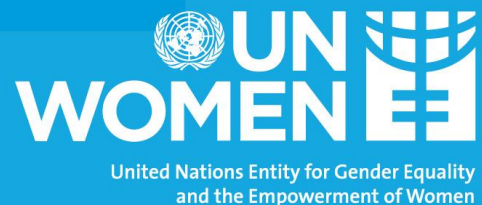


GUIDANCE NOTE

Women's Human Rights and National Constitutions

Leadership and Political Participation



New York,
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INTRODUCTION

A country's constitution is the "highest law of the land," setting out the framework for how state power operates. Authorities and responsibilities are allocated and balanced between the executive, the legislature and the judiciary, and between national and sub-national jurisdictions. Modern constitutions also create extensive rights entitlements for individuals, by placing a wide range of demands and restrictions on the use of state power. Constitutions matter for women. The specific way in which a country's constitution shapes each aspect of state power will either facilitate or limit the opportunities for advancing gender equality. A well drafted constitution containing gender equality provisions opens many doors. A constitution steeped in patriarchal values keeps them locked tight.

This guidance note provides an overview of some of the key considerations which UN Women country offices should keep in mind when providing support for the creation or reform of national constitutions. It addresses questions of process, such as the participation of women in constitution-making; of governance structures, such the impact of constitutional choices about electoral systems and decentralized power; and of substantive content, such as gender equality and non-discrimination guarantees and the constitutional interaction between gender equality and religious or customary laws. The note is divided into three main sections: 1. The constitution-making and constitutional reform processes; 2. Constitutional provisions; and 3. The role of the UN.

Perhaps the most important thing to be aware of, when designing a strategy for country support, is the critical role played by context. Strategies do not migrate very effectively between countries. A plan that produced good results in one country cannot be simply transferred wholesale to another. Too many of the enabling conditions will be different. For example, the opportunities and limits for promoting gender equality will vary depending on whether constitutional reform is post-conflict or an effort to modernize an existing constitution. For this reason the guidance note will be followed by a number of short country case studies, to provide staff with a more concrete sense of the contextual factors that made certain approaches especially productive in previous constitutional reform efforts.

The comprehensive guarantees of women's human rights set out in international and regional law only become real when they are embraced—and made actionable—at the national level. Constitutional entrenchment of women's human rights provides the best, and most lasting, assurance that the future laws, policies and decisions of the state will work to eliminate discrimination and proactively advance women's rights. UN Women's strategic support to enable gender equality advocates to engage effectively in their countries' constitution building efforts will have an impact that continues to benefit women for many years to come.

1. CONSTITUTION- MAKING AND REFORM PROCESSES

Overview

While the constitution-making process varies from country to country, it usually includes the following stages: assessment of the need for a new constitution; agreement on the rules concerning how to proceed with constitution-building; establishment of a representative body (and potentially other bodies e.g., a secretariat to support its mandate) to prepare a draft of the new constitution, including through inclusive public consultation processes; consideration and debate of the

constitution draft; referendums; adoption of the constitution; and its implementation, including through education campaigns on the new constitution.

The type of constitutional reform that is being undertaken will affect how much scope there is to bring in gender equality concerns and which gender equality issues should be prioritized. Constitutional reforms can vary in scope from drafting a new constitution to substantially revising and implementing an existing one to undertaking limited reforms. Constitutional reform that involves wholesale redrafting can represent an unprecedented opportunity for practitioners to shape how laws and institutions will incorporate gender equality and ensure women's rights moving forward. In contrast, where reforms are limited and tied to ensuring the overall continuity of existing laws, there may be less of an opportunity to address gender equality concerns. This is particularly the case where the existing constitution was drafted without women's full participation and where the existing constitution or decision-makers implementing the constitution have not fully recognized gender equality or worse, have enshrined gender inequality.

The type and extent of the reform also often determines the kind of body and the process that will be entrusted with the initial process of constitution-building. For example, where the constitution involves wholesale redrafting, new arrangements such as a constitutional convention or assembly may be established to lead the process. In cases of more limited reform, parliament may be responsible. Each of these bodies represents different opportunities for women's participation which are discussed further below.

The need for early planning on women's rights in constitution-making

It is important to plan for incorporating women's rights and gender equality issues from the very beginning of constitution-building processes. While making a constitution is a long-term process, there are several key decisions that are made in the initial stages—including decisions on the process for drafting and adopting the constitution, as well as the kinds of substantive issues or content the constitution will cover—that will ultimately determine whether the final constitution will be gender-sensitive. There are a number of strategies that women's rights advocates should be pursuing even before the constitutional drafting bodies begin their work. Women's rights advocates should be advocating for their participation in constitution-drafting, including by educating voters as to how to vote to support women's presence in the constitution drafting bodies; holding strategy sessions and producing documents on goals for the new constitution; and learning about the kinds of constitutional provisions that will most impact women.

Women's participation and gender equality in constitutional drafting, revision and adoption processes

There are several options for the kinds of bodies that will undertake or oversee constitution-building. Constitutional drafting processes can be directed by the executive, including through "governments of national unity or grand coalitions" that attempt to ensure national unity by having multiple interests represented in the executive. They can be drafted by parliament – either by an existing parliament, a new "enlarged" legislative body, or by newly elected constitutional assemblies that may also perform the functions of normal parliament in addition to constitution drafting. Or they can be drafted by constitutional conventions consisting of appointed or elected members that are established for the exclusive purpose of creating a new constitution. There are some advantages to having existing parliaments oversee constitution-building, particularly in

transitional contexts where it may be difficult to form new institutions with the legitimacy to take constitutional drafting forward. However, relying on existing institutions may often limit the opportunity for meaningful and inclusive participation of women: both because women are traditionally excluded from these legislative bodies and because experience shows that parliaments in these situations may seek to further their own institutional interests and consolidate their own authority rather than planning for the inclusion of diverse groups in decision-making processes. This is not to say that newly-created bodies will also not have their own institutional agendas, but there may be a greater window of opportunity for ensuring that women are included in these bodies.

The electoral rules and procedures that determine which interest groups are represented on constitution-building bodies are critical for guaranteeing the role of women in the process of constitutional drafting, revision, and adoption. These rules should be designed to overcome the traditional gender biases and power dynamics that undermine women's participation in these contexts, such as women's comparative social, economic, and educational disadvantage or the fact that post-conflict constitutional settlements often focus on the inclusion of the (traditionally male) leadership of armed groups or the previous government. One way to ensure women's participation is through electoral systems that use proportional representation (and through quotas for female representation). It must be noted that although proportional representation is one mechanism that facilitates increases in women's representation, it is by no means the only one. Evidence suggests that countries are moving towards mixed systems that combine characteristics of various electoral arrangements. All electoral systems have the possibility of including quotas. For a quota to be successful it needs to be designed to fit the particularities of the electoral system, have adequate enforcement mechanisms and all actors, including electoral commissions, laws, judicial system, institutions, political parties and so forth need to be part of its design and implementation.

