aware of the gendered impact of constitutionalizing such institutions. They should then decide whether it is better to avoid explicit textual references to such institutions and practices or else to draft these in a gender-inclusive manner. Of course, much will depend on how such provisions are interpreted in practice (more on this below). However, clear constitutional language stating the equality in marriage and the family between women and men, for example, will help guide such interpretation. Furthermore, given that the individual constitutes the basic unit of society, the constitution should focus on the individual rights of all genders, which also apply within the institutions of the family or marriage. Thus, “with regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws [should] be enacted from the standpoint of individual dignity and the essential equality between women and men.”⁸⁹

EXAMPLE:

Romanian constitution, Article 48 on “The family”:

The **family** is based on a freely consented marriage by the spouses, **their full equality**, and **the right and duty** of the parents to raise, educate, and instruct their children.

References to traditional, customary, or religious foundations for the protection of the family are to be avoided, as they are detrimental to gender equality.

EXAMPLES:

Saudi Arabian constitution, Article 9:

The family is the nucleus of Saudi society. Its members shall be brought up imbued with the Islamic Creed which calls for obedience to God, His Messenger and those of the nation who are charged with authority; for the respect and enforcement of law and order; and for love of the motherland and taking pride in its glorious history.

Saudi Arabia constitution, Article 10:

The State shall take great pains to strengthen the bonds which hold the family together and to preserve its Arab and Islamic values. Likewise it is keen on taking good care of all family members and creating proper conditions to help them cultivate their skill and capabilities.

Yemeni constitution, Article 26:

The Family is the basis of society, its pillars are religion, customs and love of the homeland. The law shall maintain the integrity of the family and strengthen its ties.

Explicitly incorporating assumptions about women’s inferiority to men within the family is also to be avoided—an example was the reference to women as “complementary” to men in initial drafts of the Tunisian constitution.⁹⁰ Of course, traditional views of women’s role within

[89] Coalition of Syrian Women for Democracy 2012, p. 12.

[90] Mounira M. Charrad and Amina Zarrugh, “The Arab Spring and Women’s Rights in Tunisia”, E-International Relations, 4 September 2013, <http://www.e-ir.info/2013/09/04/the-arab-spring-and-womens-rights-in-tunisia/>.

the home may underpin constitutional provisions implicitly as well. For example, the protection of marriage and family in Germany’s constitution was premised on a traditional view of these institutions. The German Constitutional Court itself at least tacitly subscribed to this view, by rhetorically “exalted the role of both sexes while demanding respect for their objective natural and functional differences.”⁹¹ The resulting jurisprudence has been a patchwork of cases, not all of which were decided on the grounds of gender equality and combatting men’s traditional domination in most social spheres.⁹²

EXAMPLE:

German constitution, Article 6 on “Marriage – Family – Children”:

1. Marriage and the family shall enjoy the special protection of the State.
2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty.
3. Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
4. Every mother shall be entitled to the protection and care of the community.
5. Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Drafters should also consider the fact that not constitutionalizing every aspect of the family does not automatically mean it will not be protected within society. The constitutions of the Scandinavian countries do not say very much about the family but these States have long been held to provide the best social protection to families—all justified on the grounds of individual autonomy.⁹³ The Norwegian constitution, for example, only mentions the family within provisions on the right to privacy and on children’s rights, leaving other regulations on the family to social legislation.

EXAMPLE:

Norwegian constitution, Article 102

Everyone has the right to respect for his private and family life, his home and his correspondence. Search of private homes shall not be made except in criminal cases.

Norwegian constitution, Article 104

Children have the right to protection of their personal integrity. The authorities of the State shall create conditions enabling the child’s development, hereunder secure the necessary economic and social safety, as well as the necessary standard of health, for the child; preferably within its own family.

[91] Blanca Rodríguez Ruiz and Ute Sacksofsky, “Gender in the German Constitution”, in Beverley Baines and Ruth Rubio-Marín, eds., *The Gender of Constitutional Jurisprudence*, Cambridge University Press, 2005, p. 161.

[92] *Ibid.*, p. 163.

[93] “The secret of their success: The Nordic countries are probably the best-governed in the world”, *The Economist*, 2 February 2013, <http://www.economist.com/news/special-report/21570835-nordic-countries-are-probably-best-governed-world-secret-their>.

4. General techniques for drafting gender sensitive constitutional language

There are three broad types of drafting considerations which will have a bearing on any constitution, but also on a gender sensitive one:

A. Specificity versus generality

There is no agreement on whether constitutional language is preferable if more specific or general. Those who favor a more general, framework constitution tend to praise the United States constitution as their model, whereas those who prefer a detailed constitution will look to one such as South Africa's as an example of good practice. A certain degree of generality will be inevitable in constitutional drafting, given that the supreme law cannot (and should not) set down the rules to guide all aspects of society. Conversely, more recent constitution making experiences have tended to produce increasingly detailed constitutional texts, reflecting also the rise in the number of issues which have come to be seen as "constitutional".⁹⁴ Specificity may refer both to the scope of issues that the constitution regulates and to the degree of detail in the elaboration of the provisions of the constitution on any given topic.⁹⁵ Some scholars argue that a constitution with a high level of specificity reflects a hard-fought constitutional bargain at the time of drafting and as such stands a better chance of enduring after ratification.⁹⁶ This view is disputed, however, by those who find overly specific constitutional provisions "risk locking governments into policies that in other countries would not even be considered questions of constitutional law."⁹⁷

From the point of view of gender provisions, these are possibly both helped and hindered by specificity in drafting. For instance, a detailed constitutional provision on the protection of the family may seek to restrict women's rights within her family by extensively referring to customs, traditions, or religion, or to duties and obligations which disproportionately fall on women. However, a lengthy provision which references gender equality within the family may work to alleviate past discrimination. An example in which specificity was used to curtail gender equality is Turkey's amendment of its Article 41 in 2001. The amendment, prompted by calls by the Council of Europe to change the existing equality principle so as to provide more leverage to equality claims, instead added text dealing with the protection of the family:

Turkish constitution, Article 41:

Family is the foundation of the Turkish society and based on the equality between the spouses.

The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

[94] Brazil's constitution, for example, spanned 65,000 words when it was adopted in 1988 and is famous for having constitutionalised nearly every aspect of public life. See Zachary Elkins et al., *The Endurance of National Constitutions*, Cambridge University Press, 2009, p. 105.

[95] *Ibid.*, p. 103.

[96] *Ibid.*

[97] George Tsebelis and Dominic J. Nardi, Jr., "When more is less: the negative economic effects of longer constitutions", *Constitution-Making & Constitutional Change*, 19 September 2014, <http://constitutional-change.com/when-more-is-less-the-negative-economic-effects-of-longer-constitutions/>.

The move was decried by women’s rights activists and civil society at large for not treating women as independent individuals but instead seeming “to support the patriarchal philosophy of traditional Turkey.”⁹⁸ An opportunity was thus missed to advance gender equality by way of further constitutional specificity.

B. Clarity versus ambiguity

Any good constitution should be written in clear, accessible language. When it comes to provisions on gender equality and non-discrimination, these should also be drafted in unequivocal terms so as to leave no room for the misinterpretation of the intention behind their adoption or of the scope of the rights and prohibitions in question. An example of a provision having received widespread criticism for its propensity to lead to discriminatory interpretation is Article 2.28 included in the first draft of the Tunisian constitution:

First draft of Tunisian constitution, 14 August 2012, Article 2.28:⁹⁹

The State shall guarantee the protection of the rights of women and shall support the gains thereof as true partners to men in the building of the nation and as having a role complementary thereto within the family.

The State shall guarantee the provision of equal opportunities between men and women in the bearing of various responsibilities.

The State shall guarantee the elimination of all forms of violence against women.

The fear was that describing women as “complementary to” men was one-sided and resulted in rights being “guaranteed to women not on the basis of them being entitled to human rights by virtue of the fact that they are human, but rather, them being complementary to men.”¹⁰⁰ Thus, although on its face the provision appeared to seek clarity over the “true partnership” between women and men, it could have resulted in discrimination in practice. The final version of the article (Article 46 of the 2014 constitution) resorts to unambiguous language of gender equality:

Tunisian constitution, Article 46:

The State commits to protect women’s accrued rights and work to strengthen and develop those rights.

The State guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains.

The State works to attain parity between women and men in elected Assemblies.

The State shall take all necessary measures in order to eradicate violence against women.

Clear language should also be used so as to prevent constitutional protections being restricted by way of judicial interpretation. Ambiguous language leaves room for judicial empowerment

[98] Hilal Elver, “Gender Equality from a Constitutional Perspective”, in Baines and Rubio-Marin 2005, p. 283.

[99] For an unofficial translation of the draft, see http://www.constitutionnet.org/files/2012.08.14_-_draft_constitution_english.pdf.

[100] United Nations Working Group on Discrimination against Women in Law and in Practice, “Tunisia: UN expert group calls on new Government to protect and strengthen achievements on equality and women’s human rights”, 21 August 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12447&LangID=E#sthash.5PocMNvO.dpuf>.

which, given the traditionally patriarchal nature of the judiciary, tends not to favor women. There may be cases in which general and/or non-explicit language can be beneficial in constitutional drafting. This strategy can allow room for the uncertainties at the time of constitution making and for the later evolution of constitutional interpretation towards more gender equality. In constitution making processes in which women's rights gain little traction and are all but excluded from drafting, advocates may attempt to limit damage done to equality by calling for constitutional provisions which at least do not close off the possibility of protection being expanded in the future. For example, in cases where references to family or marriage cannot be left out of the constitution entirely, an alternative would be to include a vague reference to their role in society so as to prevent the inclusion of clear but discriminatory language on these issues. Another example of strategic drafting is the use of non-exhaustive lists in non-discrimination clauses.

EXAMPLE:

Slovenian constitution, Article 14 on "Equality before the law":

In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance.
All are equal before the law.

The open-ended nature of the list of grounds for discrimination, reflected in the addition of "or any other personal circumstance" at the end, allows for the expansion of protections to cover categories not listed (such as sexual orientation and gender identity) and facilitates the protection against multiple discrimination (for instance, discrimination against minority women).

However, women's rights defenders have warned that general guarantees of equality in the constitution will not necessarily lead to equality in practice: "Practice revealed that phrases as "all citizens are equal before the law" or "all citizens are equal regardless of religion, race or sex..."» which appeared in a number of Arab constitutions does not guarantee equal citizenship rights between women and men, because the laws have already been built on [the] basis of, and still permeate, discrimination against women. Therefore the constitution should have specific and clear provisions on full equality between women and men in civil, economic political and social rights."¹⁰¹

C. Coherence

Consistency and coherence are crucial during the drafting of all constitutions: together they help ensure that the final text is not self-contradicting or confused. The coherence of the text may refer to a number of aspects: whether all the provisions fit logically together; whether they are consistent with the philosophy behind the text; whether mutually excluding sources of legal authority are recognized, such as the international human rights of women and religious law; whether there are different styles used throughout the text (great detail in some parts but only schematic guidelines in others); whether the same words are used with different meanings

[101] Coalition of Syrian Women for Democracy 2012, p. 5.

throughout the text; or whether there is undue repetition and confusing language.

An example of potential incoherence may be the relationship between Articles 3 on gender equality and 6(1) on the “special protection” afforded by the State to the family and marriage in the German Basic Law. These provisions were in tension at least theoretically, although the German Constitutional Court has strived to avoid direct confrontation between the two articles.¹⁰² Further examples are provided by constitutions which do not consistently refer to women and men, or to both female and masculine pronouns, in similar provisions. For example, the Tunisian constitution, while otherwise ensuring neutral language or references to both pronouns when referring to public offices, refers to the President’s mandate in the masculine:

Tunisian constitution, Article 72 on the “Mandate” of the President:

The President of the Republic is the Head of State and the symbol of its unity. He guarantees its independence and continuity, and ensures respect of the Constitution.

This despite then stipulating that the presidency can be held by either men or women (Article 74). Such slips, whether purposeful or due to errors of drafting, can have unforeseen consequences at the time of interpretation of the provisions in question. At the very least, they reduce the strong symbolic role played by a gender sensitive constitutional text.

[102] Rodriguez Ruiz and Sacksofsky 2005, p. 160.

Constitutional drafters and women's rights advocates engaged in the process of writing a new constitution can use a range of techniques and strategies so as to ensure the constitutional language is gender sensitive. This chapter has sought to provide them with answers to the following questions:

1. WHY SHOULD DRAFTERS CONSIDER THEIR CHOICE OF LANGUAGE?

- Constitutional language expresses the principles and values of the society.
- Historically, constitutional language has reflected male interests and norms, excluding women. A gender sensitive constitutional language can correct this.
- The constitution's gender sensitive language can send a strong signal to current and future law-makers that they should consider the gender implications of legislation.
- The constitution is more difficult to amend and sexist language may thus be more difficult to change once the constitutional text is ratified.

