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Women Constitution-Makers: Comparative Experiences with Representation, Participation and Influence

First Annual Women Constitution-Makers' Dialogue, Edinburgh 2019



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Erin C. Houlihan

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International IDEA
Strömsborg
SE-103 34 Stockholm
Sweden
Telephone: +46 8 698 37 00
Email: info@idea.int
Website: <https://www.idea.int>

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Executive summary

On 24–25 October 2019, the International Institute for Democracy and Electoral Assistance (International IDEA)—together with the Edinburgh Centre for Constitutional Law (ECCL) and the Political Settlements Research Programme (PSRP) at the University of Edinburgh—hosted the inaugural event in a series of forums to be known as the Women Constitution-Makers’ Dialogue. The series is a networking and peer-to-peer dialogue programme wherein women constitution-makers and comparative constitutional experts can share country-specific constitution-building experiences, knowledge resources and tools, and identify opportunities and obstacles to women’s participation and influence from both a country-level and global perspective. The dialogue focuses on women’s representation and participation in national constitution-making processes, examines constitutional outcomes from a gender perspective, and considers commonly contested constitutional design choices more broadly.

The partnership between International IDEA, ECCL and PSRP provides links to constitution-building and peacebuilding networks, as well as to key individuals from the academic, international advisor and national practitioner fields from the Global North and South. Premised on the mutual benefits of regular and structured engagement between women constitution-makers, scholars and practitioners, the dialogue series represents a conceptual and practical response to documented needs for an organized, systematic, women-centred approach to examine and support inclusive, participatory and gender-sensitive constitution-building.

The inaugural event, entitled ‘Founding Women: A Dialogue with Women Constitution-Makers on Representation, Influence and the Broader Complexities of Constitutional Reform’ took a broad approach to exploring the role and experiences of women constitution-makers. This enabled participants to examine multiple comparative experiences and assess interests and needs for establishing the dialogue as a regular series. The timeliness of the inaugural event is evidenced by the 25th anniversary of the Beijing Declaration and Platform for Action, which has been marked by the 64th Session of the Commission on the Status of Women in March 2020.

Discussions and comparative experiences shared throughout the event raised a series of practical and normative questions around the role of women in constitution-making, gender-sensitive constitutional outcomes, and broader issues of constitutional design. It also highlighted the lack of a similar global forum that can facilitate comparative examination of women in constitution-making across regions and sectors. This event report focuses on discussion topics around participation, representation and gender-sensitive outcomes. It constitutes a starting point for further exploration and coordination, knowledge production and resource mobilization. Key points arising from the first Women Constitution-Makers' Dialogue included:

1. Gender equality and constitution-building are generally considered intertwined yet distinct fields of study and practice. While there is broad agreement that constitutions ought to be gender-sensitive in terms of both the drafting process and content, common approaches tend address issues of gender and sex equality in a compartmentalized and interest-specific manner. Women's strategic interests are often addressed through a 'check list' of normative issues. Yet this partitioned approach does not sufficiently address the gendered nature of all constitution-making processes and all constitutions. Rather, comparative constitutionalists, international advisors, peacemakers and national practitioners should have a deep understanding of gender concepts and issues of equality and discrimination. **Constitution-building experts should, by definition, be gender experts as well.**
2. Regarding women's participation in peace processes, global trends reveal increased engagement in terms of both absolute numbers and seniority of roles. Yet with few exceptions, **women's participation in peacebuilding remains low compared to men's across cases and regions.** This creates both normative challenges around women's participation as a matter of right, and substantive challenges for the content of peace agreements and interrelated constitutional reforms.
3. Peace negotiations tend to approach women's participation and equality as an apolitical concern distinct from the goal of getting parties to the conflict to lay down arms. This distinction ignores the interdependence of these concerns and undercuts women's influence over political settlement formation and agenda-setting for constitutional reform. **Without early mobilization and meaningful engagement in all aspects of peacebuilding, women's capacity to influence constitution-building is more limited.**
4. Constitution-building processes and the composition of constitution-making bodies are increasingly inclusive of women and reflect the influence of international normative frameworks on the behaviours of many states. Despite this, getting a seat at the table remains challenging for women. Particularly in conflict-affected settings, decisions about process design and the nature and composition of the constitution-making body are often made at the peace table by smaller groups of political or warring elites. Given this, it is important that women influence the design of constitution-making bodies, the manner in which members are appointed or elected, leadership structures, and the diversity of women's views and experiences represented. **Early mobilization around women's participation in both peace processes and constitution-making, and particularly regarding technical decisions to set up and compose the constitution-making body, is key to ensuring that women's interests and concerns are addressed at a substantive level.**

5. With some notable exceptions, such as in the Philippines, women members of constitution-making bodies are often perceived by the public and men counterparts as representing so-called 'women's issues'. Evidence from the workshop and other qualitative sources indicated that women are less likely to be asked by the press about broader design issues regardless of personal expertise. Both inside and outside constitution-making bodies, **women tend to have more limited opportunities than men counterparts to share expertise and influence decision-making on broader constitutional design matters**, such as issues around structure of the state, system of government, and the judiciary.
6. **The relative success of gender-sensitive constitutional design depends on the confluence of several factors.** First, seats at the table are not sufficient; women should also have equitable access to leadership roles, such as serving as Chair or Vice-Chair as in Tunisia, and chairing sessions, working groups and/or committees as in Nepal. Second, gender-sensitive provisions are more likely to be retained when advocates inside the constitution-making body effectively partner with allies outside the body who can provide expertise and generate public engagement around consensus-based demands. Third, women's interests tend to be most responded to and recognized as politically salient when integrated into the mandates of broader coalitions (such as those advocating for enhanced inclusion of minorities or equality coalitions), than when presented as the views of a distinct interest group.
7. Even where constitutional provisions mandate greater inclusion and empowerment of women, the **implementation of these provisions often falls short of expectations.** In some cases, such as Kenya, courts have assisted in undercutting constitutional commitments to women's participation; in others, such as Nepal, increased women's participation through reserved seats has become an end point rather than a first step toward broader change. Shaping constitutional practices and institutional culture is dependent in large part on political will, the position of the courts, the sustainability of advocacy coalitions, and political party governance.
8. Across the board, **discussions highlighted the importance of technical, financial and capacity-building support for women to have a bigger voice in constitution-making.** While international assistance has increased over the years, gaps and challenges remain for women's access at the country level. Such support should be tailored to the country context and include, for example, comparative knowledge about the design of constitution-making bodies and mechanisms to increase inclusion; the scope of constitutional design issues impacting women; tools and expertise to assess and contextualize the implications of various design choices; skills to mobilize, advocate for and debate these issues throughout the process; and organizational and financial resources to continue advocating for effective implementation of constitutional guarantees in the years following promulgation.

1. Conceptual framework: current context and global trends

Since the end of World War II, opportunities for women's participation in constitutional transformation have increased compared to the pre-war years. This progress began slowly with a handful of states appointing a small number of women as members of constitution-making bodies up through the 1970s (Rubio-Marín and Irving 2019). Since then, a series of initiatives at the global policy level began to construct an international framework for advancing gender equality, in part through enhancing women's participation and inclusion in political life as well as in peace and security reform processes. These developments include: the proclamation of International Women's Year in 1975; the wide ratification of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); subsequent world conferences on women in 1980, 1985 and 1995; and United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security, among other events, declarations, platforms, conventions and resolutions.

At the same time, research developments have linked political legitimacy of institutions and laws to the extent of participation and representation. **Mounting evidence suggests that women's representation is linked to more equitable legal frameworks, more inclusive social and economic reforms and, in conflict-affected states, to more sustainable peace** (O'Reilly et al. 2015; Krause et al. 2018; Lee-Koo and True 2018). The idea that inclusion of women matters is partially rooted in the 'politics of presence' theory which links the descriptive representation of women and the substantive representation of women's strategic interests to outcomes for legitimacy, democratic justice, responsiveness and effectiveness (Phillips 1998). Combined, this evidence has contributed to a normative approach to constitutional reform focused on participation and inclusion; and has resulted in a marked increase in women's engagement in constitution-making and peacebuilding processes.

Since the 1980s, women's participation has become more systematic and widespread, but still falls short of parity with men. The parity gap remains the most persistent within the more discrete process of *constitution-making*, as compared to the broader process of *constitution-building*. *Constitution-building* is a long-term, inclusive and participatory process that combines the legal, political and social aspects of state transformation. It arises from elite bargains (often initiated at the peacebuilding table in conflict situations) broadened through the inclusion and participation of diverse factions and groups that come together to (re)define their state and its values. *Constitution-building* does not conclude with the promulgation of the constitutional text but extends to implementation, harmonization of law, and other efforts to support the transition and give meaningful effect to constitutional commitments. The *constitution-building* framework recognizes that the constitutional text is

not alone sufficient to institutionalize the new constitutional order. Constitution-*making* is therefore an element of constitution-building focused on the development, adoption and ratification of the constitutional text. It is the process in which decision-makers argue and bargain to design constitutional provisions within the designated constitution-making body. While women today regularly engage in constitution-*building*, constitution-*making* remains primarily reserved to elite political actors and jurists who are predominately men.

