

A GUIDANCE NOTE ON
THE MAKING AND SHAPING OF
CONSTITUTIONS
FROM A GENDER
PERSPECTIVE

EXECUTIVE SUMMARY



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Introduction

As the supreme law of the land, constitutions often provide the strongest legal means of protecting and promoting gender equality. They have the potential to entrench gender equality by providing clear rules and expectations, serving as an anchor for legal claims to advance rights and protections, and guiding decision makers and activists on more gender-responsive law-making. Constitutional review processes, therefore, create critical opportunities for advancing gender equality and women's rights.

In the 25 years since the Beijing Declaration and Platform for Action, hundreds of constitutional processes have provided gender equality advocates with a platform for consolidating real gains on women's rights.

Global women's landmarks (e.g., the Beijing Declaration and Platform for Action and the Women, Peace, and Security agenda) have fought for women to be represented and heard in constitutional processes and for their priorities to be transformed into equitable, enforceable rights. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has played a catalytic role in normalizing women's constitutional rights. Since its adoption in 1979, the inclusion of gender-related constitutional provisions has become near universal and almost all constitutions include, at a minimum, basic gender equality guarantees. While only 54 per cent of constitutions designed before 1970 included explicit guarantees of equality or non-discrimination across sex and/or gender, 100 per cent of constitutions developed between 2000 and 2017 include such guarantees. Post-conflict constitutions in particular have resulted in significant gains for women – 94 per cent include anti-discriminatory provisions based on sex and 75 per cent reference gender quotas. Women's

participation in constitutional review processes has also seen overall gains – increasing from an average of 13 per cent between 1990 and 1995 to an average of 24 per cent between 2010 and 2015.

Yet, despite this progress, much work remains. Women's inclusion in constitutional review processes remains well below parity and when women participate, they are often the target of harassment, threats and physical attacks and their substantive input is often undervalued by decision makers because they are not perceived as legitimate political actors. And despite hard-won gains, a gender-conscious constitution in itself does not guarantee the realization of rights and protections. Effective implementation is a necessary component of advancing gender equality and many countries struggle with fully implementing their constitutions due to resource shortages, failures of leadership, lack of political will, insufficient technical capacity, opposition by elites and privileged groups, and/or weak rule of law.

For decades, UN Women has played a pivotal role in advancing gender equality and women's rights in constitutional review processes and beyond. It supports the realization of CEDAW by providing technical assistance and resources to constitutional actors and the institutions, organizations and members of the public that support them. Serving as the gender focal point within the wider UN system and a key partner and convener to a range of constitutional actors (e.g., constitutional review bodies, parliamentary gender caucuses, law reform commissions, women's movements, gender machineries, international NGOs), UN Women has also directly supported gender equality advocates across all phases of a constitutional review process to ensure women's perspectives are included in constitutional deliberations and that the resulting constitutional text is gender-responsive and implemented effectively.

Drawing on insights from UN Women staff as well as other practitioners, academics and organizations working at the nexus of gender equality and constitutional review, this Guidance Note conveys lessons learned through a range of case studies, including examples of UN Women's direct support to constitutional review processes across a variety of contexts. This Guidance Note shares international good practice, examples and lessons learned from a range of **constitutional review processes** and **constitutional design** – from wholly new constitutions to more minor amendments and revisions, interim constitutions as well as unwritten constitutions. Each one of these constitutional moments provides a critical entry point for gender equality advocates to advance women's rights.

Guidance for the Constitutional Review Process

This Guidance Note is being issued at a time when the UN Secretary General has issued a **Guidance Note on UN Constitutional Assistance**. This latter Guidance Note endorses inclusivity, participation and transparency as a fundamental principle and strategy. It endorses the fact that “participatory constitution making embraces all sectors of society, particularly women, youth, linguistic, religious, and ethnic groups, sexual and gender minorities and persons with disabilities.”

The design of a gender-responsive constitution requires an inclusive process where women and other gender equality advocates are influential and active participants, both as members of constitutional review bodies and as movement builders and activists. As such, the Guidance Note focuses on maximizing the impact of these actors across the three phases of constitutional review: (1) setting the agenda, (2) consulting, negotiating, designing and adopting a constitution, and (3) implementing the constitution. For each phase, activities and strategies for advancing gender equality are shared as well as examples from UN Women constitutional support. In summary, the key takeaways include:

Setting the agenda

- **Mobilize early:** Mobilization of gender equality advocates and women's networks must occur well before the constitutional process begins, particularly where constitutional processes are preceded by peace negotiations or other political settlements. The early stages of constitution review (i.e., rule-making, election/appointment of the constitutional review body) establish how the constitution and its contents will be discussed and drafted. Gender equality advocates need to mobilize early to ensure strategic allies are included in the constitutional review body to provide entry points for continued engagement into the process.