2. WHAT TECHNIQUES SHOULD DRAFTERS EMPLOY WHEN CONSIDERING CONSTITUTIONAL LANGUAGE?

A. Avoiding gender-specific terms by:

- Using certain gender neutral terms such as "person" or "individual"
- Repeating certain nouns so as to avoid pronouns such as "President" or "Prime Minister"
- Using the passive voice, such as "was committed"
- Using gender neutral alternatives for masculine-based nouns, such as chairperson instead of chairman
- Using the plural they instead of the singular pronouns he/she

B. Where pronouns are unavoidable, inserting both female and male pronouns should be used by:

- Either alternating between the masculine he/his and the feminine she/her or
- By including them both in all provisions, preferably giving precedence to the feminine pronoun as a clear indication of the text's gender commitments

C. Correcting gendered assumptions:

- About holders of political office such as high political functions or judges
- About certain institutions and practices such as marriage or family

3. WHAT STRATEGIES CAN DRAFTERS EMPLOY WHEN CONSIDERING CONSTITUTIONAL LANGUAGE?

A. Specificity versus generality

- Drafters should aim for specificity when it enables greater protection of gender equality and avoid it when it leads to the curtailment of women's rights.

B. Clarity versus ambiguity

- Clarity and explicit language are preferable to ambiguity, in particular when stating principles of non-discrimination and gender equality.
- However, when the situation at the time of drafting is inimical to women's rights, general or non-explicit drafting may help prevent the adoption of explicitly discriminatory constitutional provisions. In such cases, drafters should strive to adopt specific gender equality provisions.

C. Coherence

- The constitutional text should be coherent and not self-contradictory, both substantively and stylistically.
- The constitution should be coherent in its use of neutral language, such as by consistently employing both feminine and masculine pronouns ("she/he") to refer to holders of political office.

The constitution should not incorporate mutually excluding sources of legal authority, such as the international human rights of women and religious law.

Michele Brandt et al., *Constitution-making and Reform: Options for the Process*, Interpeace, November 2011, pp. 208-17, <http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>.

Coalition of Syrian Women for Democracy, "Looking for a Democratic Constitution", 2012, http://wunrn.com/wp-content/uploads/syria_1.pdf.

Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Chapter 2 "Constitutional Language", Cambridge University Press, 2008.

Vicki Jackson, "Conclusion: Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, and Interpretation", in Susan H. Williams, ed., *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge University press, 2009, pp. 312-50.

Christina Murray, "A Constitutional Beginning: Making South Africa's Final Constitution", *UALR Law Review*, 23 (2001), pp. 809-38.

Sandra Petersson, "Locating Inequality—The Evolving Discourse on Sexist Language", *UBC Law Review*, 32:1 (1998), pp. 55-90.

Christopher Williams, "The End of the 'Masculine Rule'? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland", *Statute Law Review* 29:3 (2008), 139-53.

HOW TO ENSURE THE CONSTITUTION IS ENFORCED?

“There are issues I may not have thought about or, even if I had thought about them, I may not have seen them as significant as I can now appreciate that they are. That’s very much about some women colleagues, not even pointing it out to you, but just by what they say and you go ‘hmm, haven’t thought of that’.”
(Male Member of the Scottish Parliament¹⁰³)

The reality of international practices reveals that many women’s constitutional rights remain “ink on paper;” they are frozen or deactivated by restricting texts. Many times the situation is even worse because women’s capability to defend their rights is deactivated, either by complicated judicial systems, or because reaching constitutional courts as the highest judicial authorities is restricted by texts and conditions that are designed in a way which limits their accessibility, especially by women.

However, constitutional design offers potential solutions to these problems, providing the highest level of guarantees to enable every human being to enjoy the rights enunciated in the constitution. We shed light here on many good examples and practices taken from different constitutions around the world. These practices do not concern women’s rights only but deal with charters of constitutional rights as a whole for both women and men. This approach is compatible with the principle of equality as the essence of constitutional rights.

1. Restricting the possibility of law-makers or the executive power to interfere

It is preferable for a constitution, when addressing the rights and freedoms of women, to be detailed and clear and to reduce, as much as possible the need for constant clarification by law-makers or judges. It is unhelpful if constitution makers stipulate for a principle or a right at a general level and then leave its regulation to the other branches of power without having guarantees to fulfill it. Nor is it helpful to leave gaps allowing law-makers or the executive power to restrict or affect the rights under the pretext of their regulation or in states of emergency, without regulating this interference in a

The constitution must contain controls to limit law makers’ capacity to restrict rights by way of national laws.

[103] Cited in Fiona Mackay, Fiona Myers and Alice Brown, “Towards a New Politics? Women and the Constitutional Change in Scotland”, in Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives*, Palgrave Macmillan, 2003, p. 95.

clear and accurate way.

Therefore, constitution makers have to understand that the mere formulation of a good constitutional bill of rights does not ensure its implementation; supporters of democratic, gender sensitive constitutions have to be aware that the best rights enunciated in a constitution may face real risks if they are not regulated, or if other branches are allowed to restrict them, either via

- Enacting national legislation or by
- Declaring a state of emergency.

Early efforts during the constitution drafting process must be exerted to face this challenge, namely imposing constitutional controls on the possibility of restraining rights by these two means.

A. Preventing legislation which restricts rights

There are many reasons that governments may rely on when restricting some rights and placing controls on how to exercise and regulate them. These include: the obligation to respect others' rights and the requirements of maintaining "public order", "national security", "public health", and "public morality". These grounds can be listed together, in a limitation clause applying to the entire bill of rights, or separately, in each article dealing with individual rights. Wherever it is included, the limitation paragraph must contain sufficient explanation of the reasons that may be relied on to limit a right, the content and extent of the right to be limited, and whether it is a total or partial limitation, as well as the procedures to be followed to limit it. Moreover, those who are affected by a limitation must be able to resort to courts for redress, and authorities must respect the objective and procedural limits of the limitation process.

Additionally, the limitations placed on human rights must not themselves be unlimited; otherwise, nothing of human rights would remain. International human rights law has developed many controls governing the regulation or limitation of rights, such as:

- the principle that the "essence of a human right" must not be affected by the limitations, meaning that the imposed restrictions may not empty a right of its content and essence;
- the principle of proportionality, which means that governments may not impose obligations or restrictions exceeding the necessary limit to realize the social objective desired from that measure;
- the principle of democratic necessity must be respected—the Covenant on Political and Civil Rights states that the restrictions imposed on any of the rights contained in it, must be "necessary to maintaining a democratic standard oriented along the basic democratic values of pluralism, tolerance, broadmindedness, and peoples' sovereignty."¹⁰⁴

[104] Democracy Reporting International, "Lawful Restrictions on Civil and Political Rights", Briefing Paper 31, October 2012, pp. 4 et seq., <http://democracy-reporting.org/publications/country-reports/tunisia/briefing-paper-31-october-2012.html>.

It should also be taken into account that there are fundamental rights that can in no way be restricted, because they embody the essence of the fundamental right to human dignity. These are: the right to life; the prohibition of torture, inhuman or degrading treatment; the prohibition of slavery; and the non-retroactivity of penal laws.

EXAMPLES:

South African constitution, Article 36 on the “Limitation of Rights”:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

German constitution, Article 19:

1. Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.
2. In no case may the essence of a basic right be affected.”

Tunisian constitution, Article 49:

The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic State and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations.

There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.

Some constitutions specify the rights and freedoms which may not be limited.

EXAMPLE:

Portuguese constitution, Article 42:

1. Intellectual, artistic and scientific creation shall not be restricted.

It is possible to adopt a similar method to enunciate women’s fundamental rights, declaring them not to be restricted by any future legislation.

B. Regulating states of emergency

In addition to limiting law-makers' interference, the constitution must contain clear controls to limit the executive power's capacity to restrict or limit rights under the pretext of a state of emergency. This is one of the cases under which women's rights, and human rights in general, may be violated. Therefore, constitutions must contain clear objectives and procedural restrictions concerning the limits and controls of an imposed state of emergency, so that it may not be taken as a pretext to violate and affect rights.

Limitations of rights under a state of emergency must be controlled by the constitution.

According to international standards, constitution makers have to respect the following guidelines when adopting any constitutional texts concerning a state of emergency:¹⁰⁵

- A state of emergency may be declared under certain conditions (such as war, invasion, and natural disasters);
- It should be declared officially, publicly and within the law, by a constitutionally lawful body; usually this is the Head of State or government;
- It should be approved by the legislature, which should continue to function and should renew its approval in case the state of emergency is to be expanded after its original timeframe. It must be possible to resort to courts to determine if the conditions of declaring the state of emergency are met;
- It should be temporally and geographically limited;
- It should be managed transparently with explicit limitations of the executive's extraordinary powers during a state of emergency. There should be guarantees to safeguard other branches from the interference of the executive power, such as declaring that the latter may not dissolve the Parliament or expand its term, amend the constitution or issue decrees that have the power of law.¹⁰⁶

There is no doubt that a declaration of a state of emergency may have a serious impact on women's status and rights as a whole. In many cases in which a state of emergency was declared, women's rights to liberty, human dignity and physical integrity have been violated; women have been arrested without any legal justification; they have been denied all forms of freedom; moreover, they have been targeted physically and psychologically and have been used as weapons and tools to influence opponents through the arrest and abuse of female relatives. Women have also been denied any legal means to seek redress or to resort to courts. Additionally, experience shows that the prioritization of military and national security budgets during states of emergency results in cutting funding for women's rights bodies and even in their dissolution.

Therefore, good constitutions have to:

[105] Democracy Reporting International, "International Consensus: Essential Elements of Democracy", Report, October 2011, p. 12, <http://democracy-reporting.org/publications/country-reports/tunisia/report-october-2011.html>.

[106] Democracy Reporting International, "Preventing Dictatorship: Constitutional Safeguards against Anti-democratic Consolidations of Power", Briefing Paper 29, July 2012, p. 4, <http://democracy-reporting.org/publications/country-reports/egypt/briefing-paper-29-july-2012.html>.

- a. Place restrictions and controls on the authority that declares a state of emergency

EXAMPLE:

South African constitution, Article 37:

1. A state of emergency may be declared only in terms of an Act of Parliament, and only when—
 - a. the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
 - b. the declaration is necessary to restore peace and order.
2. A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—
 - a. prospectively; and
 - b. for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. [...]

- b. Place limitations on the military or civil regime that assumes responsibility during the validity of the state of emergency

EXAMPLE:

South African constitution, Article 37:

- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise:
- (a) indemnifying the state, or any person, in respect of any unlawful act...

- c. Provide legal and juridical guarantees enabling the need for, scope, and duration and implementation of the state of emergency to be challenged before courts, with redress

EXAMPLE:

Kenyan constitution, Article 58:

- (5) The Supreme Court may decide on the validity of: (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; and (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.”

2. Enabling individuals to resort to courts, including the Constitutional Court

The constitution must ensure the judicial protection of rights and freedoms, including enabling individuals to resort to the constitutional court to challenge the laws and practices that violate their constitutional rights. The constitution of Venezuela is a good example in this regard. Articles 26, 27 and 31 establish important rules, mainly: the right to access all courts, including the constitutional court, to defend individual and collective rights, in addition to the fact that the State guarantees free litigation.

EXAMPLE:**Venezuelan constitution, Article 26:**

Everyone has the right to access the organs comprising the justice system for the purpose of enforcing his or her rights and interests, including those of a collective or diffuse nature to the effective protection of the aforementioned and to obtain the corresponding prompt decision. The State guarantees justice that is free of charge, accessible, impartial, suitable, transparent, autonomous, independent, responsible, equitable and expeditious, without undue delays, superfluous formalities or useless reinstating.

This protection is considerably advanced as it is not limited to individual rights, but includes collective ones as well. Moreover, it makes it possible to access all litigation organs and does not overlook the financial and time burden of litigation; for that, it enunciates constitutional guarantees to mitigate that burden.

It is worth mentioning that the constitution of Ecuador is distinguished by the creation of the Office of the Attorney for the Defense of the People, which aims at providing free justice services to whoever cannot access the courts because of their economic, social, or cultural status. This can support women in defending their rights.

EXAMPLE:**Ecuadorian constitution, Article 191:**

The Office of the Attorney for the Defense of the People is an autonomous body of the Judicial Branch, aimed at guaranteeing full and equal access to justice by persons who, because of their situation of defenselessness or economic, social, or cultural status, cannot hire legal defense services for the protection of their rights. The Office of the Attorney for the Defense of the People shall provide technical, timely, efficient, effective and free-of-charge legal services to support and legally advise the rights of persons in all matters and institutions...

3. Judicial independence as a guarantee for rights and freedoms

Judicial guarantees are meaningless if the principle of judicial independence and the mechanisms to guarantee it are not established in the constitution. Neither the constitution nor the declaration of individual rights and freedoms or the separation of powers principle have any value if there is no independent judicial authority that can check the legislative and executive powers.¹⁰⁷

Judicial independence starts with the good selection of female and male judges, who must be academically and ethically qualified; they also must be immune against disposal, transfer and punishment; judges must also enjoy administrative and financial arrangements that maintain their dignity, impartiality and independence.

Certain constitutions acknowledge the risks of deferring the organization of the judiciary to

[107] Richard Stacey and Sujit Choudhry, "International Standards for the Independence of the Judiciary", Center for Constitutional Transitions at NYU Law and Democracy Reporting International Briefing Paper, September 2013, pp. 2 et seq., <http://www.constitutionnet.org/vl/item/briefing-paper-international-standards-independence-judiciary>.

legislation and thus themselves stipulate judicial powers and guarantees. Examples of these constitutions are the constitutions of Brazil and South Africa.