From 1990 to 2015, 75 countries engaged in constitutional reform or a negotiated transition from authoritarianism to democracy following conflict or unrest, yet only 19 per cent of members of constitution-making bodies were women (Tamaru and O'Reilly 2018). This is troubling for both the legitimacy of the constitutional reform and the capacity of the new constitutional order to effectively address the strategic interests of women and girls and to empower women as equal participants in a country's political, civil, economic and social life. Constitutions distribute (and limit) access to political power and state resources; they also provide recognition and protection for various identities and interests. Constitutions are therefore power maps that connect the legal, political and social aspects of a state and the people that comprise it; as power maps, constitutions represent the negotiated intersection of interests represented at the table and are therefore also deeply symbolic. The level of participation and inclusion brought to bear in a constitution-making process can impact the document's popular legitimacy and therefore its implementation (Hart 2003; Moehler 2008). The nature of the constitution-making process is therefore just as important as the text of the final document.

Today, women's participation in constitution-making is, at least superficially, an almost standard consideration in the design of reform processes. In some countries, such as Tunisia, gender equality is embraced at a substantive level for constitution-making, leading to gendered procedures to secure effective representation throughout the process as well as the maintenance of equality commitments in the final text. In others, such as Iraq and Somalia, commitments to women's participation and representation of their interests are more symbolic and have proven to be easily compromised through political pressure, expediency, or conflicting priorities that favour stabilization over equality (Tamaru and O'Reilly 2018: 5).

In practice, the pressures, assumptions and decisions that determine *how* women constitution-makers are elected or appointed to the constitution-making body vary significantly, as does the proportion of men to women within the institution. Similarly, perceptions—both personal and public—of *which interests* women constitution-makers represent (their mandate) and *how and when these interests are identified and added to the constitutional reform agenda* are important for understanding how women constitution-makers define their own role, how men colleagues and the general public understand women's constitution-making role, and the level of influence women can exercise in ensuring that the final constitutional text adequately addresses these interests.

In terms of design outcomes for women's equality, recent reform processes also demonstrate progress. All constitutions adopted since 2000 include equality and gender non-discrimination provisions (WORLD Policy Analysis Center n.d.). Increasingly, constitutions also protect social, economic and cultural rights—many of which are deeply important for women and girls—and obligate the state to undertake law and policy reforms for progressive realization of these rights. Yet in many countries, implementation of these and interrelated provisions remains highly uneven. Public and political backlash against women's equality gains also remains common.

There is a clear need to disentangle, examine and clarify linkages between normative frameworks on women's political participation, inclusion and substantive equality on the one hand, and the processes and outcomes of constitution-building on the other. This is particularly true for post-conflict and transitional environments where constitutional

reform results from peace agreements and/or potentially fragile political settlements which may or may not have involved women's participation. Emerging research shows that women constitution-makers often face challenges similar to those experienced by women representatives in parliaments, particularly in terms of perceptions of symbolism or 'tokenism', institutional obstacles and biases that limit women's capacity to exert influence, and conflicting definitions of 'women's interests' in a given context and in light of intersectionalities with socio-economic status, ethnic identity, religious belief, disability status, geographic location and a host of other considerations. Yet the complexities and high stakes of constitution-making challenge the ability of researchers and advisors to tease apart the interactions between conflict dynamics, social and cultural norms, interest cleavages, and the informal and formal processes and rules under which women constitution-makers operate. Understanding these dynamics from a comparative perspective is useful not only for researchers, but also for women constitution-makers and leaders on the ground.

2. Getting a seat at the constitution-making table

Key points

- Early mobilization is crucial and should target women’s participation in both peacebuilding and constitution-making processes.
- Quotas are a common and useful mechanism to enhancing women’s representation but include risks. There are many different types of inclusion mechanisms. Choices should consider the country context.
- In addition to getting a seat at the table, leadership roles in constitution-making bodies also matter for women, as do formal and informal rules of procedure and decision-making pathways.

During the constitution-building wave of the early 1990s, only 13 per cent of participants on constitution-making bodies were women. Today, participation is around 26 per cent (Tamaru et al. 2018). This is a measurable improvement compared to previous eras, but significant gaps remain. This emerging global trend reflects growing national demands for inclusive and participatory processes writ large and is buttressed by related international conventions, resolutions and policy pressure on women’s inclusion. Alongside these normative frameworks, civil society and intergovernmental organizations have developed tools and resources to assist women to claim access to and effectively engage in constitution-making processes. These include, among others, the Inclusive Security Report *How Women Influence Constitution-Making After Conflict and Unrest* (Tamaru and O’Reilly 2018a) their handbook *A Woman’s Guide to Constitution Making*; the Euromed Feminist Initiative handbook *ABC for a Gender Sensitive Constitution* (Suteu and Draji 2015) and the report *Women, Constitution Making and Peace Processes* developed by PSRP and UN Women (Suteu and Bell 2018).

Yet at a country level, the question of *how* women gain seats on the constitution-making body is often less clear. One must account for—and seek to shape—process decisions related to selection/election/appointment to constitution-making bodies, the composition of the body, representational considerations, timelines and rules of procedure, and other factors. In conflict-affected settings, these process decisions are often made early on by parties to the conflict, not through consultations with society at large (Underwood et al. 2018). Because of

this, **early mobilization and activism is crucial, including with an aim of expanding women's participation at the peacebuilding table.**

Several case examples highlight the importance of early mobilization and coordination to enhance women's representation in constitution-making bodies. Women's organizations in Sudan, South Sudan and many other states facing internal conflict and unrest, for example, have mobilized around engagement in peacebuilding and transitional processes. In the Philippines, the peace process with the Moro Islamic Liberation Front took 20 years, but women held leadership roles on both sides of the conflict throughout the period. The lead negotiator from the Government of the Philippines was a woman, both sides made commitments to women's equality, and 4 of the 12 women on the commission that drafted the Bangsamoro law were women.

In Tunisia during the 2011 revolution, women in civil society, government and the private sector coalesced around an agenda for change that built on an existing baseline of women's authority and legitimacy. Women's groups mobilized early and coordinated a common strategy to secure gender parity on electoral lists for the Constituent Assembly (CA). Despite claims by some parties that there were not sufficient numbers of qualified women to fill the parity model, the demand was supported by feminist activists, mobilized youth, and political party insiders who threatened to leave parties that would not support gender parity. As parties capitulated, a tradition was established. Gender parity in candidate lists became a core feature of CA elections, leading to demands that women also play an active role in CA leadership bodies.

More recently in Chile, mass public protests prompted the government to agree in late 2019 to hold a plebiscite on 26 April 2020. Chileans will vote on whether they want a new constitution and, if so, whether the new document should be drafted by an elected constitutional assembly or the cooperation of current law-makers. The opportunity for a constitutional assembly prompted women activists, in coordination with indigenous rights proponents and others, to mobilize and demand representation. Following fierce debates and resistance by conservative law-makers, the National Congress approved a proposal for gender parity (and indigenous representation) in the event of a constitutional convention (Arce-Riffo 2020; ConstitutionNet 2020).

In Colombia, by comparison, the women's movement in the 1991 process was fractured and unable to effectively mobilize around a core set of agreed demands. Engaged women's organizations could not agree on an electoral strategy for women candidates to the 70-member CA charged with drafting the new constitution. Some favoured the use of a separate, women-only list; others preferred a list developed by civil society and headed by a woman; and still others argued that it would be more effective to convince political parties to support women's demands within their party lists. The divided approach resulted in women gaining only 4 out of 70 available seats and being vastly under-represented in the body (Morgan and Alzate Buitrago 1992).

In terms of representation mechanisms, **provisions requiring that a certain number of women participate in the body (sometimes called a quota or temporary special measure) have proven to be a common and useful approach to get women in the constitution-making room.** When applied to leadership roles, quotas can also help increase the influence of women members throughout the process. It is important to note, however, that the design of a quota depends on whether members of the constitution-making body are elected or appointed. Where the body is elected, the quota must be designed into the election system. Various approaches to this type of quota are discussed in more detail below. Where membership is appointed, the quota—however designed—applies to the selection criteria. The nature of such special measures, however, coupled with the country-context, also present several risks.

Women who gain representation through an election or appointment quota may be seen as tokens or placeholders, which can impact perceptions of their political legitimacy among men colleagues and the population at large. They are often seen as there to represent only ‘women’s issues’ and their inputs may not be sought as often as those of men in regard to broader design issues. These challenges are most common with reserved seat arrangements but are often present even where the quota is designed in way that tends to lower the risk of delegitimizing women, such as with candidate quotas. The risks associated with quotas are often compounded by underlying gender discrimination in society. In Tunisia, for example, designers used a zipper list quota for CA elections. This resulted in women comprising 31 per cent of the CA, around 30 per cent of the body’s committee of experts, and around a third of the consensus committee. Yet media outlets predominately sought interviews from men members on key design debates even when the men had not attended the sessions at issue (Tamaru et al 2018).

Depending on context, reference to history can be a powerful tool to combat negative public perceptions and notions of illegitimacy linked to special measures for women’s inclusion. Again in Tunisia, advocates leveraged traditional stories of women leaders that are deeply rooted in Tunisia’s history, symbolism, cultural, religious and legal development. From Dido in Carthage, to priestesses resisting the Arab conquests, to a 16th century princess, Tunisia’s culture is infused with a mythology of powerful women. The country’s legal history similarly reflects progressive developments under its 1956 Personal Status Code and 1959 Constitution, which had long-term social impacts and broad regional influence, including in Egypt. This narrative, along with early and active mobilization, helped women gain a seat at the table in all stages of the process and helped convince party leaders to adopt vertical gender parity in CA election candidate lists.

