



Empowered lives.
Resilient nations.

United Nations Development Programme



GLOBAL GOOD PRACTICES IN ADVANCING GENDER EQUALITY AND WOMEN'S EMPOWERMENT IN CONSTITUTIONS



*Empowered lives.
Resilient nations.*

GLOBAL GOOD PRACTICES IN ADVANCING GENDER EQUALITY AND WOMEN'S EMPOWERMENT IN CONSTITUTIONS

Lead Author: Christine Forster

Contributor: Suki Beavers

Copy Editor: Wendy Knerr

Design: Phoenix Design Aid

Valuable inputs were received from: Shelley Inglis, Maya Morsy and Tracy Veinings, the peer reviewers, as well as from Diego Antoni, Julie Ballington, Winnie Byanyima, Gillian Chalmers, Charles Chauvel, Randi Davis, Rushika DeSilva, Beatrice Duncan, Hassen Ebrahin, Diakhoumba Gassama, Jason Gluck, Azza Karam, Patrick Keuleers, Ciara Lee, Niall McCann, Celeste McKay, Janet Murdock, Jonathan Murphy, Christina Murray, Agustela Nini, Sonia Palmieri, Kirsten Peirens, Sarah Rattray, Noëlla Richard, Charmaine Rodrigues, Shireen Said, Joanne Sandler, Nika Saeedi, Radha Singla, Larry Taman and Lee Waldorf.

© 2016 United Nations Development Programme

All rights reserved.

The views expressed in this publication are those of the author(s) and do not necessarily represent those of the United Nations, including UNDP, or the UN Member States.



TABLE OF CONTENTS

Foreword	v
1 Introduction	1
A. Purpose of this policy guidance	1
B. Definition of a constitution	1
C. Role of constitutions in advancing gender equality	1
D. Role of UNDP in advancing gender equality in constitutions	2
E. Structure and content of policy guidance	2
2 Overarching considerations when drafting constitutions	4
A. Sex and gender	4
B. The importance of gender-inclusive language	4
C. Incorporating (or domesticating) international law and treaties	5
3 Provisions for equality and non-discrimination	7
A. Right to equality	7
<i>Right to formal equality</i>	7
<i>Right to substantive equality</i>	8
<i>Imposing positive obligations on the State</i>	8
B. Right to non-discrimination	9
<i>Includes direct and indirect discrimination</i>	9
<i>Includes multiple forms of discrimination</i>	9
<i>Prohibits discrimination by both public and private persons and institutions</i>	10
<i>Includes access to a remedy for a breach of non-discrimination</i>	11
4 Temporary special measures	13
5 Institutional protection of women's rights	15
A. National gender equality institution or NHRI with a strong mandate on gender equality	15
<i>Guarantee of independence</i>	16
<i>Guarantee of adequate and sustainable resources from a designated source</i>	17
<i>Appropriate rules and procedure for membership</i>	17
<i>Accountability mechanism</i>	18
B. Independence of the judiciary	19
<i>An independent process of appointment</i>	19
<i>Judicial functions vested exclusively in the judiciary</i>	19
<i>Constitutional statement of independence</i>	20
<i>Secure tenure of office for judges</i>	20



6 Gender equality in political rights	22
A. Right to vote and right to be elected	22
B. Equal participation in public life and political office	22
<i>Equal representation in national parliaments</i>	23
<i>Equal representation in public administration</i>	25
<i>Equal representation at the sub-national level</i>	26
<i>Equal representation in traditional and chiefly councils</i>	26
<i>Equal representation in the judiciary</i>	27
7 Gender equality in civil rights (religion and citizenship)	29
A. Right to freedom of religion	29
B. Right to citizenship	29
<i>Right to citizenship upon marriage</i>	30
<i>Right to retain citizenship upon divorce</i>	31
<i>Right to hold dual nationality</i>	32
<i>Right to transmit citizenship to children</i>	32
8 Gender equality in economic, social and cultural rights	34
A. Right to participate in cultural life	34
B. Right to education	36
C. Right to health	37
D. Right to work and to economic opportunities	38
E. Right to own, manage, enjoy and dispose of property and land	40
F. Right to inherit	41
G. Representation in the management of the environment and natural resources	42
H. Right to adequate housing	42
I. Right to a life free from violence	43
J. Right to equality in marriage and family relations	44
9 Gender Equality in Indigenous Rights	46
10 Conclusion	48
Bibliography	49
ANNEX I – List of constitutions and laws referred to	53

FOREWORD

Support for constitution-making is part of UNDP's mandate to strengthen effective and democratic governance. Often carrying greater legal and moral weight than other legislation, constitutions are where equality and rights are articulated and emboldened. As such, constitutions provide the strongest legal means to protect the fundamental rights and freedoms of women.

Recent global events have underscored the importance of constitutions in the edifice of inclusive democracies and supporting peace building, state building and peaceful political transitions. Countries throughout the world have grappled with how to frame the essential foundations of democratic institutions, values and processes, including checks and balances, the division of powers and individual guarantees. Constitution-building also provides an unparalleled opportunity to shine a spotlight on the importance of gender equality and to provide the legal framework required to ensure that it is enshrined as a fundamental aspect of sustainable human development – a mandate for public policy to proactively pursue the enactment and enjoyment of rights by women.

This publication is designed to support UNDP staff, partners and national stakeholders who wish to advocate for the inclusion of comprehensive constitutional provisions that protect and advance women's human rights and fundamental freedoms. It presents good practices for the advancement of gender equality in constitutional provisions through the articulation of women's political, civil, economic, social and cultural rights. Taking examples from existing constitutions throughout the world, it also shows how gender-inclusive language, temporary special measures, the incorporation and adaptation to the domestic context of human rights treaties and institutional measures can protect and advance women's rights.

Constitutions from all regions of the world have already taken important steps to advance women's rights. And yet, much more remains to be done to realize the rights of all women and men, girls and boys. We hope this publication will support all parties involved in constitution-making to advance gender equality and women's empowerment.



Magdy Martínez-Solimán

Assistant Administrator and Director
Bureau for Policy and Programme Support
United Nations Development Programme



1 INTRODUCTION

A. Purpose of this policy guidance

This policy guidance provides a range of good practice options for advancing gender equality in the content of constitutions. It contributes to, and complements, the capacity-building support that United Nations Development Programme (UNDP) staff in country and regional offices provide to a range of national partners and stakeholders for different aspects of constitution-making (which includes but is not limited to support for the drafting of new constitutions and the revision of existing constitutions). Other UNDP initiatives provide guidance and support for the process of constitution-making. This policy guidance is designed to build the capacity of UNDP staff to advocate for the advancement of gender equality and women's human rights in the content of constitutions. It is intended to provide technical support for a range of partners and national stakeholders involved in constitution-making, including; legislatures, constituent assemblies, constitutional review committees or commissions, governments, civil society organizations and legislative drafters. Through the inclusion of numerous examples from existing constitutions, it aims to foster UNDP entry points for pursuing South–South exchanges through which countries can benefit from, and utilize, the good practice constitutional provisions of similarly situated countries. It also aims to raise awareness of the importance of advancing gender equality in the content of constitutions. With this in mind, examples have been chosen based on the de jure constitutional formulation rather than the record of gender equality in the particular country.

B. Definition of a constitution

A constitution is the fundamental legal expression of the social contract between the State and citizens. It sets out the basic principles and laws on which the State is organized, establishes the major organs of government and defines their functions, powers and limits and the relationship between them. In most constitutions, this includes the establishment of three arms of the State: the executive (the part of government that has authority and responsibility for the daily administration of the State and the conduct of its foreign relations), the legislature (a deliberative assembly with the power to pass, amend and repeal laws and to accept, amend or reject budgets) and the judiciary (the system of courts that interprets and applies the law in the name of the State). A good practice approach to this arrangement will ensure that the three branches of the State have separate and independent powers and areas of responsibility and that there is a balance of power between the branches. Constitutions also define the relationship between the State and its citizens, often including in areas such as citizenship and electoral systems, and identify the basic rights of persons and groups — often in the form of a bill of rights. Approximately 160 countries have constitutions that are contained in a single written document. A few countries (New Zealand, Israel and the United Kingdom for example) do not have a single, formal written constitutional document. Instead, their constitutional framework consists of legislation enacted over time, political precedent and parliamentary procedure. In federal systems (where the power to govern is shared between national and provincial/state governments) there are typically two constitutional layers, with a national or federal constitution (applying to the whole country) and state constitutions (applying only to the state for which it is written).

C. Role of constitutions in advancing gender equality

In most countries the constitution is the supreme law, higher than all other domestic law. Not only are constitutions normally more legally powerful than ordinary legislation, but a constitution often acquires a moral



force that legislation rarely acquires.¹ A constitution, therefore, provides in most cases the strongest legal means of protecting and promoting gender equality, including through entrenching the fundamental rights and freedoms of women, including their right to equality and non-discrimination.² As rights are interdependent and indivisible, the constitutional protection of equality and non-discrimination is important for advancing gender equality through all other rights protected in the constitution.³ In older constitutions, gender equality rights are often substantively weak or their subsequent interpretation has resulted in them being given a secondary status when claims over competing rights have been made. However, the continuing discrimination against women that prevents them from realizing their full social, political and economic potential has increasingly led many countries around the world to adopt various constitutional provisions aimed at not only protecting women's rights but requiring governments to take positive action to secure equality for all women.

Constitutions provide gender equality advocates with powerful tools to challenge the historical and continuing experiences of inequality that women experience in the courts, workplaces, homes and in all aspects of their lives. Additionally, the inclusion of gender equality provisions throughout a constitution provides an important symbolic standard for the State and its representatives, for the public in general and for the work of civil society organizations.⁴ Given how difficult it is to amend constitutions (often, amendment requires a special majority in the national legislature, or a referendum process, or both), enshrining gender equality rights in constitutions can give those rights enduring status.

D. Role of UNDP in advancing gender equality in constitutions

UNDP provides support for constitution-making as part of its mandate to strengthen democratic governance and peacebuilding. Constitutions are central to democratic transitions, peacebuilding and state-building, and constitution-making has emerged as a central component of UNDP work in many regions of the world in response to a range of shifting social, political and cultural contexts.

Constitutions provide the legal basis for a new or evolving social contract between the State and citizens, particularly after conflict and during political transition. Since contemporary constitution-making good practice is characterized by consultative processes and a much greater focus on the incorporation of human rights principles, it provides an ideal entry point for UNDP staff to advance gender equality and women's empowerment. Advancing gender equality and women's empowerment through guarantees of equality, opportunities and rights in constitutional frameworks is critical to inclusive, equitable and sustainable development which leads to better development outcomes in all areas of UNDP work with partners.

E. Structure and content of policy guidance

This policy guidance outlines a range of good practice provisions, guarantees and measures drawn from existing constitutions worldwide, which could be incorporated into a constitution to advance gender equality and women's empowerment. All components of a constitution have gender equality dimensions, including all civil, political, economic, social and cultural rights and all aspects of governance. However, given the complexities and breadth of issues at stake in constitutions, it is not possible to provide extensive detail on the gender equality aspects of each

1 H. Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Law*, Cambridge University Press, New York, 2008: 13.

2 L. Chappell, *Gendering Government: Feminist Engagement with the State in Australia and Canada*, British Columbia Press, Vancouver, 2002: 126.

3 See United Nations, 'Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance', United Nations, New York, 2009: 4, which outlines the UN approach to strengthening the rule of law through constitutional reform.

4 Ibid.



relevant right and governance issue. In addition, as the research and analysis included is global in nature, it is not possible to highlight all of the provisions that respond to issues that are specific to a particular national context.⁵ As such, this policy guidance has focused on the key areas to advance gender equality in constitutions, as follows:

- Part 2 presents three overarching issues relevant to constitutions as a whole, namely (i) the importance of recognizing the concepts of both sex and gender, (ii) using gender-inclusive language throughout the constitution and (iii) using the constitution to incorporate international law into the domestic legal system;
- Parts 3 and 4 focus on and emphasize the importance of including comprehensive equality, non-discrimination and special measures provisions to advance gender equality;
- Part 5 overviews how to ensure constitutions provide institutional protection of women's rights;
- Part 6 overviews the inclusion of political rights that ensure equal representation in the institutions of governance at all levels including the national, sub-national, local and traditional;
- Part 7 overviews how to ensure that both the right to freedom of religion and the right to citizenship promote equality and the full participation of women in society;
- Part 8 identifies a range of economic, social and cultural rights which can be included in constitutions to advance gender equality; and
- Part 9 overviews how to ensure the rights of indigenous women are incorporated into constitutional provisions on indigenous peoples.

UNDP has an important role in building the capacity of staff and other stakeholders to advocate for the inclusion of provisions that will advance gender equality and women's human rights in the content of constitutions. Gender equality advocates and supporters must develop effective strategies both for coming to agreement on the content of constitutional provisions to advance gender equality, and for garnering the much needed broad based support and political commitment that are required in order to ensure they are integrated, adopted and implemented. These strategies must be elaborated and customized in response to the complex factors and stakeholders relevant in the national context.

UNDP also has an important role in supporting the inclusion of women in the constitution-making process. Women have the right to participate equally, and their doing so provides legitimacy and a sense of ownership and ensures that their perspectives are included in the constitution that is drafted or revised and eventually agreed.⁶ In addition, the more inclusive and democratic the constitutional process is, the more legitimacy and buy in it will have once enacted, which is critical to the implementation efforts that must follow. UNDP also has an important role in supporting the implementation of constitutions, once drafted, so that the gender equality provisions are applied in practice.

Although the process of constitution-making and the implementation of constitutions are beyond the scope of this paper, this policy guidance provides a complementary resource to UNDP initiatives which focus on other aspects of the development, adoption and implementation of constitutions, including the UNDP Guidance Note on Constitution-Making Support.⁷

⁵ For example, during the recent constitution-making process in Tunisia, men and women successfully advocated for provision 46, which explicitly commits the state to both protecting those women's rights that had been enshrined in the previous constitution (and in other legislation as well) and to work to strengthen and develop them.

⁶ H. Irving, 'Why Constitutions Matter to Women,' *Sydney Papers*, 2008, 20(2): 178.

