



CONSTITUTIONS, CUSTOMARY AND RELIGIOUS LAW, AND GENDER EQUALITY

Reconciling Rights in Constitutional Design Negotiations



CONSTITUTIONS, CUSTOMARY AND RELIGIOUS LAW, AND GENDER EQUALITY

Reconciling Rights in Constitutional Design Negotiations

Third Women Constitution-Makers' Dialogue, 18–19 November 2021

Rhys Ainsworth

Sharon P. Hickey



International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
+46 8 698 37 00
info@idea.int
www.idea.int

© 2022 International Institute for Democracy and Electoral Assistance

Views expressed in this publication do not necessarily represent the views of International IDEA, or those of its Board or Council members.

This research is supported by PeaceRep and funded by United Kingdom aid from the UK Foreign, Commonwealth & Development Office (FCDO) for the benefit of developing countries. The information and views set out in this publication are those of the authors. Nothing herein constitutes the views of FCDO. Any use of this work should acknowledge the authors and PeaceRep.



With the exception of any third-party images and photos, the electronic version of this publication is available under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 (CC BY-NC-SA 3.0) licence. You are free to copy, distribute and transmit the publication as well as to remix and adapt it, provided it is only for non-commercial purposes, that you appropriately attribute the publication, and that you distribute it under an identical licence. For more information visit the Creative Commons website: <http://creativecommons.org/licenses/by-nc-sa/3.0/>.

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

Design and layout: International IDEA
Copyeditor: Accuracy Matters Ltd

DOI: <https://doi.org/10.31752/idea.2022.48>

ISBN: 978-91-7671-565-9 (PDF)

Acknowledgements

We would like to specially thank: Erin C. Houlihan, who is the architect behind the conceptualization and organization of this workshop and series and whose framing is reflected in this report; all participants of the third Women Constitution-Makers' Dialogue for their insights throughout the workshop proceedings; and International IDEA and Peace and Conflict Resolution Evidence Platform (PeaceRep) staff for their support throughout the publication process.

Contents

Acknowledgements	iv
Introduction	3
Chapter 1	
Discussion themes: constitutions, customary and religious law, and gender equality	5
1.1. Gap between constitutional text and practice	5
1.2. Variations in constitutional framing and relationship between state, customary (and/or religious) law systems and gender equality.....	6
1.3. The role of international law.....	7
1.4. The benefits and drawbacks of custom	8
1.5. The importance of demystifying law and constitutions to increase women’s participation and influence in constitution-building.....	9
1.6. Implementation and enforcement challenges	9
Chapter 2	
Lessons learned: coalition-building and transforming culture to advance gender equality	11
2.1. Ensuring full participation of women in peace negotiations and constitution-making bodies	11
2.2. Building strategic partnerships	12
2.3. Leveraging international law	12
2.4. Engaging traditional leadership and using custom to women’s advantage.....	13
2.5. Cultivating constitutionalism and mainstreaming gender equality	14
Chapter 3	
Conclusion	15
Annex A. Programme	17
Annex B. List of participants	20
About the authors	22
About the partners	23
International IDEA	23
Edinburgh Centre for Constitutional Law.....	24
PeaceRep.....	24

INTRODUCTION

On 18–19 November 2021 the International Institute for Democracy and Electoral Assistance (International IDEA)—together with the [Edinburgh Centre for Constitutional Law \(ECCL\)](#) and the [Peace and Conflict Resolution Evidence Platform \(PeaceRep\)](#)—hosted the third annual Women Constitution-Makers' Dialogue. The first Dialogue, '[Founding Women: A Dialogue with Women Constitution-Makers](#)', took place in October 2019 at the University of Edinburgh. The second Dialogue, '[Constitution-Building in Response to Social Unrest](#)', was held online in 2020.

The theme of the third Dialogue was 'Constitutions, Customary and Religious Law, and Gender Equality: Reconciling rights in constitutional design negotiations'. Held online, the Dialogue welcomed 28 participants with diverse backgrounds and experiences, in particular from countries experiencing conflict and a peace or transition process. These included experts from Bolivia, Botswana, Chile, Kenya, South Africa, South Sudan, Syria and Tunisia, along with senior international advisors and academics in the fields of constitution-building, peace processes, and gender and democracy. Participants examined and discussed: (1) the ways in which constitutions delineate the balance between constitutional guarantees of gender equality and the constitutional recognition of customary (and/or religious) practices and law; (2) the relative implications of these design choices for how constitutions shape women's equal rights and contribute to transforming societal gender relations to achieve women's substantive equality; and (3) key insights and potential alternative approaches for future constitutional reform processes.

Over five sessions, the participants explored comparative constitutional design approaches to legal pluralism and reconciling tensions between customary/religious systems and guarantees of gender equality and non-discrimination, including: substantive provisions; the status of international law; and the effectiveness of oversight, adjudication and enforcement mechanisms. In addition to technical issues, the discussion also addressed successes and challenges associated with implementation of constitutional guarantees

of gender equality and explored innovative approaches to harmonization, transformation and empowerment.

Note: the following workshop report is a record of discussions. It therefore defers to participants' framing, inferences and omissions and does not purport to be an academic or authoritative analysis of constitutions or laws of the countries represented. A forthcoming publication will provide in-depth analysis of the topic.