To mitigate backlash and the risk of delegitimizing women members of constitution-making bodies, process designers should be aware of the complexities of quota systems, understand the benefits and risks of various design options, and consider context-informed alternatives. International IDEA’s Gender Quota Database is a useful resource in this regard. As noted earlier, Tunisia applied a vertical list zipper system (also known as gender parity listing) to its CA elections. Zipper listing, used in proportional representation electoral systems, requires that party lists alternate between men and women to ensure equal representation in candidacy and enhanced representation in elected office. ‘Vertical’ listing alternates men and women placed as number two and below on party lists. ‘Horizontal’ listing alternates men and women in the number one position across constituencies. Libya used a horizontal zipper in its 2012 parliamentary elections (though for only 80 of the 200 seats). Horizontal listing is generally understood to increase the number of women elected overall, but neither approach is not without its challenges (Siskind and Pickard 2014).

Alternatively, super-district models or special seats may be preferred. These approaches preserve seats often otherwise held or won by men and can therefore mitigate resistance by removing the idea that women are ‘taking’ positions from men. However, such approaches mean that men and women candidates have different constituencies and face different election processes, which can hinder coordination and cooperation over policy issues.

‘Twinning’ is also an option. Twinning refers to design of slightly enlarged constituent districts which elect one man and one woman. This approach requires men, in practice, to ‘sacrifice’ seats they may otherwise have won, which can lead to increased resistance. In Liberia, though proposals on twinning did not move forward, the approach was attractive during leadership discussions because it was seen as a 50:50 gender split rather than a special seat reservation for women.

Participation in the constitution-making body must include access to leadership roles and the establishment of gender-sensitive rules of procedure and decision-making pathways. While gaining a seat at the table is crucial, it is not alone sufficient. Rather, the

legitimacy of the process, as well as the capacity of women to influence agenda-setting and decision-making, also depends on the level of authority women exercise within the body and the channels through which demands are negotiated. While informal influence is important, women should also prioritize securing formal leadership roles and establishing gendered rules of procedure and decision-making processes. Leadership roles are often distributed based on relationships, which tend to favour men particularly when women's representation is comparably low. It is more difficult for women to influence agenda-setting if they are not members of the leadership. Additionally, women often have family obligations related to context-specific gender roles that can challenge their ability to fully participate in working hours or meet deadlines. Balancing these obligations can be difficult; women constitution-makers have reported backlash for being bad mothers or caregivers if they prioritize constitutional reform responsibilities, yet they must often choose between these competing demands.

In the Gambia, the establishment of an inclusive Constitutional Review Commission was agreed following a series of meetings between the Ministry of Justice and advocacy groups, such as the Female Lawyers Association Gambia. The law specified that appointments by the president were to be made with regard to 'the geographical, professional, age and gender diversity of The Gambia' (The Gambia, Constitutional Review Commission Act, 2017, article 5(2)). This resulted in six men and five women commissioners (including the Vice-Chairperson) representing a range of relevant professional expertise. The rules allowed for part-time commissioner appointments, which enabled the participation of prominent women (and men) who needed to remain engaged on other work.

In Tunisia, activists both inside and outside the CA successfully advocated for a tripartite leadership approach with a woman as deputy chair (First Vice-President). Division of committee chair roles raised broader questions about inclusion since distribution among party lines or according to minority representation would have left little room for women. After much discussion, women successfully gained chairmanship over key committees, including the legislative committee and the committee on rights and liberties. Importantly, about one-third of all committee rapporteurs were women. While the rapporteur role is often overlooked, it is critical to establishing records and articulating views that can shape historical understanding of the process and potentially support constitutional interpretation.

3. Defining women’s strategic interests and gender-sensitive constitutional design

Key points

- Women are more likely to effectively assert their design priorities if they can make themselves and their proposals politically useful to powerful groups.
- Women activists need to coordinate, where possible, to develop common terms and approaches to framing a context-specific women’s rights agenda.
- Women need support through learning opportunities and access to resources in order to effectively identify, assess and contextualize the broad range of ‘women’s issues’ at stake in a constitution-making process; to increase the efficacy of their engagement through confident and concrete proposals; and to strengthen their credibility with men colleagues.
- It is important to balance the need to coalesce around ‘women’s issues’ while also advocating for broader design priorities that integrate or reflect gender considerations.
- Public consultation processes must ensure that women’s voices and needs are effectively heard, and that consultation topics are not limited to so-called ‘women’s issues’.
- In arguing and bargaining around women’s strategic interests, political context matters, as do perceptions of international normative frameworks and external influence.

The Constitution Transformation Network of the University of Melbourne has distinguished three constitutional approaches to sex and gender (Dziedzic and Samararatne 2020):

- *Gender-exclusive constitutions* explicitly or implicitly consider citizens to be men. This may be done through the use of masculine pronouns in provisions, or through constitutional interpretation wherein neutrally phrased provisions are held to exclude women.
- *Gender-neutral constitutions* include men and women on the basis of formal equality but make no effort to redress past discrimination and marginalization, nor to take corrective action to ensure equality of opportunities and outcomes. Positive and

negative discrimination on the basis of gender and sex are inappropriate or expressly prohibited.

- *Gender-sensitive constitutions* recognize the differential circumstances and historic experiences of men and women and seek to promote substantive equality. They define equality in a substantive rather than formal manner and permit special measures to redress past disadvantages. They also incorporate provisions that address women's substantive interests, including those faced exclusively or disproportionately by women, such as maternal health and sexual and gender-based violence. Finally, they understand that all sections of the constitution will have gender implications.

There has recently been an explosion of research on gender-sensitive constitution-building processes and constitutional texts, particularly regarding intersections between process and substance. The relationship is complex and not easily disentangled. Regarding substance, several organizations have recently developed tools to support constitutional analysis. These include, for example, International IDEA's *Constitution Assessment for Women's Equality* (2016). Regarding interactions between process and substance, research and experience reveal several key factors that can support gender-sensitive constitutional outcomes.

First, **women are more likely to effectively assert their design priorities if they can make themselves and their proposals politically useful to powerful groups—or at least not contrary to their interests.** Success in putting women's design priorities on the agenda is often linked to the ability of advocates to position themselves as allies to others and to integrate their interests within the positions of other groups. Women must participate not just as women, but as members of every other engaged party and group making common cause as 'insiders'; participation as a separate interest group with a separate agenda is often not as successful.

In Myanmar, coordination between feminist activists and women members of ethnic armed organizations (EAOs) presents a useful and interesting example. Compared to members of the women's movement, women EAO members are 'insiders' in their respective organizations and can serve as a bridge between their EAO's strategic interests and the activist agenda of women's rights proponents. EAO calls for increased autonomy and the right to use group customs and law, for example, have intersected with the women's rights agenda through efforts to balance cultural rights and customary practices (which can be harmful to women), with women's equality aims. Other reform issues have shown even greater opportunities for a coordinated approach; the decentralization of some economic and military powers from the Union to sub-state level, for example, would serve the ultimate goals of both ethnic minority groups and women generally. In this way, alliance building between 'insider' and 'outsider' women can not only frame gender equality as a cross-cutting theme of constitutional reform, it can also identify and reinforce common design interests among divergent groups.

In Tunisia, perspectives on women's interests broadly fell into two camps: those defending the family and women's role within it from a complementarity perspective, and those who defined women's equality under the international human rights framework. Major disagreements erupted over the phrasing of what ultimately became articles 21 and 46. To counter this, the coordinated women's movement, comprised primarily of feminists, successfully built a broad alliance that also championed the rights of minorities, freedom of expression, rights to art and culture and demands for positive discrimination mechanisms. This cross-coordination helped mainstream the demands of the feminist camp and integrate calls for women's substantive equality into the mandates of other powerful groups. Ultimately, the approach was successful and references to complementarity were removed from the final version of the constitution.

Of course, the capacity to build alliances is subject to the level of inclusion and transparency espoused by the constitutional reform process overall. In Hungary, the 2012 Constitution was reportedly drafted by three men in a single sitting. Mobilized women and other opposition groups were marginalized from the processes entirely. Because of this, women's strategic interests were largely defined through the ideological lens of the ruling Fidesz party, which took a complementarity approach to the role of women in the family and society. The 2012 Constitution contains no special measures for women's participation in parliament or politics, and no recognition of women or their role in Hungary's development. Provisions are also internally contradictory vis-à-vis equality and non-discrimination versus family values.

Second, **throughout a constitution-building process, women activists—both insiders and outsiders—need to coordinate, where possible, to develop common terms and approaches to framing a context-specific women's rights agenda, being mindful of intersectionalities and differing perspectives on gender roles.** This requires efforts to deconstruct and reevaluate assumed conflicts between a feminist agenda, religious or cultural group rights, complementarity approaches to women's gender roles, state resources and capacities, and the entrenched interests of men particularly with regard to special measures. Experience demonstrates that building consensus across ideologies and perspectives can be difficult in even the best of circumstances; women's interests and approaches to women's constitutional rights are as diverse as women themselves. Consensus building must therefore account for the intersection of other identities and statuses that shape and define perspectives on the role of women in society, politics and the family.