⁷ See UNDP, 'Guidance Note on Constitution-making Support,' UNDP New York, [2015] http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/parliamentary_development/GuidanceNote_ConstitutionMakingSupport.html



2

OVERARCHING CONSIDERATIONS WHEN DRAFTING CONSTITUTIONS

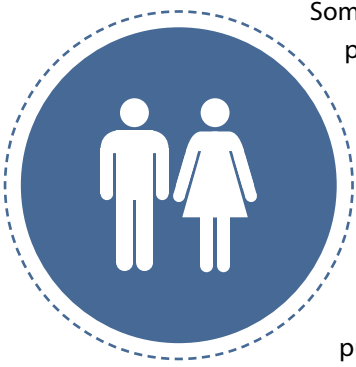
This chapter outlines 3 overarching issues to consider when drafting and revising constitutions. First, it is important to prohibit discrimination on the basis of both sex and gender, second it is important to incorporate gender-inclusive language in all parts of a constitution and third, it is important to ensure that the constitution expressly incorporates international treaties into domestic law.

A. Sex and gender

The terms ‘sex’ and ‘gender’ have different meanings, and it is important that a constitution recognizes both as sources of inequality and discrimination and provides remedies for both. ‘Sex’ refers to the biological and physiological characteristics that define men and women, (eg their different reproductive systems) and the terms ‘male’ and ‘female’ are sex categories. ‘Gender’ refers to the socially constructed roles, behaviors, activities and attributes that a given society attributes to men and women (eg. that women typically care for children), and the terms ‘masculine’ and ‘feminine’ are gender categories. While sex as male or female is a biological fact that is the same across cultures, gender roles in society differ across communities, classes and ethnicities and can change and evolve.

B. The importance of gender-inclusive language

The choice of language in the drafting of constitutions is important. Many of the world’s constitutions use masculine language in their reference to people, either individually or collectively, based on an assumption that masculine language in law is gender neutral in both its ‘real’ meaning and in practice. The rules of statutory construction often support this assumption, specifying that words ‘importing the masculine gender’ should be read to include the feminine.⁸ However, it is not merely by accident that ‘he’ instead of ‘she’ has been used to represent both women and men in legal instruments. Its historical use has coincided with and reflected the subordination of women and stands as a reminder of the historical and legal privileging of men.⁹



Some contemporary constitutions, in response to the legal significance and discriminatory potential of masculine words, have removed masculine and feminine references and usage, and replaced them with gender-neutral terms such as person or citizen.¹⁰ This recognizes that the supposed neutrality of the masculine pronoun has served as a cloak for the historical invisibility of women and reinforces stereotypes in which political and constitutional actors are presumed to be male. However, removing all references to both men and women may exclude women in much the same way as the traditional legal assumption that the masculine includes the feminine.¹¹ This is because the image of a man may persist because of stereotypical assumptions that public figures must be men.

8 See H. Irving and V. Hart, ‘Gender Equity in Constitution-Making’, UNDP Iraq, Baghdad, 2005: 26.

9 H. Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Law*, Cambridge University Press, New York, 2008: 43.

10 International law has also mirrored this trend towards gender-inclusive language. More recent treaties such as the *Convention on the Protection of Migrants and their Families* 2003 has embraced gender-inclusive language in stark contrast to the *United Declaration of Human Rights* 1948.

11 H. Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Law*, Cambridge University Press, New York, 2008: 44.



A constitution can more effectively promote gender equality if it expressly refers to both men and women, particularly when it deals with the public realm — for example, in relation to appointments to public positions — making it clear that either a woman or a man could hold the office, as in the examples of Cambodia and Iraq below. In the South African example below not only was a reference made to both women and men, but the standard gender order of ‘men and women’ was reversed so that it refers instead to ‘women and men,’ adding further emphasis to this important point.

EXAMPLES: GENDER-INCLUSIVE LANGUAGE

Constitution of the Tunisian Republic 2014

Article 21. All citizens, male and female alike, have equal rights and duties, and are equal before the law and without any discrimination.

Constitution of the Kingdom of Cambodia, 1993

Article 34. Khmer citizens of either sex shall enjoy the right to vote and to stand as candidates for the election.

Constitution of Iraq, 2005

Article 20. Iraqi citizens, men and women, shall have the right to participate in public affairs and to enjoy political rights including the right to vote, to elect and to run for office.

Constitution of the Republic of South Africa, 1996

s86(1). In its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its Members to be the President.

C. Incorporating (or domesticating) international law and treaties

International law and treaties become part of national legal systems in two ways. In some countries treaties are self-executing - which means they automatically become part of the domestic law upon ratification or accession (this is known as the ‘monist’ approach and is often found in civil law countries). In other countries incorporation is not automatic and must be achieved either through legislation or through the constitution (this is known as the ‘dualist’ approach and is more often found in common law countries). Even in monist countries, however, confusion often arises in the courts and elsewhere as to the legal status of treaties.

The incorporation of international law via treaties - such as the ‘Convention on the Elimination of All Forms of Discrimination against Women’ (CEDAW)¹² - to which a country becomes a party - into domestic legal systems is important for the achievement of gender equality through domestic courts. It enables international treaties to be directly applied in the courts both to enforce rights in areas where there is no domestic law, and to assist

¹² United Nations General Assembly, ‘Convention on the Elimination of All Forms of Discrimination against Women,’ GA Res. 34/180 (UN Doc A/34/46), United Nations, New York, 1979.



in interpreting existing law in line with the international standards. It is also important in shaping national policy and guiding the enactment of new laws and the amendment of existing law to accord with the gender equality standards in CEDAW and other treaties.

The constitution provides the strongest legal mechanism for translating a country's international obligations into domestic law in both civil and common law countries. An important and certain way of ensuring that international law, including treaties, is incorporated into national legal frameworks (both in civil and common law countries) is to include a provision in the constitution that clearly declares this to be the case, as illustrated in the example of Timor-Leste and Burundi below. In the example of Costa Rica and Colombia below, international treaties are given higher authority than domestic law.

EXAMPLES: DOMESTICATING INTERNATIONAL LAW

Constitution of the Democratic Republic of Timor-Leste, 2002

- s9(1).** The legal system of East Timor shall adopt the general or customary principles of international law.
- (2).** Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
- (3).** All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.

Constitution of the Republic of Burundi, 2004

Article 19. The rights and duties proclaimed and guaranteed, inter alia, in the Universal Declaration of Human Rights, the International Covenants on Human Rights, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on 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.

Constitution of the Republic of Costa Rica, 1949

Article 7. Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate.

Political Constitution of Colombia, 1991

Article 93. International treaties and conventions ratified by the Congress that recognize human rights ... have prevalence in the internal order.



PROVISIONS FOR EQUALITY AND NON-DISCRIMINATION

Equality and non-discrimination are core principles in international human rights law, and all member states of the United Nations have an obligation to incorporate them into their domestic legal systems.¹³ As well as meeting international obligations, including a right to equality and non-discrimination in the constitution as a core right provides powerful protection of women's human rights. As all rights are fundamentally indivisible, interrelated and interdependent, well-drafted provisions for equality and non-discrimination provide a high standard for other fundamental rights and freedoms to be measured against and with which all domestic laws must comply.¹⁴ An additional and important protection is to make equality and non-discrimination an absolute right (which means that it cannot be limited in any circumstances, such as during a conflict) or, if not an absolute right, a non-derogable right (which means that it can be limited but not suspended).

A. Right to equality

A constitutional right to equality is often characterized as a right to concrete outcomes such as resources, services or opportunity which, if not provided, can then be demanded from the government.¹⁵ A good practice constitutional right to equality includes: 1) a right to formal equality; 2) a right to substantive equality; and 3) a positive duty on the State to advance and realize substantive equality. These components are described more fully below.

Right to formal equality

Formal equality treats women and men as alike and deserving of equal and similar treatment. An example of formal equality is providing the right to vote to both men and women. It is important to constitutionally entrench formal equality, particularly in countries which are in a process of democratic transition, because it makes it explicit that men and women have equal rights.

The phrase 'equality before the law' and/or 'the equal protection of the law' often appears in constitutions, and can be a useful provision. It does not, however, require the law itself to promote equality, and it does not require that the outcome of the application of the law should lead to substantive equality.¹⁶ It merely indicates that women and men will be treated in the same way in relation to any particular law.

13 Article 2(a) of CEDAW requires States parties 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 practical realisation of this principle.' Article 2(b) of CEDAW requires States parties to adopt 'appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.'

14 See, for example, the recent case in Botswana where the High Court at Gaborone overturned a customary law which prevented women from inheriting the family home on the basis that it contravened section 3 of the Constitution of Botswana. This is despite the fact that the provision does not specifically guarantee equality.

15 See H. Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Law*, Cambridge University Press, New York, 2008: 3.

16 For example, in the case of *Geduldig v. Aiello* 417 US 484 (1974) the US Supreme Court upheld a state employment disability insurance programme that reimbursed individual employees' wages lost as a result of undergoing medical procedures, but excluded procedures incurred during a normal pregnancy. The Court reasoned that there was no (formal) gender discrimination in the pregnancy exclusion because the law applied equally to men and women.



Right to substantive equality

A good practice provision for equality must extend beyond a right to formal equality to a right to substantive equality.¹⁷ This can be defined as a right to the practical realization of equality. The concept of substantive equality recognizes that formal equality can produce unequal results where similar treatment is offered to persons who are not similarly situated, and that more is required to achieve the practical realization of equality. For example, an equal right to stand for parliament is an important formal equality measure but unlikely of itself to result in equal numbers of women and men in parliament because of the range of obstacles preventing women from taking public office. In fact, despite such rights existing for many years in many countries, the number of women in parliament is only around 22 percent globally.¹⁸

Often, constitutions will guarantee a right to substantive equality through the use of language such as ‘equal benefits or results,’ ‘equal opportunities,’ ‘equal access’ or ‘equality in practice,’ rather than by explicitly referring to ‘substantive equality.’

Imposing positive obligations on the State

A good practice equality provision, as well as extending a right to women and girls to formal and substantive equality, is to place a positive obligation on the State to achieve substantive equality. Placing such a duty on the State recognizes that structural change requires not just individuals seeking to enforce their constitutional rights but also requires concrete and active steps by the State to enact and implement legislation, to develop and implement policies, to develop and execute national plans and to launch education initiatives and media campaigns.

EXAMPLES: EQUALITY PROVISIONS

Constitution of Turkey, 1986

Article 10(2). Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice.

STRENGTHS

- The article includes a formal equality guarantee.
- The article includes a guarantee of substantive equality through the use of the words ‘exists in practice.’
- The article places a positive obligation on the State to achieve equality rather than merely stating that women have a right to equality.

¹⁷ The CEDAW Committee has explained that equality in the Convention refers to both formal equality and substantive equality, and has recommended that States parties implement a comprehensive law reflecting substantive equality of women with men in both public and private spheres of life’ Concluding Comments of the CEDAW Committee: Malaysia (2006) 35th Session: para [8] (UN Doc CEDAW/C/MYS/CO/5). See also Serbia (2007) 38th Session: para [16] (UN Doc CEDAW/C/SCG/CO/1); Peru (2007) 37th Session: para [13] (UN Doc CEDAW/C/PER/CO/6); Saudi Arabia (2008) 40th Session: para [14] (UN Doc CEDAW/C/SAU/CO/2).

¹⁸ <http://www.ipu.org/wmn-e/world.htm>



Contd.

Constitution of the Republic of South Africa, 1996

s9(1). Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2). Equality includes the full and equal enjoyment of all rights and freedoms.

STRENGTHS

- The section includes a formal equality guarantee.
- The section includes a guarantee of substantive equality through the words ‘equal benefit of the law’ and ‘full and equal enjoyment of all rights and freedoms.’

B. Right to non-discrimination

A constitutional right to non-discrimination is often characterized as a ‘negative’ right, since it typically takes the form of prohibiting gender discrimination and is often included as a right not to be discriminated against. Good practice features of a constitutional right to non-discrimination include: 1) the express extension of the meaning of discrimination to direct and indirect discrimination; 2) recognition of multiple different forms of discrimination; 3) extension of the prohibition of discrimination to both private and public persons and institutions; and 4) a complaints process with remedies. These components are described more fully below.

Includes direct and indirect discrimination

Direct discrimination occurs when a difference in law, policy or programme is directly based on sex, gender or any of the grounds of discrimination prohibited by the law. A law that provides unequal or no inheritance rights to women and girls is an example of direct discrimination. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities¹⁹ such as a minimum height requirement of 6 feet or requiring that all employees are available to work at night.²⁰ The concept of indirect discrimination recognizes that discrimination does not always appear in obvious or direct ways but may be disguised within laws, policies and practices which appear to apply to all persons equally but in practice do not.²¹

Includes multiple forms of discrimination

Women experience discrimination because of their sex and gender, but many women also face discrimination because of other unique aspects of their social identity — for example, their race, disability, marital status, HIV or health status, religion or sexual orientation. When sex and gender intersect with other forms of discrimination, the discrimination may be heightened, causing negative and cumulative effects and sometimes

19 See the UN Committee on Economic, Social and Cultural Rights, ‘General Comment 16’ (2005) 34th Session: paras [13, 14] (UN Doc E/C.12/2005/4).

20 See J. Hersch, ‘Employment Discrimination, Economics and the Law’ in K. Moe (ed.), *Women, Family and Work: Writings on the Economics of Gender*, Blackwell Publishing, Boston, 2003: 228.

21 W. Vanderhule, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, Antwerp, 2005: 35.



resulting in new or magnified forms of discrimination.²² It is important, therefore, that a constitutional right to non-discrimination includes a prohibition of not only sex- and gender-based discrimination but also ‘other multiple forms of discrimination that women may face.’²³ Additionally, to ensure protection from discrimination for persons whose sex and/or gender falls outside the categories of male and female (such as transgender people) the term ‘gender identity’ has recently been adopted as a good practice additional category in some constitutions — for example, in Bolivia.²⁴ Finally, the inclusion of an ‘other status’ provision, or of a non-exhaustive list of grounds of prohibited discrimination, which invite the recognition of further grounds of discrimination not explicitly named, are important to ensure that hidden or underlying grounds of discrimination can be recognized and addressed as required.²⁵

Prohibits discrimination by both public and private persons and institutions

To effectively combat discrimination in all areas of women’s lives, the regulation of both public and private persons and institutions is required.²⁶ It is important, therefore, that a prohibition on discrimination applies to state representatives and also to any person, organization or enterprise.²⁷

EXAMPLES: NON-DISCRIMINATION PROVISIONS

Constitution of the Republic of Serbia, 2006

Article 21. 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.

