

THE UN CONSTITUTIONAL

A Newsletter on United Nations
Constitutional Support



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FOREWORD

“The UN Constitutional” team is pleased to publish the sixth issue of its newsletter featuring articles by constitutional experts, reports from the field, and a digest of recent constitutions-related publications. This issue looks more closely at the rights of various constituencies and how they are integrated into constitutions, namely indigenous peoples and LGBTI people, as well as measures for gender equality.

“The UN Constitutional” is a manifestation of the collective desire of 6 UN entities to raise awareness around the UN of constitutional issues and themes, share information, and strengthen the provision of constitutional assistance.

The UN Constitutional Team:

- UN Dep. of Political Affairs (DPA)
- UN Dep. of Peacekeeping Operations (DPKO)
- Office of the High Commissioner for Human Rights (OHCHR)
- UN Development Programme (UNDP)
- UN Children’s Fund (UNICEF)
- UN Women

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Email: constitutionmaker@un.org

Interview with Ms. Victoria Tauli Corpuz, Special Rapporteur on the Rights of Indigenous Peoples

Questions by The UN Constitutional

Indigenous peoples across the world face particular challenges because of their distinct cultures, identities and ways of life. Rights-based constitutions play a critical role in protecting and empowering these vulnerable communities. The UN Constitutional reached out to the Special Rapporteur on the Rights of Indigenous Peoples to explore the intersection between constitutions, constitution making, and the rights of indigenous peoples.



Victoria Tauli-Corpuz was appointed as the United Nations Special Rapporteur on the rights of indigenous peoples by the Human Rights Council in 2014. She is an indigenous leader from the Kankana-ey Igorot people of the Cordillera Region in the Philippines. As an indigenous activist, she has worked for over three decades on building movement among indigenous peoples and as an advocate for women's rights.

Ms. Tauli-Corpuz is the former Chair of the UN Permanent Forum on Indigenous Issues (2005-2010) has served as the chairperson-rapporteur of the Voluntary Fund for Indigenous Populations. As an indigenous leader, she was actively engaged in the drafting and adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.

over their lands that they have traditionally occupied, it being the duty of the Federal Government to demarcate these lands, protect them and ensure that all their properties and assets are respected.” The Constitution recognizes that the indigenous peoples, their communities and organizations have legal rights and standing to pursue legal actions to protect their rights

Q. Understanding that indigenous peoples are not a monolithic group, are there common challenges faced by indigenous peoples? And how might a constitution address them?

A. A common challenge faced by indigenous peoples is the non-recognition of their basic collective rights as peoples. For most indigenous peoples, priority constitutional matters include recognition of their distinct identities and cultures, of collective rights to their territories and natural resources, and of their right to exercise their own governance systems and customary laws.

Q. What trends have you seen in constitutional treatment of indigenous people’s concerns? In other words, are constitutions getting better or worse at recognizing and addressing their rights and grievances?

A. There are several positive trends in the constitutional treatment of indigenous peoples, especially since the ratification of the ILO Convention No. 169 on Indigenous and Tribal Peoples (entered into force in 1991) and the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the

UN General Assembly in 2007. However, while several governments have amended their Constitutions to better recognize the rights of indigenous peoples, there is still a gap between recognition of indigenous peoples’ rights at the global and national levels and the effective implementation of these international standards, constitutional provisions and enabling laws.

Q. Can you share some examples of different ways that existing constitutions take into account the rights of indigenous peoples?

A. The Constitution of Colombia (1991) recognizes and protects the ethnic and cultural diversity of the nation (Article 7). It also recognizes the political rights of indigenous peoples and created indigenous territorial entities (resguardos), in which those who live have the right to autonomously govern themselves (Articles 286, 287, 329 and 330). In addition these territories are collectively owned and are not alienable or disposable (Article 329).

Article 231 of the Brazilian Constitution states “it is recognized that the indigenous peoples have the right to their social organization, customs, languages, beliefs and traditions, and their original rights

and interests, and the Public Ministry is empowered to support them in these legal processes (Article 232).

I had the chance to do an official country visit to Brazil last year, where I was informed of the various actions and cases taken by the Public Ministry to defend the rights of indigenous peoples. For example, the Public Prosecutor's office in Altamira filed a case against the Brazilian Federal State and Norte Energia in 2015, alleging ethnocide as a result of the construction and impacts of the Belo Monte River Basin Hydroelectric Dam.

Q. Modern constitution makers frequently stress inclusion and participation, which are critical to achieving a national compact on the nature and role of the state: in your view have these principles been adequately applied to indigenous peoples?

A. The UNDRIP promotes indigenous peoples' full and effective participation in all matters that concern them and emphasizes the principles of participation and free, prior and informed consent. However, reports I have read and complaints I have received frequently speak about the lack of consultation and participation of indigenous peoples in relation to relevant decision making processes, including constitutional processes. Indigenous peoples are often vastly underrepresented on constitution making bodies, or not represented at all. To overcome this barrier, several indigenous peoples have actively lobbied constitutional drafters or sought the establishment of consultative bodies in order to effectively engage with constitution making bodies. In the case of the Philippines, for example, where no indigenous peoples were included on the 1986 Constitutional Commission, representatives of indigenous peoples

Constitutional Treatment Prior to UNDRIP

Before the adoption of the UNDRIP, there were already constitutions that recognized indigenous peoples' rights, like the 1987 Philippines Constitution, 1987 Constitution of Nicaragua, 1999 Constitution of Venezuela, and the 1985 Guatemalan Constitution, among others.

A major reason for the favourable treatment in these constitutions is that there are strong indigenous peoples' movements in those countries that pushed for reforms.

The adoption of the UNDRIP and the ratification of ILO Convention No. 169, however, led to amendments in many countries that strengthened constitutional protections of indigenous rights.

engaged actively with the members of the Commission to ensure that provisions on indigenous rights would be included. Because of the sustained actions of the indigenous peoples' movement, for the first time references to the recognition of the rights of indigenous communities (Article 2, Section 22) and their right to their ancestral lands (Article X111, Section 5.b) were constitutionalized.