EXAMPLES:

South African constitution, Article 165:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts..."

Articles 166-173 of the same constitution list the courts in South Africa, as well as their powers and formations, which means that it does not leave the structure of judicial bodies to the law. Moreover, Article 174 details the conditions of appointment of judicial officers, while Article 176 specifies the terms of office and remuneration, and Article 177 addresses the reasons for and conditions of a judge's removal, as well as the body entitled to make such a decision.

Knowingly, in 1985, the UN General Assembly adopted a set of basic principles on the independence of the judiciary, which include: giving the judiciary jurisdiction over all judicial issues; banning any improper or unjustifiable interference with judicial procedures; requiring that those who are selected for judicial positions must be impartial and competent individuals; and stating that judges may not be stopped or dismissed save in cases of inability or for behavioral reasons that make them unfit for such positions.¹⁰⁸ The Moroccan constitution incorporates some of these guarantees.

EXAMPLE:

Moroccan constitution, Article 109:

Any intervention in the matters submitted to justice is forbidden. In his judicial function, the judge may not receive injunction or instruction, nor be submitted to any pressure whatever. Each time that he considers that his independence is threatened, the judge must refer [the matter] to the Superior Council of the Judicial Power [Conseil Supérieur du pouvoir judiciaire]. Any breach [manquement] on the part of the judge of his duties of independence and of impartiality, constitutes a grave professional fault, without prejudice to eventual judicial consequences.

The law sanctions any person who attempts to influence the judge in an illicit manner.

Ensuring judicial independence in the constitution and implementing it in practice will constitute an additional guarantee to enhance women's capacity to demand their rights as stated in the constitution or any other legislation. This will also enable them to seek effective protection in case any of these rights is affected or ignored. The constitution must thus effectively protect the judicial power, ensure its independence, prevent any interference with its affairs and empower it to manage and control its affairs and hold its members accountable.

[108] Ibid., p. 5.

4. Directing judicial interpretation of the constitution

Irrespective of how well-written a constitutional text, its provisions may remain meaningless if they are not enforced. This risk may be more acute in the case of constitutions which attempt to transform the society for which they have been written, including by combatting discrimination and ensuring equality for women. We address the question of constitutional enforcement more fully in Chapter 3 above. However, it is important here to consider the issue of constitutional interpretation. Given that constitutions do not speak for themselves, how their textual provisions are interpreted will have a direct bearing on what role gender considerations are attributed within the constitutional order.

There are two main aspects to contemplate when attempting to ensure that constitutions, once drafted and ratified, will also be interpreted in a gender sensitive manner. The first is whether a particular method of interpretation will be more favorable to gender considerations. The second is whether there can be special references made in the text of the constitution itself which could help guide its own interpretation in this direction.

A. Method of interpretation

With regard to the question of a method of interpretation, legal scholars have investigated whether one interpretive technique would be more suitable to feminist goals than another. Thus, the so-called “originalist” school of interpretation—which places great emphasis on understandings of the constitutional text at the time of its adoption—may be less conducive to gender sensitive results, particularly in the case of older constitutions.¹⁰⁹ Where the constitution is newer, and incorporates more protections for women, such fidelity to the original text may not be regressive.

Two other methods considered by feminist constitutional scholars have been the so-called “purposive” and the “progressive” (or “living tree”) interpretations. The first places a great emphasis on context, as well as on certain aspirational norms according to which the constitution should be interpreted.¹¹⁰ The second approach attempts to seek a middle road between, on the one hand, respect for law as stable and rooted in its origins and, on the other hand, openness to “better answers through learning by experience”.¹¹¹ The difference between these two schools may be one of degree rather than fundamental disagreement. They both seem to agree, however, that the measure for evaluating an interpretive method or another is by the substantive results it tends to produce.¹¹²

There is not one method of interpretation which can be said to always lead to gender sensitive results. Where the original constitution is older and does not provide the best protection for

[109] Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge University Press, 2008, p. 58 and Vicki Jackson, “Conclusion: Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, and Interpretation”, in Susan H. Williams, ed., *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge University press, 2009, p. 336.

[110] Irving 2008, p. 60 and Jackson 2009, p. 335.

[111] Jackson 2009, p. 337.

[112] Irving 2008, p. 62 and Jackson 2009, p. 336.

women, a textualist interpretation will not favor them. However, where the original text is considered particularly gender inclusive, women's rights activists may rely on textualism as a method which yields the better results for women. Most often, perhaps, a method of interpretation which emphasizes context and the changing values of society will be more conducive to gender sensitive outcomes. When that is the case, the purposive or "living tree" schools will be better suited to achieving this goal.

In light of these considerations, drafters should consider whether there is constitutional language they can use which will itself direct or guide future interpretation of the constitution. In this regard, several options present themselves:

B. Preambles

Constitutional preambles are deeply symbolic, in that they usually state the core values which underpin the fundamental law and, in constitutions drawing legitimacy from popular sovereignty, also the "people" in whose name the constitution has been written. Where preambles make references to "founding fathers", "brotherhood", or "sons", therefore, they denote a gendered view of the political community, one from which women are nominally excluded. Preambles can also serve as guides to interpretation, insofar as they crystalize for interpreters what the overarching objectives of constitutional drafters were. It would thus be doubly important for the preamble of a gender sensitive constitution to make references to the human rights of women, the principle of gender equality and non-discrimination based on gender and other characteristics. Such a gender sensitive preamble would first ensure the symbolic inclusion of women in the mythical "we the people" in whose name the new basic law is adopted; it would also list gender considerations among those primary aims of the constitution which should guide how the entire text is read and understood.

EXAMPLES:

Charter of the United Nations (1945), Preamble:

We the people of the United Nations determined

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, **in the equal rights of men and women** and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom [...]

Rwandan constitution (2003), Preamble:

We, the people of Rwanda,

... 9. Reaffirming our adherence to the principles of human rights enshrined in the United Nations Charter of 26 June 1945, the Convention on the Prevention and Punishment of the crime of Genocide of 9 December 1948, the Universal Declaration of Human Rights of 10 December 1948, the International Convention on the Elimination of All forms of Racial Discrimination of 21 December 1965, the International Covenant on Economic, Social and Cultural Rights of 19 December 1966, the International Covenant on Civil and Political Rights of 19 December 1966, **the Convention on the Elimination of all Forms of Discrimination against Women of 1 May 1980**, the African Charter of Human and Peoples' Rights of 27 June 1981 and the Convention on the Rights of the Child of 20 November 1989;

10. Committed to ensuring **equal rights between Rwandans and between women and men without prejudice to the principles of gender equality** and complementarity in national development;

Iraqi constitution (2005), Preamble:

We, the people of Iraq, who have just risen from our stumble, and who are looking with confidence to the future through a republican, federal, democratic, pluralistic system, have resolved with the determination of our men, **women**, elderly, and youth to respect the rule of law, to establish justice and equality, to cast aside the politics of aggression, to pay attention to women and their rights, the elderly and their concerns, and children and their affairs, to spread the culture of diversity, and to defuse terrorism.

Tunisian constitution (2014), Preamble:

Taking pride in the struggle of our people to gain independence and build the State, to free ourselves from tyranny, to affirm our free will and to achieve the objectives of the revolution for freedom and dignity, the revolution of December 17, 2010 through January 14, 2011, with loyalty to the blood of our virtuous martyrs, to the sacrifices of **Tunisian men and women** over the course of generations, and breaking with injustice, inequity, and corruption.

C. Constitutional statements of purpose

Some constitutions include declarations of their own purpose—the objectives which their drafters pursued in adopting the text in its form. Such statements of purpose may be more or less explicit and appear either in preambles (such as the preamble of the constitution of the United States of America) or in separate provisions (such as in the constitution of Switzerland). An even more detailed type of provision will also clarify the status of such a declaration of purpose: to guide interpretation (such as in the constitution of South Africa).

EXAMPLES:

Ghanaian constitution, Article 39 on “Cultural objectives”:

- 1. Subject to clause (2) of this article**, the State shall take steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national, planning.
- 2. The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the**

person are abolished.

South African constitution, Article 39 on “Interpretation of bill of rights”:

1. When interpreting the Bill of Rights, a court, tribunal or forum-
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
2. **When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.**
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

5. Limiting the possibility to amend the constitution

Constitutions specify the procedures by which they may be amended. These can contain:

- Absolute restrictions of the possibility of modifying certain principles, values, or rights (known as “unamendable” or “eternity” clauses) and
- Higher parliamentary thresholds for passing legislation affecting certain aspects of the constitution (also known as “super-majority” rules).

Limiting the possibility to amend rights protections in the constitution will help ensure that gains made by women during constitutional drafting will not be undone once circumstances change, such as when the majority in parliament is inimical to women’s rights.

A. Unamendable clauses

More than 35% of constitutions in the world include unamendable clauses. These unamendable clauses come in several types. Some aim to protect certain principles deemed fundamental for the democratic nature of the country, insulating them from the influence of the parliament or the executive power.

EXAMPLES:

French constitution, Article 89:

The republican form of government shall not be the object of any amendment.

Czech constitution, Article 9:

2. Any changes in the essential requirements for a democratic State governed by the rule of law are impermissible.

Clauses concerning women’s rights and freedoms, in particular, and human rights, in general, can also be included among those declared unamendable.

EXAMPLE:**Portuguese constitution, Article 288:**

Constitutional revision laws shall respect:

- a. National independence and the unity of the State;
- b. The republican form of government;
- c. The separation between church and State;
- d. Citizens' rights, freedoms and guarantees..."

The Tunisian constitution resorts to a different method and states in separate articles each principle or right that may not be amended. Among these are the principle of citizenship and the protection of rights and freedoms.

EXAMPLES:**Tunisian constitution, Article 2:**

Tunisia is a civil State based on citizenship, the will of the people, and the supremacy of law. This article cannot be amended.

Tunisian constitution, Article 49:

There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.

The effectiveness of these eternity clauses depends in large part on their enforcement, usually by constitutional courts. As such, rules on access to the courts, judicial independence, and judicial interpretation (all discussed above) will have a bearing on whether and how any unamendable provision is protected. Moreover, adopting eternity clauses must be done cautiously as it is a two-blade sword: it may protect women's rights against arbitrary derogation or amendment, but it may, at the same time, ascribe some "inflexibility" to the constitutional rules in a way that prevents any constitutional amendment or reform that might aim to ensure more rights for women. An example of such inflexibility in constitutional amendment rules being detrimental to women is that of the United States constitution. Inability to amend that constitution prevented an amendment for equal protection rules for women from being adopted, despite widespread support.

B. Super-majority rules

Constitutions may resort to another option which is to restrict arbitrary amendments by setting a higher legislative majority requirement for constitutional amendments. The constitution, as the basic law of a country, should not be subject to the whims of temporary parliamentary majorities; at the same time, it should adapt to societal and institutional changes occurring over time. More than 90% of constitutions in the world have a super-majority rule for constitutional amendments; this ranges between absolute majority (majority of a council's members, not of the attendants) and three-quarters of the legislature.

Certain constitutions (Sweden and Liechtenstein) stipulate that the legislature must have two successive votes on the amendment proposed before changing it into a law. This time span between the two votes reduces the possibility to amend the constitution for political causes, but it does not allow rapid changes in extreme situations. Other constitutions (Italy, Guyana, Burkina Faso and Latvia) stipulate that a referendum must be carried out to approve the amendments passed by the Parliament; this occurs in some cases if the voting in parliament fails to attain a certain majority. The constitutions of Chile, Malta and Iceland stipulate different majorities depending on the clause to be amended; others (such as Korea and Swaziland, whose parliaments are composed of two chambers) stipulate a different majority in each chamber.¹¹³

[113] Preventing Dictatorship 2012, p. 6.

1. RESTRICTING THE POSSIBILITY OF LAW-MAKERS OR THE EXECUTIVE POWER TO INTERFERE

A. Preventing legislation which restricts rights

- a. The constitution should require that any rights limitation by the legislature or executive should specify:
 - the reasons that may be relied on to limit a right,
 - the content and extent of the right to be limited,
 - whether it is a total or partial limitation, and
 - the procedures to be followed to limit it.
- b. Those affected by a rights limitation must be able to resort to courts for redress.
- c. Limitations on rights must not themselves be unlimited, but should ensure:
 - that the essence of the right is not affected by the limitation (i.e. that the right is not rendered meaningless),
 - that the limitation is proportional (i.e. that no more restrictions than necessary are imposed),
 - that the limitation is necessary (i.e. that the measures are necessary to achieve the stated social objective),
- d. Certain fundamental rights cannot be derogated from: the right to life; the prohibition of torture, inhuman or degrading treatment; the prohibition of slavery; and the non-retroactivity of criminal laws.

B. Regulating states of emergency

The constitution should specify clearly the rules applicable to states of emergency, including:

- a. stating the conditions under which they are declared;
- b. requiring that they be regulated by law and declared by a constitutionally lawful body;
- c. requiring that they be approved by the legislature, which should continue to exist during the state of emergency;
- d. making the declaration of a state of emergency reviewable by courts;
- e. limiting their application temporally and geographically; and

- f. stipulating protections for other branches of government such as prohibiting the dissolution of parliament, limiting the possibility to amend the constitution or to issue decrees that have the power of law.