STRENGTHS

- The article includes direct and indirect discrimination.
- The article extends to a range of intersections of different forms of discrimination.
- The inclusion of ‘on any grounds’ enables further intersections of discrimination to be added.

22 J. Reynoso, ‘Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins,’ *Harvard Latino Law Review*, 2004, 7: 63; T. Grillo, ‘Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House,’ *Berkeley Women’s Law Journal*, 1995(10):16; A. Parashar, ‘Essentialism or Pluralism: the Future of Legal Feminism,’ *Canadian Journal of Women and the Law*, 1993, 6: 328.

23 Concluding Comments of the CEDAW Committee: Belarus (2011) 48th Session: para [142] (UN Doc CEDAW/C/BLR/CO/7). See also Singapore (2011) 49th Session: para [12] (UN Doc CEDAW/C/SGP/CO/4C); Romania (2006) 35th Session: para [27] (UN Doc CEDAW/C/ROM/CO/6).

24 Constitution of Bolivia 2009, Article 14 II. The Rights of Transgender Persons Bill, 2014 (India) was recently passed by the Rajya Sabha (Upper House) providing legal protection for transgender persons throughout India.

25 This type of provision has sometimes been construed to confer a measure of protection for LGBTI women, who suffer some of the worst marginalisation and violence around the world, in cases where they are not – as they should be – expressly guaranteed a constitutional right to freedom from discrimination. See eg G Poore, ‘Sri Lanka Government Says LGBT Rights Are Constitutionally Protected,’ <http://iglhrc.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>

26 A. Clapham, *Human Rights in the Private Sphere*, Oxford University Press, Oxford, 1993: 100.

27 Article 2(d) of CEDAW explicitly obligates States parties to themselves refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation.



Contd.

Constitution of Kenya, 2010

s27(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)**.

STRENGTHS

- The section includes direct and indirect discrimination.
- The section extends to a range of intersections of different forms of discrimination.
- The inclusion of 'on any ground' enables further intersections of discrimination to be added.
- The section binds both the State and individuals.

Constitution of Bolivia, 2009

Article 14. II. The State prohibits and punishes all forms of discrimination based on sex, colour, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religion, ideology, political or philosophical affiliation, marital status, economic or social, occupation, education level, disability, pregnancy, or that have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal rights of all people.

STRENGTHS

- The section extends to a broad range of intersections of discrimination including gender identity.
- The requirement for a sanction strengthens the prohibition on discrimination.

Includes access to a remedy for a breach of non-discrimination

A constitutional prohibition on discrimination will have limited effect if there is no means for those who have had their rights breached to lodge a complaint and seek a remedy. A complaints process, which includes a range of penalties and enforcement measures, can also play an important role in deterring both public and private persons and institutions from future acts of discrimination, either by requiring them to pay compensation or through orders preventing them from committing future breaches. Although the detail of a complaints process may be left to other legislation, it is important that the constitution provides authority for its establishment.

A good practice complaints process requires the incorporation of a number of key components as follows:

- it should be facilitated by an independent body;
- it should be adequately funded;
- it should include staff with specific gender equality expertise;
- the complaints process should be free of charge to complainants;
- the complaints process should extend to breaches by both public and private persons and institutions;



3 PROVISIONS FOR EQUALITY AND NON-DISCRIMINATION

- standing should be open, enabling a complaint to be lodged by someone that is not personally harmed by the breaches;
- there should be a clearly set out procedure for establishing liability;
- the complaints body should have the power to award appropriate and adequate remedies, including monetary penalties and compensation;
- the complaints body should have the power to recommend prosecution for abuses to the appropriate entity;
- information about victims should be confidential and retaliation prohibited;
- the complaints body should be empowered to accept requests for an opinion from a person or institution that wants advice on whether their action will or has caused a breach; and
- an effective appeals process should be incorporated.²⁸

For easy reference, the key components of comprehensive equality and non-discrimination constitutional provisions are included in the summary checklist below.

CHECKLIST FOR EQUALITY AND NON-DISCRIMINATION PROVISIONS

- Right to formal equality
- Right to substantive equality
- Positive obligation on the state to achieve substantive equality
- Right to non-discrimination
- Non-discrimination includes direct and indirect discrimination
- Discrimination includes multiple forms of discrimination
- Discrimination by public and private actors prohibited
- Remedy provided for victims of discrimination

²⁸ See C. Forster and V. Jivan, 'Gender Equality Laws: Global Good Practice and a Review of Five Southeast Asian Countries,' UNIFEM, Bangkok, 2009: 133, http://cedaw-seasia.org/docs/Aw_GEL_incover050609Feb10.pdf



4

TEMPORARY SPECIAL MEASURES

‘Temporary special measures’ (also known as affirmative action) are proactive measures that can be used to achieve substantive equality.²⁹ They are defined in the CEDAW Committee’s General Recommendation 5 as ‘positive action, preferential treatment or quota systems to advance women’s integration into education, into the economy, politics and employment.’ Temporary special measures, such as minimum quotas in the composition of decision-making bodies, are often used to advance gender equality in public representation (see Chapter 4 on political rights for more on this topic in the context of women’s political representation), as well as in other areas of women’s lives such as education, employment and health. Temporary special measures recognize that guaranteeing formal equality is not sufficient to achieve women’s substantive equality with men, and that the application of temporary special measures can be a crucial short-term strategy to overcome the effect of historical discrimination and immediately accelerate the achievement of substantive equality for women.³⁰

A general constitutional authority mandating the use of temporary special measures in all areas of women’s lives is an important good practice measure for the advancement of gender equality.³¹ Good practice temporary special measures provisions should include: (i) a general constitutional authority for their use; (ii) an obligation on public and private actors to introduce temporary special measures when inequalities are identified; and (iii) an explicit statement that temporary special measures are not in themselves discrimination, in order to prevent any challenge to the use of measures to redress historical disadvantage faced by women on the basis that they disadvantage men.

Temporary special measures can be differentiated from ‘special measures’. Special measures respond to biological differences between women and men, such as maternity leave for birthing, which cannot be temporary as they are designed to deal with an ongoing and immutable need of women.

EXAMPLES: TEMPORARY SPECIAL MEASURES

Constitution of the Federal Republic of Ethiopia, 1994

Article 35(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.

STRENGTHS

- The article provides a general authorization of special measures in all areas of women’s lives.
- The article enables special measures to be adopted by both public and private institutions.

29 For more on temporary special measures please refer to Asian Development Bank, ‘Guidance Note: Gender and Law – Temporary Special Measures to Promote Gender Equality’ 2012 . <http://www.adb.org/documents/guidance-note-gender-and-law-temporary-special-measures-promote-gender-equality>.

30 Concluding Comments of the CEDAW Committee: Nepal (2011) 49th Session: para [15] (UN Doc CEDAW/C/NPL/CO/4-5). See also Albania (2011) 49th Session: para [22] (UN Doc CEDAW/C/ALB/CO/3; Kyrgyzstan (2008) 42th Session: para [31] (UN Doc CEDAW/C/KGZ/CO/3 CEDAW/C/SWE/CO/7); Belize (2007) 39th Session: para [39] (UN Doc CEDAW/C/BLZ/CO/4).

31 Concluding Comments of the CEDAW Committee: Sierra Leone (2007) 38th Session: para [19] (UN Doc CEDAW/C/SLE/CO/5; Bolivia (2008) 40th Session: para [30] (UN Doc CEDAW/C/BOL/CO/4).



Contd.

Constitution of Namibia, 2010

Article 23(2). Nothing contained in Article 10 [on non-discrimination] 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 past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

(3). In the enactment of legislation and the application of any policies and practices contemplated by Paragraph (2), 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.

STRENGTHS

- The article authorizes special measures in a comprehensive range of situations and makes particular note of the historical origins of discrimination.

Constitution of Sudan, 2005

s32(2). The State shall promote woman's rights through affirmative action.

STRENGTHS

- The section provides a general authorization for the use of affirmative action (special measures). It places a positive duty on the state to use affirmative action.

For easy reference, the key components of comprehensive constitutional provisions on temporary special measures are included in the summary checklist below.

CHECKLIST FOR TEMPORARY SPECIAL MEASURES PROVISIONS



- General constitutional authority for TSMs
- Identification of TSMs that could be used, including; quotas, preferential treatment, targeted recruitment etc.
- Authority to use TSMs in all areas of women and girls lives
- Obligation to introduce TSM whenever inequalities identified
- Obligation on both public and private actors to implement TSMs
- Statement that TSMs are not discriminatory



5

INSTITUTIONAL PROTECTION OF WOMEN'S RIGHTS

A. National gender equality institution or NHRI with a strong mandate on gender equality

A national gender equality institution is an independent institution with a constitutional and/or legislative mandate to protect and promote gender equality. It provides a critical link between international obligations and domestic implementation and between state responsibilities and the work of civil society organizations. While the strongest form of institution would have an exclusive mandate in the area of gender equality, it could also take the form of a broader national human rights institution (NHRI)³² or equality institution with a strong mandate in relation to gender equality. Such an institution might, as one of its responsibilities, hear discrimination complaints as discussed previously. Entrenching such an institution in the constitution usually means both that it will be difficult to dilute its mandates or powers, and that it will be seen as one of the core institutions of the nation.

To date, only a few countries have constitutionally established a national gender equality institution. Examples include Rwanda and Zimbabwe. A national gender equality institution is distinct from a government department, such as a Ministry of Women's Affairs (or national gender machinery) which is not independent. As with NHRIs, a gender equality institution provides a critical bridge between rights holders (women and girls) and duty bearers (the State), linking the responsibilities of the State to the rights of citizens. It can also connect national actors to the regional and international human rights systems, in particular CEDAW.

It is important that such a gender equality institution or NHRI with a gender equality mandate be established through the constitution to give it appropriate legal and symbolic standing in relation to both the State and society. The presence of a gender equality institution established by the constitution (which itself will likely have been approved by the nation's legislature, or the people at referendum, or both) improves visibility and transparency. Ideally, the constitutional text will set out what that institution is meant to achieve, as well as what powers it has, which will enable the public to measure the institution's performance against defined expectations. Constitutional backing also provides an assurance that the institution cannot easily be dismantled during a time of reform, political change, instability, or economic downturn.³³

The Paris Principles, endorsed by a UN General Assembly Resolution in 1993, establish good practice requirements for national human rights institutions to engender legitimacy and credibility and are broadly accepted as the international standard or test of an institution's independence and effectiveness. These Principles also provide the basic formula for good practice components of a national gender equality institution.³⁴ Specifically, this includes:

32 For more on NHRIs refer to UNDP-OHCHR 'Toolkit for Collaboration with National Human Rights Institutions' 2010 <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/IP/UNDP-UHCHR-Toolkit-LR.pdf>

33 Statement by the CEDAW Committee on its Relations with National Human Rights Institutions, 2008, 40th Session: para [3] (UN Doc E/CN.6/2008/CRP.1).

34 United Nations, 'Principles Relating to the Status of National Institutions,' General Assembly Resolution 48/134, United Nations, New York, 20 December 1993, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>



Guarantee of independence

A constitutional guarantee of independence, in particular its autonomy from other state entities, is important to enable it to provide an effective bridge between the State and civil society. Independence can be protected through a range of safeguards, including by providing instruction on appointments and dismissal procedures, requiring other organs of government to respect the independence, and reporting requirements.

EXAMPLE: GUARANTEE OF INDEPENDENCE

Constitution of the Republic of Rwanda, 2003

Article 185. The Gender Monitoring Office shall be an independent public institution.

Constitution of the Republic of South Africa, 1996

Article 181. Establishment and governing principles

1. The following state institutions strengthen constitutional democracy in the Republic:

- a. The Public Protector.
- b. The South African Human Rights Commission.
- c. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- d. The Commission for Gender Equality.
- e. The Auditor-General.
- f. The Electoral Commission.

2. These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

4. No person or organ of state may interfere with the functioning of these institutions.

5. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Identification of the duties and powers of the institution

The constitution should identify the main duties and powers of the institution required for it to fulfil its mandate although the detailed provisions describing the exact extent of the institution's powers of investigation, mediation or enforcement may be left to legislation. These duties and powers could include:

- conducting inquiries on gender equality issues through its own initiative (i.e. without having to rely on a complaint from the public);
- advising government, parliament and other public institutions on gender equality policy;
- drafting, reviewing and monitoring legislation to ensure it is gender-sensitive and in accord with international norms and standards;



- submitting recommendations to government on how to fulfil its obligations under CEDAW and other ratified treaties;
- investigating individual cases of breaches of gender equality rights and securing remedies for victims, including the authority to recommend prosecution for abuses to the appropriate entity;
- informing women of their rights;
- encouraging state institutions and civil society to understand and respect women's rights;
- running public education and awareness sessions;
- developing educational curricula, and professional training for police, the judiciary and other service providers; and
- producing and disseminating reports on gender equality.

EXAMPLE: DUTIES AND POWERS OF THE INSTITUTION

Constitution of Zimbabwe Amendment (No 20), 2013

s246. The Zimbabwe Gender Commission has the following functions:

- to monitor issues concerning gender equality to ensure gender equality as provided in this Constitution;
- to investigate possible violations of rights relating to gender;
- to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;
- to conduct research into issues relating to gender and social justice and to recommend changes to laws and practices which lead to discrimination based on gender;
- to advise public and private institutions on steps to be taken to ensure gender equality;
- to recommend affirmative action programmes to achieve gender equality;
- to recommend prosecution for criminal violation of rights relating to gender;
- to secure appropriate redress where rights relating to gender have been violated; and
- to do everything necessary to promote gender equality.