For example, Nepal's Interim Constitution established the Constituent Assembly to draft the new constitution on the basis of a mix of first-past-the-post/proportional representation/appointments (with approximately 55% of candidates to be elected through proportional representation) and ensured women's inclusion by requiring that: "The principle of inclusiveness shall be taken into consideration by political parties while selecting candidates" for first-past-the-post and that "while making the lists of the candidates [for proportional representation], the political parties shall ensure the proportional representation of women, Dalits, oppressed communities/indigenous groups, backward regions, Madhesis and other groups, in accordance with the law" (Article 63(4)). In addition, the Interim Constitution required that "a minimum of one-third of the total number of candidates nominated shall be women" (Article 63(5)).

Women must also be included in constitutional bodies that are appointed rather than elected. For example, *The Transitional Constitution of the Republic of South Sudan 2011* states in Article 200 that: "(1)The President of the Republic shall, after consultation with the Political Parties, civil society and other stake-holders, establish a National Constitutional Review Commission to review the Transitional Constitution of South Sudan, 2011. (2)The Commission shall be established with due regard for gender, political, social and regional diversity of South Sudan in recognition of the need for inclusiveness, transparency and equitable participation..."

Within these constitution drafting bodies, one tactic to further efforts for gender equality might be to call for the establishment of a separate committee or sub-group on gender equality or for the position of technical gender advisor to the one or more committees. However, at the same time, it is important to ensure that women are represented across the various committees or sub-groups

tasked with drafting particular constitutional articles, and not just in working groups on more narrowly defined “women’s rights” issues.

In addition to ensuring women’s participation via formal electoral systems, it will also be important for constitutional bodies to develop gender-sensitive mechanisms for public participation and input in constitution-building. For example, the body may adopt rules of procedure that mandate consultation with women’s organizations or an interim constitutional arrangement might provide for this. For example, *The Transitional Constitution of the Republic of South Sudan 2011* states in Article 201 that “(1) Upon the presentation of the Draft Constitutional Text and Explanatory Report by the Commission, the President of the Republic shall, after consultation with relevant stakeholders, constitute and convene a National Constitutional Conference comprising delegates representing the following categories:- ... (c) women organizations.”

Alongside these efforts to include women’s organizations, women may also participate in constitution-making as part of other interest groups, such as those organized along religious, ethnic, or geographic lines. Supporting both of these forms of participation will be helpful for advancing gender equality. When gender equality concerns are raised only by women’s organizations they are not seen as cross-cutting issues and risk marginalization; alternatively, relying solely on gender equality issues to emerge from interest groups organized around other social categories ignores the extent to which women’s rights concerns may be of secondary or lower priority in these groups. Broad-based participation of women from all backgrounds is also important to get the full range of perspectives on issues that may divide women’s activists.

In addition to facilitating women’s participation with constitutional bodies, it is important to remember that alongside political or elected leaders there are other important actors who influence constitution-building, such as tribal, religious, media or corporate leaders. The interests of these groups may not always be compatible with women’s rights. Depending on the context—including whether there are pressing security concerns—it may be helpful to support efforts to educate these other kinds of power structures on women’s rights concerns e.g., through civic and media education and outreach to private actors.

An additional strategy for making women’s rights concerns known to all influential actors in the constitution process is through women’s charters. Women’s charters are documents that contain a consolidated outline of women’s rights demands for the new constitution. These demands can relate to the kinds of rights guarantees that should be in the constitution and can also be more procedural and require, for example, that women have a place at the table in negotiating the constitution. For example, UN Women supported grassroots organizations in Egypt to come together at the first National Women’s Convention on June 4, 2011 and adopt the Egyptian Women’s Charter. The Charter emphasizes that women are “partners in revolution” and contains six demands on: representation of women; international conventions; social and economic rights; legislations; national women machinery; and media and women. According to the Charter, “The Alliance for Arab Women and the Egyptian Women Coalitions discussed this Women’s Charter in 27 governorates in Egypt. An amount of 3000 men and women from the different governorates of Egypt have registered in the first National Women’s Convention, which took place on Saturday 4th of June, 2011. And, a signature gathering campaign has been conducted, which reached 500,000 signatures up till the 4th of June 2011.” Women’s charters have also been developed in constitution drafting contexts such as South Sudan and South Africa.

Women’s charters can be effective tools for ensuring women’s rights are integrated in new constitutions provided that the charter is seen as legitimate (because it represents the consensus of

a broad-range of women's movements and gender equality advocates); credible (where, for example, the charter-drafting process involved experts and high-level technical assistance); and clear (a charter that is both comprehensive and concise can provide a strong rallying point to unit otherwise diverse groups). Women's charters can also be an effective way of advocating for the constitutional recognition of international human rights law and accordingly its progressive approach to gender equality. For example, women's charters can articulate rights-based demands based on the content of international human rights or more generally call for governments to observe international human rights treaties, including CEDAW. While the formation of a women's charter is an important starting point, ultimately the success of the charter in influencing concrete constitutional outcomes will depend on how women's rights organizations and other allied interested groups use the charter in ongoing advocacy efforts.

Gender equality and post-conflict constitutional settlements

The post-conflict constitution-building process represents a crucial opportunity to lay the foundations for gender equality in the transition period and beyond. For example, gender-sensitive processes (e.g., guaranteeing women's representation in constitutional drafting bodies) and decisions on substance (e.g., adoption of a constitutional guarantee of gender equality) set a precedent for women's participation in social, economic, and political life in the post-conflict period, as well as providing a legal base from which women's rights advocates can demand other types of gender-responsive reform that unfolds in transitional periods when laws and institutions are in flux. This need for gender-sensitivity in post-conflict constitutional arrangements is recognized in UNSCR 1325, which "[c]alls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia:...(c) 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."

However, constitution drafting in post-conflict contexts also poses a set of unique challenges for ensuring women's participation and promoting gender equality. In general terms, constitution-building processes in post-conflict contexts must balance a number of different concerns: institutions may be weakened by conflict and not have the capacity to engage in constitution building; the constitutional reform process may generate new conflicts (e.g., around the electoral system); and short time-frames for peace-building may be inconsistent with the more deliberative processes that should be involved in constitution drafting. More generally, it can be difficult to ensure that the kinds of immediate steps needed to build peace (e.g., such as the power-sharing arrangements that are needed for stability) do not pre-empt decisions about the form of the final constitution. There is an increasing trend now for peace agreements and constitutional negotiations to include some form of power-sharing. In part this may be tied to data showing that conflicts that end in some form of power-sharing agreements are less likely to return to conflict (Hartzell and Hoddie, 2003). While power-sharing deals are often negotiated between powerful elites leading the parties to a conflict, there has been an increasing trend in advocacy for both gender and minority/ethnic quotas in post-conflict settlements (Butenschøn and Vollar, 2011). To avoid the danger of their rights being ignored by these elites it is important for women on both sides of the conflict to mobilize within their parties to ensure gender equality is not sidelined in pursuit of other interests. International or regional stakeholders that act as mediators or facilitators to post conflict constitutional negotiations may also have a hand in sidelining the goal of gender equality if they place primacy on achieving other goals at the expense of women's rights or allow women's rights to be used as a bargaining chip. If constitution-building is unduly accelerated according to a tight timeframe without space for consultation or reflections this can also inhibit women's full

participation. In addition, displacement, gender-based violence, and insecurity all present significant barriers to women's participation in public affairs in the immediate aftermath of conflict.