Consulting, negotiating, designing and adopting a constitution

- **Harness collective action and build broad coalitions/movements:** Building inclusive, diverse coalitions or movements with a shared agenda is one of the most powerful tools for achieving influence in a constitutional process. This should include building strong working relationships between gender equality advocates inside constitutional review bodies as well as with activists outside the formal process. Coalition building should recognize and celebrate the intersectionality of women's experiences and acknowledge the direct/indirect discrimination of women subject to multiple forms of oppressions.
- **Develop strategic advocacy for gender equality:** Effective advocacy requires intentional planning and engagement. Messaging should reflect the current political context and, where possible, align with the priorities of key influencers and decision makers within the constitutional review body. Advocates should also think carefully about how to frame draft gender-related provisions, considering what is possible now and what may be possible in two or three political

cycles. If full gains are not realistic given current political conditions, advocates should target basic principles (like equality/non-discrimination and women's rights) that can be leveraged for growth and expansion.

- **Support women within the constitutional review body:** Women representatives in constitution review bodies occupy positions of power, but that often comes at a cost. They are subject to gender biases that question their credibility and legitimacy as political actors in addition to their gender equality priorities. Male allies and actors outside of the formal process should seek ways to support these women who are ultimately the spokespersons for the gender equality agenda within the constitutional process.

Implementing the constitution

- **Support and enable constitutional implementation:** Constitutions only provide de jure rights and protections. Continued pressure on and engagement with policymakers is needed to make those hard-won rights a reality. Gender equality advocates should concentrate on activities that promote the implementation of specific provisions, such as law/policy making, the establishment of gender equality machineries and public interest litigation.

UN Women is uniquely placed to support gender equality advocates both inside and outside a constitutional review process, through all phases of a constitutional process. This is bolstered by the long-term relationships that country office staff are able to cultivate with government institutions, local women leaders and other gender equality advocates. Staff have been able to leverage these relationships to serve as gender equality resources in constitution review processes and subsequent constitutional implementation efforts, particularly as it relates to country commitments under CEDAW.

Guidance for Constitutional Design

The Guidance Note explores eight broad categories of constitutional provisions which represent some of the first-order provisions that relate to gender equality and women's rights as reflected in CEDAW and other international human rights instruments. Each category includes general guidance on international good practice, sample constitutional provisions, and examples of how UN Women has supported the implementation of such provisions. The eight categories include:

- **Equality and non-discrimination:** Equality and non-discrimination are core international human rights standards and foundational building blocks for every constitution. Since all rights are fundamentally indivisible, interrelated and interdependent, these provisions in particular provide a high standard against which to hold other fundamental rights and freedoms as well as laws and policies. Constitutions should include language that promotes formal and substantive equality, prohibits direct and indirect discrimination, recognizes multiple forms of discrimination, and applies prohibitions to private and public persons/institutions.
- **Women's rights:** Women's rights provisions must extend beyond general principles of equality and non-discrimination by naming rights and freedoms for women explicitly. They provide an important entry point for the domestication of global and regional legal standards in areas such as equal access to education, health, citizenship and participation in elected and appointed bodies. Some constitutions provide broad language that is complementary to substantive equality provisions, while others identify specific areas where women have faced discrimination.

- **Affirmative action, political participation and participation in public life and institutions:** Many constitutions employ affirmative action provisions to address historical and widespread discrimination against women and promote progress toward substantive gender equality. Quotas or other mechanisms have been used to mandate women's inclusion in all branches of government, civil service and other political and public institutions. Yet, while quotas can be effective in increasing the number of women representatives, many countries have struggled to fully implement them and, in some cases, they have resulted in other adverse effects. This highlights the need for careful implementation design and more holistic approaches.
- **Citizenship and nationality:** Citizenship is a basic precondition to gender equality. Historically, women's citizenship rights have been defined largely by their relationships with men (i.e., granted through patrilineal relationships or marriage). This can have disastrous effects, such as rendering women Stateless when widowed or divorced. As such, recent trends have sought to promote women's equal and independent citizenship rights, including a woman's right to retain citizenship upon divorce as well as the ability to transfer citizenship to her spouse and children.
- **Marriage and family life:** A minority of constitution's guarantee equal rights within or while entering and exiting a marriage. As such, there is a need to advance provisions that recognize equality of spouses during all phases of a marriage. This includes, for example, protecting women from forced marriage and divorce, enforcing the same minimum legal marriage age for men and women, and guaranteeing equal decision-making power over communal property.
- **Property, inheritance and land tenure:** Constitutional protection of women's equal right to purchase, own, inherit, and dispose of property and land both within and outside marriage can have serious implications for women, particularly in rural areas where control and ownership are critical to livelihoods, food security and physical security. Because legal regimes for inheritance and property ownership can greatly vary, particularly in plural legal systems, strong constitutional guarantees are needed to protect women's rights.
- **Status of international law:** Incorporating international law into domestic legal frameworks can help to strengthen gender equality. In contrast to the dualist tradition, the monist tradition enables international law to be directly applied in domestic courts to enforce rights in areas where there is no domestic law and assist in interpreting existing law. This also offers women more immediate access to rights protected by international law.
- **Gender equality machineries:** Gender equality machineries are independent institutions that play a key role in supporting the implementation of constitutional guarantees and promoting continued gender mainstreaming across all levels and aspects of the government. A constitutional mandate provides gender equality machineries with legal and symbolic standing as one of the country's core institutions and also ensures that such institutions cannot be easily dismantled. Beyond a clear mandate, gender equality institutions also require adequate funding and human resources, strong relationships with women's civil society organizations, and meaningful influence over government agenda setting and decision-making in order to be effective.