2. ENABLING INDIVIDUALS TO RESORT TO COURTS, INCLUDING THE CONSTITUTIONAL COURT

- The constitution should stipulate the individual right to access the courts in order to defend their rights.

3. JUDICIAL INDEPENDENCE AS A GUARANTEE FOR RIGHTS AND FREEDOMS

- A. The constitution should guarantee the principle of judicial independence.
- B. Where the judicial power is regulated by the constitution itself (and not by ordinary legislation), there should be rules ensuring:
 - the appropriate selection of judges, based on their qualifications, impartiality, competence, and gender diversity,
 - the immunity of judges disposal, transfer and punishment, and
 - other administrative and financial arrangements that maintain their dignity, impartiality and independence.

4. DIRECTING JUDICIAL INTERPRETATION OF THE CONSTITUTION

Drafters can seek to guide future interpretations of the constitution through several means:

A. Method of interpretation

- Depending on the context, drafters may promote a particular method of constitutional interpretation (textualist, purposive, or “living tree”).

B. Preambles

- Drafters can indicate the purpose behind the adoption of the constitution within its preamble, explicitly mentioning women as rights bearers and gender equality and principle of non-discrimination based on gender and other grounds as an objective of the constitution.

C. Constitutional statements of purpose

- Drafters can explicitly guide future constitutional interpretation, such as by stipulating the preeminence of individual rights, including of gender equality and non-discrimination, over traditional or customary laws.

5. LIMITING THE POSSIBILITY TO AMEND THE CONSTITUTION CONCERNING RIGHTS AND FREEDOMS

A. Unamendable clauses

- a. The constitution can declare certain principles and rights, including those guaranteeing gender equality and non-discrimination, unamendable.
- b. The effectiveness of such unamendable clauses will depend on how they are interpreted, mainly by constitutional courts.
- c. One way to ensure an unamendable provision is interpreted in line with women's rights is to require that that interpretation relies on international human rights law.
- d. Drafters should bear in mind the risk that unamendability may result in an inflexible constitution.

B. Super-majority rules

- The constitution can impose higher thresholds for passing constitutional amendments, including:
 - A higher majority in parliament,
 - A requirement for two successive parliaments to pass the amendment,
 - A requirement of a majority vote of the entire membership of parliament (not just those present), or
 - Different majorities in different houses of parliament.

The Center for Constitutional Transitions at NYU Law and International IDEA, “Constitutional Courts after the Arab Spring: Appointment mechanisms and relative judicial independence”, April 2014, <http://www.idea.int/publications/constitutional-courts-after-the-arab-spring/index.cfm>.

Democracy Reporting International, “Preventing Dictatorship: Constitutional Safeguards against Anti-democratic Consolidations of Power”, Briefing Paper 29, July 2012, <http://democracy-reporting.org/publications/country-reports/egypt/briefing-paper-29-july-2012.html>.

Democracy Reporting International, “Lawful Restrictions on Civil and Political Rights”, Briefing Paper 31, October 2012, <http://democracy-reporting.org/publications/country-reports/tunisia/briefing-paper-31-october-2012.html>.

Democracy Reporting International, “Constitutional Review in New Democracies”, Center for Constitutional Transitions at NYU Law and Democracy Reporting International Briefing Paper 40, September 2013, <http://democracy-reporting.org/publications/country-reports/tunisia/briefing-paper-40-september-2013.html>.

Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Chapter 6 “The Constitutional Court” and Chapter 10 “Conclusions: Amendment and Compliance”, Cambridge University Press, 2008.

Richard Stacey and Sujit Choudhry, “International Standards for the Independence of the Judiciary”, Center for Constitutional Transitions at NYU Law and Democracy Reporting International Briefing Paper, September 2013, <http://www.constitutionnet.org/vl/item/briefing-paper-international-standards-independence-judiciary>.

HOW TO COME ABOUT A GENDER SENSITIVE CONSTITUTION?

“We are tolerated at best unless we get in at the design stage and say, if you are actually serious about incorporating women in every area of our life in Northern Ireland and making women feel equal partners, we have to start designing all our structures so that women feel comfortable there and we can contribute as much as we want to.”

(Northern Ireland peace process participant from a reproductive rights organization¹¹⁴)

“The struggle for emancipation depends on one key tool: organization....We cannot assume that the government will automatically be sympathetic to our demands as women. In fact, we will have to apply our united power to make sure the government heeds them.”

(Nozizwe Madlala, delegate to the Convention for a Democratic South Africa, Member of Parliament and former Deputy Minister of Defence and of Health in the Government of South Africa¹¹⁵)

There are two qualities we tend to associate with “good constitutions”: that they are accepted as legitimate within their respective polity and that they are aptly designed for their own sustainability. The issue of legitimacy of the constitutional project has come to be seen as inherently linked to the broader legitimacy of the constitution making process. Such legitimacy, scholars and practitioners increasingly seem to agree, is influenced both by the process of constitution making

and by the content of the final text. The question of the substantive provisions to be incorporated in a gender sensitive constitution was addressed in Chapters 2 and 3 above. With respect to the process of constitution making, the issue of giving a voice to women in the actual drafting and adoption of a new constitution may be seen as part of a broader expectation that negotiating and drafting a constitution be democratic. In a nutshell, this expectation translates into a “universal acceptance that the authority for a constitution must derive, in one way or another,

“When in the drafting process there is no respect for women’s rights, how can the constitution itself respect these rights?”

Afaf Marej, Egyptian Association for Community Participation Enhancement (EACPE)

[114] Cited in Margaret Ward, *Gender, Citizenship and the Future of the Northern Ireland Peace Process*, Éire-Ireland, Vol. 40, Nos. 3-4 (2005), p. 12.

[115] Cited in Gay W. Seidman, “Gendered Citizenship: South Africa’s Democratic Transition and the Construction of a Gendered State”, *Gender & Society*, Vol. 13, No. 3 (1999), p. 300, <http://www.ssc.wisc.edu/soc/faculty/pages/docs/seidman/Gendered%20Citizenship.pdf>.

from the people of the State concerned.”¹¹⁶ This expectation in turn influences the inclusiveness of constitutional negotiations, their transparency, and their mode of deliberation and decision making. There are also gender-specific arguments in favor of an inclusive constitution making process, as well as aspects of the design of such a process which specifically address women’s rights, needs and interests.

1. What benefits does an inclusive gender sensitive constitution making process bring?

A. An inclusive gender sensitive constitution making process can be a model for future political interactions

There are several benefits associated with an inclusive constitution making process. One such benefit is the educational element involved in having a “good” process, as it can serve as model for subsequent political interactions:

“Process can underpin the legitimacy of a Constitution, increase public knowledge of it, instill a sense of public ownership and create an expectation that the Constitution will be observed, in spirit as well as form. A constitution making process may assist to set the tone for ordinary politics, including the peaceful transfer of power in accordance with constitutional rules.”¹¹⁷

An inclusive constitution making process is thus also likely to lead to increased popular vigilance over constitutional enforcement: an informed public will know when the constitution has been transgressed and demand accountability. It promotes civic values and can help correct past exclusions by giving a voice to the previously suppressed.¹¹⁸

A gender sensitive constitution making process can thus serve as a model to be emulated in the entire public sphere. It can also result in women themselves feeling more empowered to take part in public life, to pursue their interests, and to speak out when their rights are being transgressed. As one Tunisian judge has recently stated about the constitution making process in Tunisia:

“The process of writing a constitution can highlight the importance of dialogue, negotiation, and contestation. Women’s participation in drafting the constitution is as important as the constitutional guarantees of women’s rights.”

See Rangita de Silva de Alwis, “Introduction”, in *Women’s Participation: The Making of the Tunisian Constitution*, Global Women’s Leadership Initiative, The Woodrow Wilson International Center for Scholars, 2013, p. 5, <https://www.wilsoncenter.org/blog-post/womens-participation-the-making-the-tunisian-constitution>.

“The People’s Congress pursued a vision of participatory counsel in drafting the Constitution, which promoted contact between the deputies, civil society, and associations of women

[116] Cheryl Saunders, “Constitution Making in the 21st Century”, *International Review of Law*, Issue 4, 2012, p.3, <http://www.qsscience.com/doi/abs/10.5339/irl.2012.4>.

[117] *Ibid.*, p. 5.

[118] Jason Gluck and Michele Brandt, *Participatory and Inclusive Constitution Making*, United States Institute for Peace, 2015, p. 12, <http://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf>.

leaders and feminists. This helped to build women’s capacities and to support the role of women in the process of democratic transition and the writing of the new Tunisian Constitution.”¹¹⁹

B. An inclusive gender sensitive constitution making process is more likely to result in a more inclusive constitution

A second argument in favor of caring about process rests on a possible link between participatory constitution making and the democratic provisions likely to be incorporated in the resulting text.¹²⁰ There is some evidence suggesting that more inclusive constitutional moments lead to more democratic politics, to more constraints on government authority and to stronger and thus more sustainable, constitutions.¹²¹ These findings would seem to confirm that “the content of constitutions depends on who sits at the table to hammer out their provisions”: the more inclusive the drafting and negotiation of the content of constitutions, the greater the benefits for democracy and constitutional stability.¹²² This prospect is especially relevant to women, who have historically been excluded from constitutional texts and denied their human rights protection.

Constitutions which fully subscribe to democratic values will therefore also incorporate protections of the values of gender equality and non-discrimination, and such constitutions are more likely to come about as a result of inclusive drafting processes. Without direct participation of women and women’s rights defenders in the negotiation and ratification of new constitutions, women and their human rights as well as interests are likely to remain marginalized. Once they are included as equal participants, however, “women’s participation substantively changes constitutional text, brings unique and often taboo issues into the national spotlight, and empowers women participants.”¹²³

“Women know well that without their own efforts to frame the rules of membership, access and the exercise of power, their concerns may go unrepresented, underrepresented and/or misrepresented.”

See Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions: New Politics and Comparative Perspectives*, Palgrave Macmillan, 2003, p. 2.

C. An inclusive gender sensitive constitution making process is more likely to be sustainable

A third potential benefit of an inclusive constitution making process has to do with a potential

[119] Anware Mnsari, “The Constitution-Making Process in Tunisia: Women’s Participation – Lessons Learned and Good Practices”, in *Women’s Participation 2013*, p. 13, <https://www.wilsoncenter.org/blog-post/womens-participation-the-making-the-tunisian-constitution>.

[120] Zachary Elkins et al., “The Citizen as Founder: Public Participation in Constitutional Approval”, *Temple Law Review*, Vol. 81, No. 2 (2008), pp. 361-82, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2451&context=journal_articles.

[121] John M. Carey, “Does It Matter How a Constitution Is Created?”, in Zoltan Barany and Robert G. Moser, eds., *Is Democracy Exportable?*, Cambridge University Press, 2009, pp. 159-60.

[122] *Ibid.*, p. 177.

[123] Elizabeth Katz, “Women’s Involvement in International Constitution-Making”, in Beverley Baines et al., eds., *Feminist Constitutionalism: Global Perspectives*, Cambridge University Press, 2012, p. 205.

correlation between inclusion during constitution making and constitutional longevity. There are empirical studies which have identified inclusion—understood as the breadth of participation in both formulating and subsequently enforcing constitutional agreements—as one of the key factors sustaining constitutional survival.¹²⁴ The common knowledge created when the constitution is publicly formulated and debated should lead to popular attachment to the constitutional project, which results in its self-enforcement and in turn in its longevity. A gender sensitive constitution will only be a meaningful achievement if it survives in the long-term and gains the support of both the public and authorities tasked with enforcing it.

A special set of benefits to an inclusive process emerge in post-conflict contexts. There, popular participation may be thought to slow down negotiations, be difficult to implement, and consequently secondary to other considerations.¹²⁵ However, excluding the voices and interests of broader civil society will come at a potentially high cost: it risks undermining the prospects of a sustainable peace, given that the populace at large will not perceive itself to have a stake in the peace building framework.¹²⁶ Unlike a peace agreement, which may require swift compromising in order to end the violence, a constitution must enjoy broad popular legitimacy and needs adequate time and resources allocated for its elaboration. Participatory constitution making in the aftermath of conflict can facilitate trust-building, national reconciliation, conflict resolution and consensus building.¹²⁷ Moreover, it can also result in the formulation of innovative solutions to contested issues and lay the groundwork for reconciliation. These potential benefits are especially attractive in post-conflict settings, where the prospect of state failure is higher and the lifespan of new constitutions is shorter than in more peaceful periods of constitutional transition.

The process of constitution building can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence. It can also lead to the democratic education of the population, begin a process of healing and reconciliation through societal dialogue, and forge a new consensus vision of the future of the State.

See Kirsti Samuels, “Post-Conflict Peace-Building and Constitution-Making”, *Chicago Journal of International Law*, Vol. 6, No.2 (2006), p. 5, <http://www.odi.org/sites/odi.org.uk/files/odi-assets/events-documents/1216.pdf>.

Women and women’s rights defenders in particular play a central role in peace building and conflict resolution and as such should be included in the creation and implementation of constitutions following conflict. Moreover, as was argued in Chapter 1 of this *ABC*, the various roles played by women and women’s rights defenders during and after conflict should be recognized and addressed during political transitions and peace building, including in the constitution. Assuming that transitional policies are by default gender neutral will only serve to deny the gendered impact of conflict and will render women’s rights, needs and interests once again invisible. An example of such false neutrality is the promotion of the rule of law as a non-gendered objective:

[124] Zachary Elkins et al., *The Endurance of National Constitutions*, Cambridge University Press, 2009, p. 78.