Chapter 1

DISCUSSION THEMES: CONSTITUTIONS, CUSTOMARY AND RELIGIOUS LAW, AND GENDER EQUALITY

The following section records the major points of discussion between the participants during the Dialogue and highlights common themes (and divergences) across the wide variation of customary and religious law systems represented.

1.1. GAP BETWEEN CONSTITUTIONAL TEXT AND PRACTICE

A major theme of the discussion was the significant gap between the rights guaranteed in constitutions and the lived experience of women and girls. A participant from Kenya outlined how the 2010 Kenyan Constitution made several progressive commitments relating to gender equality. Most notably, article 81(b) requires that not more than two-thirds of the members of national elected public bodies shall be of the same gender (article 175 repeats this requirement for county governments). This provision is supplemented by article 10, enshrining national values and governance principles of inclusion, equality and non-discrimination. Article 27(8) explicitly directs the state to take legislative action and other measures to implement the principle that not more than two-thirds of the members of elected or appointed bodies shall be of the same gender. Despite these robust constitutional guarantees, in practice women remain at the periphery of Kenyan politics because of non-implementation of constitutional guarantees, cultural norms that impede women's access to political office and intimidation and fear of electoral violence. Court rulings since 2012 have directed parliament to implement the so-called 'two-thirds rule' on threat of dissolution, but as of 2017, women make up just 21 per cent of Kenya's National Assembly, and 31 per cent of its Senate.

A participant from South Sudan noted that the gender equality clause in article 14 of the 2011 South Sudan Constitution does not bridge the gap between text and practice. Custom holds a prominent place in Sudanese legal culture, which, according to the participant, results in practices that stand in

Custom holds a prominent place in Sudanese legal culture, which, according to the participant, results in practices that stand in direct contradiction to gender equality.

direct contradiction to gender equality. For example, while the Constitution recognizes gender equality in matters like land ownership and inheritance in article 16, it also recognizes the rights of ethnic and cultural communities and their 'customs and cultures' (article 33), thus allowing a custom denying women's property ownership to prevail. The participant also mentioned that sexual abuse and intimate partner violence impedes women's full realization of their rights. Legal definitions of rape and sexual abuse are weak and vague, and spousal rape is not a crime. The gap between constitutional guarantees of gender equality on one hand, and impunity for intimate partner violence and toleration of harmful cultural practices on the other, creates a situation in which women and girls cannot fully realize their constitutional rights.

1.2. VARIATIONS IN CONSTITUTIONAL FRAMING AND RELATIONSHIP BETWEEN STATE, CUSTOMARY (AND/OR RELIGIOUS) LAW SYSTEMS AND GENDER EQUALITY

The way a constitution frames the relationship between the state, customary (and/or religious) law systems and gender equality is vital to the economic, social, political and cultural status of women and girls. Different systems take varying approaches to reconciling this tension and to defining how the systems interact. In pluralist societies, including secular states, there is often some distinction between the state-based or 'formal' system and a range of customary or religious systems of various groups within the state. The approach is generally one of accommodation and protection for minority groups within a single, non-sectarian legal system. The key issue lies in defining the parameters of tolerance and accommodation extended to elements of the minority customary or religious system that are inconsistent with the majority's conception of gender equality. In other situations, the constitution seeks to embrace both or multiple systems to operate in parallel with equal standing through partial incorporation. In this kind of case, the constitution formally recognizes the jurisdiction of the customary and/or religious system so that it exists alongside the state-based legal system. This may give rise to parallel systems and institutions operating in the same geographical territory, both of which have constitutional status but are in conflict with respect to gender equality.

A critical issue concerns the hierarchy between constitutional guarantees of human rights and equality rights and conflicting customary or religious laws.

A critical issue concerns the hierarchy between constitutional guarantees of human rights and equality rights and conflicting customary or religious laws. The Dialogue participants discussed the ways in which their constitutions resolve the potential contradictions and clashes between legal systems. In Kenya, the Constitution recognizes and promotes traditional dispute resolution mechanisms as a way of managing conflicts. Article 159(3), however, explicitly limits the use of traditional dispute resolution mechanisms if their utilization: (a) contravenes the Bill of Rights; (b) is inconsistent with the Constitution; or (c) is repugnant to justice or morality or results in outcomes that are repugnant to justice or morality.

In Botswana, the prohibition against discrimination found in section 15 of the 1966 Constitution is qualified by a ‘limited discrimination’ or ‘clawback’ clause, exempting all laws addressing ‘adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law’. However, a 2012 landmark Botswana High Court ruling effectively ended discriminatory inheritance practices and established that the section 15 clawback clause is subordinate to the right to equality before the law, enshrined in section 3 of the Constitution. In upholding the High Court’s ruling in *Mmusi v. Ramantele*, the Botswana Court of Appeal in 2013 stated that derogations for custom ‘are not unchecked’. It ruled that as section 3 is an umbrella section, the section 15 derogations must be tested against the criteria allowing restrictions of fundamental rights and freedoms specified in section 3: ‘They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest.’ The court also affirmed that any customary law that unfairly discriminates against a woman solely based on her gender would not accord with ‘humanity, morality or natural justice’ nor ‘the principles of justice, equity and good conscience’.

