



From paper to lived reality: gender-responsive constitutional implementation

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Contents

Executive Summary.....	4
1. Introduction	6
2. Key concepts.....	8
3. Methodology and format	13
4. The legislature.....	19
5. The executive	26
6. The judiciary	36
7. Independent institutions	45
8. Civil society	49
9. Conclusion	55
References	58
Annex. Workshop agenda	63
About the author	74
More International IDEA Discussion Papers	76

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This Discussion Paper was developed as a follow-up to a gender-responsive constitutional implementation workshop, 'From paper to lived reality: Implementing women's constitutional rights', hosted by International IDEA in Kathmandu, Nepal, on 26–28 February 2016.

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Executive Summary

A constitutional text that enshrines and protects gender equality and women's rights is a significant achievement. However, a new constitutional text marks only the beginning, and not the end, of the road to achieving substantive gender equality. The constitutional provisions and the principles on which they are based must be put into practice through the processes of constitutional implementation.

This practice-oriented Discussion Paper explores the dynamics and processes of constitutional implementation and the particular challenges of gender-responsive constitutional implementation. It draws on a workshop convened by International IDEA in Kathmandu, Nepal, on 26–28 February 2016.

The workshop examined constitutional implementation from the perspective of substantive gender equality by focusing on two framing rights: the right to equality in political life and the right to health. Participants from Afghanistan, Costa Rica, France, Kenya, Mexico, Nepal, South Africa and Tunisia discussed the challenges and successes in implementing these rights in their countries and reflected upon the critical factors that facilitate, or alternatively frustrate, effective gender-responsive constitutional implementation.

Constitutional implementation is the process by which the rights, institutions and aspirations set out in the constitutional text are put into practice and become part of the lived reality of the state, the government and the people. Constitutional implementation occurs once a new constitution or substantial amendments to an existing constitution come into force. It includes processes of technical implementation, constitutional interpretation and cultural change. Gender-responsive constitutional implementation requires that all aspects of the constitution are implemented in a manner that protects and promotes substantive gender equality.

This paper identifies three requirements of gender-responsive constitutional implementation: substantive equality, understanding and addressing gender stereotyping, and institutions that are inclusive of and responsive to women. These requirements cut across the technical, interpretive and cultural dimensions of constitutional implementation and frame the activities of those engaged in constitutional implementation.

The complex work of implementation determines whether and how the principles and rights embedded in a constitution, including gender equality, are realized in practice. In order to understand and compare the processes of constitutional implementation in different country contexts, the paper considers the role of five different actors in constitutional implementation: the legislature, the executive, the judiciary, independent institutions and civil society. Each of these actors has distinctive (but sometimes overlapping) responsibilities for constitutional implementation, and each face different challenges to implementing constitutional provisions in a gender-responsive way.

This paper draws together the insights and shared learnings from the experiences presented at the Workshop to identify some of these challenges as well as possible strategies to overcome them. There is no one-size-fits-all solution, and the particular constitutional text, tradition and context in each country will affect how institutional actors respond to the challenge of gender-responsive constitutional implementation.

However, there are some overarching practices which, when adapted to suit particular country contexts and the responsibilities of different institutional actors, can facilitate gender-responsive constitutional implementation. These suggested practices are based on the importance of women's participation and the incorporation of gender into all the processes of constitutional implementation; the shared responsibility for gender-responsive constitutional implementation across all institutions of government with the support of civil society; and consideration of potential ways in which constitutional drafting might support gender-responsive constitutional implementation.

The comparative insights and analysis presented in this paper will be useful for gender equality advocates and those engaged in constitution building worldwide. It marks an early comparative contribution to discussions on constitutional implementation as a distinctive step in constitution building, opening the way for new research and further comparative learning.

1. Introduction

On 26–28 February 2016, International IDEA convened a workshop to examine constitutional implementation from the perspective of substantive gender equality. The workshop was held in Kathmandu, Nepal. Participants from eight countries—Afghanistan, Costa Rica, France, Kenya, Mexico, Nepal, South Africa and Tunisia—explored the processes and challenges of constitutional implementation, and the factors that facilitate, or alternatively frustrate, gender-responsive constitutional implementation.