Q. Constitutions frequently articulate individual and group rights – do these two categories sufficiently capture rights critical to indigenous peoples? If not, what is missing?

A. Yes, collective and individual human rights are the two categories that capture the rights critical to indigenous peoples. For indigenous peoples, maintaining the interdependence and complementarity between collective and individual human rights is crucial for their survival, well-being and dignity as distinct peoples. The recognition of their collective rights, which include rights to self-determination, to lands, territories and resources, and to culture and cultural integrity, among others, is linked to enjoyment of their individual human rights. Indigenous persons should equally enjoy the basic human rights contained in international human rights law, such as the right to life, equality, association, religion,

property, etc. The right to self-determination of indigenous peoples in Article 3 of the UN Declaration on the Rights of Indigenous Peoples means their right to freely determine their political status and freely pursue their economic, social and cultural development. This right also includes their right to govern their communities autonomously (Article 4) and their right to maintain and strengthen their own political, legal, economic, social and cultural institutions (Article 5).

Q. Some international instruments adopt the principle of "self-definition" with respect to indigenous peoples. This has created challenges in some countries in terms of defining what constitutes an indigenous group and who can belong within it. Do you think that the principle of "self-definition" should be reconsidered?

A. The principle of "self-identification" more than "self-definition" is what has been included in the UNDRIP. Article 33 of the UNDRIP recognizes the right of indigenous peoples to determine their own identity or membership in accordance with their customs and traditions.

Self-identification, which is part of self-definition, emerged in reaction to the push from some States for a clear definition of indigenous peoples in the UNDRIP. Indigenous peoples consistently and adamantly rejected this. One justification used is that indigenous peoples are culturally diverse and not a single definition can capture this diversity. Giving the power to the States to define who is indigenous and who is not is fraught with political difficulties and will work to the detriment of indigenous peoples.

Additionally, indigenous peoples observed that UN Human Rights Law and instruments have not even defined “peoples”. The UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious or Cultural Minorities did not define “minorities”. In the same way, the Convention on the Rights of Persons with Disabilities did not define who are “persons with disabilities.” Thus, requiring a definition of indigenous peoples is not consistent with the practice in the UN and the principle of self-definition should prevail.

Q. Some scholars have argued that the category “indigenous peoples” has relevance in the Americas but not all over the world where the context and history is different. How would you respond to this argument?

A. I do not agree with this view. Some UN member-states want to limit the concept of “indigenous” only to situations where the original inhabitants of the territory were physically dispossessed by settlers from overseas who brought with them their alien cultures and values. However, the Experts of the Working Group on Indigenous Populations (WGIP) recognized that such a definition would exclude people not



“In the 2005 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, the African Commission studied the **term indigenous in the African** context.

According to the African Commission, the term indigenous peoples did not mean ‘first inhabitants’ as opposed to non-African communities or those who came from elsewhere.

The Commission argued that Africa was different from other continents since all Africans were native to the continent and therefore laid out the following elements to be taken into account when identifying Africa’s indigenous communities: a) **self-identification**; b) a special attachment to and use of their **traditional land** whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and c) a **state of subjugation, marginalization, dispossession, exclusion, or discrimination** because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model. African Commission on Human and Peoples’ Rights and International Work Group for Indigenous Affairs, Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (New Jersey, 2005).”

Handbook for Parliamentarians on Implementing the UNDRIP

from the Americas or Oceania. Conquest, colonization, subjugation or discrimination are not only committed by persons from other regions of the world; actors within the state have been equally guilty. Distinguishing between internal and external colonization establishes a false dichotomy that works against

the goal of ensuring the cultural integrity, dignity and survival of indigenous peoples. The demand and aspiration of indigenous groups to continue to exist as distinct communities in their ancestral territories can be found worldwide.

Q. How can the United Nations system promote fundamental constitutional rights of indigenous peoples? Are there any resources (for example, offices within the UN system or published materials) that you would recommend to UN staff members who are working on constitutional reform issues in countries with indigenous peoples?

A. There are various UN bodies, agencies, programmes and funds with specific expertise on indigenous peoples' rights, many of which could be helpful with constitution making. These include the Office of the High Commissioner on Human Rights (in particular, the Mandate of the UN Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples), the UN Department of Economic and Social Affairs (in particular, the mandate of the UN Permanent Forum on Indigenous Issues), UN Indigenous Peoples' Partnership (UNIPP), and the ILO, among others. There is also a United Nations inter-agency support group on indigenous issues (IASG). More than 40 UN entities participate in the IASG. A number of these have established policies or guidelines to support their work in relation to indigenous peoples (more [here](#).)

The United Nations has also recently developed a "System-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples" (E/C.19/2016/5)

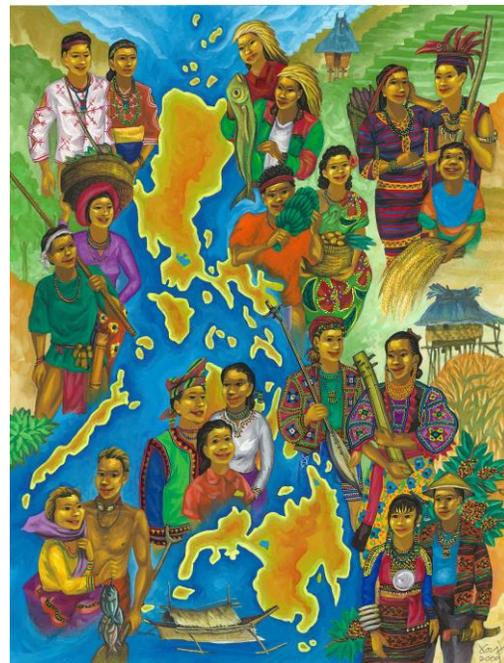
Useful publication: "[Implementing the UN Declaration on the Rights of Indigenous Peoples: A Handbook for Parliamentarians No. 23](#)," the Inter-Parliamentary Union (IPU), UNDESA, OHCHR, UNDP and IFAD, 2014

Q. The Special Rapporteur on the rights of indigenous peoples came into being in 2001. What are some of the major breakthroughs that have occurred in the years since the mandate was established? What are your priorities over the next year?