Depending on the context, it may be advisable in these circumstances to support a two-step process of constitution-building that separates out the interim arrangements that need to be made to ensure stability from the final constitution-building process. Interim or transitional constitutional plans can vary greatly in terms of their mandate, duration, and relationship to final constitutional processes. Depending on the conditions in the country concerned, there might be scope to advocate for the interim arrangement to mandate principles—including the principle of gender equality—with which the final constitution must comply.

2. CONSTITUTIONAL PROVISIONS TO ADVANCE GENDER EQUALITY

Overview

Alongside these important procedural choices, the substance or content of the constitution will also impact greatly on women's rights. Having guarantees of women's human rights in the constitution is essential: constitutional entrenchment is an important step toward ensuring that states eliminate gender-based discrimination and affirmatively advance women's rights. Most obviously, this requires including provisions that directly guarantee rights related to gender equality and non-discrimination, women's political participation, and citizenship, employment, and marriage and family life. However, in addition, a wider range of provisions—including in relation to the structure of government, the status of religious and customary law, the status of international law, and institutional mechanisms to enforce the constitution—will also have a very significant impact on the constitution's capacity to advance gender equality, and need to be considered. The kinds of provisions that are most significant to women's rights and gender equality are discussed below.

Gender equality and non-discrimination guarantees

There are a number of different ways that contemporary constitutions incorporate commitments to gender equality and non-discrimination. As a starting point, the large majority of constitutions will have some kind of equality and non-discrimination provision(s), however there is a great deal of variation in how gender and/or sex are treated in these provisions or in other parts of the constitution.

One "immediate and simple" way that constitutions can reflect a commitment to gender equality is to use gender-neutral language (such as "he or she" or "every person" or "either parent") throughout the constitution. A number of constitutions also explicitly state that unless the context otherwise requires, words and expressions importing the masculine gender includes females. While gender-neutral drafting can be an important step it is not sufficient to guarantee women's rights in national constitutions.

The large majority of constitutions contain a provision guaranteeing equality before the law, including on the basis of sex; this kind of provision will be present even when a general equal rights or non-discrimination guarantee is not included in the constitution. Constitutions that only guarantee equality before the law are important, but are ultimately a weak form of protection as they do not mandate positive steps to ameliorate gender inequality.

Some constitutions protect gender equality via general equal rights provisions which guarantee the application of rights to everyone, including women, but do not specifically reference gender equality. In some other cases, an article may contain this kind of general guarantee of equal rights or equality before the law and then a specific reference to the fact that men and women are equal under the constitution.

- *Constitution of the Kyrgyz Republic 2010*
 1. *Fundamental human rights and freedoms are inalienable and belong to each person from birth. Human rights and freedoms are of superior value. They act directly and define the meaning and the content of the activity of legislative, executive power and self governance bodies.*
 2. *The Kyrgyz Republic shall respect and ensure human rights and freedoms to all persons on its territory and under its jurisdiction.*
No one may be subject to discrimination on the basis of sex, race, language, disability, ethnicity, belief, age, political and other convictions, education, background, proprietary and other status as well as other circumstances.
Special measures defined by law and aimed at ensuring equal opportunities for various social groups in accordance with international commitments shall not be considered as discrimination.
 3. *In the Kyrgyz Republic everyone shall be equal before the law and the courts.*
 4. *In the Kyrgyz Republic men and women shall have equal rights and freedoms and equal opportunities for their realization. (Article 16)*
- *Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 11 March 2012)*
 1. *Everyone shall be equal before the law.*
 2. *No one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability.*
 3. *Men and women shall have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women shall have the right to equal pay for work of equal value.*
 4. *The law shall provide for the elimination of inequalities that affect persons with disabilities.*

Equal rights or equality provisions are often then followed by a non-discrimination provision, which usually contains a list of grounds on which discrimination is prohibited, including gender and/or sex. In some constitutions, the non-discrimination provision (or other provisions) will also explicitly state that special measures to remedy inequality do not amount to discrimination as defined in the constitution.

- *Constitution of The Republic of Namibia 1990, as amended to 2010*
 - (2) *No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status” (Article 10)*
 - (2) *Nothing contained in Article 10 here of shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving a*

balanced structuring of the public service, the defence force, the police force, and the correctional service.

(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation. (Article 23)

In other cases, constitutions will have detailed non-discrimination guarantees but then exempt certain areas of other areas of law from the prohibition on discrimination, including, matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. These kinds of provisions significantly weaken constitutional protections for gender equality.

Still other constitutions incorporate references to the equality of women in specific rights protections, such as those relating to labor rights or in the area of marriage and family life. Examples of these kinds of provisions are included below in the discussion on these areas.

Finally, another smaller set of constitutions contain provisions dedicated to setting out the rights of women. Depending on the specific rights guarantees identified in these provisions, and provided it is clear that protections contained elsewhere in the constitution also apply to women, such “rights of women” clauses can be important tools for advancing gender equality.

- *Constitution of the Federal Democratic Republic of Ethiopia 1995:*
 - 1. Women shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.*
 - 2. Women have equal rights with men in marriage as prescribed by this Constitution.*
 - 3. The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.*
 - 4. The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.*
 - 5. (a) Women have the right to maternity leave with full pay. The duration of maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family.*
(b) Maternity leave may, in accordance with the provisions of law, include prenatal leave with full pay.
 - 6. Women have the right to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting the interests of women.*
 - 7. Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.*
 - 8. Women shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.*

9. To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information and capacity. (Article 35)

The most certain way to ensure comprehensive constitutional protection for gender equality and non-discrimination is a combination of the above provisions—equality, including a specific gender equality guarantee; non-discrimination on a list of grounds including sex and/or gender, special measures, equality before the law, rights of women—that are based on a contemporary and human-rights based interpretations of the principle of equality. In practice this means that constitutional provisions on gender equality and non-discrimination should do the following:

- 1) Reflect both a formal and substantive model of equality: For example, formal equality would require that constitutions do not give women lesser citizenship rights than those granted to men (discussed further below). Substantive equality requires the State to adopt laws, policies, and practices to ensure that women enjoy equality in practice, including through addressing the causes of historically-embedded discrimination that prevent the achievement of substantive equality between men and women. Constitutions can make clear that they adopt both formal and substantive equality through provisions such as Article 66 of the *Constitution of the Republic of Ecuador 2008, as amended to 2011* which states that “The following rights of persons are recognized and guaranteed: ...4. The right to formal equality, material equality and nondiscrimination.” In addition to these explicit equality guarantees, having provisions on positive rights, special measures, and rights that bind the private sphere are further ways of operationalizing the substantive model of equality across the constitution. These elements are discussed further below.
- 2) Prohibit both direct and indirect discrimination: The Committee on the Elimination of Discrimination against Women has consistently recommended that states parties incorporate the Convention’s Article 1 definition of “discrimination against women” into their constitutions. Article 1 provides that, “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean 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.” Some examples of this include:
 - *Constitution of Kenya 2010*:
 - (4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
 - (5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
 - (6) *To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*
 - (7) *Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*
 - (8) *In addition to the measures contemplated in clause (6), the State shall 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. (Article 27)

- *Constitution of the Republic of Serbia 2006: ...All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited. Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination. (Article 21)*

3) Bind both public and private actors:

For example, *Constitution of the Republic of South Africa 1996, as amended to 2009:*

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. (Sec. 9)

- 4) **Grant special measures (including quotas) to remediate inequality**—including specifically gender inequality—and specify that such measures do not constitute prohibited discrimination. See above provisions for examples.
- 5) **Commit the state to positive action** to ensure gender equality rather than just prohibiting negative interference: According to Article 48 of the *Constitution of the Republic of Paraguay, 1992, as amended to 2011*: “Men and women have equal civil, political, social, economic and cultural rights. The State will promote the conditions and will create the adequate mechanisms for, making equality real and effective, by leveling [allanando] the obstacles that prevent or hinder its exercise and facilitating the participation of women in all areas [ámbitos] of the national life.”

Women’s representation and participation in state structures

Constitutions can guarantee women’s representation in state structures through a series of provisions, such as general guarantees of equality in political life; quotas for women’s participation; regulation of political parties; and mandating electoral management bodies to ensure respect of these gender-equality requirements. There are a few countries that notably combine all of these requirements e.g., Burundi and Kenya.

General guarantees of equality in political life: These can be very general provisions, providing for example that women are equal to men in social and political life. In some cases these provisions can guarantee women’s participation beyond elected bodies. For example, Article 40 of the Political Constitution of Colombia 1991, as amended to 2012 states that: “...The authorities will guarantee the adequate and effective participation of women in the decision-making levels of the Public Administration.”

Quotas: Many constitutions contain quota systems to ensure women's inclusion in legislative bodies, as well as other governmental institutions. For example, the *Constitution of the Republic of Senegal 2001, as amended to 2009* requires that "Two-fifths at least of the Senators are women..." (Article 60-1). Some constitutions extend the quota system beyond legislative bodies, such as *The Constitution of Kenya 2010* which requires that "...the State shall 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" (Article 27).

Constitutions may also introduce candidate quotas for political parties (e.g., Burundi), although candidate quotas, along with other more general quota systems, may often be developed outside of the constitution. Depending on local contexts, this approach of reforming electoral rules can be a useful tool for increasing women's representation, particularly where there is a constitutional basis for such reform. For example, Section 37 of the *National Constitution of the Argentine Republic 1994* states that "Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system" and this has been followed up by "an implementing decree setting in place a mechanism to ensure that parties put up women candidates." UN Women recently supported the April 11, 2011 passage of an extremely progressive gender parity law in Tunisia that requires candidate lists to include alternating male and female candidates for the Constituent Assembly election.

Political parties: in addition to candidate quotas, constitutions may also regulate political parties through a prohibition on sex discrimination in parties' membership, as well as requiring political parties to include women in party decision-making structures. These kinds of constitutional provisions can be of great assistance in influencing the behavior of political parties, which in many ways are the gatekeepers to women's political participation. Because political parties may be reluctant to change, constitutional provisions should also include sanctions, such as non-registration (e.g., in Nepal), in cases of non-compliance.

Some examples of constitution provisions that prohibit sex discrimination in parties' membership include:

- *Constitution of the People's Democratic Republic of Algeria, as amended to 2008: The right to establish political parties shall be recognized and guaranteed...In accordance with the provisions of the present Constitution political parties may not be founded on a religious, linguistic, racial, sexual, corporatist or regional basis..." (Article 42)*
- *The Constitution of the Republic of Djibouti 1992, as amended to 2010: Political parties and/or groupings of political parties shall contribute to the exercise of suffrage...They shall be prohibited from identifying themselves with a particular race, ethnic group, sex, religion, sect, language or region..." (Article 6)*
- *Constitution of the Republic of Liberia, 1984/1986: No association, by whatever name called, shall function as a political party, nor shall any citizen be an independent candidate for election to public office, unless:...b. the membership of the association or the independent candidate's organization is open to every citizen of Liberia, irrespective of sex, religion or ethnic background, except as otherwise provided in this Constitution... (Article 79)*

The Interim Constitution of Nepal 2063 (2007) 12th Amendment also provides some examples of constitutional provisions that prohibit sex discrimination in parties' membership and require political parties to include women in party decision-making structures in order to receive recognition from the Election Commission. Under the Interim Constitution, a condition for party recognition is that "there should be a provision for the inclusion of members from neglected and oppressed groups including women and Dalits in the executive committees at various levels" (Article 142(3(c))) and "(4) The Election Commission shall not register any political party if any Nepali citizen is discriminated against in becoming a member of the political party on the basis of religion, caste, tribe, language or gender or if the name, objectives, symbol or flag of such political party is of a character that may disturb the country's religious or communal unity or is divisive in character..." (Article 142).

Electoral management bodies: electoral commissions should be mandated to oversee compliance with guarantees of women's participation. For example, Article 91(g) of the *Constitution of the Republic of Burundi 2005* requires the independent national electoral Commission to "assure the respect for the provisions of this Constitution relative to multiethnicity and to gender and to take cognizance of the claims in this respect." In addition, constitutions may provide for gender balance in the staffing of such commissions.

Rights related to employment, marriage and family life, and citizenship

In practice, all of the substantive rights guarantees contained in a constitution will have implications for the enjoyment of gender equality. Some constitutional provisions will have particular significance for women's human rights because of patterns of historic discrimination in that area (e.g., citizenship and marriage and family life) or because they provide an opportunity to extend women's rights protection into the private sphere (e.g., some employment guarantees). Given also that the large majority of constitutions include some kind of provision relating to citizenship, employment, and marriage and family life, some considerations concerning these three types of rights are discussed briefly here.