Common challenges to consensus-building often relate to interactions with traditional, religious, cultural and minority rights considerations. These interactions can contribute to demands to frame women's rights through a complementarity lens (which defines the role of women as complimentary to that of men) rather than through the international human rights framework. This approach risks relegating women to proscribed caregiver roles and can result in constitutional provisions that ensure women are 'protected' rather than fully equal participants in politics and society.

In many contexts, these differing approaches lead to highly contested situations in which women's strategic interests are negotiated around 'low-hanging' fruit opportunities, hindering efforts to fundamentally transform society and gender roles. In the Philippines in 1987, for example, the constitutional drafting committee was chaired by a woman former Supreme Court Justice who emphasized reforming family provisions related to marriage and divorce in addition to enhancing limitations on state of emergency powers and powers of the president. Though the drafting committee was gender balanced, the diversity of views about gender roles limited the ability of drafters to incorporate women's strategic interests into final design choices.

In Tunisia, women CA members and their allies embraced differing views on the fundamental role of women in society and politics, but also on broader, interrelated questions of constitutional ownership and the role of Shari'a: was it to be a constitution of Islamists/Muslim democrats, or of secularists/modernists/anti-religionists? Debates were finally resolved by deferral. Unlike in Egypt, Tunisia's main conservative party, Ennahda, included progressive women members. This composition pitted insiders against insiders and forced a compromise: because of the issue's divisiveness, the party ultimately determined not to demand the inclusion of Shari'a. Instead, the party settled for reference to the Islamic religion and Arabic language, leaving the role of religion in law and policy up to judicial interpretation.

Third, **women need tailored learning opportunities and resource support to effectively identify, assess and contextualize the broad range of 'women's issues' at stake in a constitution-making process.** Such support is helpful for women to think through the

specific implications of various constitutional design options from a gender perspective within the country context, and to develop concrete proposals (e.g. what sort of federalism may be 'good' for women given the circumstances?). Training and resource support can also build confidence for women participating in debates on contentious issues and can strengthen women's credibility among men colleagues. A broad range of factors impact the level and nature of support available to women at a country level. Though enumerating these issues was beyond the scope of the Dialogue, discussions showed that if women are to have a bigger voice on a broader range of issues, they often need tailored support to achieve these aims. Trainings and other support should include, inter alia, (comparative) knowledge building on the range of substantive design issues, tools to support constitutional assessment and analysis, advocacy and consensus-building skills, and expert advising.

Fourth, **women constitution-makers must balance the need to coalesce around 'women's issues' while also advocating for broader design priorities that integrate or reflect gender considerations.** While it is well understood that women's interests and design priorities are as diverse as women themselves, 'good practice' generally tells women to unite around an often ill-formed women's rights agenda. This implies to the public that women politicians and activists focus primarily on so-called 'women's issues' and reinforces assumptions about how and what women can contribute to constitution-making. Rather, all aspects of constitutional design can and ought to be considered from a gender perspective. As noted above, women require support to identify, assess and contextualize the broad range of constitutional design issues that impact women, and to effectively translate this knowledge and their views into concrete proposals and advocacy campaigns. Key considerations on broader design priorities may include, for example:

- *Choices around gendered language.* Language is both legally and symbolically important. Gender-inclusive language indicates a commitment to gender equality and can weaken commonly held stereotypes that political leaders are men. Gender-neutral language avoids masculine or feminine terms where gender is not relevant to the text. Note, however, that there remains a risk that such text can later be interpreted as excluding women.
- *The role and composition of the judiciary.* Design of the judiciary is particularly significant in terms of gender balance, appointment processes, and jurisdiction. There is a debate in the literature over whether judicial review is helpful or harmful to the realization of women's rights, and particularly to the effective implementation and enforcement of substantive equality.
- *The role and composition of independent commissions.* Independent institutions can be important elements of national women's machinery through the establishment of, for example, commissions on women's equality, gender equality, and/or human rights. Other independent bodies, such as electoral commissions, should not be overlooked. Design choices often focus on appointment processes and qualification criteria, requirements for gender balance and women's representation, protections for independence, and the scope of the body's mandate.
- *Electoral system design.* Research indicates that proportional representation systems may be more effective than first-past-the-post and other majoritarian systems in achieving increased women's representation. However, no electoral system is sufficient in itself. Decisions about the size of constituency districts, party magnitude and other factors matter beyond the establishment of quotas. Designers may also consider approaches to candidate list structuring such as zebra lists, using a super-district or special seat model, or twinning with enlarged districts.

- *Powers and limitations under states of emergency.* State of emergency powers are often hotly contested. Constitutional reform processes—particularly in post-conflict or transitioning states—commonly seek to curb the risk of abuse. For women and many others in society, choices around derogation of rights during states of emergency are particularly relevant.
- *Structural provisions related to federalism and decentralization.* While there are no direct empirical connections linking federalism and gender equality, approaches to designing a federal system could be done in a gender responsive way. For example, gender-sensitive design may consider women’s participation in shared-rule mechanisms, protection of rights and the role of customary practice at the sub-state level, and sub-state constitutional rights.
- *Separation of branches of government.* The effective separation of power and a system of checks and balances are important for women’s strategic interests because these facilitate oversight and accountability for the government’s implementation and enforcement of substantive equality provisions. The effective participation of women across branches, and their access to leadership roles, can contribute to more effective implementation and adherence to constitutional principles related to gender equality.
- *The role of the military.* While relatively rare today, some constitutions establish a reserved role for the military within political institutions. Particularly where military representatives have a role in government, such as in Myanmar, reserved seats effectively function as a quota for men.
- *The role of international law.* Many modern constitutions provide for the relationship between domestic and international law, including treaty and customary law, and prescribe how the state’s international commitments are made. While there is significant variation as to how international law is given effect domestically, drafters should consider the role of international obligations in judicial interpretation of constitutional provisions and in law and policymaking. For women’s equality, this is particularly relevant under state commitments to, for example, CEDAW, the International Covenant on Economic and Social Rights, and the International Covenant on Civil and Political Rights.
- *Constitutional amendment processes.* In many contexts, it may be desirable to design different amendment processes for various provisions of the constitution. This approach may include entrenching some provisions—particularly those related to rights—to establish higher approval thresholds for amendment, or to establish unamendable provisions. Drafters must strike a balance between the stability of the constitutional order and the need to respond to changing circumstances through constitutional reform. Establishing higher thresholds for amendment of provisions that are fundamental to women’s equality should be considered.
- *Bills of rights and integrating rights throughout the text.* Bills of rights are crucial for gender-sensitive constitutional design. Positive rights, such as rights to education and healthcare, are profoundly gendered because women tend to be more in need of government aid compared to men. There are also considerations related to the horizontal application of rights: if a woman or girl has the right to be free from violence, can she assert that right against a private party in addition to the government? Similarly, the design of equality provisions can range from formal protections to more robust substantive equality rights that allow for positive steps on

the part of the government. These issues can be contentious and should consider state resources and capacities over time.

- Specific rights—including citizenship, land ownership and freedom from violence—have historically been drafted in such a way as to marginalize women, including by elevating rights to privacy and family life relative to the individual rights of women. Such provisions require careful attention during drafting. The role of religious, customary or traditional law also has important implications for women. These systems are often cast as part of a conflict between individual and group rights rather than as parallel systems of law. In some cases, debates around the role of religion and custom in personal status, access to justice, land tenure and other spheres are resolved by incorporating religious or customary law into state-made law (with varying degrees of textual clarity on supremacy and integration). In others, debates give rise to the establishment of parallel legal systems. All approaches pose potential challenges, and all must seek to reconcile individual rights, group rights and a state's international obligations.

For a more comprehensive list of issues which may merit attention in the development of a gender-sensitive constitution, see the International IDEA *Constitution Assessment for Women's Equality* (2016).

Fifth, **public consultation processes must be designed to ensure that women's voices are effectively heard and addressed through central institutions; consultation topics should not be limited to so-called 'women's issues'**. The Constitutional Review Commission of the Gambia designed online surveys, distributed questionnaires and held in-person focus groups that specifically targeted women. Questions focused on so-called women's issues as well as broader issues of governance and institutional design. Members of the public were also invited to submit position papers. In response, groups of women lawyers developed and submitted a common position paper, as did many other organizations and individuals.

Results of local focus groups revealed key service delivery priorities among women, including school busses and night nurses to service local villages. These concrete and localized needs are common globally, yet they are not easily articulated at the national level since local representatives/tribal leaders and members of parliament remain predominately men. Feedback from such consultations should therefore be considered by drafters in terms of not only of the specific interests expressed by women vis-à-vis 'rights', but also whether institutional architecture, composition and decision-making pathways are sufficiently gendered to enable these interests to be articulated and acted upon at the central level into the future.

Finally, **in negotiating women's strategic interests within the constitution-making body, political context and political parties matter, as do perceptions of international normative frameworks and external influence**. In Nepal, it was difficult for diverse women and women's groups to find common ground and agree on particular priorities throughout both CA processes. This was in large part due to their differences in class, caste and ethnicity—the same cleavages that had fuelled the civil war. In response in 2009, women members of the first CA established an informal women's caucus to strengthen unity and develop a coordinated agenda. The group sought to build consensus across political ideologies and to expand areas of concern beyond 'women's issues'. A related indigenous caucus also sought to address issues specific to indigenous women, such as double discrimination. While there was some progress around a coordinated agenda, the ability to establish and sustain consensus was limited. In general, CA members, including women, followed party-line interests. The

infighting made it difficult to ally with men CA members, to integrate demands across party platforms, and to effectively coordinate with civil society for external mobilization.

