

# WHY AND HOW CONSTITUTIONS MATTER FOR ADVANCING GENDER EQUALITY

## GAINS, GAPS AND POLICY IMPLICATIONS

### SUMMARY

Constitutions are the most authoritative expressions of States' systems of governance and accountability and therefore pose potential opportunities for and threats to the advancement of gender equality. This policy brief outlines the gains and gaps in gender-responsive constitution-making over the years and the policy lessons that can be drawn from these for ongoing constitutional and post-constitutional reforms. It finds that there has been a significant growth in gender-responsive constitutions since the 1980s. However, it argues that while this is an important achievement, the persistence of gender discriminatory provisions in some constitutions as well as the lack of a clear pathway between constitution-making and policy and legislative change tends to diminish the contribution of constitutions to gender equality efforts. It examines strategies that have been used by different players for achieving gender-responsive constitutional changes and pinpoints examples of situations in which reforms have been harnessed for positive advances in jurisprudence, policy and legislation.

### The importance of constitutions to women

Since the 1980s, constitutional content has evolved from the quintessentially gender-neutral to the gender-specific. Africa, Asia and the Americas account for the majority of identifiable gender-related constitutional reforms across this timeframe.<sup>1</sup> While constitutional reforms can take place as part of a regular political process, the most significant ones—often involving the rewriting of a constitution—have frequently taken place in a climate of substantial political change.<sup>2</sup> In this context, 44 sub-Saharan constitutions have been rewritten since 1995 or are in the process of being rewritten.<sup>3</sup>

An analysis of UN Women's constitutional database demonstrates commitment to a number of areas that are important for women's rights and gender equality.<sup>4</sup> Most constitutions include general provisions on equality and non-discrimination, and many have additional gender equality provisions related to, for example, protection from violence, access to education or political quotas (see Figure 1). Some constitutional reform processes have also been accompanied by a quest for specific changes in language. The constitutions of Ecuador and South Africa represent promising examples of constitutional commitment to substantive equality: The former makes express reference to substantive equality while the latter embraces a unique blend of excluded grounds of discrimination

(e.g., pregnancy, marital status, sex, gender and sexual orientation).<sup>5</sup> The deliberate use of pronouns (he and she, man and woman) in constitutions such as those of Ethiopia, Morocco and Tunisia is "a subtle acknowledgement that constitutional language functions to reorder and reconfigure society".<sup>6</sup>

### The role of constitutional jurisprudence in advancing gender equality

The availability of provisions on constitutional courts and remedies in 177 constitutions strengthens the ground for constitutional litigation.<sup>7</sup> The strong will and tenacity of civil society groups to actively engage in public interest litigation has in no small way contributed to the reform of gender discriminatory laws. Women's groups in Colombia have utilized such forums to protect women from conflict-related violence and displacement.<sup>8</sup> Women have used their national constitution to protest against the desecration of sacred land in Australia, police failure to warn about a serial rapist in Canada, forcing contraceptives on female prisoners as a condition of conjugal visits in Colombia, gendered prayer rights in Israel, the restitution of conjugal rights in India, the order of family names in Germany and male preference rules in the inheritance of nobility titles in Spain.<sup>9</sup>

Although the wider impacts of constitutional jurisprudence are rarely documented, the 1995 case of 19-year-old Adriana Granados, who filed a claim for

the right of admission to the navy in the constitutional court of Colombia, paved the way for the enrolment of the first 28 women cadets. In 1997, 34 women joined the air force as pilot trainees and 20 entered the naval officers' training school, while military installations have been adapted to provide private lodging, separate bathrooms, pregnancy tests and maternity uniforms.<sup>10</sup> The Supreme Court of Nepal annulled a provision in the criminal code that exempted husbands from marital rape.<sup>11</sup> The case of *Unity Dow v. Attorney General* of Botswana led to the repeal of the Citizenship Act, which had denied women the right to pass on their nationality to their foreign husbands and children of the marriage. The *Mmusi case*—in the same country—declared the *Ngwaketse* customary law unconstitutional, making it possible for women to claim equal rights as men to inherit property.<sup>12</sup>