Citizenship: Constitutions should ensure women's equal access to citizenship and nationality rights. There are three key ways this can be done. First, through gender-neutral definitions of citizenship in terms of parentage (such as granting citizenship if "one of the parents was a citizen") or referring to "every citizen". In practice, a number of constitutions take this approach. Second, making it clear that citizenship is not lost on marriage to a non-citizen or divorce/annulment of marriage from a citizen. Depending on the extent to which there have been previous discriminatory citizenship practices in the country, this may need to be stated explicitly in amended constitutional text or it may be sufficient for the constitution to remain silent on this point. In any event, clauses which make citizenship contingent in these ways for women who marry or divorce men, but not vice-versa, should be repealed and have no place in contemporary constitutions. Third, in some cases, the constitutional context may warrant an explicit prohibition on discriminatory citizenship on grounds such as sex. For example, the *Constitution of Bosnia and Herzegovina 1995, as amended to 2009*, states in Article I(7) that: "No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Employment: There is a spectrum of approaches that can be taken to ensure gender equality in the enjoyment of labor rights. At a minimum, where a constitution contains provisions governing employment, such provisions should comprise a general guarantee of the right to work alongside a guarantee of equality or non-discrimination, such as starting that “The right to work is recognized and is equal for all” (Burkina Faso, see below) or requiring “equal pay for equal work.” Another set of more protective constitutional provisions are those which would explicitly prohibit employment discrimination on the basis of sex and/or gender, including in relation to specific aspects of labor rights such as access to employment and remuneration. For example, Article 19 of the *Constitution of Burkina Faso 1991, as amended to 2009* provides in full that “The right to work is recognized and is equal for all. It is prohibited to discriminate in matters of employment and of remuneration founded notably on sex, color, social origin, ethnicity or political opinion.”

Some constitutions also have text—under the employment and/or marriage and family life provisions—obligations toward working mothers, such as prohibiting dismissal because of maternity, providing paid maternal leave, and providing special protection in working conditions. Article 35 of the *Constitution of the Federal Democratic Republic of Ethiopia 1995* (above) contains some examples of the language that might be used here. Other examples include Article 35 of *Constitution of the Republic of Armenia 1995, as amended to 2005* (“Dismissal for reasons connected with maternity is prohibited. Everyone woman-employee shall, in case of pregnancy and childbirth, have the right to paid maternity leave and parental leave following the birth or adoption of a child”) and Article 39 of the *Constitution of the Republic of Lithuania 1992, as amended to 2006* (“...The law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions and other concessions...”).

In practice it is quite rare for constitutions to explicitly state whether some or all of the employment guarantees apply against both public and private employers; depending on factors such as the history of domestic labor relations and whether the constitution is designed only to regulate government activity, it may be necessary to explicitly state that labor rights also govern the private sphere. For example, Article 48 of Bolivia’s *Political Constitution of the State 2009* states that “V. The State shall promote the incorporation of women into the workforce and shall guarantee them the same remuneration as men for work of equal value, both in the public and private arena.” Article 17 of the *Constitution of the Republic of Cote d’Ivoire 2000, as amended to 2004* states that: “Any person has the right to freely choose his profession or his employment. Access to public or private employment is equal for all. Any discrimination in the access to or exercise of employment, based on sex, [or on] political, religious or philosophical opinions, is prohibited.”

Marriage and Family Life: Constitutional language describing the family as a “fundamental” unit in the society that is then placed under the State’s “protection” is very common. Because traditionally women have been denied *de facto* equality in this area, strong constitutional provisions on equality of women and men in marriage and family life are another important tool for advancing gender equality. The extent to which gender equality objectives can actually be advanced through such provisions depends on other constitutional choices, such as the strength of gender equality guarantees elsewhere in the constitution, whether gender equality is also mentioned in the marriage and family life provisions, and the extent of any exceptions or modifications to the guarantees of equality and non-discrimination, such as those based on personal law.

On one end of the spectrum are those constitutions that contain the kinds of clauses that favor religious or customary law, such as clauses that exempt rules on marriage, divorce, inheritance and other matters of personal law from the prohibition on discrimination or put matters of personal law under the jurisdiction of parallel traditional or religious legal systems. The issues around these

kinds of clauses and suggestions as to how potential negative effects might be mitigated are addressed below.

Other constitutions may have provisions on marriage and religious or customary law, as well as references to equality in marriage and family life. For example, according to Article 5(b) of the *Constitution of the Kingdom of Bahrain 1973, as amended to 2002*: “The State guarantees reconciling the duties of women towards the family with their work in society, and their equality with men in political, social, cultural, and economic spheres without breaching the provisions of Islamic canon law (Shari’a).” This also occurs when the provisions favoring religious or customary law in marriage and family life are designed to deal with minority religions or cultures in the community. For example, the *Constitution of Kenya 2010* provides for the modification of equality rights in the application of Muslim law before the Kadhis’ courts on personal status, marriage, divorce and inheritance (see Article 24), but also provides in Article 45 that “(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State. (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. (3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage...”

Another set of constitutions that contain weak equality protections are those that are completely silent on gender equality in the context of marriage and family life (such constitutions tend to have established a state religion on which all decision-making is to be based).

At the other end of the spectrum, there are a large number of constitutions provisions that explicitly guarantee marriage and family relations on the basis of equality of women and men, including by constitutionally guaranteeing equal rights to enter into marriage and choose a spouse, equality during marriage and its dissolution, and the same rights with regard to child-rearing.

Constitution of Burkina Faso 1991, as amended to 2009: The family is the basic unit of society. The State has the duty to protect it. Marriage is founded on the free consent of the man and of the woman. All discrimination based on race, color, religion, ethnicity, caste, social origin, [and] fortune, is forbidden in the matter of marriage. Children are equal in rights and in duties in their familial relations. The parents have the natural right and the duty to raise and to educate their children. They must give them respect and assistance. (Art. 23)

Constitution of Eritrea 1997:

- 1. The family is the natural and fundamental unit of society and is entitled to the protection and special care of the State and society.*
- 2. Men and women of full legal age shall have the right, upon their consent, to marry and to found a family freely, without any discrimination and they shall have equal rights and duties as to all family affairs.*
- 3. Parents have the right and duty to bring up their children with due care and affection; and, in turn, children have the right and the duty to respect their parents and to sustain them in their old age. (Art. 22)*

Constitution of Japan 1946: (2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes. (Art. 24)

Constitution of the Republic of Armenia 1995, as amended to 2005: The family is the natural and fundamental cell of the society. Men and women of marriageable age have the right to marry and found a family according to their free will. They are entitled to equal rights as to marriage, during marriage and divorce... (Art. 35)

Political Constitution of the State 2009 (Bolivia):

II. Everyone, in particular women, have the right not to suffer physical, sexual or psychological violence, in the family as well as in the society. (Art. 15)

I. Every person has the right to an adequate habitat and home that dignifies family and community life. (Art. 19)

V. Women have the right to safe maternity, with an inter-cultural practice and vision; they shall enjoy the special assistance and protection of the State during pregnancy and birth and in the prenatal and postnatal periods. (Art. 45)

The State recognizes and protects the family as the fundamental nucleus of society, and guarantees the social and economic conditions necessary for its full development. Every member has equal rights, obligations and opportunities. (Art. 62)

I. The marriage between a man and a woman is formed by legal bond and is based on equality of the rights and duties of the spouses.