Article 3 of the 2012 Syrian Constitution recognizes Islam as the religion of the President, and while providing that the State shall protect all religions, it also notes that ‘the personal status of religious communities shall be protected and respected’. A participant reported that personal status laws (e.g. marriage, inheritance, divorce, custody and maintenance) tend to be deeply patriarchal and harmful to women.

1.3. THE ROLE OF INTERNATIONAL LAW

Most international and regional frameworks—including treaties, agreements and court rulings—are clear that the equal rights of women and girls should take legal precedence over discriminatory customary and religious rules and practices, and that cultural diversity cannot be invoked to infringe upon or limit the scope of human rights guaranteed by international law (for example, articles 2 and 5 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and article 2 of the UN Universal Declaration of Human Rights). This aligns with calls to reform discriminatory aspects of Indigenous, customary and religious systems from within, and to ensure that constitutional recognition does not entrench the dispossession of women in socio-economic, cultural and political spheres.

The 2009 Bolivian Constitution provides a robust framework for recognizing and applying international human rights laws and standards. Article 13(IV) specifies that international human rights treaties and conventions ratified by the legislature prevail over national law. Article 256 further provides that constitutional rights shall be interpreted in accordance with international human rights treaties and that signed and/or ratified treaties with ‘more

Most international and regional frameworks are clear that the equal rights of women and girls should take legal precedence over discriminatory customary and religious rules and practices.

favourable' human rights will enjoy preferential application over rights guaranteed in the Constitution.

Other states may be less amenable to arguments based on international law. Nevertheless, international and regional laws, norms and standards can provide significant leverage to pressure the state towards compliance with its gender equality commitments. The impact of appeals to international law may be tempered depending on the legal system of the state and the extent to which institutions and courts recognize the application of international law (dualist versus monist), and the state's commitment to implementation, for example, by reforming uncompliant law or enforcing a relevant court judgment.

The recognition and protection of cultural rights, including customary and/or religious law, is sometimes essential to addressing past injustices, forging a political settlement and building broad societal consensus around a revised constitutional order.

1.4. THE BENEFITS AND DRAWBACKS OF CUSTOM

Participants also stressed that it is important not to dismiss the value of customary law. The recognition and protection of cultural rights, including customary and/or religious law, is sometimes essential to addressing past injustices, forging a political settlement and building broad societal consensus around a revised constitutional order, to which religious and customary actors may be key. Recognition is particularly relevant in situations where constitutional reform is rooted in issues of identity and demands for self-governance, or where the process aims to (re)found or (re)legitimize a political community after a period of exclusionary constitutional governance, such as under (post)colonialism or authoritarianism. Among Indigenous and other traditional peoples in particular, constitutional recognition of culture and custom is foundational to protecting traditional knowledge and to the exercise of rights to (internal) self-determination. The issue is increasingly important in several countries in Latin America, Africa, and Asia and the Pacific, as evidenced by recent constitutional reform processes in Bolivia, Ecuador, Kenya, Samoa and Tonga, and in current processes in Chile and South Sudan.

Nonetheless many customary and religious systems include norms, rules, procedures and institutions that discriminate against women and girls or violate their human rights. Common areas of tension relate to: personal status matters (e.g. marriage, divorce, inheritance, custody and maintenance); women's ability to inherit, acquire, administer, control, use and transfer property; and women's bodily integrity, dignity and safety with regard to concepts of honour and varying degrees of acceptance for family violence, spousal rape and/or female genital cutting. Customary (and religious) institutions, such as chiefs or leadership councils, often exclude women from positions of power and decision-making roles. Similarly, customary and religious dispute resolution systems and approaches may be discriminatory or harmful to women and girls.

Several participants identified aspects of custom that can and have been used to advance women's rights, including, in Africa, the philosophy of *ubuntu*, which embodies fundamental principles of human rights and is frequently

used to advocate for change from a legal and sociocultural perspective. One participant from Botswana described using customary law to her advantage while advocating for the advancement of gender equality. In response to accusations of being ‘westernized’ and ‘having no respect for her culture’, she approached traditional leaders and cited the overlooked areas of gender-inclusive customary law, arguing that discriminatory laws violate custom. The participant affirmed that customs are not uniformly discriminatory and so it is important to push chiefs and traditional councils not to be selective about which customs to respect. Another participant described a 2011 case in Kenya, *Monica Jesang Katam v. Jackson Chepkwony*, in which the court relied on customary law to recognize marriage between two women as valid for the purposes of inheritance.

1.5. THE IMPORTANCE OF DEMYSTIFYING LAW AND CONSTITUTIONS TO INCREASE WOMEN’S PARTICIPATION AND INFLUENCE IN CONSTITUTION-BUILDING

A common area of agreement was the importance of engaging broader society and enhancing the capacity of women’s movements to shift the cultural needle in favour of women’s equality.

While in theory the constitution is the supreme law of the land, in practice the constitution does not touch the lives of all equally, especially in rural areas (which tend to be strongholds of customary leadership). Participants stated that many countries inherited a ‘cookie-cutter’ postcolonial constitution, insensitive to their heterogenous country contexts, which often permitted the continuation of processes and structures that discriminated against women. One of the main challenges in creating a gender-inclusive constitution centres on demystifying law in the eyes of the people to help them understand that, in the words of one participant, ‘law is man-made but can be woman-infused’ and therefore transformed. In other words, assertive and effective women’s movements can participate in the constitution-building process and influence the substance of the constitution.