A. The establishment of the mandate of the Special Rapporteur on the Rights of Indigenous Peoples in 2001 is a milestone in the efforts of the UN to address indigenous peoples' rights. Part of what the mandate does is to conduct official country visits upon the invitation of a UN member-state. Such visits are breakthroughs within the national and global levels because these allow the Rapporteur to analyze more deeply the obstacles to the effective protection of the rights of indigenous peoples and to engage in constructive dialogues with the government, indigenous peoples and other actors. The Rapporteur develops recommendations addressed to governments and he or she can follow-up on how these are being implemented. In various instances, the Rapporteurs have been asked to provide technical advice to States that are developing their national laws on consultation with indigenous peoples. This is part of their obligation when they ratify ILO Convention No. 169.

In terms of what my priorities are for this year, I will be conducting three official country missions to the United States of America (February 2017), to Australia (March 2017) and to Guatemala (November 2017). My thematic report will be on "Climate Investment Finance and Indigenous Peoples' Rights" which is the third of a series of thematic reports I made on Investments and Impacts on the Rights of Indigenous Peoples." I will be holding some global and regional consultations on the issues of

stigmatization and persecution of indigenous peoples and on indigenous peoples in voluntary isolation. Since 2017 is the ten year anniversary of the adoption of the UN Declaration on the Rights of Indigenous Peoples, I will also prepare a report on how the mandate has helped in the implementation of the Declaration.



Philippines. UNDP project on Democratic Governance paintings, this one portraying indigenous peoples' governance. Credit UNDP

Advancements in Constitutional Recognition of LGBTI Rights

By Charles Chauvel

The International Bill of Rights declares a non-exhaustive list of characteristics upon which the state may not treat individuals differently. The framers of the relevant clauses correctly foresaw that international law and human rights practice would evolve to favour the inclusion of new grounds of unconscionable differentiation. Such an evolution has been the decision by some 65 countries to include sexual orientation and gender identity amongst the grounds on which they prohibit discriminatory treatment in whole or in part.

In most cases, the relevant anti-discrimination provisions appear in ordinary statutes that may be amended at will by the country's legislature, thus providing a lower level of protection. To date, however, Canada, Kosovo (within the framework of Security Council Resolution 1244 (1999)), Mexico, Portugal, and Sweden have applied a constitutional protection against unequal treatment on the basis of sexual orientation; Bolivia, Ecuador, Fiji, Malta, Nepal, and South Africa have taken the additional step of prohibiting at the constitutional level discriminatory treatment on the grounds of both sexual orientation and gender identity. In addition, superior courts in at least three other jurisdictions – Slovenia, Austria, and Belize - have declared sexual orientation to be a ground on which discrimination is fundamentally proscribed.

South Africa, in its interim post-apartheid constitution in 1993, expressly included sexual orientation as a prohibited ground of discrimination; the provision was substantially carried over into s 9(3) of the final 1996 constitution. Unlike

most constitutional provisions, it regulates the conduct of both state and non-state actors. Section 9 has been applied rigorously by the judiciary. Decisions have struck down the former common law offences of sodomy and the commission of an unnatural act;

disallowed an unequal age of consent; required Parliament to provide for equal access to marriage, adoption, and artificial insemination; and construed the provision to amount to a constitutional protection against discrimination on the basis of gender identity.

Canada enacted, in 1982 (with effect from 1985) a constitution containing a non-exhaustive anti-discrimination provision. In 1995, its Supreme Court construed the provision to include sexual orientation, with wide reaching effect. For example, from 2002, litigation in a number of provinces and one territory began to establish that s 15(1) required the federal Marriage Act to apply to both same-sex and opposite-sex couples, and in July 2005 the federal Parliament enacted amending legislation to confirm that position.

Fiji adopted a new constitution in 1997 that prohibited discrimination on the ground of sexual orientation. In 2002, in apparent conflict with the



UN Postal Administration commemorative stamps to promote UN Free & Equal – a global UN campaign for lesbian, gay, bisexual, transgender, and intersex (LGBTI) equality launched and led by the Office of the High Commissioner for Human

1997 constitution, the Marriage Act was amended to expressly reserve the status of marriage to unions of the opposite sex. In 2005, however, the High Court found that the colonial-era sodomy statute was inconsistent with the 1997 constitution, and therefore invalid. In 2009, the President abrogated the 1997 constitution. A Crimes Decree in 2010 decriminalised adult, consensual, non-commercial male and female sexual conduct in private, and stipulated an equal age of consent. A new constitution, promulgated in September 2013, prohibits discrimination on the grounds of sexual orientation, and of gender identity and expression. However, the administration of the law in general appears to be largely unaffected to date by the 2013 constitution, and the 1997 amendment to the Marriage Act is treated as continuing in effect.

The Treaty of Amsterdam in 1985 inserted a new Art 6a into the Treaty on **European Union**, strengthening the legal protections on the ground of sexual orientation required to be afforded by EU member states. To date, **Portugal** (2004), **Sweden** (2011), and **Malta** (2014), have reflected this protection on a constitutional basis. Sweden additionally provides a constitutional shield for hate speech against LGBT people, and a positive duty on the public services to combat discrimination against them; Malta also constitutionalises protection on the ground of gender identity. In each country, a significant degree of de facto equality appears to accompany the de jure position.

Austria's Constitutional Court and the European Court of Human Rights have both affirmed that, because sexual orientation is read into the European Convention on Human Rights as a prohibited ground of discrimination, and because under the Austrian constitution treaty

provisions to which Austria is party are directly incorporated into the constitution, a constitutional ban on discrimination applies on this ground. The jurisprudence of both courts across a range of state activity has enforced this ban, although not in the area of marriage equality.

Slovenia's Constitutional Court has likewise declared sexual orientation to be a ground on which discrimination should be proscribed. The extent to which the declaration has been honoured in practice is unclear, particularly with regard to whether it is constitutionally permissible to conduct voting on marriage equality both in parliament and in referenda.