[125] Jennifer Widner, “Constitution-Writing in Post-conflict Settings: An Overview”, *William and Mary Law Review*, Vol. 49, No. 4 (2008), p. 1533, <http://scholarship.law.wm.edu/wmlr/vol49/iss4/16/>.

[126] Gluck and Brandt 2015, p. 12.

[127] Michele Brandt, *Constitutional Assistance in Post-Conflict Countries: The UN Experience: Cambodia, East Timor & Afghanistan*, United Nations Development Programme (UNDP), June 2005, p. 3, http://www.unrol.org/doc.aspx?n=constitution+making+and+UN+Experience+Report_Michele+Brandt.doc.

“Traditionally, those involved in defining and conducting peacebuilding have operated from a stance of gender neutrality, considering specific interventions to be time-bound and aimed at discrete outcomes such as the cessation of hostilities or the opening of communication channels. Programs that are gender neutral may succeed at that, yet they fail to recognize the gender-specific needs of individuals, undercutting their own effectiveness.”¹²⁸

Such gender-specific needs may be reflected in security sector reform addressing police, military, and judicial institutions and in the inclusion of women’s security and their human rights in the security sector agenda, in recognition of the greater gender based insecurity and violence against women they face in many settings. Thus, assuming a “gender neutral” citizen in periods of transition is erroneous and leads to blind spots in transitional constitutions.¹²⁹

D. An inclusive gender sensitive constitution making process has limits

Despite all these potential benefits, participation in constitution making, including that of women, is not a panacea and should not be “oversold” as the solution to all problems. There are fears that participation may lead to legally ineffective language or to the constitutionalization of irrelevant issues.¹³⁰ Moreover, if ill-managed, such participation may backfire or else be subverted in order to legitimate unilateral exercises of power.¹³¹ For instance, women’s participation in constitution making may result in conservative positions being taken on certain “moral” issues such as abortion.¹³² Women are not one homogenized group; as much as men they have different political interests, different religious belonging etc. Independently of this, their participation is a matter of democracy.

The endurance of women’s rights in the constitution and in legislation is tied to the presence and participation of women’s rights defenders in all law making processes.

With careful and good-faith planning, these risks may be mitigated and truly inclusive processes can be set in place.¹³³ For example, the possibility that the resulting constitution will not be gender sensitive despite the involvement of women in the constitution making process can be prevented by ensuring that women’s rights representatives from the civil society, defenders, and women’s rights lawyers and constitutional experts participate in the process (rather than merely relying on the inclusion of a certain number of women without consideration to their ideological commitments). The inclusive constitution making experiences of several post-conflict

[128] Richard Strickland and Nata Duvvury, *Gender Equity and Peacebuilding: From Rhetoric to Reality: Finding the Way*, International Center for Research on Women, 2003, p. 23, <http://www.icrw.org/files/publications/Gender-Equity-and-Peacebuilding-From-Rhetoric-to-Reality.pdf>.

[129] Fionnuala Ní Aoláin et al., *On the Frontlines: Gender, War, and the Post-Conflict Process*, Oxford University Press, 2011, p. 205.

[130] Jill Cottrell, *Participation in Constitution Making: Making Women Voices Heard*, International IDEA, 2009, p. 10, http://iknowpolitics.org/sites/default/files/idea_participation20in20constitution20making_0.pdf.

[131] David Landau, “Constitution-Making Gone Wrong”, *Alabama Law Review*, Vol. 64, No. 5, 2013, pp. 923-80, <http://www.law.ua.edu/pubs/lrarticles/Volume%2064/Issue%205/1%20Landau%20923-980.pdf> and Alicia L. Bannon, “Designing a Constitution-Drafting Process: Lessons from Kenya”, *Yale Law Journal*, Vol. 116, No. 8 (2007), pp. 1943-44, <http://www.yalelawjournal.org/note/designing-a-constitution-drafting-process-lessons-from-kenya>.

[132] Michele Brandt et al., “Constitution-making and Reform: Options for the Process”, *Interpeace*, November 2011, p. 27, <http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>.

[133] Gluck and Brandt 2015, p. 17.

contexts—such as South Africa, Kenya, and Tunisia—have shown that we should not too hastily discard avenues for popular involvement in constitutional drafting and that this openness may actually aid conflict resolution. Moreover, the type of purely elite-driven processes which were accepted by the international community in the past—such as in Germany and Japan—may not be tolerable today. The tide has turned towards giving the real people behind “we the people” the opportunity to have their say in the drafting and adoption of their constitution, and this includes giving a voice to women, women’s rights activists and gender equality experts.

2. Key moments in the gender sensitive constitution making process

A truly gender sensitive constitution making process will seek the input of women, women’s rights activists and gender experts at all relevant moments. These may be divided in four broad groups:

- A. In preparation for drafting, such as during peace negotiations preceding the formal constitution making process or as part of negotiations for an interim constitution;
- B. During drafting, which includes the actual preparation of a draft by a constituent assembly or other body, but also civic education, awareness raising, and public consultations;
- C. During ratification, whether it is achieved by a vote in the constituent assembly, the parliament, or by way of popular referendum; and
- D. After ratification, including by way of mechanisms monitoring the enforcement of the constitution.

A. In preparation of drafting

Constitution making begins before a constituent assembly is convened and certainly before a constitution is drafted and ratified. Key decisions about who will sit at the negotiating table, what objectives the constitution should pursue, as well as the method of adopting the new constitution are all made in the very early stages of talking about a new constitution. Despite the intense focus on military and political values during these stages, the constitutional impact of these early negotiations should not be ignored.¹³⁴ These decisions should therefore explicitly address the participation of women and women’s rights activists and experts. Without their inclusion in such critical decision making structures, it will be much more difficult to correct imbalances in representation during the process later on.

a. Peace agreements

Some of these pre-drafting processes are conceptually biased and lack a gender perspective, such as peace agreements: despite the significant role played by (often female-driven) civic peace initiatives, it is only when the main protagonists (mostly male) come together to put an end to the conflict that a formal peace agreement is recognized to exist.¹³⁵ Furthermore, other structural

[134] Ní Aoláin et al. 2011, p. 205.

[135] Christine Bell, *Women and Peace Processes, Negotiations, and Agreements: Operational Opportunities and Challenges*, Norwegian Peacebuilding Resource Centre, March 2013, p. 2, http://www.peacebuilding.no/var/ezflow_site/storage/original/application/b6f94e1df2977a0f3e0e17dd1dd7dcc4.pdf.

biases may permeate peace processes. For instance, the granting of amnesties and immunities may be agreed upon as part of peace negotiations and promised as constitutional guarantees. These negotiations tend not to include women (particularly in the roles that typically dominate talks, such as politician, lawyer, diplomat, and member of a party to the armed conflict)¹³⁶ and their outcomes rarely take into account women and women's rights activists' views on such matters. The granting of amnesties and immunities for wartime conduct thus appears as a structural bias inherent in the compromises necessary to put an end to conflict: justice concerns, including gender justice, are balanced against (and must often bow to) overriding peace considerations.¹³⁷ Other examples of such structural biases include the focus on overcoming political violence and ignoring the different types of gender based violence perpetrated during a conflict. They also include the setting of reconstruction and development agendas, in which women's needs and their role as socioeconomic agents are often not recognized.

b. Interim legal regimes

A further example of pre-drafting activity in which women must be equal participants is the negotiation of interim (temporary or provisional) legal regimes. These can take several forms, from interim regimes governed by a variety of international or national legal instruments to fully fledged interim constitutions. Examples of temporary regimes governed by international law include East Timor and Kosovo, where the United Nations itself established transitional administrations.¹³⁸ A more likely alternative is to mandate for legal continuity under the existing constitution until a new one is adopted, to adopt a special law governing the transitional period, or else to restore a past constitution (such as a constitution pre-dating a toppled authoritarian government). The transition to democracy in Spain, for instance, was governed by the 1977 Political Reform Act; this was the last law adopted by the non-democratic legislature and was approved in a popular referendum before being replaced by a new, democratic constitution adopted in 1978. In Tunisia as well, there were transitional laws passed which stipulated the organization of public powers until a final democratic constitution was adopted in 2014.

Interim constitutions have also become increasingly common, in particular in post-conflict settings, and provide both a temporary institutional structure for government and a framework for negotiating the final constitution.¹³⁹ Such temporary arrangements are especially attractive when conditions on the ground are unstable and not conducive to broad-based participation in constitution making: for instance, the likelihood of reverting to violent conflict is great or institutional capacity is reduced. In such a context, an interim constitution can institutionalize transitional arrangements while postponing the negotiation of the permanent constitution until

[136] UN Women, *Women's Participation in Peace Negotiations: Connections between Presence and Influence*, 2nd ed., October 2012, p. 3, <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2012/10/wpssourcebook-03a-womenpeace negotiations-en.pdf>.

[137] Bell 2013, p. 2.

[138] Carsten Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis", *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), pp. 105-83, http://www.mpil.de/files/pdf1/mpunyb_stahn_5.pdf.

[139] Kimana Zulueta-Fülscher, *Interim Constitutions: Peacekeeping and Democracy-Building Tools*, International IDEA, 2015, p. 3, <http://www.idea.int/publications/interim-constitutions/index.cfm>.

conditions are more stable.¹⁴⁰ A two-stage process (of an interim constitution preceding the adoption of a permanent one) has also been suggested as a way to clearly distinguish between the different timeframes, milestones, and priorities of peace versus constitution building processes. Failure to keep these separate in such places as Bosnia and Herzegovina and Iraq has been held to have precluded the consensus building, awareness raising, and civic debate necessary in constitution making and to have adversely affected the legitimacy of those constitutions.¹⁴¹

An instance of such agreement on constitutional principles to guide the drafting of the permanent constitution occurred in South Africa. There, a set of 34 principles was agreed upon during multi-party talks and was adopted as part of the 1993 interim constitution. These principles were to serve as the basis for the certification of the permanent constitution by the Constitutional Court, an institution itself set up by the interim constitution.¹⁴² South Africa's was not the first example of such temporary arrangements, nor was it the last.¹⁴³

The lengthier the timeframe for the constitution making process, the more important interim arrangements become and the more crucial it is for women to have the chance to influence their content. In order to avoid exclusion, women should ideally be given a direct voice in any pre-drafting activities, including seats at peace negotiation tables and amidst other agenda-setting bodies. As will be discussed below, there are strategies which women's organizations can employ to bring this about, including the creation of broad-based coalitions to lobby for such a seat at the table. An example is the African National Congress (ANC) Women's League producing the *Women's Charter*, a political rather than a legal document which then constituted the basis for lobbying parliament and mobilizing women in the early years of South Africa's democracy.¹⁴⁴ At the very least, women's interests should be explicitly considered and addressed, even if they are not physically present among negotiators or are underrepresented. The South African pre-agreed constitutional principles are a good example of how to include commitments to a democratic system of government, equality between the genders and people of different color, human rights and non-discrimination amidst interim arrangements. The result was that the South African

Beyond South Africa's 1993 interim constitution, recent examples of such constitutions include Somalia (2004), Sudan (2005), Nepal (2007), and South Sudan (2011), among others. Gender equality was included among South Africa's pre-agreed constitutional principles, with the first such principle referring to the government's commitment "to achieving equality between men and women" and the fourth principle stating that the permanent constitution would have to prohibit gender discrimination and promote gender equality. Other interim arrangements have also included substantive commitments related to gender, to a far larger extent than peace agreements do.

See Zulueta-Fülscher 2015, p. 19.

[140] Markus Böckenförde et al., *A Practical Guide to Constitution Building*, International IDEA, 2011, p. 13, www.idea.int/publications/pgcb/index.cfm.

[141] *Ibid.*, pp. 6-7.

[142] (Interim) Constitution of the Republic of South Africa, Act 200 of 1993, Schedule 4, http://www1.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Legislation/Constitution%20of%20South%20Africa%201993.pdf.

[143] Zulueta-Fülscher 2015, p. 8.

[144] Seidman 1999, p. 300.

Constitutional Court had to take gender equality considerations into account when deciding whether the newly ratified constitution complied with these principles.¹⁴⁵ While such recourse to a judicial body will not be possible in every transitional context,¹⁴⁶ at the very least, the inclusion of gender considerations in interim constitutions will raise the likelihood of their presence on the agenda for the drafting of the permanent constitution.

c. Timetables for the constitution making process

A separate concern, including for gender equality and women's rights advocates, is the length of the constitution making process. This will vary from country to country and there is no established ideal duration. For example, the Indian constituent assembly sat for three years (1946-1949), although it was severely affected by Partition; the Eritrean process lasted thirty-eight months from the proclamation of the constitutional assembly to the ratification of the constitution; the South African process took five years, counting from the beginning of multiparty negotiations to the adoption of the permanent constitution; and the Tunisian process lasted over three years, from the elections for the constituent assembly in October 2011 until the adoption of the new constitution in January 2014.¹⁴⁷ Although it is understandable that political actors and the public may want to see a new constitution adopted as quickly as possible, it is likely that negotiating, drafting, and adopting a good, gender sensitive constitution will take longer and require a greater investment of resources than would an elitist, closed process.