Assertive and effective women’s movements can participate in the constitution-building process and influence the substance of the constitution.

1.6. IMPLEMENTATION AND ENFORCEMENT CHALLENGES

While much discussion focused on improving the substance of the constitutional text itself, it was acknowledged that constitutional design has its limits and that constitutional guarantees depend on political will for implementation and the strength and independence of institutions tasked with monitoring, adjudicating and enforcing constitutional rights. As one constitution-maker noted: ‘We enter the post-promulgation period assuming it is the end...but it is not always that.’ In general, participants found that institutions lagged, were ineffective or were never fully established.

Kenya's 2010 Constitution is instructive in this area. The Kenyan Constitution was accompanied by a robust implementation framework that included a five-year timeline for specific legislation to be enacted and oversight measures relating to the legislature and judiciary, as well as advisory powers for the chief justice. Much remains undone and incomplete. For example, the much celebrated 'two-thirds rule' remains merely words on paper due to a lack of consensus regarding implementation.

Courts resistant to the advancement of gender equality may produce inconsistent or regressive decisions, or progressive rulings with essentialist reasoning.

The participants considered various ways that constitutionalized institutions have failed to adequately advance women's equality. For example, courts resistant to the advancement of gender equality may produce inconsistent or regressive decisions, or progressive rulings with essentialist reasoning. A participant explained that in Syria the Constitutional Court has little power to challenge the current system as it is politically obliged to act only with explicit instruction 'from the top'.

Some institutions may simply disregard their responsibility altogether. A participant from South Sudan noted that the role of traditional authorities is twofold—to regulate and to preserve custom. However, the participant concluded, traditional councils almost exclusively focus on preservation, no matter how negative the custom in question may be for women's equality. Additionally, when women in South Sudan seek recourse to the state courts regarding family law issues, they are often referred back to the customary courts, which are typically more conservative.

Nevertheless, a promising example of implementation comes from South Sudan. While the legal age of marriage is 18, custom allows a girl to become eligible for marriage when she reaches puberty, creating a clear conflict. A 2019 landmark ruling annulled the customary marriage of a 16-year-old girl and put her under the protection of a guardian. While the practice of early and forced marriage continues, the ruling establishes that when faced with a conflict between laws supporting gender equality and a widespread custom, the formal legal system settled the dispute in favour of gender equality. Activists view this ruling as a promising precedent for future cases.

Chapter 2

LESSONS LEARNED: COALITION-BUILDING AND TRANSFORMING CULTURE TO ADVANCE GENDER EQUALITY

A significant portion of the workshop concerned the importance of strategic coalition-building and the need for ‘smart activism’ to advance women’s equality. For women peacebuilders and constitution-makers, the balancing act between cultural and religious rights and gender equality is often complex and involves intersecting identities and interests. Moreover, the process of forging consensus among women, among political decision-makers and within society more broadly can be challenging. Both gender equality provisions and those on customary and/or religious rights serve multiple purposes and are important for a range of legal, normative and practical reasons. Given this, how should women constitution-makers and their allies approach reconciling these rights within a constitutional framework? How can they mobilize to influence negotiations on constitutional design to ensure that the constitution reflects an intersectional approach to women’s human rights? What constitutional design approaches and institutions may be optimal in each context to enhance women’s substantive equality? How can women be more empowered to transform discriminatory elements of state institutions and customary/religious systems themselves? This section outlines key insights and potential complementary or alternative approaches for future constitutional reform processes.

What constitutional design approaches and institutions may be optimal in each context to enhance women’s substantive equality?

2.1. ENSURING FULL PARTICIPATION OF WOMEN IN PEACE NEGOTIATIONS AND CONSTITUTION-MAKING BODIES

Participants concurred that it is essential that women are well represented in peace negotiations and in constitution-making bodies. Participants also noted that ‘women’ is not a single category, and that diversity of age, race, class, religion, ethnic identity and political affiliation (among others) is also key to advancing a nuanced and robust agenda of gender equality.

The discussions revealed how it is vital for women to be at the table during peace negotiations to ensure their contribution to a final agreement and a future constitution-making body. One participant also outlined the importance of gender-inclusive constitutional review commissions to ensure that women's assessment of the previous text and priorities for reform are represented.

Women's movements must align themselves with other marginalized groups to maximize political and social pressure to win reforms.

2.2. BUILDING STRATEGIC PARTNERSHIPS

Rainbow coalitions are vital to achieve significant and systemic change. Women's movements must align themselves with other marginalized groups to maximize political and social pressure to win reforms. This diversity can then be tactically utilized. For example, during the national constitutional conference in Kenya, male allies and Muslim women were spokespeople to advocate for various aspects of gender equality as a way of bridging the gap between constituencies. This was described by Dialogue participants as 'triangulating leverage'—that is, who is the best spokesperson to influence a certain group?