Kosovo – within the framework of Security Council Resolution 1244 (1999) - adopted a constitution in 2008. Article 24(2) prohibits discrimination on the basis of sexual orientation. An equal age of consent has applied since 1994 and anti-discrimination legislation since 2004, although it is said that societal pressure largely requires LGBT people to be invisible as to their orientation or identity.

Ecuador amended its constitution in 1998 to include a ban on discrimination based on both gender identity and sexual orientation; in 2009 it amended the constitution again, this time to reserve the status of marriage to opposite-sex couples.

Bolivia implemented Art 14 (II) of its constitution in February 2009 to prohibit discrimination on the basis of either gender identity or sexual orientation. However, Art 63 of its constitution reserves the status of marriage only for couples of the opposite sex; a strong de facto taboo is said to prevent openly homosexual people serving in the armed forces; and legislation fully implementing the constitutional gender identity equality provisions was not enacted until May 2016.

Mexico amended Art 1 of its federal constitution in 2011 to prohibit discrimination on the ground of sexual orientation, and the Federal Supreme Court has declined to apply several state statutes that proscribe marriage equality, although only 11 of the 32 jurisdictions at present conduct marriages on this basis. In August 2016, the High Court of **Belize** declared the definition of "sex" in s 16(3) of the constitution – its anti-discrimination provision – to include "sexual orientation". The immediate effect of the decision was to repeal the colonial-era criminalisation of private consensual male homosexual acts; if the decision survives a partial appeal to the Caribbean Court of Justice by the Government of Belize, presumably it will have further effect across the country's legal system, and potentially beyond.

Following **Nepal's** transition from monarchical government, litigation initiated under the interim constitution resulted in the Supreme Court holding in 2007 that "(t)here should be a declaration for full fundamental human rights for all sexual and gender minorities – lesbian, gay, bisexual, transgender, and intersex citizens", and that "(l)egal provisions should be made...for gender identity to the people of transgender or third gender...as per the concerned person's self-feeling". In September 2015, the societal discussion stimulated by the litigation helped see Parliament (in which the plaintiff in the 2007 case served) adopt three significant provisions. Art 12 declares a person's right to citizenship identification reflecting their preferred gender; Art 18 enacts a non-exhaustive protective provision that in addition expressly saves affirmative action on behalf of a range of groups including "gender and sexual minorities"; and Art 42, in a similar vein, affirms that "the

principle of inclusion” embraces the right of members of “gender and sexual minorities” to participate in state activities and public services. Recent reports indicate that empowering legislation to give full effect to some of these rights is still awaited.

A constitutional right against discrimination on the ground of sexual orientation, or gender identity, or both, has over the past quarter century now been applied in jurisdictions on every continent. In some cases, the judiciary has required change, in others the legislature has led. The effectiveness of the protection depends on societal conditions, and whether contradictory constitutional provisions exist. It is clearly appropriate to consider including such provisions when a constitution-making or amending exercise is contemplated, and in doing so it will be instructive to examine in greater detail the experiences of the fourteen jurisdictions mentioned in this note.

The Role of Standing in Constitutional Jurisprudence on Gender Equality

By Aneesa Walji and Sumit Bisarya

UN Women’s Global Gender Equality Constitutional Database demonstrates that the vast majority of the world’s constitutions—approximately 90 percent, contain provisions for judicial review and access to constitutional review bodies. These bodies play an important role in interpreting and enforcing constitutions around the world, including constitutional provisions related to gender equality.

To explore this further, and to begin looking beyond the law on the books to the law in action, UN Women and the International Institute for Democracy and Electoral Assistance (International IDEA) launched a study to explore constitutional jurisprudence on gender equality and women’s empowerment in a number of different contexts. The study is the first extensive comparative mapping of constitutional jurisprudence in this area. It highlights more than 60 court cases from the year 2000 onwards, spanning Asia, Africa, the Middle East and North Africa as well as Latin America and the Caribbean. In identifying trends and areas for further research, it lays the groundwork for further research on how constitutional language can be transformed into practical and progressive gains for women through courts.

One of the preliminary findings concerns access to justice and the role of standing; that is, the right or capacity of an organization or individual to initiate a judicial action or to appear before a court of competent jurisdiction. The study finds that constitutional provisions

and judicial interpretation providing for broad and flexible standing requirements enhances the potential for positive jurisprudence to be produced. For instance, when individuals and civil society organizations are entitled to bring claims, even when they themselves may not have experienced direct harm, the scope of public interest issues being considered, including gender equality issues, increases.

A case brought before the Constitutional Court of Zimbabwe illustrates this phenomenon. Loveness Modzuru and Ruvimbo Tsopodzi, two former child brides, brought suit challenging the legal age of marriage for Zimbabwean girls. In finding in favour of a right to access the Court,¹ the Court relied on Article 85 in the 2013 Zimbabwean Constitution, which provides broad scope for standing, including for “any person acting in the public interest.” In the Court’s analysis, it referred to

¹ Loveness Mudzuru and Ruvimbo Tsopodzwa v Minister of Justice, Legal and Parliamentary Affairs; Minister of Women’s Affairs, Gender and Community Development; and Attorney General of Zimbabwe. Judgment No. CCZ 12/2015, Constitutional Application No. 79/14 (Constitutional Court of Zimbabwe).

FEATURED: JURISPRUDENCE ON GENDER EQUALITY

various precedents from within Zimbabwe, as well as comparative approaches from other jurisdictions.

It was only after the question of standing was addressed that the Court proceeded to decide the merits of the case. As a result of this finding, Zimbabwe achieved significant progress in the battle against child marriage for girls—the age of marriage was deemed to be 18 years of age for both men and women and a contradictory legislative provision was stuck down.

The role of standing was also central in a case from India's Supreme Court, *The Chairman, Railway Board v Chandrima Das*.² In that case, railway employees gang raped a Bangladeshi national, Hanuffa Khatoon, on railway premises. Chandrima Das, a practicing lawyer, filed a petition under Article 226 of the Indian Constitution without any personal connection to the victim.