In the second CA, political parties more effectively coordinated an agenda under pressure to perform following the 2015 earthquake. However, cross-party coordination among women remained limited. The final constitution did reflect several long-standing demands—including proportional representation in elected bodies, reform of inheritance rights, and the establishment of a women's commission. However, citizenship remained discriminatory. Parties had little interest in the issue and coordination among women activists was insufficient to bring the blocs on board.

In Egypt, feminist members of the Committee of 50 (C-50) faced significant challenges negotiating with other powerful political groups. This was due, in large part, to the political context of the time. Unlike in Tunisia where the Islamist-leaning Ennahda party includes progressives, Egypt's Islamist parties are composed of a regressive elite who contributed to curtailing the revolution. The 2013–2014 process took place in the context of a counter-revolution, the rise and fall of the Muslim Brotherhood, violence in the streets fomenting a risk of civil war, and a popularly supported coup. As a result, it was controlled by the Supreme Commander of the Armed Forces rather than the forces of the revolution. Combined, these factors limited the negotiating ability of progressive women in the C-50 and resulted in more intense debates around the rights of women (Elsadda 2015).

As a mark of successful negotiation, article 11 of the 2014 Constitution establishes equality between men and women, obligates the state to combat violence against women, specifies the right of women to hold public office and judicial posts, and requires 'necessary measures to ensure appropriate representation of women in parliament'. The provision requiring legislative 'measures' for 'appropriate representation', however, reflects an unsuccessful attempt to establish constitutionalized gender quotas. Debates around the quota issue in particular highlighted the importance of the political context: members of the C-50 feared that such a mechanism would only facilitate the representation of pro-regime, elite women regardless of the fact that Egypt's past parliaments were already entirely pro-regime. This political focus precluded discussion of a quota as a rights-based issue to redress past marginalization (Elsadda 2015).

Within this context, three factors strengthened the feminist position in Egypt. First, new political spaces had opened up because of the revolution that mobilized public attention and facilitated coordination among activists within the committee and on the street. Public scrutiny of the processes constrained regressive men from dismissing women's equality demands out of hand. Moreover, the spirit of the revolution and the process of public consultation broke taboos about particular issues impacting women, including sexual violence. These issues entered mainstream media; survivors overcame stigmas to speak publicly and call for more women in the judiciary.

Second, the divisive politics of Islamism versus secularism created space for women to assert their demands. The 2012 Constitution had been drafted by the Islamist majority. It annulled existing commitments to equality between men and women, established the family as the cornerstone of society and emphasized the role of women as mothers and wives. The significant public backlash against both the 2012 process and the content of the text galvanized progressive women during the 2013–2014 process, with many members of the C-50 self-identifying as progressive. While removing the application of Shari'a in Egyptian law was never on the table, support for article 11 was seen even by conservative members as a mechanism to 'reverse' what was seen as the excessive Islamicization of the 2012 Constitution.

Third, the internationalization of human rights and women's rights issues buttressed arguments by women's rights advocates. The act of championing women's rights as human rights was considered a marker of education and identity as a member of the elite. The C-50 broadly embraced this designation as a mark of distinction from Islamists, leading to greater public support for article 11 (Elsadda 2015).

4. Gendered constitutional outcomes, implementation challenges and mitigation strategies

Key points

- Alliances built prior to and during the drafting process are often short-lived. They are often less effective in supporting implementation and must be supplemented by other means.
- Constitutional mechanisms to enhance women's political participation, such as quotas, often face backlash in the years following promulgation.
- While courts can be effective in enforcing substantive rights, results are mixed and the remedies limited.
- Independent institutions may be insufficiently independent or otherwise lack teeth to effectively hold the executive to account.
- Constitutions are not transformative in isolation. Even with significant changes in the text, additional, comprehensive and long-term efforts are needed to shift underlying attitudes.
- Representation in parliament is not enough. Women also need to be members of influential parliamentary committees, the cabinet and the judiciary, and they need to have some decision-making authority over budget allocations.
- International frameworks and mechanisms on women's equality and democracy often lack the teeth to counter regressive domestic reforms.

Once the process of *constitution-making* concludes, the process of *constitution-building* continues. Promulgation of a new constitutional text is not alone sufficient to transform the promise of substantive rights into a law- and policymaking reality. In many transitional contexts, the implementation process is fraught with setbacks and political and institutional opposition. In addition to common challenges related to limited state resources, capacity and political will, sustained support for gender-sensitive implementation often faces several key obstacles.

First, **women's rights alliances built prior to and during the drafting process are often short-lived and begin to dissolve once the urgency of drafting has passed.** This is due to limited financial and human resources, competing priorities and personal responsibilities

among activists, as well as general fatigue. This dissolution of networks and decline in public attention can mean that shortcomings in implementation are less understood and less challenged by the public at large—including in the voting booth. In Kenya, after decades of coordinated activism through several constitutional reform initiatives, the women's equality discourse has shifted. Rather than debating women's representation as a constitutional right, the focus has moved on to issues of qualification, custom and morality. This commonly pits 'rural' women against 'elite' women, with discussions filtered through the internal politics of political parties which are (still) mainly led by men.

Such coalitions are therefore often less effective in supporting implementation over time and must be supplemented through other means as time and resources permit. This includes, for example, pursuing strategic litigation, coordinated advocacy around particular rights issues, civic education and particularly public sensitization as to the causes of earlier conflicts, and building linkages with regional and international judiciaries and treaty bodies.

Second, **constitutional mechanisms designed to enhance women's political participation, such as quotas, often face backlash in the years following promulgation.** This backlash is often based on arguments of a democratic deficit for limiting electoral competition and accusations that 'token' women are taking seats from men. In Kenya, for example, the Constitution establishes a quota for women elected to the National Assembly through county-wide constituencies, and reserved seat party nominations for the Senate. In addition, article 27 requires the state to take measures to ensure that not more than two thirds of the members of any elective or appointed body be of the same gender, and reflects a long-term demand for affirmative action that had been central to the women's movement since the 1990s. As discussed below, the two-thirds gender rule has not been effectively or consistently implemented. Yet in the decade since promulgation, backlash has manifested among youth and divided women politicians. Young men increasingly report opposition to quotas and the two-thirds gender rule compared to the older generation, and they use more violent rhetoric. Women elected or appointed under the quotas must ally with powerful men politicians and are often perceived as members of an entourage rather than representatives of women's interests. Majority opinion continues to view women as owing their elections to men party leaders rather than a matter of constitutional entitlement.

Third, **while courts can be effective in enforcing constitutional rights, results are mixed and remedies limited.** All judicial systems face problems of access, knowledge of rights and state obligations among both marginalized groups and individual judges, and limitations in the remedies that can be provided. Courts can only address harms after they occur and can rarely make a claimant whole in a holistic sense. Moreover, courts do not always support expansive interpretation of constitutional rights and state obligations. Rather, courts can narrow the scope of government obligations to advance substantive rights under the constitutional text, forming an institutional obstacle to effective implementation.

In Kenya, for example, the 2010 Constitution reformed the composition and structure of the judiciary, including Supreme Court jurisdiction, and expanded standing to bring constitutional claims to court. This has resulted in an explosion of strategic litigation to support effective constitutional implementation. Activists, however, report that the judiciary is not living up to expectations. Despite groundbreaking judgements on the rights of lesbian, gay, transgender and intersex persons and non-discrimination protections, the court has undercut implementation of the two-thirds gender rule under article 27. In an advisory opinion requested by the Parliamentary Committee on Implementation and Oversight of the Constitution to address delays in implementing the rule in the cabinet, the Supreme Court supported postponement for another five years (Supreme Court of Kenya 2012). Women's representation in Kenyan institutions remains among the lowest in East Africa. This mixed record has opened a space for other constitutional transgressions: parliament recently

criminalized the status of being gay, which should, in theory, be interpreted as unconstitutional by the courts.

Fourth, **independent institutions established to monitor implementation, such as human rights or gender equality commissions, may be insufficiently independent or otherwise lack teeth to effectively hold the executive to account.** Independent regulatory, oversight and integrity institutions are often established in a constitution or by law as public bodies which are politically neutral and independent from the three branches of government. They serve multiple functions in a democracy and can be crucial to monitoring and promoting human rights and gender equality, ensuring fairness in elections, curbing corruption, and protecting the impartiality and neutrality of public administration, among other roles. All of these issues matter to women and impact the quality of constitutional implementation. These institutions can be more effective when the constitution guarantees sufficient resources; ensures financial, political and administrative independence; requires diversity in composition and transparency in appointments; and establishes a clear mandate, among other considerations.

Fifth, **it is unclear how much even significant constitutional change can effectively alter underlying social values and traditions absent the broad mobilization of civic education and sustained political will.** A constitution cannot alone transform a society. This means that public expectations about what a constitution can and cannot do must be managed, and resources must be mobilized to build a culture of constitutionalism and respect for human rights and the rule of law. In some cases, constitutional choices are intended to be more symbolic than operational. In Somalia, for example, the constitution prohibits female genital mutilation (FGM), called 'circumcision of girls', in article 15(4). But this ban is largely symbolic; criminalizing FGM in the penal code would likely be similarly effective in legal terms. Elevating the issue to the level of the constitution involves conscious signalling despite limited enforcement in practice. The process of building a culture of constitutionalism and ensuring that individual actors within implementing institutions embrace the values set out in the constitution can take time. It requires concerted efforts to educate and train civil servants and elected officials as well as the public.