This practice-oriented Discussion Paper draws on the discussions of the workshop to understand the processes of constitutional implementation in pursuit of substantive gender equality.

Chapter 2 sets out the core features of gender-responsive constitutional implementation. Constitutional implementation is the process by which the rights, institutions and aspirations of the constitutional text are put into practice and become part of the lived reality of the state, the government and the people. Constitutional implementation occurs once a new constitution or substantial amendments to an existing constitution come into force. It includes the processes of technical implementation, constitutional interpretation and cultural change. Gender-responsive constitutional implementation requires that all aspects of the constitution are implemented in a manner that protects and promotes substantive gender equality. Chapter 2 identifies three requirements of gender-responsive constitutional implementation—substantive equality, understanding and addressing gender stereotyping, and institutions that are open and responsive to women. These requirements cut across the technical, interpretive and cultural dimensions of constitutional implementation and frame the activities of those engaged in constitutional implementation.

The workshop sought to identify some of the challenges of gender-responsive constitutional implementation, and the factors that facilitate effective implementation. It did so by focusing on the experiences of the eight case study countries in implementing two types of constitutional provisions of particular significance to women: the right to equal political participation and the right to health. The methodology of the workshop, including the reasons for selecting the case study countries and these two rights are explained in Chapter 3.

This paper is organized around the roles of the legislature, the executive, the judiciary, independent institutions and civil society organizations in gender-responsive constitutional implementation. Chapters 4 to 8 set out the functions of each actor with respect to constitutional implementation. Using case examples from each country on the implementation of the right to equal political participation and the right to health, these chapters identify barriers to effective gender-responsive constitutional implementation and suggest some strategies to overcome them.

Chapter 9 concludes by drawing out seven overarching practices that facilitate gender-responsive implementation across the work of all actors considered in this paper. It also suggests some areas for further research. In doing so, this paper provides information and insights useful for gender equality advocates and those engaged in constitution building, and specifically constitutional implementation, worldwide.

2. Key concepts

Constitutional design for women's equality

A constitution establishes the structure of the state, regulates political power and recognizes and protects the rights of the people. A constitution may also set out a vision of the country's values, history and aspirations for the future. In some circumstances, a constitution is understood as a transformative document, formalizing new understanding of the state and the communities within it based on ideals of democracy, human dignity and equality, including gender equality.

Constitutions impact upon women and their activities in political, social and economic life, and there are multiple ways in which a constitution contributes to substantive gender equality (International IDEA 2016: 11). Constitutional provisions to protect and promote women's rights impose enforceable obligations on the state. A gender-responsive constitution signals the nation's commitment to gender equality and inclusiveness. Because constitutions are generally more difficult to change than ordinary laws, entrenching gender-responsive provisions in the constitution provides a relatively fixed foundation for gender equality. Finally, gender-responsive constitutional provisions can influence state actions and court decisions in favour of women's equality when implementing and interpreting all aspects of the constitution.

Almost every new constitution made since 1945 includes provisions on gender equality (Lucas 2009: 134). Many recent constitutions also include gender-specific provisions and gender-inclusive drafting styles to promote substantive equality, such as:

- An explicit commitment to gender equality, for example as a fundamental value of the state set out in the preamble or as a specific provision that empowers the state to take actions to achieve substantive gender equality.
- An express prohibition of discrimination on the basis of sex (biological difference between women and men); gender (socially constructed roles of women and men); marital status; pregnancy; and/or maternity.
- Provisions to permit or require special measures in order to achieve substantive gender equality. Special measures allow for preferential treatment of women in some spheres of life in order to redress the effects of prior or systemic discrimination against women. Special measures may be temporary and discontinued when the objective of substantive equality is achieved or permanent where required to address a particular need only women have, such as maternity (Committee on the Elimination of Discrimination against Women 2004).
- An express hierarchy of rights which ensure that customary, religious or plural legal systems must respect constitutionally protected rights relating to equality and non-discrimination against women.

- A specific guarantee of the equality of women and men in political, economic and/or social spheres of life and provisions to permit or require special measures to increase the representation of women in political parties and/or elected and appointed institutions of government.
- Specific women's rights, for example to reproductive and maternal healthcare, paid maternity leave, and the right to be free from gender-based violence.