One participant mentioned how fractures can occur in women's movements over ethnic or religious identities. The process of effectively building inclusive, broad coalitions can therefore lie in the framing of the movement. For example, by widening the cause to economic liberation, alliance-building may be more likely between women with varying intersectional identities and with human rights and constitutional reform advocates. On a similar note, coalescing around shared concerns can be key to building a bridge between women's activists. A participant from Tunisia shared how, during the constitution-building process after the Arab Uprisings, women formed an informal caucus to advance gender equality and prevent women's rights being rolled back based on religious arguments from conservative members in the constituent assembly. Even though the women were from very different backgrounds and spanned the political spectrum, they agreed on national concerns facing women. The group successfully advocated for the inclusion of constitutional articles creating an obligation on the state to ensure gender parity in all elected bodies and a guarantee that the state will act to eradicate violence against women. A conservative member was the coordinator of the group, reinforcing the notion that 'unexpected' allies are sometimes best placed to build consensus on issues related to gender equality.

2.3. LEVERAGING INTERNATIONAL LAW

Participants agreed that, where strategic, women should continue attempting to leverage international law, particularly in states that have committed themselves to international human rights treaties. Progress has been made by women transnationally mobilizing around international human rights law, and activists should continue to insist that leaders advance legislation, policies and institutions to tackle discrimination against women.

A participant commented that gender equality activists in Botswana were able to leverage public commitments made by the government during the 1995 Fourth World Conference on Women in Beijing, which eventually led to constitutional reforms in 2016 that expressly prohibited discrimination on the grounds of sex.

However, sometimes the participants faced backlash against reliance on international law and they were criticized as ‘westernized’ and ‘elitist’. Therefore, it is beneficial to be aware of and strategically use regional comparative examples where these can be persuasive. For example, during debates in Kenya on political gender quotas, activists pointed to positive examples in East Africa (particularly Rwanda) to show regional practice and consensus.

2.4. ENGAGING TRADITIONAL LEADERSHIP AND USING CUSTOM TO WOMEN’S ADVANTAGE

As previously discussed, not all customary or religious law is discriminatory. On this basis, many participants argued in favour of relying on aspects of religious/customary law to enhance empowerment where a state system is lacking. Participants also discussed the benefits of overturning the assumption that religious/customary law is immune to growth or development. As one participant said: ‘When cultures freeze, they die.’ The goal is to convince those who care deeply about these systems to view them as living, growing bodies of law that are responsive to changing times and circumstances.

Some suggested codifying customary law to constrain the discretion of traditional leaders and produce a level of consistency. However, codification could also reinforce the notion that customary law is static, and therefore hinder the inherent evolution of these systems and limit their potential as, in the words of a South Sudanese participant, ‘a progressive vehicle for change’. A better approach might be to treat customary law more like common law; in other words, to record the judgments to achieve a sufficient level of consistency while also entrusting judges with the discretion to revise the law when appropriate. Thinking must be altered to view customary law as, according to one participant, ‘patterns to be developed in light of changing circumstances rather than as rules to be mechanically applied’.

Participants advocated for exploring ways of empowering women within their customary systems. In most cases this would require significant feminist outreach and engagement, which would be challenging considering that target groups tend to live in remote regions. Nevertheless, where possible it would be advantageous to select female customary leaders or to provide incentives to customary leaders to encourage gender equality.

Participants advocated for exploring ways of empowering women within their customary systems.

2.5. CULTIVATING CONSTITUTIONALISM AND MAINSTREAMING GENDER EQUALITY

Drafting the constitution is just the first part in advancing women's equality. For the constitutional provisions to be executed and effective, activists must prioritize transforming both the legal and social culture. Participants indicated that constitutions have the power to create norms, but they must be rigorously enforced to ensure entrenchment of these norms. Focusing on implementation also means immediately drawing attention to constitutional violations. The discussion among participants then centred on whether sanctions for non-compliance should be delineated in constitutional or ordinary law, and the potential implications of the latter for incentivizing or deterring compliance.

Beyond this, there was an appeal for the establishment of strong, broad and effective civil society movements, able and willing to pressure institutions to enforce constitutional provisions related to women's equality. Strong civil society movements can also engage in public education on why a constitution-building process is important and how people in general—and women and minorities in particular—can get involved.

A final note, supported by all participants, is that any comprehensive activist strategy must account for the need to sustain women activists on the long and arduous road to achieving gender equality. This is particularly important given the increase in economic, social and political pressures exacerbated by the Covid-19 pandemic, the rise in conflict and shrinking space for civil society activism.

Chapter 3

CONCLUSION

Several common threads emerged over the course of the third Women Constitution-Makers' Dialogue. The participants noted how states have varying approaches to framing the relationship between the constitution and customary and/or religious law. Some resolve conflicts between customary law and the constitution in favour of the constitution, while others give practical precedence to custom (including some discriminatory custom). Panellists commonly mentioned a rift—sometimes a sizeable rift—between the recognition of gender equality in the constitution and the actual status of women in society, including their ability to claim their rights and to access justice and redress where violations of their rights occur.

Overall, participants emphasized that the issue of discrimination in customary and religious law and practices is a global problem that precedes state-based constitutions. Yet constitutions have an important role to play in transforming deeply held societal beliefs, attitudes and behaviours that contribute to the systemic marginalization of women in different contexts around the world. Key to this is recognizing that customary law—and to some extent religious law—are living systems and that their ability to change over time is foundational to transformation. It is also crucial, among other points, to ensure that all law—including the constitution, legislation and traditional/religious systems—are demystified and accessible for everyone, and that advocates, traditional and 'formal' civil leaders and institutions are empowered and capacitated to support necessary change over time. Women's robust participation and influence in peace negotiations and constitution-making bodies are critical to ensuring meaningful representation and, hopefully, gender-sensitive constitutional design.