One of the arguments put forward was that Chandrima Das had no standing upon which to file suit. The

Court concluded that standing existed because the petition was not just for one individual victim's compensation—relief was also sought in order to put an end to the various criminal activities occurring on the railway premises, for example. The Court took into account domestic jurisprudence expanding the scope of standing for public interest purposes before determining that Chandrima Das had a right to initiate the petition. In the end, it also found that the right to life and liberty (Article 21 of the Indian Constitution) was violated, and that the State was liable to provide compensation to Hanuffa Khatoon; another win for access to justice and women's rights.

This preliminary finding on the role of standing in the development of favourable gender equality jurisprudence at the constitutional level is important. Cases in the study demonstrate that without standing, not only can women victims be denied access to justice, but also anyone else seeking to bring claims that serve to benefit women.

The study being undertaken by UN Women and International IDEA provides policy reference for moving discussions of gender equality in the world of constitution building beyond what is often a limited focus on gender-inclusive constitutional language and women's rights enshrinement. While these are critical at the stage of constitution drafting, a wider and longer-term view of constitution building—focusing, for instance, on the potential value of different sorts of constitutional provisions (e.g. decentralization) and the realization and enforcement of human rights broadly—is needed. The final results of the study will offer a foundation with which to explore new avenues and ideas about women and constitution building, with a focus on constitutional implementation through jurisprudence.

² *The Chairman, Railway Board v Chandrima Das* (2000) 2 SCC (Supreme Court of India).



Côte d'Ivoire. Women in Côte d'Ivoire Celebrate International Women's Day. UN Photos

What is the United Nations doing in the area of constitutional assistance? This section offers an overview of the latest developments, challenges and lessons in this key area of support sourced directly from our field missions, country offices and other UN entities.

Grenada (UNDP)

Grenada Fails to Pass Constitutional Reforms

Grenada's 2016 referendum on proposed constitutional amendments represented the country's fourth attempt at constitutional reform since its independence in 1974. The process was initiated in 2014, and the hosting of a referendum following slow and steady progress could in itself be seen as a step forward. The overall negative result, however, has called into question whether Grenada can ever successfully achieve substantive changes to its constitution.

In 2014, the Government of Grenada established the Constitution Reform Advisory Committee (CRAC), comprising individuals from a broad cross-section of the Grenadian society. As part of its mandate, the CRAC reviewed past recommendations and held over 50 consultations within and outside of Grenada. These recommendations were reassessed and most were submitted to the Cabinet for approval. The approved recommendations were organized into seven amendment bills – six of which the Cabinet passed in November 2015. Parliament conducted a first reading of the six amendment bills in December 2015. One of the amendment bills was later split into three separate bills, based in part on feedback from civil society organizations during a UNDP civic education workshop in January 2016. Parliament, followed by the Senate,

passed all eight amendment bills, notably: (1) Changing the name of State from Grenada to Grenada, Carriacou and Petit Martinique; (2) Making the Caribbean Court of Justice the court of final appeal instead of the Privy Council; (3) Creating an independent Elections and Boundaries Commission to replace the Office of the Supervisor of Elections; (4) Strengthening fundamental rights provisions relating to freedoms, directive principles of state policy, and gender equality; (5) Establishing a fixed term of office of Prime-Minister; (6) Establishing fixed dates for elections; and (7) Amending the appointment procedure for the Leader of the Opposition. The eighth bill would not be voted on but allowed for any amendments that passed by two-third majority to be made to the constitution. As mandated by the Grenada constitution, Grenadians were required to vote on each of the seven amendment bills put forward.

At the request of the Government of Grenada and in collaboration with national stakeholders, UNDP's Support to Referendum on Constitution Reform project focused on assistance in the development of well-drafted constitutional amendment bills, the delivery of comprehensive civic education and voter information campaigns, and assisting the Parliamentary Elections Office in the organization of the referendum and its related administrative processes.

In an effort to navigate the complex nature of Grenada's constitution reform, civic education became the

major area of UNDP's support through a small grant program for CSOs and technical support in the development of civic education tools for the CRAC. Interventions included a number of workshops that brought together CSOs, the CRAC and the Parliamentary Elections Office, which provided participants with the tools to design and implement civic education campaigns. UNDP also provided technical assistance to the Parliamentary Elections Office in shaping the ballot and the design of a system of tabulating results. UNDP, in partnership with OHCHR and UN Women, was welcomed as a neutral actor in the process that helped build the capacity and confidence of national actors to navigate the 2016 referendum and any similar attempts in the future.

Nonetheless, the overall low voter turnout and negative referendum outcome provide an opportunity for reflection on the dynamics and approach to constitutional reform in Grenada.

There are a number of political factors that played a role in the referendum outcome. There was an overwhelming "no" campaign, initially led by the opposition party and joined by some CSOs and church groups. At the same time, an organized, coherent "yes" campaign was absent, due in part to intentional and deliberate neutrality on the part of the Prime Minister and the CSOs that participated in the official civic education campaign (many of which would otherwise have likely supported many of the bills). Church-based organizations mounted an emotive campaign against the rights and freedoms bill arguing that adding "gender" to the basis upon which discrimination is prohibited could open the door for same-sex marriage. The strong, highly vocal and visible opposition to that bill derailed support for the other

proposed amendments. Finally, some of those opposed to the process suggested that there were too many issues for the electorate to consider at one time. Stakeholders have since recommended revisiting the constitutional amendments one issue at a time, possibly incorporating constitution reform on the ballot during parliamentary elections. Given the political partisanship that surrounded the whole process, stakeholders have recommended that any future attempt at constitutional reform should be considered only if Grenada's political parties sign a formal agreement in support of the constitutional amendment put forward.

If nothing else, the Grenada experience reminds us that constitution making never takes place in a political vacuum, and that even in stable environments strategic stakeholder management is crucial. The CRAC saw the 2014-16 process not as the culmination of constitutional reform in Grenada, but a step in what would be a long term process to address a range of constitutional issues while strengthening a culture of constitutionalism in Grenada.

For the time being, the reforms Grenadians have been discussing for decades remain unresolved.