Sixth, for women to effectively support gendered implementation, it is not enough to be a member of parliament. Rather, **women also need to be members of influential parliamentary committees, the cabinet and the judiciary, and they need to have some decision-making authority over budget allocation decisions.** Women in positions of power can better ensure that sufficient resources are provided to support services and programmes that can enhance substantive equality, and that policies, laws and regulations reflect both the spirit and text of constitutional promises.

Finally, **international frameworks and mechanisms on women's equality and democracy often lack the teeth to counter regressive domestic reforms.** In Hungary, where the articulation of women's constitutional interests was led by the ruling Fidesz party, the government has successfully established and implemented regressive constitutional provisions. These reforms have significantly scaled back the social, economic and political status of women, yet Hungary's international and regional obligations have done little to counter the trend. The European Union has placed Hungary under monitoring for violations of the rule of law as a founding value of the Union (article 7). However, EU rule of law monitoring is not sensitive to even the most blatant gender inequality and rarely addresses government policies, political/ideological commitments or social science data related to perceptions of gender roles. UN mechanisms on gender equality are similarly challenged to curb domestic transgressions of international commitments. The Hungarian Government has

defended its marginalization of women as an effort to protect the survival of a Christian nation in the heart of Europe and to defend Hungary against EU and international anti-Christian conspiracies. This framing has pitted supporters against perceived external interference and left progressives with few options to counter the regressive developments.

5. Peace agreements, political settlements and constitution-building

Key points

- Recent trends indicate that the number of women involved in comprehensive peace processes is on the rise, but women are still rarely present in early stages of negotiations when agendas are set, or implementation stages that determine the agreement's effectiveness.
- Peace negotiations tend to approach women's participation and gender equality as an apolitical concern distinct from the primary goal of ceasing violence. This approach often fails to address the interrelated nature of these issues and the continuities of violence that women often experience.
- There is significant variation in how peace agreements and constitutional reform are sequenced, each with implications for the inclusion of women and women's substantive interests.
- While the international peacebuilding community can support women's participation, buy-in for women's meaningful engagement and opportunities for coordination must also be embraced by domestic elites and parties to the conflict if it is to be effective.
- Windows for constitutional change are often short and opportunities should be taken. Engagement in the political marketplace requires trade-offs as part of the bargaining. This will require compromises of all groups in the process and so may include women's substantive priorities. Women must have a sense of which are the most important priorities to be realized in the constitution, and which battles they can continue to fight elsewhere even if not included explicitly in the constitutional framework.
- Regarding the content of peace agreements, mechanisms to ensure power-sharing across particular identity cleavages need to consider potential negative impacts on women's inclusion and participation in executives, legislatures and judiciaries.

Peacebuilding processes are often catalysts for constitution-building. The theory of change that propels a peace process is based on the idea that the status quo serves the interests of only one or several groups, but not all peoples within a state. Particularly in conflict and post-conflict situations, contenders for power try to fundamentally restructure the state to gain access to political power, resources and/or recognition. Revising the constitution offers the hope for a more fair and equal state, where political process and protection of rights can be a viable alternative to violence as a mechanism of change.

Public engagement and broad consultation during constitution-building can help generate a sense of national ownership, enhance the legitimacy of transitional processes and outcomes, and support sustainable peace through structures and institutions that contribute to non-recurrence. In theory, constitutional reform arises from initial elite bargains at the peace table, which are then broadened through the inclusion of diverse social groups and cross-sections of society. In practice, however, peace processes face an inherent mission creep: while mediators seek to forge a political settlement necessary for the cessation of hostilities, even basic discussion topics create path dependencies for constitution-building by delimiting the reform agenda prior to broadened engagement.

In Yemen, for example, mediators wanted a ‘thin’ peace agreement to preserve space for later public participation in determining the future governance dispensation. However, armed actors—whether state or non-state—retain a trump card of violence that can be played to undercut effective settlements and commitments. Given these dynamics, it is often difficult if not impossible for mediators to segregate fundamental questions about constitutional design when negotiating a reallocation of power to shift violent conflict into political debate. Women’s participation in peacebuilding, therefore, has strong implications for women’s participation in constitution-building and the entrenchment of women’s strategic interests in the constitutional text.

Recent trends indicate that the number of women involved in comprehensive peace processes is on the rise, but women are still rarely present in early stages, during humanitarian dialogues and in ceasefire negotiations. From 1992 to 2018, women made up only 4 per cent of signatories to peace agreements (Council on Foreign Relations 2019; UN Women 2019). In many processes, women and agendas around gender equality are not included at the peace table except at the very local level; the vast majority of agreements established since 1990 do not reference women or address their concerns. In many cases, pre-negotiation discussions (‘talks about talks’) take place in secrecy and/or are limited to parties to the conflict, who are usually men. This can impact women’s influence in early agenda-setting and subsequent participation in later phases.

This participation gap presents significant normative challenges for the international community operating under international law and has practical implications for peace agreements more broadly. There is a growing body of empirical evidence that women’s participation in peace processes is linked to better accord content through more inclusive provisions and broader consultation, higher implementation rates and more durable peace (O’Reilly et al. 2015; Krause et al. 2018).

In South Sudan, as an example of an exceptional case, 15 per cent of negotiators during the 2015 peace process were women, and three women served as part of the opposition’s 10-person delegation (no women were present in the government’s delegation). After significant advocacy and some unconventional approaches, the South Sudan’s Women’s Bloc became a formal observer and a signatory to the Agreement on the Resolution of Conflict in South Sudan. During the 2018 renewed process women made up 25 per cent of official delegates, a figure made achievable by an existing provision in the 2011 Transitional Constitution mandating at least 25 per cent representation of women in all political organs (article 16(1) (a)). Throughout the process, women advocated for protections against and mechanisms to address gender-based violence, for quotas and one of the four vice president positions, as well as for prohibitions on child marriage. They were largely successful except for attempts to address child marriage.

In practice, peace negotiations tend to approach women’s participation and gender equality as an apolitical concern that is distinct from the primary goal of getting parties to the conflict to cease violence. This distinction fails to recognize the interdependence of these two concerns and undercuts the influence of women over security issues, political

settlement formation and agenda-setting for the constitutional reform process and core design principles (Suteu and Bell 2018).

In Indonesia, for example, peace talks between the Government and the Free Aceh Movement (GAM) in 2005 included only a single woman. The GAM representative's participation was not a conscious act of inclusion. Rather, her mandate rested primarily on her substantive expertise on peace and security. While this expertise merited her important influence over the process, the negotiator later noted that women's strategic needs and interests were generally overlooked. Moreover, women were not included in the peace agreement's reintegration and reparations programmes despite GAM having over 2,000 women members (O'Reilly et al. 2015).

Peace agreements and constitutional reform may be sequenced in many different ways. Each approach has implications for the inclusion of women and women's substantive interests. The trajectory impacts opportunities for participation in the peace process and influence over agreement content, as well as access to and influence over constitutional reform (Bell and Zulueta-Fülscher 2016; Suteu and Bell 2018).

In some cases, a partial peace agreement is negotiated and followed by (or includes) a new constitution or significant amendments. If the peace process has been highly elite driven, then women and other marginalized groups may have greater or fewer opportunities to influence the constitutional reform agenda depending on representation at the peace table. In the Bosnia case, the Dayton Peace Agreement included the new constitution. This was negotiated in Dayton, Ohio, USA by the main conflict and political parties, who were entirely men. As there was no subsequent constitution-building process in which to broaden inclusion, women and wider civic actors had no role or opportunity to influence constitutional design since the document was negotiated at a high diplomatic level (Grebäck and Zillén 2003). As discussed below, it is possible that the Syria peacebuilding process could follow a similar trajectory as a combined 'peace agreement constitution', though with far more women participating in the process.

In other cases, the sequencing pattern may involve a partial peace agreement which operates as an interim constitution or is followed by one, and then a final constitution. Examples include Chad, the Democratic Republic of Congo, Egypt, Madagascar, Nepal and South Africa. In Nepal, women had participated in the long-term conflict between the Maoist insurgency and government forces, and the peace agreements made particular reference to the need to reform the state along equality and inclusion lines, including specifically the inclusion of women. However, according to one source, no women were appointed initially to the interim constitution drafting committee despite the underlying agreements being quite progressive on women's interests (Women's Caucus et al. 2011: 22). In response, women's groups and others coordinated public protests against this under-representation. The interim drafting committee was reorganized to include 4 women out of 16 total members (Women's Caucus et al. 2011: 22). This more inclusive body then developed the 2007 Interim Constitution, which required that at least one-third of all candidates nominated for election to the CA be women.

In still other cases, sequencing can include the establishment of transitional political arrangements to help manage a constitutional reform process, among other processes. This is common in situations of post-election violence, such as in Kenya and Zimbabwe, but also when a power vacuum requires immediate governance arrangements, and in cases where sub-state territorial autonomies are renegotiated following conflict (e.g. Timor Leste and Bougainville). While women may be grossly under-represented at the peace table and interim government level, there may be important opportunities to secure representation in the constitution-making bodies.