Nevertheless, no single strategy works to combat patriarchal social and legal structures. Each country context requires an active civil society to encourage and sometimes force political compliance with the constitution by creating a culture of constitutionalism. To be successful, civil society movements must strive to build broad, strategic partnerships, with the strength of their diversity

Some countries resolve conflicts between customary law and the constitution in favour of the constitution, while others give practical precedence to custom (including some discriminatory custom).

used to women's advantage. Many activists have had success in leveraging international law to advance gender equality, but such success depends on the degree of the state's legal and political commitment to implementing and adhering to international law. In other cases, gender rights activists have effectively leveraged progressive aspects of customary law to support arguments in favour of gender equality. Participants concluded that gender equality will not be achieved by the state imposing top-down progressive change. Lasting change can only happen when women are empowered within their communities to initiate shifts in culture and can rely on a broader constitutional and legal framework for support.

Annex A. Programme

Day 1. 18 November 2021

Time (CET) Session

Time (CET)	Session
14:30–14:45	Welcome, objectives and introductions
14:45–16:00	<p>Session I: Defining the issues—Constitutions, custom and women's equality</p> <p>This session will conceptualize the theme of the event, define key concepts and outline the issues and challenges that commonly arise when seeking to reconcile constitutional guarantees of gender equality with recognition of customary (and religious) systems. Speakers will address concepts of legal pluralism, customary (and religious) systems, cultural rights, gender equality, and special measures. They will also review trends over time in the constitutional entrenchment of gender equality and constitutional recognition of customary (and/or) religious systems and provide a preliminary outline on various constitutional approaches to balancing and reconciling tensions.</p> <p>Moderator: Erin Houlihan, Programme Officer, International IDEA</p> <p>Panellists:</p> <p>Susan H. Williams, Walter W. Foskett Professor of Law; Director, Center for Constitutional Democracy, Indiana University Maurer School of Law</p> <p>Christine Bell, Professor of Constitutional Law and Assistant Principal (Global Justice), University of Edinburgh School of Law</p> <p>Aleta Sprague, Senior Legal Analyst, WORLD Policy Analysis Center, University of California Los Angeles Fielding School of Public Health</p> <p>Judy Gitau, Regional Coordinator, Africa, Equality Now</p>
16:10–17:25	<p>Session II: Identity, Recognition and the constitution-building process—How do demands for cultural rights and gender equality arise in the constitution-making process, and how do intersectional identities shape coalition-building?</p> <p>This session will examine the ways in which women mobilize during the constitution-building process to build coalitions and bridge divides around these contentious issues. Panellists will discuss the ways in which often competing demands for recognition and protection of cultural rights, including customary (or religious) systems, and women's equality protections arise in a constitution-building process, the importance of these issues in building consensus around the new constitutional order, and challenges and successes in forming alliances given women's multiple and intersectional identities and interests.</p> <p>Moderator: Kimana Zulueta-Fülscher, Acting Head, Constitution-Building Programme, International IDEA</p> <p>Panellists:</p> <p>Atsango Chesoni, Governance and Human Rights Consultant; former Executive Director, Kenya Human Rights Commission; former Deputy Chairperson, Committee of Experts on Constitutional Review, Kenya</p> <p>Lobna Jeribi, Founding President, Solidar Tunisie; former Minister of Major National Projects/Reforms; former Member, National Constituent Assembly, Tunisia</p> <p>Rim Turkmani, Research Fellow and Director of Syria Conflict Research Programme (CRP), Department of International Development, London School of Economics</p> <p>Onalenna Selolwane, Development and Gender Expert; former faculty member, University of Botswana; Founding Member and former President, Emang Basadi Women's Association; Executive Committee Member, Mosadi Khumo Socio-Economic Empowerment Forum for Women, Botswana</p>

Day 2. 19 November 2021

Time (CET) Session

14:30–14:35	Opening and brief review of the previous day
14:35–15:40	<p>Session III: Comparative constitutional design approaches—How does the constitution frame the relationship between the ‘formal’/‘civil systems’ that apply across the state and customary and religious systems? How can a constitution reconcile tensions (or conflicts) between civil/state-wide values and the interest of particular cultural or religious groups?</p> <p>This session will examine comparative ways in which constitutions frame the relationship between ‘state’ and ‘non-state’ legal systems from the (loose) perspective of ‘recognition without incorporation’, ‘partial incorporation’ and ‘full incorporation’. Panellists will also discuss whether and how the text resolves potential inconsistencies between customary/religious laws and guarantees of gender equality and non-discrimination.</p> <p>Examination of design considerations and institutional structures will include, for example, clarity and consistency of provisions, the framing or definition of customary (or religious) systems, the use of repugnancy clauses or clawback clauses, the recognition and role of customary (or religious) institutions, jurisdictional issues, the status of international law, role of the judiciary, issues of justiciability, mechanisms of state oversight or regulation, the inclusion of special measures and state obligations to advance gender equality, among others. Panellists will consider the benefits and challenges of these various approaches.</p> <p>Moderator: Christina Murray, Member, United Nations Mediation Support Standby Team; Professor Emeritus of Human Rights and Constitutional Law, University of Cape Town, South Africa</p> <p>Panellists:</p> <p>Lobna Jeribi, Founding President, Solidar Tunisie; former Minister of Major National Projects/Reforms; former Member, National Constituent Assembly, Tunisia</p> <p>Caroline Kibos, Chair, South Sudan Women Coalition for Peace; Representative, Reconstituted Joint Monitoring and Evaluation Commission (RJMEC)</p> <p>Fernanda San Martín Carrasco, Program Manager for Latin America, International Panel of Parliamentarians for Freedom of Religion or Belief (IPPFORB), Bolivia</p> <p>Mona-Lisa Mungure, Lawyer; Director of Molao Matters, Botswana</p>