Guarantee of adequate and sustainable resources from a designated source

The constitution should state explicitly that adequate funding must be provided to ensure that the gender equality institution can carry out its functions and have its own staff and premises. This will ensure independence from the government and guard against the possibility that a body which makes adverse findings to the government will have its funding cut as a response. The funding should be secure so that it cannot be diminished arbitrarily during the period for which it was approved.

Appropriate rules and procedure for membership

The constitution should also include provisions setting out minimum standards for membership of the body although these provisions may be elaborated in subsequent legislation. Appropriate standards for membership include: 1) requiring broad membership from civil society and government; 2) ensuring that members have experience and knowledge of gender equality; (3) requiring that appointment and removal procedures do not undermine the independence of members; 4) ensuring that members are adequately paid; 5) specifying a term of office that is long enough to support independence and effectiveness; 6) providing



immunity for official acts taken in good faith so that independence is maintained; and 7) ensuring security of tenure by requiring serious misconduct, inappropriate conduct, conflict of interest or incapacity to be established before members can be dismissed.

EXAMPLE: APPROPRIATE RULES FOR MEMBERSHIP

Constitution of Zimbabwe Amendment (No 20), 2013

Section 245(2). Members of the Zimbabwe Gender Commission must be chosen for their integrity and their knowledge and understanding of gender issues in social, cultural, economic and political spheres and the genders must be equally represented on the Commission.

STRENGTHS

- The section provides that all members must have knowledge and understanding of gender issues
- Members of one gender cannot dominate the membership of the Commission

Accountability mechanism

To ensure that the gender equality institution performs its duties and obligations with the intended results, a monitoring mechanism should be adopted. Reporting is an appropriate monitoring mechanism for a gender equality institution or NHRI. Although the detail can be left to legislation, a constitution can include guidance on the essential components of the process, such as: 1) reporting should be mandatory and regular (eg. annual); 2) the report should review in detail the measures adopted to implement gender equality; 3) the report should demonstrate the progress made towards the objectives of each adopted measure and identify obstacles to the full achievement of the objectives; and 4) a clear compulsory follow-up procedure should be established by which the government responds to the report. Reporting and written follow-up by government should be transparent and public, ideally involving the legislature.

EXAMPLE: ACCOUNTABILITY MECHANISM

Constitution of the Republic of Rwanda, 2003

Article 185(3). The Gender Monitoring Office shall submit each year its programme and activity report to the Cabinet and submit copies thereof to other State organs determined by law.

STRENGTHS

- A reporting system is legislated in the constitution requiring an annual report of all activities which must be submitted to the Cabinet and to other state organs.



B. Independence of the judiciary

The independence of the judiciary is important to the achievement of gender equality since it is the role of the courts to protect the rights of women contained in the constitution, to review legislation for its compliance with the constitution and international law, and in some instances to hold the State accountable for its actions in relation to the functions assigned to it by the constitution and other legislation. Without an accessible and fair judiciary, women will not be able to enforce their rights under the constitution. An independent judiciary is characterized by the following good practice components.³⁵



An independent process of appointment

The process of appointing judges is a key factor in guaranteeing the independence of the judiciary. Appointments can be made by politically neutral bodies who consider the training and suitability of candidates for judicial office, or by the government, in some cases with legislative approval. It may also be useful to have appointments of judges made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.

EXAMPLE: INDEPENDENT PROCESS OF APPOINTMENT

Constitution of the Republic of Namibia, 2010

Article 82(1). All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission.

Judicial functions vested exclusively in the judiciary

The independence of the judiciary is weakened if the government can give judicial functions to non-judicial bodies. When this happens, the government can avoid the judiciary by giving crucial matters over to other bodies more likely to follow the government's wishes. It is, therefore, important that judicial decisions are left exclusively to judicial bodies.

EXAMPLE: JUDICIAL FUNCTIONS VESTED EXCLUSIVELY IN THE JUDICIARY

Constitution of Ghana, 1992

s135(3). The judicial power of Ghana shall be vested in the judiciary, accordingly neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power.

³⁵ L. Madhuku, 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa,' *Journal of African Law*, 2002, 46(2): 232–245.



Constitutional statement of independence

A clear statement in a constitution stating that the judiciary is independent has both legal and political value. In legal terms, it allows redress to be sought in the courts in the event of a law or action undermining the independence of the judiciary. In political terms, it enables members of the public to criticize any tendencies by the government to interfere with the work of the judiciary. The failure by a government of the day to promote judicial independence is a legitimate basis for advocating for its removal at the next election.

EXAMPLE: CONSTITUTIONAL STATEMENT OF INDEPENDENCE

Constitution of the Kingdom of Swaziland, 2005

s62(1). The independence of the judiciary as enshrined in this Constitution or any other law shall be guaranteed by the State. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

(2). The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

Secure tenure of office for judges

Security of tenure for judges is a key factor in determining whether or not the judiciary is independent. If judges can easily be removed from office, there can be no independence of the judiciary. A protection against improper removals of judges from office is to give the power of removal to an independent and impartial tribunal. The grounds for removal should be limited to either inability to perform judicial duties or serious misconduct.

EXAMPLE: SECURE TENURE OF OFFICE FOR JUDGES

Constitution of the Republic of Maldives, 2008

s154(a). A Judge shall not be removed from office during good behaviour and compliance with judicial ethics.

(b) A Judge may be removed from office only if the Judicial Service Commission finds that the person is grossly incompetent, or that the Judge is guilty of gross misconduct, and submits to the People's Majlis a resolution supporting the removal of the Judge, which is passed by a two thirds majority of the members of the People's Majlis present and voting.



For easy reference, the key components of comprehensive constitutional provisions on institutional protections of women's rights are included in the summary checklist below.

CHECKLIST FOR INSTITUTIONAL PROTECTION OF WOMEN'S RIGHTS

- Creation of a national gender equality institution or NHRI
- Guarantee of GE institution/NHRI's independence
- Identification of duties and powers of GE institution/NHRI
- Guarantee of adequate funds for GE institution/NHRI
- Appropriate rules and procedures for membership
- Accountability mechanism eg reporting
- Creation of an independent judiciary
- Independent process of judicial appointment
- Judicial functions vested exclusively in the judiciary
- Statement of independence of the judiciary
- Secure tenure of office for judges

6

GENDER EQUALITY IN POLITICAL RIGHTS

Political rights are enshrined in the Universal Declaration of Human Rights (UDHR), in the International Covenant on Civil and Political Rights, 1966 (ICCPR) and in Article 7 of CEDAW which requires equality between men and women in all political rights. All member states of the United Nations have an obligation to incorporate these rights into their domestic legal systems.

A. Right to vote and right to be elected

Article 7 of CEDAW requires States Parties to ‘ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies’. A constitutional guarantee of the equal right to vote and the equal right to be elected to public office at any level including national, provincial, local and traditional/customary councils is an important formal equality measure. It is important symbolically that both rights are constitutionally protected, and also important in practice, since they provide a concrete foundation for women to contribute to the governance of the nation.³⁶ Most countries do guarantee universal suffrage, and many countries guarantee an equal right to stand for public office.

Some constitutions, however, limit the right to stand for office to those who have attained a certain educational attainment, which may have an impact on women (and poor people) in countries where there is limited and unequal access to education.



B. Equal participation in public life and political office

Constitutions have an important role in promoting women’s participation in public office. Article 7 of CEDAW requires States Parties to ensure to women, on equal terms with men, the right: ‘to hold public office and perform all public functions at all levels of government’. Women are poorly represented in political decision-making bodies the world over despite formal equal eligibility in most countries.³⁷ The constitution can include special procedures, institutional arrangements and legislative and administrative measures that require the participation of women. Temporary special measures such as gender quotas (discussed in Chapter 4) are one example of a measure that has proven successful at furthering women’s participation in public life and political office. Without a gender balance in public office, decisions are unlikely to represent the diversity of women and girls. There has been global agreement that at a minimum, women should hold 30% of decision-making positions, which was raised to ‘gender balance’ in the Beijing Platform for Action.³⁸

36 See H. Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Law*, Cambridge University Press, New York, 2008: 114.

37 Latest figures (April 2015) show that 22.1.8% of national parliamentary seats are held by women worldwide. Rwanda continues to have the highest percentage of parliamentary seats held by women (63.8%). The top ten countries with the highest proportion of women include countries from Africa, Latin America and the Caribbean and Europe. Regionally, Nordic countries have the highest representation of women, and Arab countries have the lowest. See Women in National Parliaments, <http://www.ipu.org/wmn-e/world.htm>

38 Economic and Social Council Resolution E/RES/1990/15 (24 May 1990) ‘Recommendation VI: [2nd para] Governments, political parties, trade unions and professional and other representative groups should each aim at targets to increase the proportion of women in leadership positions to at least 30 % by 1995, with a view to achieving equal representation between women and men by the year 2000, and should institute recruitment and training programmes to prepare women for those positions.’



Equal representation in national parliaments

Constitutions typically include only the basic requirements for parliamentary electoral procedures, leaving the detail for electoral legislation. This may be advantageous for gender equality in some instances, as gender equality measures can be much more easily inserted into legislation at a later date, in contrast to a constitution which is difficult to amend. However, if a new constitution is being drafted or an existing constitution revised, this can be an important opportunity to advocate for the inclusion of temporary special measures to promote women's representation in parliament.³⁹ There are two temporary special measures that have been used globally to increase women's representation in parliament - reserved seat quotas and candidate quotas.⁴⁰

Reserved seat quotas mean that a certain number of parliamentary seats are reserved exclusively for women. The reservation of a minimum of 30% of seats for women is considered necessary to ensure sufficient numbers to result in change. The following are models of reserved seat quotas.

- Direct election - where everyone (women and men) in the electorate in which the seats are reserved vote to elect the women to the reserved seats, as in the example of Bougainville below.
- Indirect election - where elected bodies or the legislature elect the women to the reserved seats, as in the example of Rwanda below.
- Political party selection - where the seats reserved for women are allocated to political parties based on the number of votes or seats won by the party in the election, as in the example of Pakistan below. The parties are responsible for nominating the women to fill the seats they have been allocated in accord with their own selection process.
- Direct appointment - where the Executive or a member of the Executive (for example the Prime Minister) or another body appoints women directly to reserved seats without any election process, as in the example of Swaziland below. Swaziland provides an example of quota used within an absolute monarchy, illustrating that provisions can be incorporated into a constitution to advance women's rights even in the absence of democracy.



EXAMPLE: INDIRECT ELECTION

Constitution of the Republic of Rwanda, 2003

Article 76. The Chamber of deputies shall be composed of 80 members as follows:

(2). Twenty four (24) women; that is: two from each Province and the City of Kigali. These shall be elected by a joint assembly composed of members of the respective District, Municipality, Town or Kigali City Councils and members of the Executive Committees of women's organizations at the Province, Kigali City, District, Municipalities, Towns and Sector levels.

³⁹ For more specific information on electoral systems, temporary special measures and how to apply them see: United Nations Focal Point for Electoral Assistance DPA, 'UN support to electoral system design and reform', Policy Directive, 16 September 2013 and United Nations Focal Point for Electoral Assistance DPA, 'Promoting women's electoral and political participation through UN electoral assistance' Policy Directive, 24 December 2013 and www.quotaproject.org

⁴⁰ See J Ballington, 'Empowering Women for Stronger Political Parties. A Good Practices Guide to Promote Women's Political Participation' New York, UNDP & National Democratic Institute for International Affairs, 2001 & L Clarke & C Rodrigues, 'Utilising Temporary Special Measures to Promote Gender Balance in Pacific Legislatures (United Nations Development Programme Pacific Centre & Pacific Islands Forum Secretariat: Suva, 2009) for a more detailed overview of these measures.



EXAMPLE: DIRECT ELECTION

The Constitution of the Autonomous Region of Bougainville, 2004

s55(2)(b)(ii). The House of Representatives consists of three women members, each representing a constituency for a separate Region (North, Central and South), elected to represent the interests of the women of the Region.

EXAMPLE: SELECTION BY POLITICAL PARTIES

Constitution of the Islamic Republic of Pakistan, 1973

s51(6). For the purpose of election to the National Assembly (d), the (60) seats reserved for women which are allocated to a Province under clause (3) shall be elected in accordance with law through a proportional representation system of political parties' list of candidates on the basis of the total number of general seats secured by each political party in the National Assembly.

Constitution of Burundi, 2005

Article 129. The Government is open to all the ethnic components. It includes at most 60% of Hutu Ministers and Vice-Ministers and at most 40% of Tutsi Ministers and Vice-Ministers. A minimum of 30% of women is assured. The members come from the different political parties that have received more than one-twentieth of the votes and which so desire. These parties have the right to a percentage, rounded to the inferior number, of the total number of Ministries at least equal to that of the seats that they occupy at the National Assembly.

EXAMPLE: APPOINTMENT

Constitution of Swaziland, 2005

s94(1). The Senate shall consist of not more than thirty-one members (in this Constitution referred to as 'Senators') who shall be elected or appointed in accordance with this section.

(3). Twenty Senators, at least eight of whom shall be female, shall be appointed by the King acting in his discretion after consultation with such bodies as the King may deem appropriate.

STRENGTHS

- All 4 examples reserve a specified number of seats for women, which is a positive measure for achieving substantive equality.

Candidate quotas mean that political parties have a minimum percentage of women candidates. For example, the Australian Labor party has voluntarily adopted a requirement to its party constitution that at least 40% of candidates must be women.⁴¹ This approach is less effective at ensuring that women win seats in a 'first past the post' electoral system as women may simply not receive enough votes to gain seats, particularly in countries where there is opposition to women holding public office. In a proportional representation 'closed

⁴¹ Australian Labor Party Regulations. Rule 10.



list' system (where voters vote for the party, not the candidate, and a party gains seats based on the number of votes received) coupled with a 'zipper list' (also known as a 'zebra list' and where male and female candidates are alternated on the list) a party quota for women will always translate to seats in parliament for the parties that win more than one seat. Countries to adopt a 'closed list zipper' approach include Tunisia and France, and they have seen a much higher percentage of women in Parliament result.

Equal representation in public administration

Public administration refers to the management and direction of the affairs of government. It can also be used as a collective term, and is sometimes referred to as the 'civil service' or the 'public service.' It includes the whole set of activities and public services dealing with the implementation of laws, regulations and decisions of the government and the management of the public services in charge of these activities. Government departments and agencies are responsible for the implementation of government policy and are staffed by unelected employees, known as 'public servants.'