### Drivers and actors in gender-responsive constitutional reforms

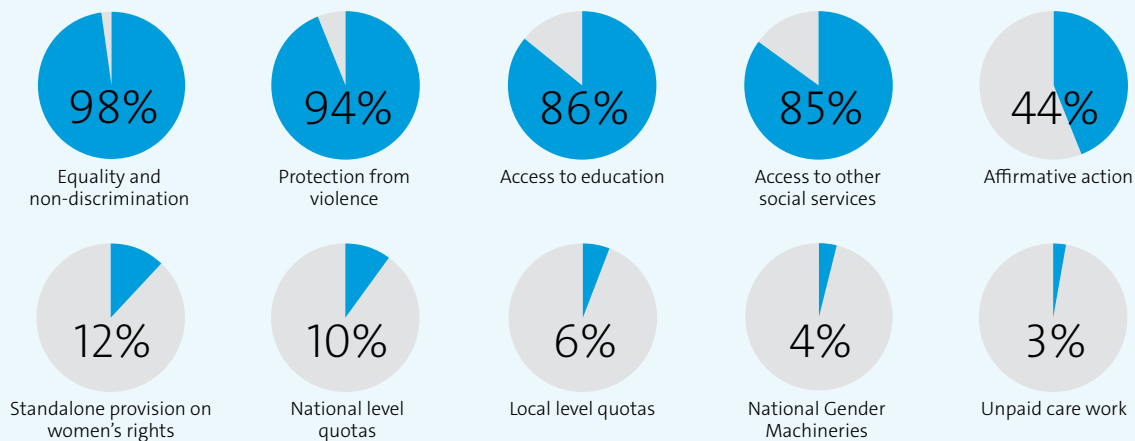
A constellation of factors may be identified as having served to accelerate gender-responsive constitutional reforms across post-independence constitutions in particular. They include the wide and rapid ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) from the early 1980s onwards; the proclamation of International Women's Year in 1975 and the subsequent world conferences on women of 1975, 1980, 1985 and 1995; growing and relentless civil society activism since the 1970s; and women's mobilization in the context of democratic transitions and post-conflict settlements. Article 2(a) of the Convention places an

obligation on 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 realization of this principle”. The Committee on the Elimination of Discrimination against Women consequently requests States to report on measures being made to ensure that discriminatory constitutional provisions are reviewed. As recently as March 2016, the United Republic of Tanzania and Vanuatu were among a group of States to which the Committee recommended a comprehensive review of constitutional provisions for ensuring adequate reflection of the principle of equality and a definition of discrimination that conforms to the Convention.<sup>13</sup>

In post-conflict countries, constitutional reforms have often formed part of a three-pronged political reform process that includes peace agreements and electoral reforms.<sup>14</sup> In sub-Saharan Africa, countries that experienced major civil conflict and violent upheaval in the period following the mid-1990s have witnessed the most significant constitutional changes on the continent.<sup>15</sup> Post-conflict transitions created “political openings” for women's groups to make demands for change; and “major disruptions” in gender relations permeated through countries of political transition as women occupied traditionally male-dominated roles as breadwinners and leaders during times of community and national crisis.<sup>16</sup> These shifts laid the ground for women's groups to make far-reaching gender equality demands as part of the constitutional reform process. For example, 94 per cent of post-conflict con-

FIGURE 1

Percentage of countries with constitutional provisions to advance equality, by type



stitutions contain anti-discriminatory provisions based on sex, and 75 per cent of post-conflict constitutions reference gender quotas in contrast to 25 per cent of non-post-conflict constitutions.<sup>17</sup>

From a broader perspective, post-colonial constitution-making has experienced a significant trend towards open and participatory constitutional review processes. Gender equality advocates have often seized the opportunity to influence constitutional design from different locations, including women's movements, gender machineries, constitutional review bodies, parliamentary gender caucuses, law reform commissions, the UN System, regional bodies and other development actors.<sup>18</sup> Strategic alliances between these actors as part of a relatively open, democratic and transparent process have been crucial to placing and maintaining gender equality on the constitution-making agenda.<sup>19</sup> Some of the strategies that women's organizations have used to press their demands have included alliance-building across party lines, exploiting strategic entry points and engaging male leaders.