That said, any well-designed constitution making process should from the outset have a timetable with deadlines and clear sequencing of each step to be embarked on. How much detail is included in such a road map will again vary:

- The road map can focus on specific dates, whether only the start and end dates of the process or the full sequencing of the constitution making process;
- Alternatively, the road map can focus on specific tasks to be achieved during the process, which it can describe in general terms or in some detail, with or without also specifying the order in which they are to be carried out;
- The road map can include a mix of these approaches; or
- The road map can tie events not to particular dates or tasks, but to the completion of other processes (for example, to the signing of a peace agreement).¹⁴⁸

It is impossible to determine in advance how long a constitution making process should last, but giving advance attention to such a road map will help ensure that key aspects of the process are not overlooked and will allow for easier monitoring of the process. Gender advocates in particular will be able to assess whether deadlines or tasks with particular relevance to women—such as consultations with women's rights groups or gender sensitive civic education programs—have been complied with. It is not uncommon for time extensions to be required in the constitution

[145] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), 6 September 1996 and Certification of the Amended Text of the Constitution of The Republic Of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97, 4 December 1996.

[146] Zulueta-Fülscher 2015, p. 23.

[147] For more examples, see Brandt et al. 2011, pp. 49-50.

[148] *Ibid.*, p. 46.

making process; however, they should not be so unrestricted as to completely undermine the initial timetable. From a gender perspective, it is important that any delays or extensions are not used as means to undercut women's involvement in the process.

B. During drafting

Different types of activities may be engaged in during the drafting state, in conjunction or separately, all of which offer opportunities for women's participation:

a. Constitution drafting bodies

There are a variety of bodies which may be tasked with drafting a new constitution, among which are constituent assemblies, round tables, constitutional conventions, expert committees, national conferences, and hybrid forms.¹⁴⁹ The choice of the type of body entrusted with drafting the new constitution will depend on the constitutional culture of a given country.¹⁵⁰ Constituent assemblies in particular have been resorted to in recent constitution making efforts (Nepal 2015, Tunisia 2014) and will be mainly addressed here. Many of the considerations for ensuring the gender sensitive operation of constituent assemblies can also be applied to other types of drafting bodies, however.

- **Method of selection of the constitution drafting body**

A constituent assembly is a body specifically tasked with drafting the new constitutional text.¹⁵¹ Its members can be directly elected in separate elections or, where the constituent assembly also serves as the ordinary legislature, in the regular parliamentary elections. They can also be appointed rather than elected, chosen randomly among citizens, or there can be a mix between methods. The method by which the composition of constituent assemblies is decided will have an impact on the resulting gender representativeness of the body. For example, elections in which some form of proportional representation is chosen tend to result in the higher representation of women.¹⁵² Such a system was used in South Africa's first democratic elections, for instance, combined with quotas for women instituted at party-level and over time produced higher levels of gender representation both in parliament and in the government.¹⁵³ A supplement or alternative to proportional representation are quotas for women representatives, whereby a set number or proportion of seats in the constitution drafting body are set aside for women (see discussion of quotas in parliaments in Chapter 3 above). Neither proportional representation nor quotas for women can, on its own, change patriarchal attitudes in political practice however. Therefore efforts should be made to give structural inclusion of women's rights activists and

[149] *Ibid.*, pp. 229-74 and Jennifer Widner, "Reform Models", Constitution Writing and Conflict Resolution Project, Princeton University, 2005, <http://www.princeton.edu/~pcwcr/drafting/models.html>.

[150] Brandt et al. 2011, p. 42.

[151] Andreas Auer, "L'institution de la constituante: traits caractéristiques, naissance et développement", Centre for Research on Direct Democracy (C2D) Working Paper Series 37/2011, 2011, http://www.c2d.ch/files/C2D_WP37.pdf.

[152] European Parliament, Differential Impact of Electoral Systems on Female Political Representation, Directorate-General for Research Working Document, Women's Rights Series, March 1997, http://www.europarl.europa.eu/workingpapers/femm/w10/2_en.htm.

[153] Seidman 1999, p. 300.

gender experts from the civil society. As shown by the experience of Nepal during its long constitution making process, the electoral system needs to be supplemented by good efforts to ensure inclusion of women.¹⁵⁴ Where citizens are to be selected randomly, the selection will be made with a view to ensuring statistical representation. Thus, the constitutional conventions set up in Iceland in 2010 and in Ireland in 2012 both utilized quasi-random selection methods in which special efforts were made to ensure the age, gender, and geographic representativeness of convention members.¹⁵⁵

- Rules of procedure of the constitution drafting body

Beyond the method of selection of its members, the inner workings of a constitution drafting body are also likely to reflect gendered practices.¹⁵⁶ Whether the body gets to adopt its own rules of procedure or these are adopted before it is set up, it is necessary that their gendered impact be considered. For example, due consideration should be given to whether the working hours of the constituent assembly are friendly to members with family care duties, which tend to be women. The decision making rules may also suit women or not, with more consensual and collaborative rules tending to ease their participation and more adversarial rules tending to exclude them. The physical layout of the assembly, rules for taking the floor, the appointment of chairs, and the extent to which work is being conducted in smaller committees (in which women tend to feel more comfortable and to thus be more effective) are further examples of aspects to be considered from a gendered perspective. These are not hypothetical problems. For example, during the constitution making process in Afghanistan, women delegates were present but the number of those allowed to speak was limited and many were restricted to only five minutes, while also being intimidated by warlords and commanders.¹⁵⁷

Mechanisms to ensure training of the more inexperienced members, which also are likely to be disproportionately women, will help them more quickly learn the ropes and proceed to have an impact on the workings of the assembly. The official recognition of caucuses—groups with shared interests within parliaments—has tended to improve the effectiveness of women in legislatures and could be harnessed to similar effects in constituent assemblies as well. Other aspects of the working methods of a constituent assembly which would help integrate and give a voice to women members include: implementing time limits on speeches; seeking gender representativeness among assembly leadership positions; and the adoption of disciplinary measures to reprimand sexist or derogatory language and sexual harassment in the assembly.

- Expertise available to the constitution drafting body

[154] Rajju Malla Dhakal, *Contesting Patriarchy: The Gender Gap and Gender-based Violence in Nepali Politics and the Constituent Assembly Election 2013*, International IDEA, 2015, p. 3, <http://www.idea.int/publications/contesting-patriarchy/loader.cfm?csModule=security/getfile&pageID=72300>.

[155] Silvia Suteu, "A New Form of Direct Democracy: Constitutional Conventions in the Digital Era", Edinburgh School of Law Research Paper No. 2014/39, 2014, p. 14, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2511285.

[156] International IDEA, *Marginalized Groups and Constitution Building (A Roundtable Report)*, 2014, <http://www.idea.int/publications/marginalized-groups-and-constitution-building/>; National Democratic Institute for International Affairs (NDI), *Tunisia's National Constituent Assembly Gender Assessment*, 2014, <https://www.ndi.org/node/21189>; and Cottrell 2009.

[157] Katz 2012, p. 206.

It is important that the constitution drafting body have access to expertise on gender equality and non-discrimination. This expertise should come both from technical experts and from women's rights defenders, which can inform the work of the body in different and complementary ways.

- **Facilities available during the workings of the constitution drafting body**

Other, more practical considerations also have an impact on the capacity of women to act as effective members of a constituent assembly. These range from the availability of certain facilities as basic as female toilets or baby caring facilities to the provision of accommodation, transportation, and special security where women are at risk of violence.¹⁵⁸

b. Outside constitution drafting bodies

The work of women's rights representatives as members of constitution drafting bodies, while important, is only one site where the participation of women in the constitution making process becomes reality. Public input should inform the work of these constitution drafting bodies as much as possible, throughout their operation. This is particularly important given that members of constituent assemblies tend to be party members and as such may follow the party line rather than represent a wide range of women's interest; that they may not be very experienced; and that members of the public may hesitate to bring issues to constituent assembly members.¹⁵⁹ Moreover, there are benefits to public participation beyond the constituent assembly, such as promoting an interest in the constitution and capabilities at grassroots level, a sense of ownership over and commitment to the constitution, and the likelihood that matters otherwise ignored by assembly members (such as certain socio-economic rights) will be brought to their attention.¹⁶⁰ Good examples are the awareness raising campaigns and programs carried out by feminist organizations in Tunisia and Egypt.

- **Civic education and awareness raising**

Public outreach can take different forms. Whereas the purpose of public consultations discussed below is to apprise the members of the constituent assembly of the views of the larger population on particular issues, civic education and awareness raising aim to ensure that the public is kept informed of the progress made in the constitution making process and of opportunities to become involved.¹⁶¹ Civic education is important outside of the drafting timeframe as well. Where a popular referendum is to take place as part of the method of ratifying the new constitution, civic education and awareness raising will play an especially significant role in informing the public on the content of the constitution it is to vote on. Also after the adoption of the constitution, it will be important to educate the public on its provisions and new institutions created, how these will impact people's lives, and what rights and responsibilities the new basic law creates. Civic education and awareness raising will be especially important where citizens have been excluded from governance for a long time, and should therefore precede public consultations in such

[158] National Democratic Institute 2014; Cottrell 2009; and Jill Cottrell, Constituent Assembly Procedures from a Gender Perspective, International IDEA, 2008, http://www.idea.int/resources/analysis/ca_gender_perspective.cfm.

[159] Cottrell 2009, p. 6.

[160] Ibid.

[161] Brandt et al., 2011, pp. 91-108.

contexts.¹⁶²

Gender sensitive civic education and awareness raising programs should be adapted to the realities of a particular country. For instance, in many developing countries, radio is the most widely available technology and as such should be used to disseminate information about the drafting of the new constitution. An example of successful use of radio was the constitution making process in Nauru, where the debates of the drafting committee were broadcast in their entirety and were received with great interest by the public.¹⁶³ Such initiatives should take into account different constraints which may have an impact on women's ability to benefit from them: for example, radio or television programs can be repeated at different times during the day, given that women may listen or watch at different times from men.¹⁶⁴ Printed material such as newsletters, brochures, posters, leaflets, and booklets can supplement these programs. For example, biweekly and monthly magazines were used in the Afghan constitution making process and reached hundreds of thousands.¹⁶⁵ The rise of social media platforms can greatly aid with the dissemination of information, although it should be seen as a supplement to rather than a replacement for other, more traditional outreach avenues.

Gender sensitive civic education and awareness raising should reach the widest possible audience. This will be made more difficult by certain socioeconomic impediments, such as poverty and illiteracy, both of which particularly affect women. Examples of education campaigns carried out during the constitution making process include South Africa and Tunisia, where multiple drafts were published during the process and where illiteracy was at least partially overcome by way of poster campaigns, radio programs, and other mass media campaigns. In places such as Eritrea, where illiteracy surpassed 80 per cent, non-traditional outreach initiatives were pursued, such as songs, poetry, mobile theatre, short stories. In Somalia, where there were real security risks to public participation, it was still sought by resorting to the comparatively safe mobile texting.

It is vital to consider who designs and administers these education programs. A separate administrative management body or government department may be set up by the constituent assembly and tasked with implementing programs of civic education, awareness raising, and public consultations.¹⁶⁶ Such outreach programs can also be designed in conjunction with civil society organizations. In both cases, it is important to ensure that the institution carrying out civic education and awareness raising tasks is independent, credible and itself has a gender sensitive agenda and working methods. This can be achieved by ensuring adequate time and resources for the gender training of educators and the media; by adopting a gender sensitive national curriculum; and by ensuring the coordination and monitoring of education programs.¹⁶⁷

- **Public consultations**

Public consultations are different from gender sensitive civic education and awareness raising

[162] Böckenförde et al. 2011, p. 17.

[163] Brandt et al. 2011, pp. 97-98.

[164] *Ibid.*, p. 98.

[165] *Ibid.*

[166] *Ibid.*, pp. 274-80.

[167] *Ibid.*, pp. 95-96.

in that they aim to inform the constitution drafting body itself of societal views, whether from organized groups or individual members. Such consultations may take a range of forms, including face-to-face public meetings, civil society hearings, expert conferences, surveys, focus groups, social media, and requests for written submissions. They can be organized geographically or thematically and will need to be properly documented (including by ensuring anonymity, especially where there is a risk for reprisals against those who take part in the process). Public consultations are especially important in post-conflict and divided societies where, if run credibly and transparently, they can offer “an opportunity to build consensus, a shared sense of identity, values, and purpose, and to resolve major differences.”¹⁶⁸

The timing of public consultations will influence to what extent the views expressed therein can influence the drafting process. Public consultations can take place:

- on the agenda of issues to be considered by the constitution drafting body, such as was the case in Uganda, Kenya, or Thailand;
- on the content of the constitution before drafting, such as in Uganda, Colombia, Kenya, Eritrea, Fiji or Nepal; or
- on changed to concrete drafts of the constitution, such as was the case in Nicaragua, Ghana, South Africa, Eritrea, Kenya or Nepal.¹⁶⁹

From the point of view of women’s rights advocates, the more numerous the opportunities to influence the drafting process, the better. They should promote the inclusion of gender issues on the agenda of constitutional reform from the outset so as to avoid gender considerations becoming a mere afterthought for drafters.