II. The free unions or de facto unions, which meet the conditions of stability and singularity and that are maintained between a man and a woman without legal impediment, shall have the same effects as a civil marriage, both in the personal and property relations of the couple as well as with respect to adopted children or to children born to the couple. (Art. 63)

I. Spouses or cohabitants have the duty, in equal conditions and by common effort, to attend to the maintenance and responsibility of the home, and to the education and development of the children while they are minors or have some disability.

II. The State shall protect and assist those who are responsible for the family in the exercise of their obligations. (Art. 64)

Gender equality and the structure of government

Constitutional provisions on the structure and mechanisms of government can significantly impact gender equality. Key structural issues relate to: whether government is decentralized (e.g., through federalism); the electoral system and its design (e.g., whether it includes gender quotas); and the relationship between the branches of government, including the role and composition of the judiciary and the extent to which gender is mainstreamed in legislative and administrative processes.

The impact of decentralization on women's rights varies depending on local conditions. On the one hand, women may have greater access to local decision-making entities than at the national level, and may be able to achieve change that is more immediate and responsive to gender realities than that which comes from centralized governments. Local governments are also often mandated to implement laws that have particular relevance to women e.g., family law, meaning that women may have a greater opportunity to participate more directly in the government decisions that

significantly impact their lives. However, at the same time, there may be resource constraints in local government centers, and traditional or religious authorities are more likely to dominate at local levels; both of these factors may limit the capacity of local government centers to fully advance women's rights and gender equality. Moreover, devolution of power tends to benefit groups that are regionally or territorially defined (e.g. indigenous or other minority groups); because women are not a homogenous group, decentralization will not strengthen their autonomy but instead mean that their rights will vary from region to region. In addition, devolution may mean that women's rights hinge on local custom rather than constitutional mandates of gender equality, particularly where the devolution was itself motivated by the desire of traditional or religious leaders to preserve local customs: this can bode badly for women's rights protection.

In the past certain electoral systems were shown to be more favorable to women. In particular, women tended to achieve higher levels of political representation when the constitution mandated an electoral system of proportional representation, rather than that the first-past-the-post system where the candidate who wins the largest number of votes is elected. First-past-the-post systems can exclude women because in some circumstances political parties may be reluctant to select female candidates for fear of alienating the majority of voters. Currently most systems are moving towards hybrid electoral models. What is important to note is that the constitutional design of the mechanics of the electoral system— particularly whether it includes gender quotas—can improve prospects for women's political participation and will be discussed further below. Temporary special measures can work in all electoral systems provided that they be appropriately designed and implemented.

Constitutions also regularly contain rules about the relationship between the three branches of government. Where constitutions create rights that are legally enforceable against the government, the judiciary's ability to support gender equality in practice will depend on factors such as how rights are articulated in the constitution (e.g., whether there is an explicit gender equality guarantee and the nature and scope of any exceptions). The extent to which the judiciary has either conservative or a progressive approach to constitutional interpretation will also make a difference. Other factors are more structural and relate to the judiciary's independence, power, and composition. Independent judges with the power to strike down discriminatory laws and practices can be an important bulwark against gender inequality; in many cases a legal decision that may not be popular with electorates (e.g., enforcing sexual and reproductive rights) will usher in gender equality reforms that would not be possible if political channels were the only means available for their recognition and enforcement. In terms of judicial composition, constitutions should ideally promote measures for including women in the judiciary. For example, the *Constitution of the Republic of Ecuador 2008, as amended to 2011* states in Article 183 that in "[p]arity between men and women shall be fostered" by the Judiciary Council in electing judges of the National Court of Justice.

Another structural consideration is that constitutions may also create special institutions—either inside or outside of the government—that influence how the executive and legislature advance women's rights. The nature and functions of these institutions is considered further below.

Gender equality and religious or customary law

Another key issue for the constitutional protection of women's human rights is how guarantees of gender equality interact with constitutional provisions that recognize systems of customary or religious law. Constitutions vary greatly in the approach adopted to resolve potential conflicts

between these two kinds of guarantees, depending on factors such as whether the constitution is concerned with minority or majority culture and religion. At one end of the spectrum, there are some constitutions that provide a very weak basis for ensuring gender equality in the case of conflict between the two guarantees. This includes those constitutions that exempt marriage, divorce, burial, devolution of property and other matters of personal law from the prohibition on discrimination, or otherwise recognize the complete autonomy of customary or religious law and institutions in particular areas of law, such as personal law. There are also a set of constitutions that establish a state religion and specify that it is the source for all laws. In practice, these kinds of constitutions tend to have weaker explicit guarantees of gender equality and non-discrimination.

In the middle of the spectrum are those constitutional provisions that guarantee both gender equality and legal pluralism but are silent as to how potential conflicts will be resolved, relying instead on the judiciary or potentially the legislature to resolve disputes. The extent to which this affects gender equality will depend on a host of factors discussed elsewhere throughout this guidance note, such as how the gender equality guarantee is framed; the composition, independence and power of the judiciary; and the status of international human rights treaties, such as CEDAW, under the constitution. For example, where a constitution guarantees a role for international human rights law—as interpretative guide, as directly enforceable, or as superior to domestic law, including in cases of conflict with domestic law—this can be an important check against constitutional interpretations that might undermine gender equality.

The kinds of constitutional provisions that will provide a stronger foundation for ensuring gender equality are those that establish that there is no official State religion and/or specifically direct how to resolve potential conflict through mechanisms that will favor gender equality guarantees. For example, a constitution may specify that if laws or principles in recognized legal systems conflict with constitutional provisions, then international law or constitutional provisions prevail. The latter kind of provision can be found in Section 39 of the *Constitution of the Republic of South Africa 1996, as amended to 2009*, which states that “(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.” In other cases, the constitution may require that customary and traditional rules comply with equality. For example, Article 156 of the *Constitution of the Republic of Chad 1996, as amended to 2005* provides that: “Until their codification, customary and traditional rules apply only in communities where they are recognized. However, customs contrary to public policy or those that promote inequality between citizens are prohibited.”