Briefing prepared by:
UNDP Sub-Regional Office for
Barbados & the OECS

Kenya (UNWomen)

Working Towards Implementation

Kenya's Constitution, adopted in 2010, introduced significant reforms to the 1963 Constitution, including in the areas of decentralization and socio-economic rights. Since 2010,



Kenya. Mentorship Forum for women MCAs by KEWOPA in partnership with UNWomen held on 30th June 2016. Credit: KEWOPA

Kenyans have focused on constitutional implementation. The Constitution itself laid some of the groundwork for this, including through the creation of both the Commission for the Implementation of the Constitution (CIC) and the Constitutional Implementation Oversight Committee (CIOC) – mechanisms intended to help ensure the progressive vision of the constitution is realized.

UN Women's collaboration with partners in Kenya is reflective of this long-term view of constitution building. For example, UN Women has been supporting work towards ensuring implementation of Article 81(b), which provides that "not more than two-thirds of the members of elective public bodies shall be of the same gender." Effectively, this means that women members of the two houses of parliament must account for at least one third of all parliamentarians. UN Women supported the work of the Kenya Women Parliamentarians Association (KEWOPA) in this regard. UN Women provided KEWOPA with financial resources and technical capacity through the secondment of advisors. It also helped mobilize the women's movement to engage with KEWOPA. With this support, the Association

held at least three consensus and capacity building sessions focused on promoting discussion about a bill to ensure implementation. The Association, in collaboration with the women's movement and other stakeholders, successfully drafted the two-thirds gender bill, presented the bill both in the National Assembly and Senate, and lobbied 147 male parliamentarians to support the bill. However, more work remains to be done to garner the support required to enact the bill. In the meantime, a judge has found that the President's cabinet is unconstitutional because its composition does not reflect the two-thirds gender requirement that applies separately to appointed government positions.

Gender equality in constitution building is not only about ensuring that women have larger numbers in decision-making, it also intersects with other questions of governance. For example, poverty is a key driver for food insecurity, with women frequently forming the bulk of the poor and hence affected disproportionately with hunger. UN Women, working in collaboration with the University of Nairobi's African Women's Studies Centre and the Kenya National Bureau of Statistics, supported the drafting of a bill to give

effect to Article 43(1)(c) of the Constitution on the right “to be free from hunger, and to have adequate food of acceptable quality.” The food security bill is at the Committee Stage in Parliament, so the work continues.

Similarly, UN Women is supporting the Government of Kenya to effectively implement the Access to Government Procurement Opportunities (AGPO) initiative. For example, UN Women provided technical and financial support to the Public Procurement Regulatory Authority in convening a forum that brought together over 20 technical staff. The workshop focused on Article 227(2)(b) of the Constitution. This provision provides for “the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.” With this as an important element of the legal framework for procurement in Kenya, participants were sensitized on the procurement opportunities to be made available to marginalized groups, such as women, youth, and persons with disabilities, elders and minorities. Participants reported that they had a better understanding of how to implement the 30 percent legislative quota for disadvantaged groups through their budgets, annual procurement plans and contracts.

Briefing prepared by:

Robert Simiyu, UNWomen Team Leader Democratic Governance, East and Southern Africa

Liberia (UNDP)

The Constitutional Review Process in Liberia

As previous editions of the UN Constitutional have reported, Liberia commenced a constitutional review process in 2012 in response to



Liberia. UNDP, USAID and Naymote project ‘Deepening Citizens’ Engagement in Constitutional Reform in Liberia’. Credit: UNDP Liberia

expressed concerns about the adequacy of the current constitutional framework to support inclusive and participatory governance, nation building and reconciliation in post conflict Liberia.

Though the 1986 Constitution includes several provisions that are relevant in a democratic environment, many Liberians believe its fundamental weaknesses lie in three areas: over-centralization of power; lengthy tenures for elected leaders such as the President and members of the legislature; and lack of provisions for effective power sharing that ensures checks and balances between the people and their elected leaders. The focus on constitutional reform and the case for it therefore stemmed from the realization that the system of government practiced in Liberia over the years were no longer adequate to meet citizens’ demands for participation in governance beyond the election of leadership of the central state. Additionally key constitutional issues have emerged in the post conflict period, including (1) citizenship – its racial definition and dual citizenship; and (2) Property

rights – land ownership, tenure, security and distribution.

The constitutional review was conducted by the Constitutional Review Committee (CRC), which led to an inclusive and participatory process in which over 5,000 Liberians (at least 30% of which were female) provided input through 73 constituency dialogues and 12 thematic and sectorial policy dialogues, as well as through written submissions. The process culminated in a National Constitutional Conference in March 2015, which saw the validation of 25 issues for policy, legislative and constitutional review. These were presented to the President in August of 2015 and forwarded to the legislature in September of 2015 along with her personal recommendations in a cover letter. The House of Representatives have since concluded a series of public hearings on the proposed amendments and passed them to the Senate for concurrence.

The Senate has referred the proposals to its Judicial Committee, which has signaled its intension to schedule public hearings in early

2017. It is anticipated that the Senate and subsequently a joint legislature committee will review and determine priority issues for possible constitutional amendment in 2017. Once passed, the most likely scenario for a referendum will be late 2018, one year after the passage by the legislature. The Committee is working in close collaboration with the Executive through the Law Reform Commission to structure the propositions into appropriate constitutional language. The collaborative efforts between the Committee and the Executive is intended to fast-track the Constitution Review process and ensure its earliest passage.

In the meantime, many Liberians agree it is necessary to maintain dialogue on the constitution, separating the reform from the political process as much as possible, and continuing to engage citizens in order to strengthen grassroots demand for constitutional reform and advance reconciliation, political dialogue, and peace consolidation efforts in Liberia. Towards this end, UNDP has engaged a number of CSOs to contribute to the constitutional review process through advocacy and engagement with relevant policy-makers and the Legislature on the proposed amendments, as well as by conducting research and analysis on constitutional issues, and deepening citizen understanding of the constitutional review process and by so doing strengthen public demand for it.

CSO groups such as the Liberian Diaspora Groups, Muslims Associations in Liberia and CSO Consortium for Decentralization have therefore continued to advocate on issues of constitutional concern to their constituencies. UNDP is supporting this civic engagement through support to an additional 7 CSOs to engage legislators and their

constituents on the outcome of the constitutional review process and to advocate for action.