The drafting of Uganda's post-conflict constitution, for instance, was effectively undertaken through a coalition of 52 female members of the Constituent Assembly, two women lawyers on the Constitutional Commission, a non-partisan Women's Caucus and the broader women's movement, which supported this process externally.<sup>20</sup> The tenure of the 2008 National Constituent Assembly of Ecuador saw assembly members, their legal assistants, women's civil society organizations (CSOs) and other stakeholders play the role of constitutional drafters: "these individuals and organizations worked to operationalize earlier gains so that non-normative individuals, families and households could access material gains from previous forms of legal recognition".<sup>21</sup> Similarly, gender equality provisions in the 2013 Constitution of Zimbabwe were spearheaded by the Group of 20, which consisted of women activists, politicians and academics.<sup>22</sup>

## Challenges, gaps and policy implications

Despite this progress, UN Women's constitutional database shows that a number of challenges and gaps in constitutional reform remain.<sup>23</sup> For example, 84 per cent of constitutions contain provisions that relate to the status of customary or religious law. While this is not intrinsically worrying for the advancement of women's rights, the CEDAW Committee has expressed concern about the potential impact of religion and

custom on women's rights, including through the reservations that some 30 States have entered on women's personal law and non-discrimination. Relatedly, 11 constitutions reflect 'claw back clauses', which allow exceptions to non-discrimination clauses in matters of personal law—particularly marriage, divorce, adoption and inheritance. This has a tendency to water down the positive entry points that non-discrimination clauses present for eliminating discrimination against women in law and in practice. Stark constitutional inequalities are also located in provisions on the qualification of heirs to monarchies—of the 44 constitutional monarchies in existence, 27 are strictly patrilineal. Additionally, of the 98 constitutions that reference the right to citizenship/nationality, 14 do not provide women with equal rights to men to acquire, change, transfer or retain their nationality.<sup>24</sup> The new constitution of Nepal is a key milestone of the Peace Agreement and includes a number of gender-responsive provisions, such as the establishment of the National Women's Commission as a constitutional body. However, it also retains provisions (e.g., on citizenship) that are not consistent with the CEDAW Committee's Concluding Observations.<sup>25</sup>

To be effective, post-constitutional reforms must be anchored in ongoing financial and technical support.<sup>26</sup> CSOs often experience significant setbacks in post-conflict settings—including withdrawal of funding from international and local donors on the basis that the war is over. CSOs involved in constitutional litigation also suffer severely from the lack of both human and financial resources, while Jagwanth and Murray point to the under-resourced capacity of the South African Gender Equality Commission established under the Constitution.<sup>27</sup>

While knowledge generation on the impacts of constitutions on policy and legislative reforms can contribute to broader gender equality advocacy efforts, such efforts are yet to gain any meaningful attention globally.

At the same time, however, limited data from some countries demonstrate the value of constitutions as tools of change. The South African Constitution, for example, provided significant impetus for a wave of legislative reforms that address gender discrimination (e.g., the Promotion of Equality Act, the Labour Relations Act, the Prevention of Family Violence Act, the Choice on Termination of Pregnancy Act, the Maintenance Act and the Films and Publications Act).<sup>28</sup> In Ecuador, a number of national studies on women's time use, the feminization of poverty, domestic chores and

unpaid labour—as well as the 2007 Quito regional conference on women in Latin America and the Caribbean—served as important catalysts for promoting constitutional provisions on unpaid care work.<sup>29</sup> Such provisions and the forces that had promoted them led to far-reaching commitments to legal and policy change, starting with the National Plan for Good Living (2009–2013). The Plan committed to: (1) the creation and consolidation of a National Care System for children, people with disabilities and older persons; (2) the allocation of public resources to the progressive extension of social security to unpaid caregivers; and (3) the recognition and monetary evaluation of care activities within the National Accounts System through the creation of a Satellite Account, which was designed in 2010 and updated in 2014.<sup>30</sup>

Overall, constitutional reforms have implied major gains for women’s rights through a broad range of widespread and emerging provisions. Success in incorporating gender-responsive provisions has resulted from strategic alliances between state and non-state actors, particularly women’s groups. These gains should not, however, mask the deficits in constitutional reform, particularly as seen in the persistence of discriminatory provisions. Constitutions can also serve as effective triggers of legislative and policy change in support of gender equality, provided opportunities and entry points afforded by post-constitutional reforms are fully exploited and resources are made available for such purposes. Research is also needed to assess how to boost the effective use of constitutions as tools for more far-reaching legal and policy changes that advance gender equality.