Some more recent constitutional provisions go one step further and explicitly prohibit customary law practices or customs that discriminate against women, as well as support women’s rights to eliminate harmful customs. Some examples here include:

- *Constitution of the Federal Democratic Republic of Ethiopia 1995: 4. The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited. (Article 35)*
- *The Interim National Constitution of the Republic of the Sudan 2005: (3) The State shall combat harmful customs and traditions which undermine the dignity and the status of women. (Article 32)*

- *Transitional Constitution of the Republic of South Sudan 2011: (4) All levels of government shall: . . . (b) enact laws to combat harmful customs and traditions which undermine the dignity and status of women. (Article 16)*
- *The Constitution of the Kingdom of Swaziland Act 2005: (3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed. (Article 28)*
- *Constitution of the Republic of Uganda 1995, as amended to 2005: (2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this Constitution. (Article 32)*

Gender equality and constitutional status of international law

Constitutions are more capable of advancing gender equality if they incorporate international law, including international human rights standards. Constitutional incorporation of international law can create new rights guarantees for women and also guide judicial interpretations of the constitution that are more rights-protective for women, including by helping to resolve conflicts between gender equality and other constitutional guarantees (e.g., on religious and customary law) in favor of women's rights. It can also require legislatures to adopt laws that ensure the implementation of international human rights and be part of the tool-kit used by human rights or gender equality commissions to then monitor government activity for compliance with gender equality guarantees. The kinds of constitutional provisions most favorable to the full enforcement of international human rights law are those which:

- Give international law direct effect and give precedence to international law over domestic law in cases of conflict or where the international law instrument(s) is more rights-protective;
- Require that international law and/or human rights instruments are taken into account in interpreting constitutional rights guarantees;
- Directly guarantee rights protections contained in international human rights instruments, including CEDAW;
- Mandate human rights commissions to monitor the enforcement of the country's international obligations with respect to human rights; and
- Establish the right of individuals to apply to international law mechanisms for rights protection.

Some examples of these kinds of constitutional provisions include:

- *Constitution of the Republic of Burundi 2005: The rights and the duties proclaimed and guaranteed, among others, by the Universal Declaration of the Rights of Man, the International Pacts relative to the rights of man, the African Charter of the Rights of Man and of Peoples, the Convention on the Elimination of all Forms of Discrimination concerning [à l'égard de] Women and the Convention relative to the rights of the child are an integral part of the Constitution of the Republic of Burundi. These fundamental rights are not subject to any restriction or derogation, except in certain circumstances justifiable by the general interest or the protection of a fundamental right. (Article 19)*
- *Constitution of Kenya 2010:*

(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. (Article 2)

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. (Article 21)

(1) There is established the Kenya National Human Rights and Equality Commission. (2) The functions of the Commission are— (g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;... (Article 59)

- *Constitution of the Republic of Somaliland 2000:*
 - 2. The Republic of Somaliland recognises and shall act in conformity with the United Nations Charter and with international law, and shall respect the Universal Declaration of Human Rights. (Article 10)*
 - 2. The articles which relate to fundamental rights and freedoms shall be interpreted in a manner consistent with the international conventions on human rights and also with the international laws referred to in this Constitution. (Article 21)*
- *Constitution of the Kyrgyz Republic 2010*
 - 3. International treaties to which the Kyrgyz Republic is a party that have entered into force under the established legal procedure and also the universally recognized principles and norms of international law shall be the constituent part of the legal system of the Kyrgyz Republic. The provisions of international treaties on human rights shall have direct action and be of priority in respect of provisions of other international treaties. (Article 6)*
 - 1. Everyone shall be guaranteed judicial protection of his/her rights and freedoms envisaged in the present Constitution, laws, international treaties to which the Kyrgyz Republic is a party as well as universally recognized principles and norms of international law. The state shall ensure the development of extrajudicial and pre-trial methods, forms and means to protect human and civil rights and freedoms. (Article 40)*
 - 2. Everyone shall have the right to apply in accordance with international treaties to international human rights bodies seeking protection of violated rights and freedoms. In the event that these bodies confirm the violation of human rights and freedoms, the Kyrgyz Republic shall take measures to their restoration and/or compensation of damage. (Article 41)*
- *Constitution of the Republic of Moldova 1994, as amended to 2006:*
 - (1) Constitutional provisions on human rights and freedoms shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, other conventions and treaties to which the Republic of Moldova is a party.*
 - (2) Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations. (Article 4)*

Enforcement of gender equality guarantees

Constitutions should also establish mechanisms for the executive, legislative, and judicial enforcement of gender equality guarantees. As discussed through this concept note, choices about the best kinds of constitutional mechanisms to enforce gender equality guarantees will depend on contextual factors such as how open the political vs. legal channels are to women's rights; whether decentralized power is an advantage or disadvantage for women in light of local circumstances; the

constitutional status of international human rights instruments; and whether gender equality provisions apply to both government and private actors.

Other important considerations relate to the role of the courts both under the constitution and in relation to women's rights guarantees in particular. For example, one key factor will be whether gender equality provisions are something which the courts can enforce or whether they are just intended to be a guide to government actions; this will often be determined by where in the constitution the gender equality guarantees are placed (e.g., if the guarantee is in the Preamble or a separate section on directive principles it will usually not be directly enforceable by the judiciary). Additional considerations relate to ensuring that in practice, women can access the courts to enforce rights guarantees. For example, while specialized constitutional courts may benefit women (e.g., because they enable the development of a coherent jurisprudence on gender equality), broad standing rules and relaxed pleading rules (e.g., such as those in public interest litigation in India) may be necessary to guarantee that women pursue their right to remedy to the highest levels of the judiciary.

An additional enforcement option is for the constitution to mandate specialized enforcement bodies. These institutions can vary in nature and function. The constitutional establishment of gender equality commissions is still a relatively rare occurrence. Some examples include the Gender Monitoring Office established by the *Constitution of the Republic of Rwanda 2003, as amended to 2010* or the Commission for Gender Equality established by the *Constitution of the Republic of South Africa 1996, as amended to 2009* in Section 187 with the power to "monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality." To be effective these gender commissions, ministries, monitoring offices, and ombudspersons must be well-funded, properly staffed, connected to grassroots women's rights organizations, and have the real ability to influence government activity. It is however more usual to see constitutions establishing human rights commissions. Where this is the approach taken, it is important that the body's mandate includes the promotion of gender equality and that commission members include women. For example, the *Constitution of Kenya 2010* establishes a Kenya National Human Rights and Equality Commission and states that its functions include "to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development" (Article 59). The *Interim Constitution of Nepal 2063 (2007) 12th Amendment* requires that "(2) While appointing the chairperson and members of the National Human Rights Commission, diversity, including gender diversity, must be maintained" (Article 131), while also leaving open the possibility that gender-specific institutions may need to be created: "The Government of Nepal may form necessary commissions to safeguard and promote the rights and interests of different sectors of the country including women, Dalits, indigenous ethnic groups [Adivasi Janajati], Madhesi, disabled, labourers or farmers. The provisions for the formation, functions, duties and powers of such commissions shall be as determined by the law" (Article 154). If a country has both a human rights and gender equality commission, it will be important that responsibilities are clearly allocated as between them to ensure that women's rights issues are not marginalized.