UNDP Liberia provided technical, financial and logistical support to the CRC to undertake the review, research, establish its secretariat, coordination processes, and implement its work plan. UNDP also supported the participatory process through a civic education programme at national, county and community levels and the National Constitution Conference (NCC), which brought together more than 750 Liberians and provided a platform validation of the CRC's proposals.

Briefing prepared by:

Nessie Golakai-Gould, Team leader
Governance and Public Institutions,
UNDP Liberia

Philippines (DPA, UNDP)

The Moro Peace Process and Constitutional Review

In July 2016, Rodrigo Duterte became the 16th president of the Philippines after having run on a campaign promise of lifting the political and economic stranglehold of the metropolitan region of Manila on the remainder of the country. Shortly thereafter, a debate started in the Philippines Congress on the best course to the adoption of a new federal charter for the country, and whether federalism was indeed the best solution—as advocated by the President—for addressing the challenges of over-centralization. Also at the center of the debate was the fate of the 2014 Comprehensive Agreement on the Bangsamoro, the peace deal between the Government and the Moro rebels wherein a special autonomous region of “Bangsamoro” will be created in Mindanao. The rebel leadership indicated that while supporting the overall drive towards

federalism, they strongly expected the special autonomous region to be established in advance of a federal system for the rest of the country, and for such a system to subsequently guarantee the features of special autonomy for Bangsamoro.

In October 2016, a House of Representatives special committee approved a resolution authorizing the Congress to convene as a Constituent Assembly to consider a new federal charter for the Philippines. Simultaneously, the House Speaker launched a push for a new constitutional commission to lead a consultative process of drafting a new charter that would be considered by the Assembly. And in December the President issued an Executive Order establishing a Consultative Commission tasked to review the existing constitution, consult with the public and present to the President recommendations for constitutional changes. The Commission will have six months to complete its work.

Since August 2016, UNDP has supported the Institute for Autonomy and Governance of the Notre Dame University in Cotabato in Mindanao to organize conversations around federalism, autonomy, and governance in the Senate and the House of Representatives. The Institute's Director, Benedicto Bacani, is widely regarded as one of the country's foremost interlocutors on this issue. The conversations have reportedly helped legislators to deepen their understanding of the key steps involved in a transition to a federal system, as well as links between the issue and the question of Bangsamoro autonomy, wherein Moro armed insurgencies have fought and negotiated with successive Filipino governments for an autonomous, self-governing Bangsamoro region.



Philippines. Moro Islamic Liberation Front Peace Panel Chair, Malaysian, and Philippine Government Peace Panel Chair present the signed Comprehensive Agreement on the Bangsamoro. Source: gov.ph

The UN Senior Advisor on Peacebuilding, deployed with the Resident Coordinator's office in Manila through the Joint UNDP-DPA Programme on Building National Capacities for Conflict Prevention, participated in and served as a resource person for a number of these conversations. The largest of them was the Global Forum on Governance and Federalism in Manila in October 2016. Two UNHQ experts contributed to the Forum and to the follow-on engagements

In November 2013, UNDP joined Australian Aid in supporting a similar conversation, also convened by IAG, in Davao, Mindanao, wherein significant advocates of federalism at the national level interacted systematically with advocates of peace and the rights of indigenous persons at the local level in Mindanao.

UNDP, in partnership with DPA, is currently exploring methods to provide more sustained support—which can be formalized once and should the Congress approve specific

mechanisms for carrying the process forward—for exchanges of ideas and options through national counterparts such as IAG around issues of federalism, autonomy, and governance reform. Assistance will also be provided, for the Moro leadership in thinking through strategies and options with regard to positioning Moro autonomy and the implementation of the peace agreements within the ambit of governance reform.

Briefing prepared by:

Chetan Kumar, UN Senior Advisor on Peacebuilding, Philippines

Sierra Leone (UNDP, UNWomen)

The Sierra Leone Constitutional Review Commission Concludes its Work

As previous editions of the UN Constitutional have reported, Sierra Leone emerged from an eleven-year civil war through the signing of the

Lomé Peace Accord in 1999. Article 10 of the Accord provides for a review of the 1991 Constitution. The Constitutional Review Committee (CRC) in Sierra Leone was established in 2013 to complete this review. Despite serious challenges, most notably the Ebola outbreak in 2014 and 2015, the constitution-making has proceeded apace and enjoyed widespread gender inclusive participation and consultation. At every stage of the process Sierra Leone, with support from the UN, has prioritized inclusion and participation.

During 2016, UNDP supported CRC efforts to conduct nationwide consultations to solicit public opinion and gather feedback on the CRC's Draft Abridged Report. The process targeted between 10,000 and 15,000 stakeholders including Paramount Chiefs, Local Government officials, Village Headmen, tribal heads, students, civil society organizations (CSOs), Non-Governmental Organizations (NGOs), Ministries, Departments and Agencies (MDAs), Community Based Organizations (CBOs), Members of Parliament, teachers, students, women, men, religious groups, bike riders, farmers and youth. The exercise contributed to renewed energy to ensure that practical and popular views were reflected in the final report. Contentious and national issues were lengthily discussed and vigorously analyzed before a resolution was reached in every deliberation.

UN Women provided similar support, for example to a two-day workshop for approximately 50 women who were mostly representatives of political parties. The workshop equipped these women with improved technical know-how and advocacy skills to engage at the intra-party level as well as other levels. UN Women provided support to consultations with rural women across the country. Teams gathering



Sierra Leone. UN Women-led consultations with rural women on the constitutional review process in 2014. Credit: UN

Members of Parliament must be women, and further, that at least 30% of election nominees for each political party in national and local elections must be women.

The CRC Report was presented to the President of Republic of Sierra Leone on 24th January 2017. The report will be discussed in the Cabinet meeting and government response will be released in the form of white paper. UNDP and UN Women remain committed to supporting the process of reviewing and adopting the constitution to its conclusion.