While the international peacebuilding community can support women's participation, buy-in for women's meaningful engagement and opportunities for

coordination must also be embraced by domestic elites and parties to the conflict. In Syria, as noted above, the extent to which internationally mediated peacebuilding has become a constitution-building process remains an open question, and while in recent times the constitution-making process has taken central stage, at the time of the Dialogue, neither process appeared to be progressing. Current negotiations are taking place between two very unequal parties and are shaped by the strategic demands of external states, such as Russia, which insist that constitutional reform be instituted effectively as a substitute for any other transition negotiations. In practice, constitution-building is already ongoing despite UN Security Council Resolution 2254 (2015), which envisions constitution-building through an ‘inclusive and non-sectarian’ transitional government.

In 2019, the Syrian Government and opposition groups agreed to establish a Constitutional Committee to begin working on constitutional reform. Women are represented in both the Constitutional Committee and drafting Committee in higher proportions than in, for example, the South Sudan revised peace process or the Nepal Interim Constitution Drafting Committee. This is due, in large part, to international intervention as part of the internationally mediated peace process. The 150 members of the Constitutional Committee represent three components: 50 chosen by the regime with around 26 per cent women; 50 chosen by the opposition with around 20–22 per cent women; and 50 chosen (theoretically) by the United Nations. Both sides had the right to veto UN nominees. The drafting committee is composed of 45 members from the Constitutional Committee, about half of which are women. Of these, two represent the opposition and both are secular feminists, 3–4 represent the regime, and the remainder are from the UN bloc.

UN efforts to expand women’s participation in the negotiations have therefore had a significant influence on the number of women at the table and represent a way in which the international community can leverage its position in mediation processes. Following advocacy by Syrian organizations and women’s rights advocates, the UN established a Women’s Advisory Board (WAB) and Civil Society Room to operate as resources during negotiations. The efficacy of these bodies, however, has been an issue of much debate.

On the civil society side, members have reported regime harassment of their families in Syria, prompting many to quit. The WAB in particular has proven controversial and has faced significant criticism during the period of active negotiations. It is seen as a top-down mechanism that under-represents the diversity of Syrian women, or an act of tokenism, that does not meaningfully enhance the level of inclusivity among negotiating delegations. This has prompted criticism that it fails to meet obligations under UNSC Resolution 1325 (2000). Members have reportedly disagreed on whether women’s rights should be addressed from an international human rights or complementarity lens, and some activists suggest that the body’s rotating membership has fostered competition and rivalry within the women’s movement. The body reportedly has no meaningful capacity to establish a constituency, and there is no mechanism through which to formally connect the separately constituted WAB to the negotiation processes; the WAB meets with the UN special envoy for Syria separately from the government and opposition delegations (Ghanem 2019; Syria Justice and Accountability Centre 2016). In practice, it is notable that many WAB members have been absorbed into the committee through the UN list. Such debates around the efficacy of the UN-backed inclusion mechanisms and the frustrations of some in the women’s movement reflect the reality of gender inequality within broader Syrian society and the structural barriers women face in assuming leadership roles (Bandura and Blackwood 2018).

Still, members of the committee believe that women from both sides of the divide could find common ground around key substantive rights issues, particularly as these same issues are points of contention in broader debates. These include, inter alia, the role of religion and ‘Arab’ identity, personal status law and the application of religion or custom versus civil law,

the recognition and inclusion of minorities (including secularists), and decentralization in governance and service delivery. Despite the importance of these issues to women's equality, opportunities to coordinate a common agenda and effectively influence the processes have been highly limited.

Constitution-making is a political process, not one of finding the best possible text in the abstract. Engagement in the contested forum of constitution-making negotiations requires trade-offs as part of the bargaining process. This may include women's substantive priorities. Demands around quotas, for example, may require other structural reforms that lead to further negotiations—such as redesign of electoral systems more generally; particular demands which cannot find consensus among women or support with wider parties may have to be bargained away in exchange for other concrete and important gains which will provide a platform to build on in the future. This is a common occurrence with women's rights in both peace-making and constitution-building. To mitigate threats to a women's rights agenda, demands should be rooted in human rights and equality norms and supported by coalition building that is as inclusive as possible. Rainbow coalitions and the establishment of broad-based equality coalitions, for example, may be a more effective approach than women's coalitions alone: it is more difficult to reject an equality agenda that also explicitly addresses the rights of persons with disabilities, ethno-linguistic minorities, and other groups than it is to reject women's equality as a 'special interest'; the more constituencies that are included, the more the group will have links of influence to the key groups in the process, and will have more ways of neutralizing their objections and even winning their support.

Regarding the content of peace agreements, mechanisms for power-sharing across particular identity cleavages need to consider potential impacts on women's inclusion and participation. Data on peace agreements indicates that power-sharing arrangements are increasingly coupled with provisions for the inclusion of women (e.g. via legislated quotas), but not always and not consistently. Particularly with consociational power-sharing structures, such as under the Belfast/Good Friday Agreement in Northern Ireland, the nature and type of provisions on women's inclusion are crucial. Emerging feminist analysis of consociational arrangements—mainly based on single-case theorizing—indicates that the focus on community identity can undercut and distract from the inclusion of women, making it difficult for the strategic interests of these groups to gain political traction (Bell 2015; Byrne and McCulloch 2018; Kennedy et al. 2016).

As noted above, the Belfast/Good Friday Agreement supports the participation of women in public life and politics. However, there was no real mechanism to translate this aim into institutional structures. Representation of women in the Assembly was low, for example, although has recently increased: in 2017 snap elections, women were elected to around 30 per cent of seats, up from 19 per cent in 2011 (Fenton 2017). Women's participation in subsequent community forums to address legacies of the conflict and ongoing disputes has been significantly lower. For example, 14 men and 1 women were appointed to the Flags, Identity, Culture and Tradition Commission in 2016 (Northern Ireland Executive 2016), and earlier legal challenges to the poor representation of women on public bodies were rejected by Northern Irish judges (Northern Ireland's highest court having had no women judges until 2015).

Additionally, challenges with government stability under the power-sharing arrangement have undercut progress on women's substantive rights. Tensions between the two main parties saw the (largest) Democratic Unionist Party use veto powers given as part of the power-sharing mechanism to block women's reproductive rights as well as lesbian, gay, bisexual and transgender rights. In January 2017, when this political conflict collapsed the Stormont Government, the body was not able to be reconvened until early 2020. The absence of a functioning government led to gaps in legislation and policy, including on the

rights and safety of women (Committee on the Elimination of Discrimination against Women 2019). Interestingly, however, during that time feminists in the rest of the UK found a way to pass, at Westminster level, legislation on abortion and gay marriage which had been previously blocked by the power-sharing veto (Page 2019).

Moreover, key pieces of the peace agreement, such as its provision for a bill of rights, remain unimplemented because of political disagreement along sectarian and political rights. The provision of a better rights framework would have offered women a way to enshrine some of the commitment to equal participation in the Northern Irish constitutional framework, and might also have helped mitigate the ethnic basis of the power-sharing arrangements.

Looking ahead, and learning from across these examples, the peacebuilding and gender equality communities must think critically and systematically about adaptive management. They must balance the need for rapid response in a narrow window of opportunity against needs for meaningful deliberation and political settlement formation. They must also examine methods to continue engagement with elites and to mitigate risks of withdrawal and abuse.

6. Next steps

Based on the outcomes of this event and additional research, International IDEA, together with the ECCL and the PSRP at the University of Edinburgh, will establish the Women Constitution-Makers' Dialogue as a series to bring together women active in constitution-making processes with their peers, women who have prior experience as constitution-makers and comparative experts.

The annual Women Constitution-Makers' Dialogue forum and related global network of women constitution-makers will expand opportunities for comparative experience sharing among women, enhance access to women's expertise across a range of constitutional topics, and elevate the experiences of women in the constitution-building community as equally valid and viable voices for transformation. Such a network has the potential to increase the global role of women in providing comparative constitutional advice. Links with various women peace-making networks will also be considered in the future.

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Annex A. Programme

Day One: 24 October 2019 Women's Participation, Representation and Influence in Constitution-Building

University of Edinburgh, Edinburgh School of Law, Old College

Time	Session
09:00–09:30	Welcome, Objectives Overview and Introductions
9:30–11:30	<p>Session I: Introduction to the conceptual framework on Women's Participation, Representation and Influence in Constitution-Making Processes. The session will provide an overview of the phases and elements of constitution-building through a gender lens, while touching on broader issues, considerations, approaches and challenges. Presentations will set the stage for subsequent sessions.</p> <p>Moderator: Erin Houlihan Panelists:</p> <ul style="list-style-type: none"> • Nanako Tamaru: Constitution-Building Processes. <i>How and when are process decisions made? In what ways do these choices impact women's representation, participation and influence over constitution-making?</i> • Susan Williams: Constitutional Design. <i>What do gender-sensitive constitutions look like and what are the debates surrounding these issues?</i> • Sumit Bisarya: Constitutional Implementation. <i>What are common challenges with implementation, particularly regarding design choices that seek to alter the status quo in terms of access to political, economic or social power for women and/or other historically marginalized groups?</i> • Christine Bell: Links between Constitution-Building and Peacebuilding. <i>What is the relationship between peacebuilding and constitutional reform from a gender perspective?</i>
11:45–13:15	<p>Session II: Designing the Constitution-Building Process from a Gender Lens. This session will focus on the process development phase, touching on identifying entry points for women's participation and representation, challenges impacting women's engagement, and considering how such factors can impact public and personal perceptions of women participants, their mandate, and the credibility of the process.</p> <p>Moderator: Nanako Tamaru Panelists:</p> <ul style="list-style-type: none"> • Sumit Bisarya: Case study on establishing the Constitutional Review Commission of The Gambia, efforts to engage women in public consultations, and the importance of media, public education and communication. • Mehrezia Labidi: Case study on the Tunisia process and the role of women in securing representation and maintaining a women's rights agenda.