The overall representation of women in public administrations is uneven across countries, with particularly low numbers of women in decision-making positions. In addition to being a right in all contexts, the equal participation of women at all levels in public administrations is important for women's economic empowerment in many countries where it is one of the only actual or acceptable employers of women.⁴²

The expansion of the numbers of women in state machinery at all levels could be constitutionally advanced through a temporary special measure such as a quota. The example of Colombia below provides a good practice example of a general constitutional protection promoting women in the public service. Legislation has subsequently been enacted to give force to the constitutional guarantee creating a 30 percent quota for women in high-ranking offices at the departmental, regional, provincial, municipal and national level.⁴³

EXAMPLE: GENDER REPRESENTATION IN PUBLIC ADMINISTRATION

Constitution of Colombia, 1991

Article 40(7). The authorities will guarantee the adequate and effective participation of women in the decision making ranks of the public administration.

STRENGTHS

- This example provides a constitutional guarantee of representation of women in the public service.

⁴² For more information on women's participation and decision-making in public administrations, see the UNDP Global Report on **Gender Equality in Public Administration** (GEPA) (New York, 2014) , http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/public_administration/gepa.html

⁴³ Law 581 of 2000 (Colombia).



Equal representation at the sub-national level

Equal representation is important not only at the national level of government but at the local level where day-to-day decision-making and administration occurs. There are a range of forms of hybrid and informal bodies that have administrative authority at the local level in which members may be popularly elected or administratively appointed in different countries.⁴⁴ The representation of women in all forms of local-level political bodies can be constitutionally advanced through the use of temporary special measures such as a quota. In India, as illustrated in the example below, the Constitution was amended in 1993 to reserve at least one third of the seats for women in India’s 265,000 village governing bodies known as the *Panchayat*. More than one million women across India have since been elected into the reserved positions in the *Panchayats*, which administer public services and resolve disputes on matters ranging from marriage to property.

EXAMPLE: REPRESENTATION AT THE SUBNATIONAL LEVEL

Constitution of India, 1950

Part IX 243D (3). Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women.

Equal representation in traditional and chiefly councils

A number of countries have been historically governed by systems of chiefs and tribal authorities, often based on inherited power, which excluded women generally and also men not born into noble and chiefly families and classes. Many constitutions in countries moving from traditional to more democratic systems of governance have established traditional councils with a variety of structures, functions and authority. In some instances, councils have the capacity to advise government, at the local and national levels, on local custom and tradition. In other countries such councils have a more direct input into governance including on law reform. Although there are limited examples of measures designed to increase gender representation on such councils, South Africa (as illustrated in the example below) has introduced a legislated quota.

EXAMPLE: GENDER QUOTA FOR TRADITIONAL AND CHIEFLY COUNCILS

No. 41 Traditional Leadership and Governance Framework Amendment Act, 2003 (South Africa)

s3(1). Once the Premier has recognized a traditional community that traditional community must establish a traditional council in line with principles set out in provincial legislation.

⁴⁴ UN Women, UNDP, UNICEF, 'Informal Justice Systems: Charting a Course for Human Rights-based Engagement,' UN Women, UNDP, UNICEF, New York, 2012: 60.

**Contd.**

(2)(a). A traditional council may have no more than 30 members, depending on the needs of the traditional community concerned.

(b). At least a third of the members of a traditional council must be women.

Equal representation in the judiciary

The judiciary plays a powerful role in upholding and enforcing the constitution and protecting women's human rights in all levels of the court system. Although there is low representation of women in all levels of the judiciary throughout the world, it is important that women are represented to bring diversity to judging through their 'different voice' and to ensure equality of opportunity and representativeness.

While the use of gender quotas for the judiciary has attracted much less focus than quotas in political representation, this is a topic under discussion in a range of forums.⁴⁵ The draft amendment for the Constitution of Pakistan illustrated below has not been adopted, but the drafting of the proposed provision represents good practice in constitutional reform. In Rwanda, as illustrated below, the Constitution requires that women hold at least 30 percent of posts in decision-making bodies including the judiciary and in the community-based mediation committees that have been established throughout Rwanda (the *abunzi*) which provide a compulsory community-based process for resolving civil, criminal and family disputes prior to filing cases in ordinary courts.

EXAMPLES: GENDER REPRESENTATION IN THE JUDICIARY

Proposed Amendment to the Constitution of Pakistan

Article 192 Clause 1(a). There shall be reserved in each High Court up to ten percent seats for women.

Constitution of the Republic of Rwanda, 2003

Article 9. The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof:

(3). Equitable sharing of power;

(4). Building a State governed by the rule of law, a pluralistic democratic government, equality of all Rwandans and between women and men reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs.

⁴⁵ K. Malleon, 'Diversity in the Judiciary: The Case for Positive Action', *Journal of Law and Society*, 2009, 36(3): 376.



For easy reference, the key components of comprehensive constitutional provisions that advance the political rights of women are included in the summary checklist below.

CHECKLIST FOR GENDER EQUALITY IN POLITICAL RIGHTS

- Right to vote and to stand for election
- Measures to ensure representation in parliament
- Measures to ensure representation in subnational government
- Measures to ensure representation in traditional and chiefly councils
- Measures to ensure representation in the public administration
- Measures to ensure representation in the judiciary



GENDER EQUALITY IN CIVIL RIGHTS (RELIGION AND CITIZENSHIP)

A. Right to freedom of religion

The International Covenant on Civil and Political Rights (ICCPR) recognizes the right to freedom of thought, conscience and religion in Article 18. The right to freedom in religion is routinely included in modern constitutions. In countries where the legal system is based on religion the constitution typically nominates religion as ‘a’ or ‘the’ primary source of law. Some religious interpretations and practices do not, however, accord with the principles of equality and non-discrimination and, in particular, discriminate against women and girls.

While it is important that a constitution recognizes the right to freedom of religion, it must be interpreted or reconciled with human rights generally, and women’s rights and gender equality specifically. A good practice approach is for the constitution to reaffirm the importance of religious traditions, but also to clearly place women’s rights to equality and non-discrimination above inconsistent interpretations of religion, as illustrated below in the example of Angola. The constitutional guarantee of non-discrimination, which includes specific prohibition against discrimination on the basis of sex, is placed above the recognition of custom along with human dignity. In particular instances, harmful religious practices should be prohibited, preferably by express prohibitions or (a weaker alternative) as a general limit on any constitutionally religious right.

EXAMPLES: LIMIT ON THE RIGHT TO FREEDOM OF RELIGION

Constitution of Angola, 2010

Article 7. The validity and legal force of custom which does not contradict the Constitution and does not threaten human dignity shall be recognised.

Article 10. The state shall protect churches and faiths and their places and objects of worship, provided that they do not threaten the Constitution and public order and abide by the Constitution and the law.

Article 23 (1). Everyone shall be equal under the Constitution and by law.

2. No-one may be discriminated against, privileged, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, ethnicity, colour, disability, language, place of birth, religion, political, ideological or philosophical beliefs, level of education or economic, social or professional status.

B. Right to citizenship

Article 15 of the Universal Declaration of Human Rights (UDHR) states that ‘[e]veryone has the right to a nationality,’ and Article 9 of CEDAW states that States parties must ‘grant women equal rights with men to acquire, change or retain their nationality.’ Historically, because of a view that, due to their dependence on men, women did not need equal rights in citizenship, they have been prevented from transferring their citizenship to their non-citizen husbands, unable to determine the citizenship of children which was instead based on the father’s citizenship, and rendered stateless when divorced or widowed. Citizenship is critical



to women's full participation in society, and that of their children, since it affects women's rights to vote or stand for public office, their choice of residence and mobility, and their family's access to a range of public services and benefits. While the rules of citizenship can be placed in a constitution or legislation or both, the importance of ensuring women have equal rights with men to acquire, change or retain their citizenship makes constitutional protection desirable. The following good practice measures should be incorporated into provisions for constitutional citizenship.

Right to citizenship upon marriage

Citizenship is primarily acquired through birth (either on the basis of the place of birth or through the citizenship of parents); it can also be granted upon marriage. A grant of citizenship after birth is known in common law countries as 'naturalization' or 'registration' or as 'declaration' in civil law countries. Generally, citizenship upon marriage is not automatic, and many countries require a period of residency by the non-citizen spouse before citizenship is granted. Some countries continue to have discriminatory citizenship laws in relation to marriage, either not granting a woman an equal right to transfer citizenship to her non-citizen husband or requiring a waiting period for the non-citizen husband that is not required for a non-citizen wife.

Such discrimination originates from two sources. First, the principle of 'dependent nationality' assumes that upon marriage a wife joins her husband in his country and, therefore, her non-citizen husband does not require citizenship in her country. Second, in some countries such laws stem from a (protectivist) fear that economically vulnerable women may be exploited by non-citizen men seeking to acquire rights and status (including rights to property) in the wife's country.⁴⁶ This denies women equal rights with men and deprives her husband of employment opportunities and the opportunity to exercise other civil and political rights which may disadvantage her and any children.⁴⁷ A woman married to a non-citizen may be forced to choose between residence in her country of citizenship and residence with her husband.⁴⁸

A good practice approach is to grant citizenship to either spouse upon marriage without any waiting period, as illustrated in the examples of Saint Kitts and Nevis and Mauritius below.⁴⁹ If a waiting period is required, it should apply equally to both spouses. Additionally, since many countries do not permit same-sex marriage, the example of Sweden below shows how a legal system can grant the same citizenship rights to those in same-sex relationships.

46 B. Manby, 'Citizenship Law in Africa', Open Society Institute, New York, 2010, http://www.opensocietyfoundations.org/sites/default/files/citizenship-africa_20101118.pdf

47 K. Knop, 'Relational Nationality: On Gender Nationality in International Law' in A. Aleinkoff and D. Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices*, Brookings Institution Press, Washington, DC, 2001: 89.

48 See S. Pradhan-Malla and P. Gautam, 'Women's Right to Nationality and Citizenship', IWRAP, Kuala Lumpur, 2006: 8.

49 In accord with the finding in *Attorney General of the Republic of Botswana v Unity Dow* (1991) where the Botswana High Court held that a citizen of Botswana married to a non-citizen, whose children had been denied citizenship under a provision of the Citizenship Act 1984 that conferred citizenship on a child born in Botswana only if 'a) his father was a citizen of Botswana; or b) in the case of a person born out-of-wedlock, his mother was a citizen of Botswana' violated equality guarantees of the Botswana Constitution.



EXAMPLES: RIGHT TO CITIZENSHIP UPON MARRIAGE

Constitution of Saint Kitts and Nevis, 1983

Chapter VIII, s90(1). The following persons shall, if they do not already possess citizenship, be entitled, upon making application, to be registered as citizens: (a). any person who is married to a citizen.

Constitution of Mauritius, 1968

s24. Any person who, after 11 March 1968, marries another person who is or becomes a citizen of Mauritius shall be entitled, upon making application in such manner as may be prescribed ... to be registered as a citizen of Mauritius.

Act on Swedish Citizenship, 2001

s12. If the requirements in Section 11 are not met, and unless paragraph 2 provides otherwise, the applicant may still be naturalized if: ... (2). the applicant is married to or living in conditions resembling marriage with a Swedish citizen.

Right to retain citizenship upon divorce

Women should not lose citizenship either because of divorce or because the spouse changes their citizenship. This is discriminatory because it may make women vulnerable after marriage, particularly if they have previously been forced to surrender their birth citizenship. If the citizenship laws of her husband's country are also discriminatory, divorce may leave a woman stateless.⁵⁰ Additionally, if there is a waiting period for citizenship in her husband's country, then she will be stateless until such time as she fulfils the requirement for citizenship. Such laws also prevent a woman from exercising rights in her country of birth, where she may still have strong family ties.

EXAMPLES: RIGHT TO RETAIN CITIZENSHIP UPON DIVORCE

Constitution of Kenya, 2010

s13(3). Citizenship is not lost through marriage or the dissolution of marriage.

Constitution of the Philippines, 1987

Article 4(4). Citizens of the Philippines who marry aliens shall retain their citizenship, unless by their act or omission, they are deemed, under the law, to have renounced it.

50 CEDAW Committee, General Recommendation 21, 'Equality in Marriage and Family Relations,' 1994, 13th Session (UN Doc A/49/38): para [38]. See also F. Banda, 'Project on a Mechanism to Address Laws that Discriminate against Women,' Office of the High Commission for Human Rights, Women's Rights and Gender Division, Geneva, 2008: 74.



Right to hold dual nationality

Many countries do not allow dual citizenship, and although the rationale behind this often relates to issues of loyalty, security and sovereignty rather than gender discrimination it is an important gender equality measure. Dual nationality is important: if a woman divorces or is widowed she and her children can return to her birth country if she chooses or if the citizenship laws of her husband's country remove her citizenship upon divorce or widowhood. If dual nationality is not available she may be left stateless.

EXAMPLE: RIGHT TO DUAL NATIONALITY

Constitution of Iraq, 2005

Article 18. Fourth: An Iraqi may have multiple nationalities.

Right to transmit citizenship to children

In some countries discriminatory provisions exist that automatically give children the citizenship of their father but not their mother. The failure to give an equal right to mothers to determine the citizenship of their children reinforces historical and discriminatory notions of paternal authority⁵¹ and may have negative effects on both the mother and the children.⁵² A child may become stateless if a father cannot be identified, or may have no rights in the country where the child's mother has citizenship and resides. A good practice measure, therefore, is to include in the constitution a guarantee that a child gains citizenship at birth through either a mother or a father, as illustrated in the examples of Kenya and the Philippines below.

EXAMPLES: RIGHT TO TRANSMIT CITIZENSHIP TO CHILDREN

Constitution of Kenya, 2010

(1). A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

Constitution of the Philippines, 1987

Article IV. The following are citizens of the Philippines:

(2). Those whose fathers or mothers are citizens of the Philippines.

51 C. Bredbenner, *A Nationality of Her Own. Women, Marriage and the Law of Citizenship*, University of California Press, Los Angeles, 1998: 84.