Briefing prepared by:

Mary Okumu, UN Women Representative for Sierra Leone
Sana Baloch, Chief Technical Adviser, UNDP-Sierra Leone

inputs from rural women were carefully designed to include policy makers, legal and development experts, gender advocates and members of the Constitutional Review Committee. These in-person consultations were supplemented by the airing of radio phone-in programs. Ultimately, approximately 6,600 women from remote areas in the country were consulted and their voice was registered in the process.

Among the many proposed amendments that were publicly debated are ones that address local government and decentralization, land, natural resources and the environment, citizenship, information and the media, national development planning, national security, the public service, and independent commissions. In addition, the amendments make significant enhancements to social and political rights, which was a priority issue raised during the public consultations. The recommendations include provisions for the right to free education, free health care services,

right to a reasonable standard of sanitation and clean water, as well as the right to property, including a right to land and property acquired during marriage, and a right to free legal services, particularly in complaints concerning rights violations. The CRC also recommended a provision guaranteeing the justiciability of socio-political rights, including education, healthcare, housing and social security.

Another major issue was the gender-discriminatory effect of certain provisions of section 27 of the 1991 Constitution. Sub-section 4(d) provided for an exception to the guarantee against non-discrimination with respect to family law matters, such as divorce and inheritance, where gender inequalities are common. The CRC recommended that they should be deleted, and that discrimination on any ground should be prohibited. And to address the long-standing demand for representation in the Parliament, the CRC recommended an affirmative provision that not less than 30% of

Highlights of papers on constitution-making offering insights into current debates, including articles from academia, policy- or practitioner-oriented organizations, and material produced by UN entities.



Sequencing Peace Agreements and Constitutions in the Political Settlement Process

By IDEA

This Policy Paper aims to address the gap in the constitution-making and peacebuilding literatures regarding descriptive and normative accounts of the relationship between peace agreements and constitutional arrangements in political settlement processes. It explores the sequencing of peace deals and constitutional arrangements.

accompanying challenges, when trying to enter the political arena, and identifies some of the efforts that have been used to reduce these barriers.



Amendment and Revision in the Unmaking of Constitutions

By SSRN

This paper examines the distinction between constitutional amendment and constitutional revision, concluding that an amendment should be understood as an effort to continue the constitution-making project that began at the founding moment, while a revision should be understood as an effort to unmake the constitution by introducing an extraordinary change that is inconsistent with the fundamental presuppositions of the constitution.



Constitutional Assessment for Women's Equality

By IDEA

The paper helps users analyse a constitution or draft constitution from the perspective of the substantive equality of women. Using a series of questions, short explanations and example provisions from constitutions around the world, the Assessment guides you through an examination of the most critical constitutional issues that affect women's rights and gender equality.



Judicial review systems in West Africa

By IDEA, Hanns Seidel Foundation, in

cooperation Centre for Global Cooperation Research

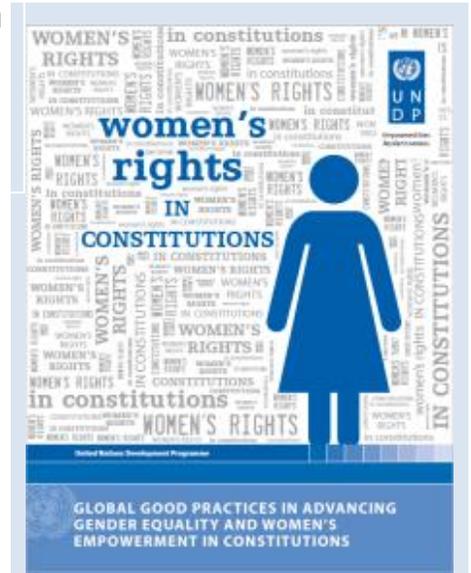
This comparative study aims to facilitate understanding on the constitutional and legal framework of the institutions in the different legal cultures in West Africa, including on the historical evolution of constitutional justice systems as well as trends in the contemporary design, structure and mandates of institutions responsible for judicial review and constitutional justice.



Decentralization and Gender Equity

By Enid Slack

This paper explores the gender dynamics of decentralization in developing and transitioning explores trends in decentralization in several countries, examines the role of women in decentralization, identifies the barriers women face countries. It defines decentralization and outlines the potential benefits and



Global Good Practices in Advancing Gender Equality and Women's Empowerment in Constitutions

By UNDP

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



Dissolution of Parliament Primer paper

By IDEA

The primer discusses dissolution in general terms, including the history of the dissolution power, explains how it relates to the dynamics of parliamentary government and examines the purposes and rationale of the dissolution power. It then looks at design options including dissolution by the head of state, dissolution by the prime minister or dissolution by a decision of parliament.

Find all of the **Constitution-building Primers** [here](#).



The Transition to a Decentralized Political System in Spain

By Carles Viver Pi-Suñer

This paper discusses the three stages of the process of the transition to a decentralized system in Spain and more specifically transfers of services and how the regions were financed during this



Whither Provinces and States? The case for an Hourglass Model of Federalism

By Anwar Shah

This paper discusses the hourglass model of Federalism; that is, having strong central and local governments with provinces and states simply playing a coordinating role. This role is the opposite of the one in traditional federal constitutions such as those in the U.S. and Canada, which empower provinces and states but disempower local governments by treating them as creatures of provinces and states.



The judiciary and constitutional transitions

By IDEA

This report provides an overview of the discussions held during a framing workshop on the role of the judiciary in constitutional transitions. Its objective was to generate dialogue on common and distinct challenges,



The role of regional organizations in the protection of constitutionalism:

By IDEA

This Discussion Paper compares how three regional organizations - the African Union, the European Union and the Organization of American States - protect constitutionalism in their member states.



Annual Review of Constitution-Building Processes

By IDEA

This third edition covers events in 2015 and is organized geographically, with chapters on constitutional protections of democracy in Africa; constitution-building in the Pacific; plurinational constitution-building in South Asia; military and constitutional reform in Myanmar and Thailand; centralism and supervision in Armenia and Ukraine; and the role of constitutional identity in France and Hungary.



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successes and lessons learned.

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United Nations Headquarters
New York City, 10017
New York, USA



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We welcome your comments and suggestions. Please contact us at: constitutionmaker@un.org

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