Time	Session
14:00– 15:30	<p>Session III: Defining and Negotiating Women’s Strategic Constitutional Interests. This session will examine how, when, and in what ways women’s strategic interests arise in constitution-building, intersectionalities and perspectives on ‘complementarity’ and the ‘human rights’ paradigm, and how such negotiated interests translate into design choices.</p> <p>Moderator: Erin Houlihan Panelists:</p> <ul style="list-style-type: none"> • Hoda Elsadda: Case study on the 2013 Egyptian experience and negotiating the chapter on rights and freedoms in the Committee of 50. Meta-contextual factors influencing constitutional design choices more broadly, and how these interacted with considerations of women’s interests. • Lucky Sherpa: Case study on Nepal and efforts to identify and address the strategic needs of women, indigenous peoples and minorities, and related intersectionalities. • Mehrezia Labidi: Case study on successes and challenges in identifying and negotiating the strategic interests of Tunisian women as part of the drafting process—including establishing gender parity in the electoral system; successes and challenges in serving as first Vice-President of the Constituent Assembly.
15:45– 17:15	<p>Session IV: Constitutional Outcomes, Implementation Challenges and Potential Strategies for Mitigation. This session will examine common challenges impacting the successful implementation of transformative constitutions across a range of issues, including specific impacts and considerations for women’s equality and empowerment.</p> <p>Moderator: Sumit Bisarya Panelists:</p> <ul style="list-style-type: none"> • Martha Karua: Case study on Kenya’s 2010 Constitution as a transformative charter, remaining gaps and implementation challenges, and the status of efforts to enhance gender equality in access to political power. • Renata Uitz: Case study on Hungary’s constitutional reform process and the absence of gender perspectives, the impacts of emphasizing Christian and family values, and the role of the European Human Rights regime.
17:15– 17:45	<p>Key points and wrap up</p>

Day Two: 25 October 2019 Constitutional Design Choices and Links to Peacebuilding, Inclusion and Rights

University of Edinburgh, Edinburgh School of Law, Old College

Time	Session
9:00–11:00	<p>Session V: Peace Agreements, Political Settlements and Constitution-Building. This session will focus on links between peace processes and constitution-building, and the role of normative constitutional design in mitigating conflict and transforming the political-societal-legal order.</p> <p>Moderator and Co-Panelist: Christine Bell Panelists:</p> <ul style="list-style-type: none"> • Miriam Coronel-Ferrer: Case study on Mindanao peace processes with the Moro Islamic Liberation Front. Review of issues and challenges around ethnopolitical conflict, federalism and restructuring the state to frame self-determination. Touching on political inclusion and implications for the constitution. • Bassma Kodmani (via Skype): Case study on Syria conflict and peace process, aims for broader change, and procedural and substantive implications for the expanded inclusion of minorities through constitutional reform. • Christine Bell: Comparative experiences in mediation and constitution-building from a global perspective.
11:15–12:45	<p>Session VI: State Structure, Systems of Government and Electoral Systems. This session clusters three fundamental constitutional design issues to consider how and why restructuring the state, adjusting system of government, or reforming electoral system(s) seeks to mitigate conflict, expand political inclusion, enhance rights, and/or improve good governance. Will consider successes, challenges, and needs.</p> <p>Moderator: Susan Williams Panelists:</p> <ul style="list-style-type: none"> • Susan Ubalde-Ordinario: How a shift from a unitary to federal state in the Philippines could help mitigate internal conflict and expand political inclusion, and related links to electoral system reform and political party formation. • Martha Karua: Kenyan debates on structure of government, establishment of the post of prime minister and options for a parliamentary system.
13:30–15:00	<p>Session VII: Inclusion in Politics, Special Measures (e.g. quotas) and Human Rights. This session will consider constitutional design choices framed to open the political space, increase political participation, and protect and respect human rights, particularly in post-conflict situations or political transitions. Will touch on successes, challenges, capacity considerations, and context dynamics.</p> <p>Moderator: Renata Uitz Panelists:</p> <ul style="list-style-type: none"> • Hoda Elsadda: Successes and challenges in enhancing political inclusion and protecting human rights in Egypt. • Susan Ubalde-Ordinario: Political inclusion in the Philippines. Identifying needs, defining constitutional options and assessing challenges. • Lucky Sherpa: Expanding political inclusion and constitutional protections of indigenous peoples, minorities and women; role of federalism in supporting inclusion in Nepal; Nepal's innovations in gender identity recognition and protections.
15:15–16:30	<p>Session VIII: Needs and Next Steps. The final session will focus on trends in access to data and resources for women in constitution-making processes and gaps in the resources and support needed. Will also consider participant interests in forging a Global Network of Women Constitution-Makers.</p> <p>Facilitators: Christine Bell and Erin Houlihan</p>

Annex B. List of participants

1. **Christine Bell**, Professor of Constitutional Law and Assistant Principal (Global Justice), Director of the Political Settlements Research Programme, University of Edinburgh School of Law
2. **Sumit Bisarya**, Head of Constitution-Building Programme, International IDEA
3. **Miriam Coronel-Ferrer**, Senior Mediation Advisor, United Nations; former Head of the Government of the Philippines panel in peace talks with the Moro Islamic Liberation Front
4. **Beatrice Duncan**, Rule of Law Advisor Focal Point on Indigenous and Minority Issues, UN Women
5. **Hoda Elsadda**, Chair of the Board of Governance, Women and Memory Forum, Egypt; Professor of English and Comparative Literature, Cairo University; former Member of Egyptian Constitutional Committee of 50
6. **Erin Colleen Houlihan**, Programme Officer, Constitution-Building Programme, International IDEA
7. **Martha Karua**, Head of Narc Kenya Party; former Minister of Justice and Constitutional Affairs, Kenya
8. **Bassma Kodmani**, Member, Syrian Constitutional Committee; Founder and former Executive Director of Arab Reform Initiative; Associate Professor of International Relations, Paris University; former Board Member, International IDEA
9. **Mehrezia Labidi-Maïza**, Member, Assembly of the Representatives of the People, Tunisia; former First Vice President, Tunisian Constituent Assembly
10. **Lucky Sherpa**, former Ambassador to Australia and New Zealand; former Member of the first Constituent Assembly and Parliament of Nepal
11. **Nanako Tamaru**, Peace and Security Consultant, former Senior Programme Officer, Research and Training, Inclusive Security

12. **Susan Ubalde-Ordinario**, Attorney, Advocate and Member of Consultative Committee to Review the 1987 Constitution, the Philippines
13. **Renata Uitz**, Chair (Director), Comparative Constitutional Law Programme, Department of Legal Studies, Central European University
14. **Susan H. Williams**, Walter F. Foskett Professor of Law, Director, Center for Constitutional Democracy, Indiana University Maurer School of Law

About the author

Erin Colleen Houlihan is a Programme Officer with International IDEA's Constitution-Building Processes programme. She supports constitution-building in a range of contexts around the globe, develops comparative knowledge products and manages tools and databases related to both constitution-building processes and constitutional design. Houlihan is an attorney specializing in comparative constitutional law, human rights promotion and protection, democratization and post-conflict transitions. She has previously served in a variety of leadership, technical advising and research roles with country-based rule of law, human rights and good governance assistance programmes in Afghanistan, Iraq, Somalia and Syria. Prior to joining International IDEA, Houlihan served as Legal Advisor with the Institute for International Law and Human Rights and as Senior Legal Advisor and Deputy Chief of Party with a USAID-funded access to justice program, among other roles. She holds a Juris Doctor and an MA in foreign affairs from the University of Virginia and an MA in special education from Loyola Marymount University.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work. International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

On 24–25 October 2019, the International Institute for Democracy and Electoral Assistance (International IDEA)—together with the Edinburgh Centre for Constitutional Law (ECCL) and the Political Settlements Research Programme (PSRP) at the University of Edinburgh—hosted the inaugural event in a series of forums to be known as the Women Constitution-Makers’ Dialogue. The series is a networking and peer-to-peer dialogue programme wherein women constitution-makers and comparative constitutional experts can share country-specific constitution-building experiences, knowledge resources and tools, and identify opportunities and obstacles to women’s participation and influence from both a country-level and global perspective. The dialogue focuses on women’s representation and participation in national constitution-making processes, examines constitutional outcomes from a gender perspective, and considers commonly contested constitutional design choices more broadly.



International IDEA

Strömsborg
SE-103 34 Stockholm
Sweden

Telephone: +46 8 698 37 00

Email: info@idea.int Website:

<http://www.idea.int>