Conclusion

The kind of constitutional provisions discussed above—gender equality and non-discrimination; women's political participation; citizenship, employment, and marriage and family life; structure of government; the status of religious and customary law; the status of international law; and institutional mechanisms to enforce the constitution—are some of the main types of provisions relating to gender equality that are frequently included in constitutions. Constitutions can also address many other gender equality issues; it all depends on the specific challenges and

opportunities that may exist in the country context. For example, some constitutions also include provisions guaranteeing gender equality in relation to property and inheritance or reproductive rights. For example, Article 36(3) of the *Constitution of the Republic of Somaliland 2000* states that “Women have the right to own, manage, oversee, trade in, or pass on property in accordance with the law” and Article 66 of the *Political Constitution of the State 2009* (Bolivia) states that “Women and men are guaranteed the exercise of sexual rights and their reproductive rights.”

Regardless of the particular subject that a constitutional provision addresses, there are some general considerations that apply across the board when trying to ensure that constitution-making or constitutional reform promotes gender equality:

- Constitutions that create rights and enforcement mechanisms in both the public and the private spheres will be of more benefit to women. This broader scope would, for example, facilitate women claiming rights protection in relation to private employment and the family.
- Constitutions that merely require governments to refrain from negative interference with women’s rights will not be as advantageous to women. Instead, constitutions that also mandate (e.g., through special measures) governments to pursue laws, policies and activities aimed at achieving gender equality are essential to ensure that women enjoy gender equality in practice.
- Gender equality guarantees should be included in those chapters or sections of the constitution that create legally enforceable rights. Gender equality and non-discrimination guarantees contained in the Preamble or the directive principles of a constitution can be useful for framing a constitution, but are generally non-justiciable and provide weak protection for women’s human rights.
- Constitutional guarantees of gender equality and non-discrimination should—along with other constitutional rights—apply to both citizens and non-citizens. For example, where labor rights (and other constitutional rights) are seen to be limited to citizens, this will significantly impact the ability of groups such as female migrant workers to realize their rights.
- Gender equality guarantees interact with all other areas of the constitution, making it important to ensure that constitutional provisions on women’s human rights are not subject to either general or specific limitations or derogations (e.g. in states of emergencies).

3. THE ROLE OF THE INTERNATIONAL COMMUNITY

The assistance of the UN is regularly sought by national actors when constitutional processes are being initiated—whether as part of post-conflict nation building, national renewal in more peaceful times through the creation of a new constitution, or targeted reform efforts to modernize an existing constitution. The generally recognized “added value” of the UN’s involvement comes from perceptions of its objectivity and neutrality, its normative expertise regarding international standards, its convening powers, its capacity to disseminate constitutional experiences across countries, and its protection role. At the outset of the process it is important for UN Women staff to

understand both the legitimate expectations of our national partners, and the demands and constraints these may place on our provision of support, as well as the standard to which the whole UN system should be held to account, including in relation to gender equality.

The UN Secretary General issued a Guidance Note in 2009 on “United Nations Assistance to Constitution-making Processes.” It sets out the guiding principles and policy framework that should be respected in all aspects of UN support. The note is very useful tool, drawing important lessons from UN engagement in countries such as Cambodia, Timor-Leste, Afghanistan and Iraq, which should thoroughly inform the development of any country strategy and be read by all staff involved in the provision of constitutional assistance.

The note lists six guiding principles:

1. Seize the opportunity for peace building
2. Encourage compliance with international norms and standards
3. Ensure national ownership
4. Support inclusivity, participation and transparency
5. Mobilize and coordinate a wide range of expertise
6. Promote adequate follow-up

There are a number of directions the Secretary General gives to UN staff in the discussion of these principles that have particular relevance for UN Women’s work. He underlined that the whole of the UN has a responsibility to actively promote the constitution’s compliance with international human rights standards, noting, for example, that a guarantee of equality between men and women, and guarantees of other rights established under international law for women, should be embedded in constitutions. The UN should undertake activities to raise awareness and enhance national actors’ understanding about the ways in which international human rights standards can be incorporated into constitutions. The UN also has an obligation to speak out when a draft constitution does not comply with these standards.

At the same time, the UN has a responsibility to respect national sovereignty and ensure national ownership of constitutional processes. What is to be especially avoided is the perception that the UN is facilitating a foreign imposed constitution. Support and advice should be carefully tailored to specific national contexts and no one country’s constitution should be held up as an ideal, “one size fits all”, model. Ensuring that all engagement in constitutional processes is at the request of national actors is also an important component of guaranteeing national ownership.

Experience has shown that a high level of inclusivity, participation, and transparency in constitutional processes will produce constitutions with widespread legitimacy, and also strengthen the chances for their effective implementation. Broad involvement can transform what could be a technical (or narrowly politically sectarian) exercise into a genuine experience of nation building or national renewal. The Secretary General’s Guidance Note states that the UN must encourage outreach to all groups in society, and support public education and consultation campaigns – involving, in particular, human rights defenders, legal professionals, the media, and civil society groups representing women, children, minorities, indigenous peoples, refugees, stateless and displaced persons, and labor and business.

A round table for practitioners hosted in 2011 by DPA and OHCHR explored some of the benefits and challenges involved in implementing these principles. Participants strongly endorsed the value of supporting the most extensive and deep public outreach and consultation possible. The experience in South Africa, which resulted in the recording of over 2 million public submissions,

and that of Rwanda, in which the members of the constitution making committee lived for six months among different groups of people to hear their concerns, were highlighted. At the same time, it was stressed that the UN's role cannot be limited to facilitating internal dialogue within the country, but must also include sharing its comparative constitutional knowledge, in terms of other national and international experiences, and advocating for the application of international standards.

Questions were also raised about the possibility of a tension between respect for national sovereignty and the UN's advocacy for incorporating international standards into constitutions. It was emphasized that governments have voluntarily undertaken the responsibility to uphold human rights standards. UN advocacy and technical support for incorporation should be recognized as assistance to meet these national responsibilities, rather than being portrayed as an unjustified attempt to impose external limits on the exercise of national power.

Regarding the need for broad national ownership, an ongoing tension was noted between the especially close relations some UN agencies and UN representatives have with the executive powers in countries, and the need to facilitate an effective democratization process with inclusive representation. Round table participants stated that the UN must rethink its current approach in this regard, and that the norm for UN engagement in the future should place greater emphasis on a broader range of relationships, including with parliaments and civil society groups.

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For additional examples of constitutional provisions, please consult UN Women's compilation of gender equality provisions in constitutions worldwide on the UN Women intranet, at: <https://intra.unwomen.org/Policy-Programming/Human-Rights/Resources/Forms/Gender%20Equality%20%20Constitutions%20Worldwide.aspx>