52 See S. Pradhan-Malla and P. Gautam, 'Women's Right to Nationality and Citizenship', IWRAW, Kuala Lumpur, 2006: 8.



For easy reference, the key components of comprehensive constitutional provisions advancing the civil rights of women in the areas of religion and citizenship are included in the summary checklist below.

CHECKLIST FOR THE RIGHT TO RELIGION AND THE RIGHT TO CITIZENSHIP



- Right to religion subject to the right to equality
- Right to citizenship upon marriage
- Right to retain citizenship upon divorce
- Right to hold dual nationality
- Right to transmit citizenship to children





GENDER EQUALITY IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Economic, social and cultural rights are enshrined in the UDHR and in the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). They include rights to work, social security, education, an adequate standard of living, housing, the highest attainable standard of physical and mental health, including a right to be free from violence, a right to a healthy environment, and a right to cultural life. The ICESCR obligates States parties to ensure the equal rights of women and men to the enjoyment of all economic, social and cultural rights in the covenant. CEDAW also recognizes and protects many of the same economic, social and cultural rights as they particularly relate to women and girls.

Historically, economic, social and cultural rights were not often included in constitutions, which tended to focus more on 'negative rights' (ie. prohibitions against infringements of people's rights) rather than positive rights (ie. an active requirement that governments take action to ensure people can enjoy their rights). However, economic, social and cultural rights are particularly important and relevant for women's equality because of the disproportionate impact that violations of such rights have on the well-being of women, their lives and their livelihoods.

Increasingly constitutions are now moving to protect economic, social and cultural rights and advance gender equality and women's empowerment, as illustrated in the examples below. In addition to the general constitutional protection of economic, social and cultural rights, a good practice measure is to make specific references to their gender dimensions which is important to advancing gender equality and women's empowerment.⁵³

A. Right to participate in cultural life

Article 15 of the ICESCR recognizes the right of everyone to take part in cultural life. In some countries where traditions, practices and cultural beliefs are a dominant part of the social system, constitutions often afford culture and custom powerful constitutional status.⁵⁴ Some cultural practices, however, are not in accord with the principles of equality and non-discrimination. While it is important that the constitution recognizes the right to culture, it must be interpreted consistently or reconciled with human rights generally, and women's rights and gender equality specifically.

A good practice approach is for the constitution to reaffirm the importance of cultural traditions, but also to make clear that their recognition may not derogate from women's rights to equality and non-discrimination, as illustrated in the example of Pakistan below. In particular instances, harmful cultural practices should be prohibited. For example, female genital mutilation/cutting, early forced or child marriage or betrothal, paying to acquire husbands for daughters through the dowry system, family 'honour' killings by 'shamed' fathers

⁵³ D. Otto, 'General Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?' *Canadian Journal of Women and the Law*, 2002(14) 23: 35.

⁵⁴ See, for example, the Solomon Islands, where the Constitution gives constitutional status to customary law, permitting its observance in a range of situations including land, marriage, divorce and other personal laws: Constitution of Solomon Islands, 1978, Schedule 3 s 3(1); see also the Constitution of Vanuatu, 1980, s 51 s 52.



or brothers of a girl sexually violated and other similar practices should be prohibited, either by express prohibitions (as illustrated in the examples of Malawi and Ghana below) or as a limit on any constitutionally recognized cultural or customary right. This is an approach promoted by the CEDAW Committee, which has called on State parties to ensure that 'customary law and practices that are harmful to and discriminate against women are discontinued.'⁵⁵

EXAMPLES: ENSURING THAT CULTURAL RIGHTS PROMOTE GENDER EQUALITY

Constitution of Namibia, 2010

Article 19. Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Constitution of the Islamic State of Pakistan, 1973

s8(1). Any law or custom or usage having the force of law in so far as it is inconsistent with the rights conferred by this Chapter (Fundamental Rights) shall to the extent of such inconsistency be void.

s25(2). There shall be no discrimination on the basis of sex.

Constitution of Malawi, 1964

s2. Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as -

- a.** sexual abuse, harassment and violence;
- b.** discrimination in work, business and public affairs; and
- c.** deprivation of property, including property obtained by inheritance.

Constitution of Ghana, 1992

Article 25. Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this constitution. All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.

⁵⁵ Concluding Comments of the CEDAW Committee: Zambia (2011) 49th Session: para [14] (UN Doc CEDAW/C/ZMB/CO/5-6). Concluding Comments of the CEDAW Committee: Vanuatu (2007) 38th Session: para [11] (UN Doc CEDAW/C/VUT/CO/3).



B. Right to education

The ICESCR recognizes the right of everyone to education in Article 13. A constitutional guarantee of the right to education is critical to women's empowerment and advancing gender equality. The importance of education in enabling women and girls to realize their potential and overcome historic disadvantage in the economic, political and social arenas is reflected in the target for Millennium Development Goal 3 (Promote Gender Equality and Empower Women) to 'eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015.' Educated women are healthier, more often in paid employment, have fewer children and provide better care and education to their children.



Good practice constitutional provisions to advance gender equality in education include:

- a general right to education for all citizens, as in the example of Serbia below;
- compulsory free education at both primary and secondary levels, which has been shown to have a dramatic impact on the numbers of girls enrolled and attending school,⁵⁶ as in the examples of Serbia and Hungary below;
- a prohibition of discrimination on the basis of gender, as in the example of Sudan below;
- a guarantee of free tertiary education to women who meet stipulated criteria, as in the example of Serbia below, (which guarantees it to those with lower property status, a category which is likely to include women disproportionately); and
- a temporary special measures provision enabling positive action such as preferential treatment, scholarships or quota systems to ensure equal access for girls and women to all levels of education,⁵⁷ as in the example of Afghanistan below.

EXAMPLES: RIGHT TO EDUCATION

Interim National Constitution of the Republic of the Sudan, 2005

Article 44(1). Education is a right for every citizen and the State shall provide access to education without discrimination as to religion, race, ethnicity, gender or disability.

(2). Primary education is compulsory, and the State shall provide it free.

Constitution of Hungary, 2011

Article XI(1). Every Hungarian citizen shall have the right to education.

(2). Hungary shall ensure this right by extending and generalizing public education, providing free and compulsory primary education, free and generally available secondary education, and higher education available to every person according to his or her abilities, and by providing statutory financial support to beneficiaries of education.

⁵⁶ See S. Surbakti, 'Gender Mainstreaming and Sex-disaggregated Data' in K. Robinson and S. Bessell (eds), *Women in Indonesia. Gender, Equity and Development*, Institute of Southeast Asian Studies, Canberra, 2002: 212; and H. Ross, 'Policy as Practice, Agency as Voice, Research as Intervention: Imagin(in)g Girls' Education in China' in M. Maslak (ed.), *The Structure and Agency of Women's Education*, SUNY Press, Albany, 2008: 235.

⁵⁷ Concluding Comments of the CEDAW Committee: Niger (2007) 38th Session: para [30] (UN Doc CEDAW/C/NER/CO/2).



Contd.

Constitution of Serbia, 2006

Article 71. Everyone shall have the right to education. Primary education is mandatory and free, whereas secondary education is free. All citizens shall have access under equal conditions to higher education. The Republic of Serbia shall provide for free tertiary education to successful and talented students of lower property status in accordance with the law.

Constitution of Afghanistan, 2004

Article Forty-Four. The State shall devise and implement effective programmes to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country.

C. Right to health

Article 12 of the ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A constitutional guarantee of the right to health has major significance for women, including in relation to guarantees of access to health services, protection against coerced sterilization or other medical treatments, from environmental pollutants that interfere with their fertility, and against traditional or customary practices that interfere with their bodily integrity, sexuality or fertility. Many constitutions protect the right to life; but if there is no express protection of women's reproductive autonomy, this blanket right can operate to deny women the right to control their fertility.

Good practice constitutional provisions to advance gender equality in health include:

- a general right to health and health services for all citizens, as in the examples of Bolivia and Tajikistan below;
- a right to sexual and reproductive freedom, as in the example of South Africa below;
- a prohibition on non-consensual medical treatment and experimentation such as sterilization, as in the example of South Africa below; and
- a guarantee of appropriate and adequate services in connection with pregnancy, birthing and the postnatal period, as in the example of Ecuador and Colombia below.

EXAMPLES: RIGHT TO HEALTH

Constitution of Bolivia, 2009

Article 18 I. Every person has the right to health.

Constitution of Tajikistan, 1994

Article 38. Each person has the right to health care. This right is ensured through free medical assistance in governmental health care institutions, measures to improve the condition of the environment, formation and development of mass athletics, physical fitness, and other sports.



Contd.

Constitution of South Africa, 1995

s12(2). 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.

Constitution of Colombia, 1991

Article 43. During pregnancy and after delivery women shall enjoy the special protection and assistance of the state and receive an allowance if unemployed.

Constitution of Ecuador, 2008

Article 35. Elderly persons, girls, children and adolescents, pregnant women, persons with disabilities, persons in prison and those who suffer from disastrous or highly complex diseases shall receive priority and specialized care in the public and private sectors. The same priority care shall be received by persons in situations of risk, victims of domestic and sexual violence, child mistreatment, natural or manmade disasters. The State shall provide special protection to persons who are doubly vulnerable.

Article 43. The State shall guarantee the rights of pregnant and breast-feeding women to: **2.** Free maternal healthcare services. **3.** Priority protection and care of their integral health and life during pregnancy, childbirth and postpartum. **4.** The facilities needed for their recovery after pregnancy and during breast-feeding.

D. Right to work and to economic opportunities

Article 6 of the ICESCR recognizes a general right to work for everyone and Article 7 a right to equal remuneration for work of equal value, a right for women to have the same work conditions as men and a right to equal opportunity for promotion. A constitutional guarantee of equality in all aspects of work and to economic opportunities is critical for the achievement of gender equality. In all countries worldwide, women earn less than men⁵⁸ regardless of education and work experience,⁵⁹ are more likely to be unemployed,⁶⁰ to be in 'vulnerable' employment,⁶¹ to have poor and inadequate working conditions,⁶² are less likely to occupy the upper management levels of organizations and institutions⁶³ and have lesser access to finance and business opportunities.⁶⁴ Additionally, sexual harassment and women's unpaid caring responsibilities reduce their employment opportunities and their economic empowerment.

Good practice constitutional guarantees to advance gender equality in the area of work include:

58 See ILO, 'Global Employment Trends for Women', ILO, Geneva, 2009: 1–4.

59 ILO, 'Time for Equality at Work', ILO, Geneva, 2003: 23.

60 ILO, 'Global Employment Trends for Women', ILO, Geneva, 2009: 1–4.

61 UN Economic and Social Commission for Asia and the Pacific (ESCAP), 'Statistical Yearbook for Asia and the Pacific', ESCAP, Bangkok, 2009.

62 G. Pascall and A. Kwak, *Gender Regimes in Transition in Central and Eastern Europe*, The Policy Press, Bristol, 2005: 84.

63 ILO, 'Indicators for the Labour Market', ILO, Geneva, 2007: 4.

64 UN Department of Economic and Social Affairs (UN DESA), 'Womens' Control over Economic Resources Including Microfinance', UN DESA, New York, 2009: 8.



- a guarantee that everyone has a right to work, including domestic workers, family workers, casual workers, those who work from home and part-time workers, as illustrated in the example of Hungary below;
- a guarantee that women are afforded the same rights, opportunities, choices and benefits in relation to all forms of economic opportunities as men;
- a guarantee that women have the right to join trade unions;
- a guarantee of equal pay for work of equal value, as illustrated in the example of Zimbabwe below;
- a guarantee of adequate child care to enable women to engage in paid work and education;
- a guarantee of parental leave (for both fathers and mothers) to reduce and/or redistribute women's unpaid care burdens, as illustrated in the example of Zimbabwe below;
- a prohibition on sex and gender discrimination in all aspects of employment, as illustrated in the example of Somalia below;
- a guarantee for women and men not only of the right to work, but also of the rights to decent working conditions and a fair wage.

EXAMPLES: GENDER EQUALITY IN WORK AND ECONOMIC OPPORTUNITIES

Constitution of Zimbabwe, 2013

Article 65 Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.

Every employee is entitled to just, equitable and satisfactory conditions of work.

Women and men have a right to equal remuneration for similar work.

Women employees have a right to fully paid maternity leave for a period of at least three months.

Provisional Constitution of the Federal Republic of Somalia, 2012

Article 24(5). All workers, particularly women, shall have a special right of protection from sexual abuse, segregation and discrimination in the work place. Every labour law and practice shall comply with gender equality in the work place.

Constitution of the Portuguese Republic, 1976

Article 68(3). Women shall possess the right to special protection during pregnancy and following childbirth, and female workers shall also possess the right to an adequate period of leave from work without loss of remuneration or any privileges.

(4) The law shall regulate the grant to mothers and fathers of an adequate period of leave from work, in accordance with the interests of the child and the needs of the family unit.

Constitution of Hungary, 2011

Article 58 (1) Everyone shall possess the right to work.

2. In order to ensure the right to work, the state shall be charged with promoting:

a) The implementation of full-employment policies;

b) Equal opportunities in the choice of profession or type of work, and the conditions needed to avoid the gender-based preclusion or limitation of access to any position, work or professional category.



Contd.

Constitution of the Republic of Tunisia, 2014

Article 40. Work is a right for every citizen, male and female. The state shall take the necessary measures to guarantee work on the basis of competence and fairness. All citizens, male and female, shall have the right to decent working conditions and to a fair wage.

E. Right to own, manage, enjoy and dispose of property and land

Article 16 of CEDAW recognizes ‘the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.’ A constitutional protection of women’s equal right to own, manage, enjoy and dispose of property and land both within marriage and outside marriage is of major significance for women. The control and ownership of land and property by women, especially in rural areas, is critical to their livelihoods, food security, economic independence and physical security. Women own only a fraction of land and property worldwide. Some estimates have indicated women own only 1–2 percent of all titled land, and similar estimates have been made in relation to movable property such as businesses, equipment, furniture and capital.⁶⁵ A lack of ownership and control of land and other property places women at a disadvantage in securing a place to live, accessing economic opportunities, earning a livelihood, enjoying financial independence, and providing adequate housing and nutrition for herself and her dependants.⁶⁶

Gender inequality is present in all systems of land and property ownership. Rules governing land and property ownership are increasingly included in constitutions, particularly in Africa. Although the detail of land law can be left to legislation, a good practice constitutional measure is to include a guarantee of equal ownership and usage, as illustrated in the examples of Ethiopia and Cambodia below. Another good practice measure, as illustrated in the example of Kenya below, is a specific prohibition on customary practices in relation to land and property that discriminate against women.