Civil society and political parties can help with the organization of such public consultations given their institutional capacities and stronger local ties. However, great care should be taken to avoid the manipulation or abuse of public consultation mechanisms. For example, civil society groups invited to speak on behalf of women should be women’s *rights* groups—in other words, they should be groups which subscribe to an agenda of gender equality, women’s human rights and non-discrimination. Moreover, there should be an attempt to ensure the broad, intersectional representativeness of participating women’s rights groups, including the representation of indigenous women, women of color, or women from disadvantaged socioeconomic categories. Furthermore, the inclusion of women’s rights groups in public consultations should not be taken to eliminate the need for openness to individuals’ input in the constitution drafting process. Maintaining opportunities for individuals to have their say can be especially beneficial in countries where civil society is underdeveloped, or where existing groups are not representative of the full array of women’s interests in society. Finally, the rules of procedure applicable to public consultations should take into account the gender sensitive considerations discussed above with regard to the constitution drafting body. For instance, time limits for interventions can help ensure all groups or individuals will get equal opportunity to be heard.

[168] Ibid., p. 108.

[169] Ibid., p. 113.

Of great importance is the outcome of public consultations; in other words, the extent to which the public's input actually has an impact on the drafting process. Attempting to ensure this can be tricky but is aided by incorporating the requirement that public views inform drafting in the drafting body's legal mandate, as was done in Uganda, Fiji, and Kenya.¹⁷⁰ In order to ensure the best outcome from a gender perspective, however, it may be beneficial to allow the constitution drafting body some flexibility in choosing the sources for its substantive decisions. For example, public views may be rather conservative or discriminatory on women's rights issues, in particular where women and women's rights groups were underrepresented during the public consultations. In such a situation, the constitution drafting body can appeal to other sources such as international human rights or comparative principles of democratic constitution making to draft their provisions on women (see Chapters 2 and 3). For instance, the Ugandan Constitutional Commission declared the people's views on the constitution its "primary and most important source" but also used three other sources: the Commission's own "observations and analysis of society"; its review of Uganda's previous constitutions; and a comparative study of constitutional and political arrangements in other countries.¹⁷¹

C. During ratification

The ratification of the newly drafted constitution typically takes place in the constituent assembly and may be followed by a national referendum. When it takes place within the drafting body itself, a higher threshold for the vote is typically instituted to ensure that the adoption of the constitution is representative of a large majority. Submitting the new constitution for approval in a popular referendum can be complicated, however, especially in contexts where the draft represents a hard-fought political settlement, including from a gender perspective. A popular referendum can have the role of securing the popular legitimation of the text, even where the actual drafting process may not have been distinctly participatory. However, the injection of additional popular legitimacy by way of referendum, while widespread, is not an obligatory element of the adoption of new constitutions. Older constitutions such as Germany's and Japan's largely became accepted as legitimate without ever having been submitted to a popular vote. The ratifications of Nepal's constitution in 2015 and of Tunisia's 2014 constitution are more recent examples of constitutions not being submitted to a referendum.

The fears behind not resorting to referendums are that:

- they can be manipulated through the biased framing of the referendum question or via partisan campaigning;
- they can allow for crude majoritarianism instead of more consensual decision making; and
- they can add legitimacy to populist measures infringing on minority rights.¹⁷²

Therefore, where referendums are resorted to at the end of the process of constitutional drafting, they must be carefully designed so as to ensure the highest degree of inclusiveness and

[170] *Ibid.*, pp. 115-16.

[171] *Ibid.*, p. 116.

[172] Böckenförde et al. 2011, p. 16.

legitimacy. Constitutional scholars have sought to identify principles of good practice to help ensure such referendums return a close approximation of popular will rather than becoming mere exercises in populism. Among the goals identified as key to a constitutional referendum being democratic, deliberative, and inclusive are:

- maximizing popular participation (including via voter registration and regulating the franchise);
- ensuring an environment where meaningful public reasoning can take place (including outreach initiatives which ensure the people understand the options before them);
- pursuing inclusion and parity of esteem (bridging societal divides so as to ensure widespread assent to the referendum's result, but also setting out balanced funding and spending rules to ensure a level playing field); and
- transparent rules for measuring consent (agreeing on the majority requirements for referendum success).¹⁷³

To what extent such design elements will be possible to implement in post-conflict contexts or in deeply divided societies is uncertain. Thus, where there is a distinct possibility that substantive gains for gender equality and non-discrimination in the draft will be rejected by the majority of the population, gender rights activists should advocate against a referendum on the constitution.

D. After ratification

The fight for a gender sensitive constitution does not end with the adoption of a new text. It is not uncommon for a new constitution to not be implemented fully once adopted, and this can result in women's rights not being enforced. For example, the Constitutional Court instituted by the 2014 Tunisian constitution had still not been created by the Tunisian parliament more than a year and a half after the ratification of the constitution.¹⁷⁴ Reasons for non-implementation of part of or entire new constitutions include failures of leadership, lack of political will, insufficient technical capacity, opposition by elites and privileged groups, and the absence of a tradition of constitutionalism and the rule of law.¹⁷⁵ Constitution makers have seldom concerned themselves with what happens once a new constitution is adopted, although recent experience does provide some examples of implementation mechanisms which can be successful. Among these are:

- Adopting a schedule (an annex) in the constitution dealing with transitional matters;
- Adopting a schedule (annex) containing a list of legislative and other steps necessary for implementation and deadlines for action;
- Creating an independent commission with responsibility for the supervision and implementation of the constitution;

[173] Stephen Tierney and Silvia Suteu, "Towards a Democratic and Deliberative Referendum?: Analysing the Scottish Independence Referendum Bill and the Scottish Independence Referendum (Franchise) Bill", Workshop Report, 23 August 2013, http://www.scottishindependenceaudit.ed.ac.uk/__data/assets/pdf_file/0020/125912/Report_-_Analysing_the_Scottish_Independence_Referendum_Bill_and_the_Scottish_Independence_Referendum_Franchise_Bill.pdf.

[174] Yassine Bellamine, "Tunisie – Projet et proposition de loi sur la Cour Constitutionnelle: Ce qu'il faut savoir", Huffington Post Tunisie, 1 September 2015, http://www.huffpostmaghreb.com/2015/09/01/projet-proposition-loi-cour-constitutionnelle_n_8071672.html.

[175] Brandt et al., 2011, p. 222.

- Adopting a constitutional provision that principles should be implemented by executive authorities so far as possible, even if no legislation has been passed;
- Adopting a provision that courts should be able to give orders within the same framework;
- Empowering civil society to participate in the implementation and mobilization of the constitution; and
- Making the implementation of certain principles a condition, for example, for the assumption of specified powers by the executive or the legislature.¹⁷⁶

To these legal tools aimed at implementing a new constitution can be added those which aim to safeguard the text against erosion by various actors, including the legislature, executive, or the military. Examples of the latter are discussed in detail in Chapter 5.

Women's rights advocates should thus remain vigilant once a new constitution is adopted. They should immediately call for drafting and/or implementing legislation on gender equality and non-discrimination and continue monitoring progress made at both the constitutional and legislative levels.

[176] These examples are adapted from *ibid.*, p. 31.

1. WHAT BENEFITS DOES A GENDER SENSITIVE INCLUSIVE CONSTITUTION MAKING PROCESS BRING?

- A. An gender sensitive and inclusive constitution making process can be a model for future political interactions
- B. An gender sensitive and inclusive constitution making process is more likely to result in a more inclusive constitution
- C. An gender sensitive and inclusive constitution making process is more likely to be sustainable
- D. An gender sensitive and inclusive constitution making process has limits

2. WHEN SHOULD WOMEN SEEK TO ENGENDER THE CONSTITUTION MAKING PROCESS?

A. In preparation of drafting

a. Peace agreements

- Women and women's rights defenders should participate in peace negotiations at all levels and have a say on the long-term peace strategies set out therein.

b. Interim legal regimes

- Whatever form they may take, interim legal regimes governing the transition period until a new constitution is adopted should themselves be gender sensitive.

c. Timetables for the constitution making process

- Clear timetables are important for ensuring that key aspects of the process are not overlooked and for allowing women's rights advocates to more easily monitor the process.
- Longer constitution making processes tend to allow for higher levels of inclusion and are thus likely to result in more robust protections for women in the constitution.

B. During drafting

a. Constitution drafting bodies

- Method of selection of the constitution drafting body
 - Certain methods of selection of the drafting body, such as proportional representation and gender quotas, are likely to yield a higher proportion of women members.

- Rules of procedure of the constitution drafting body
 - Rules such as those on the working hours of the body, its decision making method, available training, and recognition of caucuses will have an impact on the degree and quality of women members' participation.
- Expertise available to the constitution drafting body
 - Both technical expertise on women's rights and that of women's rights defenders should inform the work of the body.
- Facilities available during the workings of the constitution drafting body
 - Facilities such as sanitation, child care, transportation, and security are all likely to have a gendered impact.

b. Outside constitution drafting bodies

- Gender Sensitive civic education and awareness raising
 - Gender sensitive civic education and awareness raising should reach the widest possible audience and be adapted to the realities of the country, such as its poverty and literacy rates, which in turn tend to be gendered.
 - The institution carrying out gender sensitive civic education and awareness raising tasks must be independent, credible and itself have a gender sensitive agenda and working methods.
- Public consultations
 - Women's rights advocates should attempt to influence all public consultation opportunities.
 - Women's rights groups informing public consultations should truly promote a gender equality and non-discrimination agenda and represent broad, intersectional interests.
 - The participation of women's rights groups in public consultations should not preclude the participation of individual women in the process.

C. During ratification

Ratification by popular referendum is risky for women if the views of the majority of the voters are not gender sensitive.

D. After ratification

Women should remain vigilant once the constitution has been adopted and call for developing, adopting and implementing legislation on gender equality and non-discrimination.

Jill Cottrell, *Participation in Constitution Making: Making Women Voices Heard*, International IDEA, 2009, http://iknowpolitics.org/sites/default/files/idea_participation20in20constitution20making_0.pdf.

Jill Cottrell, *Constituent Assembly Procedures from a Gender Perspective*, International IDEA, 2008, <http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=30856>.

Jason Gluck and Michele Brandt, *Participatory and Inclusive Constitution Making*, United States Institute for Peace, 2015, <http://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf>.

International IDEA, *Marginalized Groups and Constitution Building (A Roundtable Report)*, 2014, <http://www.idea.int/publications/marginalized-groups-and-constitution-building/>.

International IDEA, *Journeys from Exclusion to Inclusion: Marginalized Women’s Successes in Overcoming Political Exclusion*, 2013, <http://www.idea.int/publications/from-exclusion-to-inclusion/>.

Jenny Hedström and Julian Smith, *Overcoming Political Exclusion: Strategies for Marginalized Groups to Successfully Engage in Political Decision-making*, International IDEA, 2013, <http://www.idea.int/publications/overcoming-political-exclusion/index.cfm>.

National Democratic Institute for International Affairs (NDI), *Tunisia’s National Constituent Assembly Gender Assessment*, 2014, <https://www.ndi.org/node/21189>.

Kirsti Samuels, “Post-Conflict Peace-Building and Constitution-making”, *Chicago Journal of International Law*, 6:2 (Winter 2006), pp. 1-20, <http://www.odi.org/sites/odi.org.uk/files/odi-assets/events-documents/1216.pdf>.

Cheryl Saunders, “Constitution Making in the 21st Century”, *International Review of Law*, Issue 4, 2012, pp. 1-10, <http://www.qscience.com/doi/abs/10.5339/irl.2012.4>.

UN Women, *Women’s Participation in Peace Negotiations: Connections between Presence and Influence*, 2nd ed., October 2012, <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2012/10/wpssourcebook-03a-womenpeacenegotiations-en.pdf>.

Jennifer Widner, “Constitution-Writing in Post-conflict Settings: An Overview”, *William and Mary Law Review*, Vol. 49, No. 4 (2008), pp. 1513-41, <http://scholarship.law.wm.edu/wmlr/vol49/iss4/16/>.

The Woodrow Wilson International Center for Scholars, *Women’s Participation: The Making of the Tunisian Constitution*, Global Women’s Leadership Initiative, 2013, <https://www.wilsoncenter.org/blog-post/womens-participation-the-making-the-tunisian-constitution>.

STRATEGIES TO MOBILIZE AND ADVOCATE FOR A GENDER-SENSITIVE CONSTITUTION

Beyond the formal procedures which may be instituted during the constitution making process, there are informal strategies which may be resorted to in order to facilitate the mobilisation and capacity-building needs of women, both as individuals and as parts of civic organisations. The following table lists some of these strategies, which can be used on their own or in various combinations, and gives examples of concrete instances where they have been used successfully. A caveat is here in order, however, while this *ABC* has mostly focused on procedures and strategies for the mobilisation of women and women’s groups, the task of ensuring a gender sensitive constitution is the responsibility of society in its entirety. In other words, the burden of ensuring that gender interests and rights are reflected in the constitution does not fall solely on the shoulders of women and women’s rights defenders but should be embraced by all committed democrats.