Day 2. 19 November 2021 (cont.)

Time (CET) Session

15:50–16:55	<p>Session IV: Implementing the balancing act and transformative remedies—Successes and challenges in comparative approaches</p> <p>This session will examine comparative successes and challenges in implementing constitutional guarantees of women's equality in light of the way in which the text frames the relationship between the state and customary law and whether/how the constitution seeks to transform discriminatory aspects of customary/religious systems. Discussions will focus on what types of remedies the constitution provides and how they are working.</p> <p><i>Affirmative</i> constitutional remedies provide mechanisms to redress injustices, such as appeals to state courts. <i>Transformative</i> remedies provide mechanisms that seek to transform the root problem, such as the discriminatory or harmful elements of customary or religious systems themselves (e.g. through codifying and requirements to modify customary law). Another approach is through <i>special measures</i> aimed at increasing women's participation and influence in the formal state system, which may or may not interact with the customary system. Panellists will consider the benefits and drawbacks of these approaches in advancing women's equality and in remediating and/or transforming discriminatory views and practices.</p> <p>Issues will include, for example: benefits and drawbacks of these various approaches, including codification; (state) judicial intervention; special measures and their interactions with customary/religious systems, if any; and other formal and informal mechanisms. Panellists will also address, as appropriate, issues around political will, societal awareness, attitudes and behaviours in supporting or hindering this process.</p> <p>Moderator: Susan H. Williams, Walter W. Foskett Professor of Law; Director, Center for Constitutional Democracy, Indiana University Maurer School of Law</p> <p>Panellists: Elsie Alexander, Development and Gender Consultant and Entrepreneur; Director, Putting Women First Trust, Botswana Toribia Lero Quispe, Member of the National Assembly, Chamber of Deputies of the Plurinational State of Bolivia; President, Commission of Native Indigenous Nations and Peasant Peoples, Culture and Interculturality Jackline Nasiwa, Founder, Centre for Inclusive Governance, Peace and Justice (CIGPJ); Chairperson of Board of Directors, South Sudan National Alliance of Women Lawyers (NAWL), South Sudan Marilyn Muthoni Kamuru, Lawyer and Gender Expert, Kenya</p>
16:55–17:25	<p>Session V: Reimagining constitutional architecture—Identifying innovative approaches to harmonization, transformation, and empowering women</p> <p>Moderators: Christine Bell and Erin Houlihan</p> <p>This open discussion session aims to distil key insights and lessons learned on the ways in which constitutions seek to recognize and reconcile customary/religious law and gender equality. In particular, it seeks to identify strategies and innovations that could be incorporated into choices about constitutional negotiation, design and implementation to more effectively contribute to transforming the content of custom and, by extension, women's socio-economic, cultural and political resources and status. Focus will be on identifying the conditions, frameworks, institutions and actors that have contributed to positive transformations and identifying gaps and needs to support similar approaches elsewhere.</p> <p>Particular focus will be on: the ways that women have led such transformations; the role and contributions of customary institutional leaders and 'formal' institutions (such as courts, legislatures and independent oversight institutions); and the international community.</p>
17:25–17:30	Key points and wrap-up

Annex B. List of participants

Tiare Maeva Carolina Aguilera Hey, Lawyer; Representative of the Rapa Nui people, Chilean Constitutional Convention

Elsie Alexander, Development and Gender Consultant and Entrepreneur; Director, Putting Women First Trust, Botswana

Christine Bell, Professor of Constitutional Law and Assistant Principal (Global Justice), University of Edinburgh School of Law

Sumit Bisarya, Constitutions Advisor, UN Department for Peacebuilding and Political Affairs; (former/future) Head of Constitution-Building Programme, International IDEA

Atsango Chesoni, Governance and Human Rights Consultant; former Executive Director, Kenya Human Rights Commission; former Deputy Chairperson, Committee of Experts on Constitutional Review, Kenya

Mona-Lisa Mungure, Lawyer; Director of Molao Matters, Botswana

Rebeca Elvira Delgado Burgoa, Lawyer; former Judge; former Head, Human Rights Unit at Office of the Ombudsman, Bolivia; former Member, Departmental Electoral Tribunal; former President of the Chamber of Deputies, Andean Parliament

Pamela Figueroa Rubio, Academic, Institute for Advanced Studies of the University of Santiago, Chile; Academic Coordinator, New Constitution Observatory