EXAMPLES: RIGHT TO OWN MANAGE ENJOY AND DISPOSE OF PROPERTY AND LAND

Constitution of the Federal Democratic Republic of Ethiopia, 1994

Article 35(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...

65 N. Steinzor, ‘Women’s Property and Inheritance Rights: Improving Lives in Changing Times,’ *Women in Development*, Washington, DC, 2003: 2.
66 P. Foutnier, ‘Conflicting Agenda? Women’s Rights and Customary Law in African Constitutional Reform,’ in S. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge University Press, Cambridge, 2001: 192; and C. Grown, G. Gupta and A Kes, *Taking Action: Achieving Gender Equality and Empowering Women*, Earthscan, London, 2005: 75, <http://www.unmillenniumproject.org/documents/Gender-complete.pdf>



Contd.

Constitution of the Kingdom of Cambodia, 1993

Article 44(1). All persons, individually or collectively, are entitled to the right to ownership, including rights to land ownership. Both women and men are equally entitled to have ownership over property.

Constitution of Kenya, 2010

s60(1). Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: **(f)** elimination of gender discrimination in law, customs and practices related to land and property in land.

F. Right to inherit

A constitutional right to inherit has major significance for women. Many women are subject to discrimination in inheritance laws — often customary — and left with a smaller share of their husband or father's property upon death than widowers, sons or brothers,⁶⁷ justified by stereotyped assumptions that women marry and leave the family of origin and will be cared for by her husband and his family.⁶⁸ In other countries a person is free to distribute their assets according to their will subject to certain guidelines. When an individual dies without a will, legislation dictates how the property should be distributed. It is important that the law does not discriminate between women and men since the majority of people across the world die without a will.

Although inheritance is not yet an area often included in constitutions, a good practice measure is to include a constitutional guarantee of equal inheritance rights, as illustrated in the example of Ethiopia below, which can then set the standard for inheritance rules whether customary or legislative.

EXAMPLES: EQUAL RIGHT TO INHERIT

Constitution of the Federal Democratic Republic of Ethiopia, 1994

Article 35(7). Women... shall also enjoy equal treatment in the inheritance of property.

67 CEDAW Committee, General Recommendation 21, 'Equality in Marriage and Family Relations,' 1994, 13th Session (UN Doc A/49/38): para [38].

68 F. Banda, 'Project on a Mechanism to Address Laws that Discriminate against Women,' Office of the High Commission for Human Rights, Women's Rights and Gender Division, Geneva, 2008: 105.



G. Representation in the management of the environment and natural resources

Constitutional protection of natural resources and the environment has major significance for women. Women (and sometimes girls) are often responsible for providing their households with the basic necessities of life in developing countries and sometimes in the rural areas of developed countries. They rely heavily on natural resources from land, forests, lakes, rivers and fisheries, which provide food, fuel, medicines and fresh water. Throughout Africa, Asia and Latin America women are primarily responsible for local food production and make up the larger share of the agricultural workforce. Mismanagement and overuse of natural resources and environmental degradation including climate change, therefore, disproportionately affect women in these regions.

Although the management and protection of natural resources and the environment has not historically been a focus of constitutions, it is increasingly becoming so, particularly in recently drafted constitutions in developing countries. As illustrated in the example below, Ecuador is the first country to incorporate a ‘bill of rights’ on behalf of the environment. Both women and men should participate equally at all levels of management of natural resources to ensure the equal distribution of resources and to ensure that both women’s and men’s needs and priorities are taken into consideration in the management of these resources. Ethiopia, as illustrated below, although it does not guarantee women an equal role in decision-making, provides them with a right to ‘full consultation.’

EXAMPLES: REPRESENTATION IN MANAGEMENT

Constitution of Ecuador, 2008

Article 71(1). Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

(2) All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

(3) The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Constitution of Ethiopia, 1994

Article 35(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.

H. Right to adequate housing

Article 11 of the ICESCR recognizes the right of everyone to adequate housing. Although housing is not exclusively a women’s issue, the gendered nature of social and economic relations within and outside the



household means that many women experience discrimination and inequality in all aspects of housing.⁶⁹ A constitutional guarantee of the right to adequate housing is, therefore, critical for women, as adequate housing is intimately connected to their security, health, livelihood and overall well-being.

A constitutional guarantee of a right to adequate housing may be generally framed as illustrated in the example of South Africa below; however, its effectiveness will depend on the following key components:

- the housing afforded to women must provide adequate space, physical security, shelter from weather, and protection from threats to health such as structural hazards and disease, access to safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;
- the location, whether urban or rural, must permit access to employment opportunities, health care, schools, child care and other social facilities;⁷⁰
- the housing must be affordable;
- there must be sufficient protection against forced evictions and security of tenure. Lack of secure tenure can have serious implications for women. Without control over or ownership of housing, women enjoy little personal or economic autonomy and therefore are more vulnerable to abuse and violence within the family, community and society at large; and
- a prohibition against discrimination in the provision of housing is important, as women are often subject to discrimination in obtaining housing, particularly if they are without a male partner.

EXAMPLE: RIGHT TO ADEQUATE HOUSING

Constitution of South Africa, 1996

Article 26(1). Everyone has the right to have access to adequate housing, and **(2)** the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

I. Right to a life free from violence

A right to a life free from violence is not incorporated into many constitutions. It is, however, an important right for women, especially since up to 70% of women experience physical and/or sexual violence in their lifetime.⁷¹ During war or other humanitarian crises the risks to women and girls are further heightened.

A good practice constitutional right to a life free from violence should bind both private and public actors (as illustrated in the example of South Africa below) because statistics show that women suffer an extraordinary amount of violence in the private and domestic sphere. If a constitution protects a right to privacy or, as in

69 F. Leilani, 'Is There a Woman in the House — Re/conceiving the Human Right to Housing,' *Canadian Journal of Women and the Law*, 2002, 14: 121.

70 It is important to note however that the absence of accessible employment opportunities, health care, schools, child care or other social facilities should not be used as a rationale to try to force indigenous communities to shift location. Rather, ensuring these services and opportunities exist within or close to indigenous communities reflects a rights-based approach.

71 UN Secretary-General, 'In-Depth Study on Violence Against Women,' United Nations, New York, 2006, (A/61/122/Add.1).



some constitutions, the sanctity of the home, such rights should be qualified to exclude instances of violence and abuse.

EXAMPLES: RIGHT TO A LIFE FREE FROM VIOLENCE

Constitution of the Republic of Tunisia, 2014

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 takes all necessary measures in order to eradicate violence against women.

Constitution of Bolivia, 2009

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

Constitution of South Africa, 1996

Article 71 (12)(1). Everyone has the right to freedom and security of the person, which includes the right (c) to be free from all forms of violence from either public or private sources.

Provisional Constitution of Somalia, 2012

Article 15(4). Circumcision of girls is a cruel and degrading customary practice, and is tantamount to torture. The circumcision of girls is prohibited.

J. Right to equality in marriage and family relations

Article 16 of CEDAW recognizes a right to equality in all aspects of marriage and family relations. A constitutional guarantee of equality in marriage and family relations, while not currently incorporated into many constitutions, is important to the empowerment of women and the advancement of gender equality. Gender discrimination in all aspects of marriage and family relationships continues worldwide. Many countries have different marriageability ages for males and females, typically younger for females; some allow polygamous relations, or continue to grant only fault-based divorce, which requires proof of a matrimonial offence (typically desertion, adultery or cruelty), all of which can prevent women from leaving violent relationships.⁷² Additionally, after divorce women often do not receive equal rights to property accumulated during marriage or an appropriate amount of spousal support because non-financial contributions during a marriage such as raising children are often not accorded the same weight as financial contributions.⁷³

72 For example, fault-based divorces are common throughout the Pacific. In some countries in the Middle East only a husband can divorce without fault. See S. Nazir and L. Tomppert, *Women's Rights in the Middle East and North Africa. Citizenship and Justice*, Rowman & Littlefield, London, 2005: 8. In some countries, however, fault-based divorces were never introduced — for example, Japan. See H. Fuess, *Divorce in Japan. Family, Gender and the State 1600–2000*, Stanford University Press, Stanford, 2004: 5.

73 CEDAW Committee, General Recommendation 21, 'Equality in Marriage and Family Relations,' 1994, 13th Session (UN Doc A/49/38): para [38].



Good practice examples of constitutional guarantees of equality in marriage and family relations include:

- a general guarantee of equality in marriage and family relations, as illustrated in the example of Cambodia below;
- the recognition of civil monogamous marriages only, effectively prohibiting bigamous, polygamous and customary marriages; and
- equality in all aspects of marriage and divorce, as illustrated in the example of Zimbabwe below.



EXAMPLES: RIGHT TO EQUALITY IN MARRIAGE AND FAMILY RELATIONS

Constitution of Zimbabwe, 2013

Article 26. Marriage

The State must take appropriate measures to ensure that-

- a. no marriage is entered into without the free and full consent of the intending spouses;
- b. children are not pledged in marriage;
- c. there is equality of rights and obligations of spouses during marriage and at its dissolution; and
- d. in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses.

(2). Marriage shall be entered into only with the free and full consent of the intending spouses.

Constitution of the Kingdom of Cambodia, 2003

Article 45. Men and women are equal in all fields especially with respect to marriage and family matters.



9

GENDER EQUALITY IN INDIGENOUS RIGHTS

There are approximately 370 million indigenous people in 70 countries worldwide who face discrimination and disadvantage that is more complex and substantively different than other disadvantaged groups. Indigenous women are, in turn, the most vulnerable among indigenous peoples as they face double disadvantage - on the basis of both their gender and their ethnicity. Worldwide they lack access to education, to health care and to their ancestral lands, have low participation in decision-making processes and face disproportionately high rates of domestic violence and other gender-based violence, particularly in situations of armed conflicts and militarization.⁷⁴

The constitutional recognition of indigenous rights has been increasing in some parts of the world – for example, in Latin America⁷⁵ – although this has not been replicated to the same extent in all regions.⁷⁶ Constitutional protection of indigenous peoples, and in particular indigenous women and girls, is extremely important and accords with the United Nations Declaration on the Rights of Indigenous Peoples which was adopted by the General Assembly in 2007. The Declaration sets out a universal framework of minimum standards for the survival, dignity, well-being and rights of the world’s indigenous peoples.

Indigenous rights are collective rights which, if constitutionally recognized, can advance the rights of indigenous peoples. These rights should be used to advance and not undermine the rights of indigenous women and girls. Constitutions in some countries have started recognizing the rights of indigenous peoples. These provisions would be strengthened by particular references to the rights of indigenous women and girls such as illustrated in the example of Canada below. Good practice constitutional protection of indigenous rights, including explicit references to indigenous women’s rights, includes: a right to cultural diversity to counter policies of assimilation by colonizing nations, which have particularly impacted indigenous women; a right to self-determination to enable indigenous peoples to govern themselves

and to enjoy their rights to land, territories, resources, culture, language and education, a right to political participation as indigenous peoples and in particular indigenous women are poorly represented in political processes despite formal equal eligibility in most countries for political offices; a right to possess, conserve, and administer lands, territories, and ancestral resources which is vital for the physical and cultural survival of indigenous peoples who have a special relationship with land and resources; a right to the protection of indigenous languages and the right to receive an education in the maternal language is fundamental to safeguarding the heritage of indigenous peoples and to ensure the recognition of indigenous women as keepers of languages and knowledge.



74 United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues, 'Gender and Indigenous Issues: Overview,' *Briefing Note* No. 1, UN DESA, New York, 2010: 1, http://www.un.org/esa/socdev/unpfii/documents/BriefingNote1_GREY.pdf; and C. McKay, 'Good Practices in Realizing Women's Rights to Productive Resources, with a Focus on Land: the Case of Indigenous Women with Examples from Canada,' UN Women in collaboration with United Nations Office of the High Commissioner for Human Rights, New York, 2012.

75 See G. Aguilar, S. Lafosse, H. Rojas and R. Steward, 'South/North Exchange of 2009. The Constitutional Recognition of Indigenous Peoples in Latin America,' *Pace International Law Review*, 2010: 44.

76 See, for example, F. Thornberry and F. Viljoen, 'The Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries. Overview Report,' International Labour Organization, Geneva, and the African Commission on Human and Peoples' Rights, Banjul, 2009, which finds that African countries have been reluctant to legally acknowledge indigenous groups within their territories.



EXAMPLE: INDIGENOUS WOMEN'S RIGHTS

Constitution Act, 1982 (Canada)

s35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of 'aboriginal peoples of Canada'

(2) In this Act, 'original peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection **(1)** 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

Marginal note: Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection

(1) are guaranteed equally to male and female persons.



10

CONCLUSION

Constitutions provide the legal basis for the social contract between the state and citizens, and it is critical that countries developing or revising constitutions incorporate guarantees of gender equality. Constitution-making is an important component of UNDP’s mandate to strengthen democratic governance, particularly after conflict or during transitions.

This policy guidance has outlined a range of global good practice provisions, guarantees and measures which can be incorporated into a constitution to advance gender equality and women’s empowerment and it provides many good practice examples from existing constitutions worldwide. Ultimately the process of constitution-making and the equal inclusion of women in that process is an important and essential element.

The analysis and good practice examples provided in this global guidance can be employed to support women and their allies to advocate for constitutions that advance gender equality and women’s empowerment. The concrete examples of how to advance gender equality across constitutional provisions can be used by UNDP staff, civil society organizations, constitutional drafters, national policy and decision-makers, regional bodies, other United Nations organizations and development partners.