## RECOMMENDATIONS

- **Ensure women’s full and equal participation in processes of constitutional review and reforms in all contexts, e.g., post-conflict and development**
- **Leverage the opportunity for cross-country learning by showcasing positive experiences of gender-responsive constitution-making, particularly in relation to eliminating persistent discriminatory constitutional provisions**
- **Provide sufficient resources for post-constitutional policy and legislative processes to leverage constitutional enforcement and implementation. In particular, constitutions must serve as tools for challenging and eliminating gender discriminatory laws as defined by Sustainable Development Goal 5.1**
- **Support gender-responsive public interest litigation by equipping relevant actors to build on achievements in successful gender equality-related litigation. This must be accompanied by continuous efforts to assess the impact of court decisions on women more broadly and strategies that have been and can be used for scaling up such benefits**
- **Conduct further research into the wider impacts of gender-responsive constitutional reforms to serve as a basis for strategic uses of constitutions as instruments of transformative change for women among a wide range of audiences**

The policy brief series synthesizes research findings, analysis and policy recommendations on gender equality and women’s rights in an accessible format. This brief was produced by Beatrice Duncan, Justice and Constitutional Advisor at the Leadership and Governance Section. To see the full bibliography visit: <http://unwomen.org/jnAn3o9botU>

### FURTHER READING

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Waylen, G. 2006. “Constitutional Engineering: What Opportunities for the Enhancement of Gender Rights?” *Third World Quarterly* 27, no. 7: 1209–21.

### ENDNOTES

<sup>1</sup> Based on a review of UN Women’s Global Gender Equality Constitutional Database, which reviews 195 constitutions of member States and territories of the United Nations from a gender perspective. It defines ‘gender-responsive constitutions’ as “those that meet internationally agreed upon standards on gender equality”. See UN Women 2016a.

<sup>2</sup> Tripp 2016.

<sup>3</sup> Ibid.

<sup>4</sup> UN Women 2016a, 2016b.

<sup>5</sup> Article 11(2) of the Constitution of the Republic of Ecuador 2008, as amended to 2011 and Section 9 (3) of the Constitution of the Republic of South Africa 1996, as amended to 2012.

<sup>6</sup> Ni Aolain et al. 2011

<sup>7</sup> Baines and Rubio-Marin 2005.

<sup>8</sup> O’Neil and Domingo 2016.

<sup>9</sup> Baines and Rubio-Marin 2005.

<sup>10</sup> Morgan 2005.

<sup>11</sup> UN Women 2011.

<sup>12</sup> Under Ngwaketse customary law, the youngest male child inherits the home.

<sup>13</sup> Committee on the Elimination of Discrimination against Women 2016a, 2016b.

<sup>14</sup> Ni Aolain et al. 2011.

<sup>15</sup> Tripp 2015.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Jagwanth and Murray 2005.

<sup>19</sup> Waylen 2006, 2014.

<sup>20</sup> Ibid.

<sup>21</sup> Lind 2012, p. 538.

<sup>22</sup> Flores and Made 2014.

<sup>23</sup> UN Women 2016a.

<sup>24</sup> Ibid.

<sup>25</sup> Committee on the Elimination of Discrimination against Women 2011.

<sup>26</sup> UN Women’s experiences in supporting such efforts demonstrate that constitutional reform tends to attract a substantial volume of resources, which often dwindles once a draft constitution is in place. Resource allocation to constitutional and post-constitutional reforms can be a subject of further investigation.

<sup>27</sup> Jagwanth and Murray 2005.

<sup>28</sup> Ibid.

<sup>29</sup> Dighiero 2015.

<sup>30</sup> Ibid.

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