Judy Gitau, Regional Coordinator, Africa, Equality Now

Sharon Pia Hickey, Associate Programme Officer, Constitution-Building Programme, International IDEA

Erin Colleen Houlihan, Programme Officer, Constitution-Building Programme, International IDEA

María Jaraquemada, Programme Officer, Chile and Southern Cone of Latin America, International IDEA

Lobna Jeribi, Founding President, Solidar Tunisie; former Minister of Major National Projects/Reforms; former Member, National Constituent Assembly, Tunisia

Marilyn Muthoni Kamuru, Lawyer and Gender Expert, Kenya

Caroline Kibos, Chair, South Sudan Women Coalition for Peace; Representative, Reconstituted Joint Monitoring and Evaluation Commission (RJMEC)

Toribia Lero Quispe, Member of the National Assembly (Citizen Community coalition), Chamber of Deputies of the Plurinational State of Bolivia; President, Commission of Native Indigenous Nations and Peasant Peoples, Culture and Interculturality

Christina Murray, Member, United Nations Mediation Support Standby Team; Professor Emeritus of Human Rights and Constitutional Law, University of Cape Town, South Africa

Jackline Nasiwa, Founder, Centre for Inclusive Governance, Peace and Justice (CIGPJ); Chairperson of Board of Directors, South Sudan National Alliance of Women Lawyers (NAWL)

Hyeshin Park, Economist, Gender Programme Coordinator, Organisation for Economic Co-operation and Development (OECD) Development Centre

Fernanda San Martín Carrasco, Program Manager for Latin America, International Panel of Parliamentarians for Freedom of Religion or Belief (IPPFORB), Bolivia

Onalenna Selolwane, Development and Gender Expert; former faculty member, University of Botswana; Founding Member and former President, Emang Basadi Women's Association; Executive Committee Member, Mosadi Khumo Socio-Economic Empowerment Forum for Women, Botswana

Aleta Sprague, Senior Legal Analyst, WORLD Policy Analysis Center, University of California Los Angeles (UCLA) Fielding School of Public Health

Silvia Suteu, Associate Professor and Athena Scientific Women's Academic Network (SWAN) Lead, University College London

Nanako Tamaru, Peace and Security Consultant; former Senior Program Officer, Research and Training, Inclusive Security

Rim Turkmani, Research Fellow and Director of Syria Conflict Research Programme (CRP), Department of International Development, London School of Economics

Verónica Undurraga, Professor of Law, Universidad Adolfo Ibáñez, Chile

Sindiso Mnisi Weeks, Associate Professor of Law and Society, School for Global Inclusion and Social Development, University of Massachusetts Boston; Adjunct Associate Professor in Public Law, University of Cape Town

Susan H. Williams, Walter W. Foskett Professor of Law; Director, Center for Constitutional Democracy, Indiana University Maurer School of Law

Kimana Zulueta-Fülscher, Acting Head of Constitution-Building Programme, International IDEA

About the authors

Rhys Ainsworth graduated from the University of Edinburgh in 2021 with an LLB in Law. He worked at the Edinburgh Centre for Constitutional Law, funded by Peacerep, as a Research Assistant until July 2022. He currently works as a consultant at a political communications agency in Edinburgh.

Sharon P. Hickey is an Associate Programme Officer in International IDEA's Constitution-Building Programme, where she generates knowledge on comparative constitutional process and design and supports constitution-building processes.

About the partners

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 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 democratic practices; offers technical assistance and capacity building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where we work

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the 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.

<<https://www.idea.int>>

EDINBURGH CENTRE FOR CONSTITUTIONAL LAW

The Edinburgh Centre for Constitutional Law (ECCL) provides a focal point for staff and postgraduate research students working in all areas of Scots and UK public law, Commonwealth and comparative constitutional law, human rights law, environmental law and climate change law, democratisation and transitional constitutionalism, and constitutional theory. Our members undertake research and teaching in all these areas, as well as providing expertise to institutions outside academia in the UK and beyond.

Website: <<https://www.law.ed.ac.uk/research/research-centres-and-networks/edinburgh-centre-constitutional-law>>

Email: law@ed.ac.uk

Twitter: @UoELawSchool

School of Law
University of Edinburgh
Old College
South Bridge, EH8 9YL
United Kingdom

PEACEREP

PeaceRep is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes.

PeaceRep is comprised of a consortium of organizations who work together to produce practice-based research: Austrian Study Centre for Peace and Conflict Resolution, Conciliation Resources, Edinburgh Centre for Constitutional Law, International IDEA, Keele University, LSE IDEAS, LSE Middle East Centre, Queens University Belfast, University of St Andrews, and the University of Glasgow. We also have a range of country partners in the field in case study countries.'

Website: <<https://PeaceRep.org>>

Email: peacerep@ed.ac.uk

Twitter: @Peace_Rep_



International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
+46 8 698 37 00
info@idea.int
www.idea.int

The participants of the third annual Women Constitution-Makers' Dialogue explored comparative constitutional design approaches to legal pluralism and reconciling tensions between customary/religious systems and guarantees of gender equality and non-discrimination. In addition to technical issues, the discussion also addressed successes and challenges associated with implementation of constitutional guarantees of gender equality and explored innovative approaches to harmonization, transformation and empowerment.

ISBN: 978-91-7671-565-9 (PDF)