BIBLIOGRAPHY

- Aleinkoff, A. and D. Klusmeyer (eds), 'Citizenship Today: Global Perspectives and Practices,' Brookings Institution Press, Washington, DC, 2001: 89.
- Al-Krenawi, A., 'Women from Polygamous and Monogamous Marriages in an Out-Patient Clinic,' *Transcultural Psychiatry*, 2001, 38: 187.
- Al-Krenawi, A., J. Graham and V. Slonim-Nevo, 'Mental Health Aspects of Arab-Israeli Adolescents from Polygamous versus Monogamous Families,' *Journal of Social Psychology*, 2002, 142: 446.
- Ballington, J., 'Empowering Women for Stronger Political Parties. A Good Practices Guide to Promote Women's Political Participation,' UNDP and National Democratic Institute for International Affairs, New York, 2001.
- Ballington, J. (ed.), 'The Implementation of Quotas: African Experiences,' International Institute for Democracy and Electoral Assistance, Stockholm, 2004, http://www.idea.int/publications/quotas_africa/upload/IDEA_no3.qxd.pdf.
- Banda, F., 'Project on a Mechanism to Address Laws that Discriminate against Women,' Office of the High Commission for Human Rights, Women's Rights and Gender Division, Geneva, 2008: 105.
- Beavers, S., and N Richard, *Gender Equality in Public Administration*, UNDP, New York, 2014.
- Bredbenner, C., 'A Nationality of Her Own. Women, Marriage and the Law of Citizenship,' University of California Press, Los Angeles, 1998.
- Chappell, L., *Gendering Government: Feminist Engagement with the State in Australia and Canada*, British Columbia Press, Vancouver, 2002.
- Clapham, A., *Human Rights in the Private Sphere*, Oxford University Press, Oxford, 1993.
- Clarke, L. and C. Rodrigues, 'Utilising Temporary Special measures to Promote Gender Balance in Pacific Legislatures,' UNDP Pacific Centre and Pacific Islands Forum Secretariat, Suva, 2009.
- Crowley, J., 'When Tokens Matter,' *Legislative Studies Quarterly*, 2004, 29(1): 109.
- Dubay, C., 'Beyond Critical Mass: A Comparative Perspective on Judicial design and Gender equality in Iraq and Afghanistan,' *Florida Journal of International Law*, 2012, 24: 163.
- Edwards, L. and M. Roces, *Women's Suffrage in Asia: Gender, Nationalism and Democracy*, Routledge, Oxford, 2004.
- Elbedour, S., W. Bart and J. Hektner, 'The Effect of Polygamous Marital Structure on Behavioural, Emotional and Academic Adjustment in Children: A Comprehensive Review of the Literature,' *Clinical Child and Family Psychology Review*, 2002, 5: 255.



- Feenan, D., 'Women Judges: Gendering Judging, Justifying Diversity,' *Journal of Law and Society*, 2008, 35: 490.
- Forster, C. and V. Jivan, 'Gender Equality Laws: Global Good Practice and a Review of Five Southeast Asian Countries,' UNIFEM, Bangkok, 2009, http://cedaw-seasia.org/docs/Aw_GEL_incover050609Feb10.pdf
- Fuess, H., *Divorce in Japan. Family, Gender and the State 1600–2000*, Stanford University Press, Stanford, 2004.
- Grillo, T., 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House,' *Berkeley Women's Law Journal*, 1995, 10: 16.
- Grown C., G. Gupta and A. Kes, *Taking Action: Achieving Gender Equality and Empowering Women*, Earthscan, London, 2005, <http://www.unmillenniumproject.org/documents/Gender-complete.pdf>
- Hackeker, D., 'The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought,' *Journal of Empirical Legal Studies*, 2010, 7(2): 322.
- Hersch, J., 'Employment Discrimination, Economics and the Law' in K. Moe (ed.), *Women, Family and Work: Writings on the Economics of Gender*, Blackwell Publishing, Boston, 2003.
- ILO, 'Time for Equality at Work,' ILO, Geneva, 2003.
- ILO, 'Indicators for the Labour Market,' ILO, Geneva, 2007.
- ILO, 'Global Employment Trends for Women,' ILO, Geneva, 2009.
- International Centre for Research on Women (ICRW), 'Intimate Partner Violence. High Costs to Households and Communities,' ICRW, Washington, DC, 2009, <http://www.icrw.org/files/publications/Intimate-Partner-Violence-High-Cost-to-Households-and-Communities.pdf>
- Irving, H., 'Why Constitutions Matter to Women,' *Sydney Papers*, 2008, 20(2): 172.
- Irving, H., *Gender and the Constitution: Equity and Agency in Comparative Constitutional Law*, Cambridge University Press, New York, 2008.
- Irving, H. and V. Hart, 'Gender Equity in Constitution-Making,' UNDP Iraq, Baghdad, 2005.
- Kaganas, F. and C. Murray, 'The Contest between Culture and Gender Equality under South Africa's Interim Constitution,' *Journal of Law and Society*, 1994, 21: 409.
- Kelly, L., 'Polygyny and HIV/AIDS: A Health and Human Rights Approach,' *Journal for Juridical Science*, 2006, 31: 1.
- Leilani, F., 'Is There a Woman in the House — Re/conceiving the Human Right to Housing,' *Canadian Journal of Women and the Law*, 2002, 14: 121.



- Lijphart, A., 'Constitutional Design for Divided Societies,' *Journal of Democracy*, 2004, 15: 96.
- Madhuku, L., 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa,' *Journal of African Law*, 2002, 46(2): 232.
- Malleson, K., 'Diversity in the Judiciary: The Case For Positive Action,' *Journal of Law and Society*, 2009, 36(3): 376.
- B. Manby, 'Citizenship Law in Africa,' Open Society Institute, New York, 2010, http://www.opensocietyfoundations.org/sites/default/files/citizenship-africa_20101118.pdf
- Maslak, M. (ed.), *The Structure and Agency of Women's Education*, SUNY Press, Albany, 2008.
- Morgan, M., 'Gender Jurisprudence under the Colombian Constitution' in B. Baines and R. Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence*, Cambridge University Press, Cambridge, 2005: 75.
- Nazir, S. and L. Tomppert, *Women's Rights in the Middle East and North Africa. Citizenship and Justice*, Rowman & Littlefield, London, 2005.
- Otto, D., 'General Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?,' *Canadian Journal of Women and the Law*, 2002, 14: 23.
- Parashar, A., 'Essentialism or Pluralism: the Future of Legal Feminism,' *Canadian Journal of Women and the Law*, 1993, 6: 328.
- Pascall, G. and A. Kwak, *Gender Regimes in Transition in Central and Eastern Europe*, The Policy Press, Bristol, 2005.
- G Poore, 'Sri Lanka Government Says LGBT Rights Are Constitutionally Protected,' <http://iglhrc.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected>
- Pradhan-Malla, S. and P. Gautam, 'Women's Right to Nationality and Citizenship,' IWRAW, Kuala Lumpur, 2006.
- Reynoso, J., 'Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins,' *Harvard Latino Law Review*, 2004, 7: 63.
- Robinson, K. and S. Bessell (eds), 'Women in Indonesia. Gender, Equity and Development,' Institute of Southeast Asian Studies, Canberra, 2002.
- Ross, S., 'Polygyny as a Violation of Women's Right to Equality in Marriage: An Historical, Comparative and International Overview,' *Delhi Law Review*, 2002, 24: 22.
- Sagade, J., *Child Marriage in India: Socio-Legal and Human Rights Dimensions*, Oxford University Press, New Delhi, 2005.



- Shoemaker, J., 'Constitutional Rights and Legislation,' *Justice, Governance and Civil Society*, 2004, 21: 21.
- Steinzor, N., 'Women's Property and Inheritance Rights: Improving Lives in Changing Times,' *Women in Development*, Washington, DC, 2003: 2.
- Thistle, S., *From Marriage to the Market: The Transformation of Women's Lives and Work*, University of California Press, Los Angeles, 2006.
- United Nations Development Programme, UNDP Guidance Note on Constitution-Making Support, New York, 2015.
- UNESCAP, 'Women in Local Government in Asia and the Pacific: A Comparative Analysis of Thirteen Countries,' UNESCAP, Bangkok, 2005, <http://iknowpolitics.org/en/2007/03/women-local-governments-asia-and-pacific-comparative-analysis-thirteen-countries>
- UNESCAP, 'Statistical Yearbook for Asia and the Pacific,' UNESCAP, Bangkok, 2009.
- UN, 'Millennium Development Goals Report 2012,' UN, New York, 2012, <http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2012/English2012.pdf>
- UN Secretary-General, 'In-Depth Study on Violence Against Women' (A/61/122/Add.1), UN, New York, 2006.
- UN Women Constitutional Database <http://constitutions.unwomen.org/>
- Vanderhule, W., *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, Antwerp, 2005.
- Williams, S. (ed.), *Constituting Equalit: Gender Equality and Comparative Constitutional Law*, Cambridge University Press, Cambridge, 2009.



ANNEX I – LIST OF CONSTITUTIONS AND LAWS REFERRED TO

COUNTRY	LEGISLATION	YEAR ENACTED	URL
AFRICA			
Angola	Constitution of the Republic of Angola	2010	http://www.wipo.int/wipolex/en/details.jsp?id=5622
Burundi	Constitution of the Republic of Burundi	2005	https://www.constituteproject.org/constitution/Burundi_2005.pdf
Central African Republic	Constitution of the Central African Republic	2004	http://www.law.yale.edu/RCW/rcw/jurisdictions/afm/centralafricanrepublic/car_const.pdf
Ethiopia	Constitution of the Federal Republic of Ethiopia	1994	http://www.africa.upenn.edu/Hornet/Ethiopian_Constitution.html
Ghana	Constitution of Ghana	1992	http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php
Kenya	Constitution of Kenya	2010	https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf
Malawi	Constitution of Malawi	1964	http://www.africa.upenn.edu/Govern_Political/mlwi_const.html
Mauritius	Constitution of Mauritius	1968	http://www.gov.mu/portal/site/AssemblySite/menuitem.ee3d58b2c32c60451251701065c521ca/
Namibia	Constitution of Namibia	2010	http://www.superiorcourts.org.na/supreme/docs/NamibiaConstitution.pdf
Rwanda	Constitution of the Republic of Rwanda	2003	http://www.rwandahope.com/constitution.pdf
South Africa	Constitution of the Republic of South Africa	1996	http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf
	Commission on Gender Equality Act	1996	http://www.acts.co.za/commission-on-gender-equality-act-1996/commission-on-gender-equality-act-1996_content.php
	Traditional Leadership and Governance Framework Act 41	2003	http://www.saflii.org/za/legis/num_act/cogea1996316/
Swaziland	Constitution of the Kingdom of Swaziland	2005	http://aceproject.org/ero-en/regions/africa/SZ/CONSTITUTION%20OF%20THE%20KINGDOM%20OF%20SWAZILAND%202005.pdf
Zimbabwe	Draft Constitution of Zimbabwe	2013	http://www.zim.gov.zw/index.php/documents/constitution-of-zimbabwe



COUNTRY	LEGISLATION	YEAR ENACTED	URL
ARAB STATES			
Iraq	Constitution of Iraq	2005	http://www.wipo.int/wipolex/en/text.jsp?file_id=230001
Somalia	Constitution of the Federal Republic of Somalia	2012	http://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTOSpoMME=
Sudan	Constitution of Sudan	2005	http://www.wipo.int/wipolex/en/details.jsp?id=10720
Tunisia	Constitution of the Republic of Tunisia	2014	http://confinder.richmond.edu/admin/docs/Tunisia_2014_EN.pdf
	Decree No. 35	2011	http://aceproject.org/ero-en/regions/africa/TN/tunisia-decree-no.-35-dated-10-may-on-the-election
ASIA AND THE PACIFIC			
Afghanistan	Constitution of Afghanistan	2004	http://www.servat.unibe.ch/icl/af00000_.html
Cambodia	Constitution of the Kingdom of Cambodia	1993	http://www.constitution.org/cons/cambodia.htm
East Timor	Constitution of the Democratic Republic of East Timor	2002	http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf
India	Constitution of India	1950	http://india.gov.in/my-government/constitution-india/constitution-india-full-text
Maldives	Constitution of the Republic of Maldives	2008	http://www.maldivesinfo.gov.mv/home/upload/downloads/Compilation.pdf
Pakistan	Constitution of the Islamic Republic of Pakistan	1973	http://www.pakistani.org/pakistan/constitution/
Papua New Guinea	The Constitution of the Autonomous Region of Bougainville	2004	http://www.paclii.org/pg/constitution-bougainville-2004.html
Philippines	Constitution of the Philippines	1987	http://www.chanrobles.com/philsupremelaw2.html
Tajikistan	Constitution of Tajikistan	1994	http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan003670.htm



COUNTRY	LEGISLATION	YEAR ENACTED	URL
EUROPE AND NORTH AMERICA			
Canada	Constitution Act	1982	http://www.solon.org/Constitutions/Canada/English/ca_1982.html
Hungary	Constitution of Hungary	2011	http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf
Portugal	Constitution of the Portuguese Republic	1976	http://www.servat.unibe.ch/icl/po00000_.html
Serbia	Constitution of the Republic of Serbia	2006	http://www.un.int/serbia/UstavRS_pdf.pdf
Sweden	Act on Swedish Citizenship	2001	http://www.government.se/content/1/c6/02/91/91/dcdd4a24.pdf
Turkey	Constitution of Turkey	1986	http://global.tbmm.gov.tr/docs/constitution_en.pdf
LATIN AMERICA AND THE CARIBBEAN			
Bolivia	Constitution of Bolivia	2009	https://www.constituteproject.org/constitution/Bolivia_2009.pdf
Colombia	Political Constitution of Colombia	1991	http://www.ifes.org/~media/Files/Publications/Constitutional%20Law/1991/IFES_26/CON00013.pdf
Costa Rica	Constitution of the Republic of Costa Rica	1949	http://www.servat.unibe.ch/icl/cs00000_.html
Ecuador	Constitution of Ecuador	2008	http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html
Saint Kitts and Nevis	Constitution of Saint Kitts and Nevis	1983	http://pdba.georgetown.edu/Constitutions/Kitts/kitts83.html



*Empowered lives.
Resilient nations.*

United Nations Development Programme
Bureau for Policy and Programme Support
304 East 45th Street
New York, New York 10017