Strategy	Example(s)
Building coalitions, alliances, and networks	
1. Building broad-based and representative women’s coalitions already before constitutional drafting begins and having them influence the constitution making process both formally and informally	<ul style="list-style-type: none"> In Syria, the Coalition of Syrian Women for Democracy started its work in 2012, years before concrete plans for a new constitution were in place. In 2014, it produced a report on a gender sensitive constitution for Syria¹⁷⁷. Numerous women’s rights, human rights, and organisations working on citizenship and democracy have embraced this work since then. In the Burundi peace process, UNIFEM convened the All Party Women’s Peace Conference with two representatives from each of the warring factions and the seven women observers to the process, and an “equality-friendly” mediator in the form of Nelson Mandela. The resultant Arusha Peace and Reconciliation Agreement for Burundi of August 29th 2008 was signed “in the presence of the representatives of Burundian civil society and women’s organizations and Burundian religious leaders”. More than half the recommendations formulated by the All Party Women’s Peace Conference were adopted, including measures on sexual violence and provisions for participation.¹⁷⁸

- During the **Afghan** constitution making process, the ethnically diverse non-governmental group Women for Afghan Women (WAW) drafted a Women’s Bill of Rights, listing twenty-one essential rights to improve women’s status, increase their participation in economic, civil, and public life, and enhance their well-being. WAW distributed copies of its Bill of Rights throughout the country and also presented copies to the president Karzai, the Constitutional Commission, and the Minister of Women’s Affairs.¹⁷⁹
- During the 1991 **Colombian** Constitutional Convention, women organized in the Women and the Constituent Assembly National Network, which eventually grew to include more than seventy organizations. The Network advocated for “free motherhood” (rather than focusing on abortion access) and pushed for gender equality, compensatory actions for marginalized groups, the incorporation of CEDAW into the constitution, equal participation in decision making, social security for domestic work, gender neutral language, and other related demands. During the workings of the Constitutional Convention, the Network circulated its list of proposals and publicized its demands through the radio, press conferences, lobbying, and a letter-writing campaign.¹⁸⁰
- After the **Kenyan** Parliament rejected a woman delegate’s proposal to increase women’s participation in Parliament through quotas in 1997, the Women’s Political Caucus (WPC) emerged and unified many of the other women’s groups. The WPC submitted a document titled “The Women’s Reforms Initiative” during the early stages of constitutional reform, demanding that women comprise half the constitutional reform body, that 30% of Parliamentary seats be reserved for women, that the government enact legislation in conformity with two international provisions involving women, and that a gender equality commission be created. The WPC was later divided when differences arose between Muslim and non-Muslim women regarding the continuance of the Kadhi courts, between women of different ethnic groups regarding executive power, and among women of different classes regarding whether elite women could adequately represent women’s interests broadly.¹⁸¹

	<ul style="list-style-type: none"> In 2014, the Tanzanian Network of Women and the Constitution, a coalition of more than 50 women’s groups, put forth a platform of 12 key issues focused on political and socioeconomic rights for women and the need for an independent commission to oversee the implementation of these rights, and to advocate for their inclusion in the new constitution.¹⁸²
<p>2. Building local networks</p>	<ul style="list-style-type: none"> In Brazil, the rural women’s movement Farmwomen began in Rio Grande do Sul in 1986, combining the fight for women’s rights and gender equality with that for workers’ rights. The movement linked hundreds of neighbourhood groups in small towns across the state to regional and national network and eventually established close relations with similar movements in other parts of Brazil. These groups’ advocacy initially focused on constitutional rights guarantees; after the adoption of the 1986 constitution, they continued their work pressuring for implementing legislation and procedures.¹⁸³ Traditional leaders, including traditional female leaders such as those in South Africa or the Queen mothers in Ghana, can play an important role in advancing gender equality and non-discrimination at the local level. Not only do they wield special social influence, but they are often also tasked with maintaining law and order. They should themselves benefit from gender sensitive training.¹⁸⁴
<p>3. Building international solidarity and networks</p>	<ul style="list-style-type: none"> The Euromed Feminist Initiative (IFE-IFE) has developed together with the Coalition of Syrian Women for Democracy and other Syrian civil society organizations a process aimed at bringing the issue of a gender sensitive constitution for Syria higher on the international agenda as well as at national organizing. Lessons learned from good and bad practice were exchanged in order to prepare a gender sensitive constitution building process in Syria as early as possible. Many international events promoting a nonviolent transition towards democracy were also organized in the frame of this process. During the Iraqi constitution making process, the Women for Women International, an international NGO, produced the report <i>Our Constitution, Our Future: Enshrining Women’s Rights in the Iraqi Constitution</i>, which included a list of ten recommendations for gender sensitive constitutional provisions.

	<ul style="list-style-type: none"> • During negotiations for EU treaty revisions in 1995, the European Women’s Lobby (EWL) established the informal “Wise Women’s Group” (in response to the formally established and nearly all-male “Wise Men’s Group”) comprised of legal and women’s rights experts. The Group’s work enabled the EWL to develop its position on the EU Treaty and make detailed proposals.¹⁸⁵ • South African feminists took advantage of the new global discourse around gender issues at the time of their country’s constitution making, as well as of funding opportunities available from international agencies.¹⁸⁶
4. Building alliances with marginalised groups	<ul style="list-style-type: none"> • Women can seek alliances with young people, such as in South Africa or in northern Kenya, which then increased local ownership and capacity.¹⁸⁷ • Women have also established alliances with agricultural collectives in South Africa, which facilitated their access to land for cultivation and empowered them economically.¹⁸⁸
5. Building alliances with broader human rights groups, trade unions and other groups	<ul style="list-style-type: none"> • Nigerian women’s rights organisations have been part of nationwide civil society coalitions such as the Citizen Forum for Constitutional Reform and the Electoral Reform Network, advocating for constitutional and electoral reforms.¹⁸⁹ • In Morocco, women’s rights organisations joined forces with trade unions in long advocacy campaigns to make sexual harassment in the workplace a criminal offence, increase maternity leave, and codify domestic work, resulting in a new labour code.¹⁹⁰
Strategic advocacy	
6. Advocating for women’s rights as democratic rights	<ul style="list-style-type: none"> • In Mali, women’s rights activists advocated for constitutional change without explicit reference to the international discourse on gender equality. This discourse and the Beijing platform in particular were seen as elitist and remote from Malian realities. Instead, Malian activists articulated their demands in local terms, emphasising the role of women in nation building and in the transition to democracy.¹⁹¹

	<ul style="list-style-type: none"> In Egypt, the majority of members of the constituent assembly negotiating the 2014 constitution identified as liberals or pro-democracy or secularists or socialists (contrary to the majority of the 2012 constituent assembly members, who had identified with the project of political Islam). They accepted the link between democracy and women’s rights and this resulted in Article 11 on gender equality and non-discrimination being included in the 2014 Egyptian constitution.¹⁹²
7. Advocating for women’s rights as an international obligation of the state	<ul style="list-style-type: none"> In India, international law has been invoked in conjunction with the constitution in litigation, as a form of standard setting and as a source of international pressure on the government. Appeals to international conventions on women’s rights were more successful when lobbying higher levels of government and less so when approaching poor urban and rural communities.¹⁹³
Strategic lobbying and boycotts	
8. Strategic lobbying	<ul style="list-style-type: none"> The Wajir Women Association for Peace in Somaliland strategically lobbied politically non-aligned clan elders to serve as the public face of peace-making.¹⁹⁴
9. Boycotts	<ul style="list-style-type: none"> When other strategies have failed, women’s rights advocates can resort to boycotts. For example, Liberian women repeatedly threatened to boycott public functions and not to elect men if legislation was not passed to implement their constitutional rights. In Uganda, women's rights activists threatened to call for a boycott of an important 2000 referendum on political systems because of the government’s failure to allow for co-ownership of land by women. ¹⁹⁵ In Iraq, political blocs and parliamentary committees called for a boycott of parliamentary sessions following the nomination of only men to the Independent High Electoral Commission, the country’s electoral authority. Under the slogan “No women, no elections in March 2013”, Kenyan women’s rights defenders and pro-democracy activists threatened to boycott the 2013 general elections and bring government to a standstill. The protest came after the Kenya Supreme Court had ruled that the constitutional quota requirement of a one-third gender representation among elected officials would not apply to that election (the first general election under the country’s 2010 constitution).

[177] “Gendered Constitution-Building Process for Syria: Gender Entry Points to a Democratic Constitution in Syria and Lessons Learned from Constitution-Making Processes in the Middle East and North Africa”, Coalition of Syrian Women for Democracy with the support of the Euromed Feminist Initiative (IFE-IFE), November 2014, <http://www.efi-ife.org/sites/default/files/001%20Gendered%20Constitution%20Building%20Process%20for%20Syria%20Report%20%28November%202014%29.pdf>.

[178] Christine Bell, *Women and Peace Processes, Negotiations, and Agreements: Operational Opportunities and Challenges*, Norwegian Peacebuilding Resource Centre, March 2013, p. 2, http://www.peacebuilding.no/var/ezflow_site/storage/original/application/b6f94e1df2977a0f3e0e17dd1dd7dccc4.pdf.

[179] Elizabeth Katz, “Women’s Involvement in International Constitution-Making”, in Beverley Baines et al., eds., *Feminist Constitutionalism: Global Perspectives*, Cambridge University Press, 2012, p. 206.

[180] *Ibid.*, p. 209.

[181] *Ibid.*, pp. 213-14.

[182] Melanie Allen, “Women and Constitution-building in 2014”, in *Annual Review of Constitution-Building Processes: 2014*, International IDEA, 2015, p. 18, <http://www.idea.int/publications/annual-review-of-cbp-2014/index.cfm?css=new2013>.

[183] Jeffrey W. Rubin and Emma Sokoloff-Rubin, *Sustaining Activism: A Brazilian Women’s Movement and a Father-Daughter Collaboration*, Duke University press, 2013, 21-22.

[184] “The Role of Traditional Leaders in Preventing and Addressing Sexual and Gender-Based Violence: Findings from KwaZulu-Natal, Northwest and Limpopo Provinces in South Africa”, Population Council and Ubuntu Institute, 2010, http://www.popcouncil.org/uploads/pdfs/2010RH_TradLeadersFinalReport.pdf.

[185] Johanna Kantola, *Gender and the European Union*, Palgrave MacMillan, 2010, p. 97. See broadly Barbara Helfferich and Felix Kolb, “Multilevel Action Coordination in European Contentious Politics: The Case of the European Women’s Lobby”, in Doug Imig and Sidney Tarrow, eds., *Contentious Europeans: Protest and Politics in an Emerging Polity*, Rowman & Littlefield, 2001.

[186] Seidman 1999, p. 295.

[187] International IDEA, *Journeys from Exclusion to Inclusion: Marginalized Women’s Successes in Overcoming Political Exclusion*, 2013 (“International IDEA 2013”), pp. 24, 142-43, <http://www.idea.int/publications/from-exclusion-to-inclusion/>.

[188] *Ibid.*, p. 142

[189] Hussaina J. Abdullah, “Women as Emergent Actors: A Survey of New Women’s Organizations in Nigeria since the 1990s”, in Catherine M. Cole, Takyiwa Manuh and Stephan F. Miescher, eds., *Africa After Gender*, Indiana University Press, 2007, pp. 163-64.

[190] Sameena Nazir and Leigh Tomppert, eds., *Women’s Rights in the Middle East and North Africa: Citizenship and Justice*, Freedom House, 2005, pp. 194-95.

[191] Susanna D. Wing, “Women Activists in Mali: The Global Discourse on Human Rights”, in Nancy A. Naples and Manisha Desai, eds., *Women’s Activism and Globalization: Linking Local Struggles and Transnational Politics*, Routledge, 2002, pp. 168-82.

[192] Hoda Elsadda, “Article 11: Feminists Negotiating Power in Egypt”, *OpenDemocracy*, 5 January 2015, <https://www.opendemocracy.net/5050/hoda-elsadda/article-11-feminists-negotiating-power-in-egypt>.

[193] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, The University of Chicago Press, 2006, p. 165.

[194] Jenny Hedström and Julian Smith, *Overcoming Political Exclusion: Strategies for Marginalized Groups to Successfully Engage in Political Decision-making*, International IDEA, 2013, pp. 32-33, <http://www.idea.int/publications/overcoming-political-exclusion/index.cfm> and International IDEA 2013, p. 16.

[195] Jacqueline Asiiwe, “Making Women’s Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses”, *Yale Human Rights and Development Journal* 4:1 (2014), p. 181, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1026&context=yhrdj>.

Constitution building is a fight, from the early phases of preparation, throughout drafting and ratification, and continuing during implementation. This struggle is worthwhile if the end result is adopting and enforcing a constitution which recognizes all citizens as having equal worth and being equal before the law and in law, which prohibits all forms of oppression, violence, and discrimination. Therefore, all democratic movements should keep gender equality considerations at the forefront of their action.

The ***ABC for a Gender Sensitive Constitution*** is the result of a fruitful collaboration between the Euromed Feminist Initiative IFE-EFI, researchers and activists from Syria, Europe and the Maghreb. The dialogue established in this frame was an asset and a shared source of experience and knowledge. The handbook combines academic research and constitutional expertise with a feminist theoretic approach, substantiated by the experiences of the women's rights activists in the Euro-Med region and examples from different constitutions and processes across the world.

This ***ABC*** does not only support future constitution building in transitional political processes and post-conflict situations, but also strives to inspire a critical review of existing constitutions, many of which still lack a genuine commitment to women's rights and gender equality.