The choice of particular kinds of gender-specific constitutional provisions will affect how the constitution is implemented. In addition to providing for specific rights or outcomes, such provisions can guide how other constitutional provisions are interpreted and applied. However, the actual effect of design choices on constitutional implementation will depend on a range of other factors deriving from the social, political and economic context and the characteristics of the constitutional system.

Constitutional implementation

Constitutional implementation is the process by which the rights, institutions, and aspirations of the constitutional text become a lived reality. Constitutional implementation occurs in a continuum and comes to the forefront after a new constitution, or a significant amendment to an existing constitution, comes into force. It is useful to separate the processes of constitutional implementation into three dimensions (Saunders 2015).

1. *Technical implementation.* The first dimension entails meeting the technical requirements of the constitution. This involves passing legislation, establishing new institutions and developing policy frameworks as directed or required by the constitution. It also involves identifying and training responsible government actors, providing necessary funding, and establishing accountability frameworks. Technical implementation might be smoother where institutions and procedures already exist, and conversely more challenging where the state has to establish these anew. Some new constitutions include a timeline for technical implementation. In the majority of cases, however, it is left to the institutions of government to determine the priorities for technical implementation.
2. *Interpretation.* The second dimension of constitutional implementation involves interpreting the constitutional text. Constitutions are framed in general terms, leaving room for different interpretations which can lead to different outcomes in practice. Sometimes, textual ambiguity arises as a result of compromises made during the drafting process. At other times, it is understood that it is simply not possible to anticipate and directly address every kind of issue during the constitution-making process and so the details are left to be developed over time in light of changing societal requirements. While courts generally have the formal power to interpret the constitution, the legislature, the executive and independent institutions also have an important interpretative role as they make and apply laws within the frameworks established by the constitution.
3. *Cultural change.* Cultural change might be required to ensure that the principles and values of the new constitution take effect in the life and conduct of the people and the state. Effective implementation might require cultural change within the

institutions of government, so that new constitutional provisions and principles are understood and integrated into the work of the legislature, executive, judiciary and public service. Constitutional implementation might also require overcoming deeply entrenched cultural barriers within the broader society and so extend the implementation process to a wide range of social groups and institutions, such as political parties, educational institutions, religious groups and members of society as a whole.

Constitutional implementation is a complex, multilayered process. There are many different ways in which constitutional provisions can be realized. All institutions of government, as well as society at large, are involved in the project of constitutional implementation. The implementation process might need to be broken down into coordinated stages, with different actors responsible for different activities. Where a new constitutional concept or institution is being introduced, implementation might require experimentation, evaluation and modification. Implementation can be impeded by foreseeable, as well as unexpected, contextual challenges, which affect the priorities for government action and resources (political and financial) that governments can devote to an issue. Implementation can be facilitated, or alternatively restricted, by the political, social, cultural and economic context of the state at a particular time. As such, there is no standard criteria for assessing the success of constitutional implementation. Success can take different forms in different contexts, depending on the constitutional framework, the goals of the constitution, the nature of the 'starting point' and the challenges of the particular context.

Constitutional implementation is an important part of constitution-building and is one of several factors that underpin the legitimacy of a new constitution (Saunders 2015). Successful implementation can empower citizens to look to the constitution to hold their governments to account; while weak implementation risks creating a situation in which 'citizens are resigned to their own fate and place more faith in patronage and acquiescence than in empowerment and demand for fulfillment of constitutional guaranteed entitlements' (Hofisi 2015). Thus the process of implementation conducted in the years following the enactment of new constitutional provisions is critical to building a sustainable constitutional culture.

Gender-responsive constitutional implementation

Gender-responsive constitutional implementation requires that all aspects of the constitution are implemented in a manner that protects and promotes substantive gender equality. Specific provisions that provide for gender equality and women's rights must be implemented. The implementation of other constitutional provisions will also have a direct or indirect effect on substantive gender equality. The demands placed on a new constitution are high: there is an expectation that having fought for and gained constitutional recognition of women's rights and a constitutional commitment to gender equality, the condition of women in their daily lives will be improved.

The objective of substantive gender equality frames three broad requirements of gender-responsive constitutional implementation.

1. 'Equality' is interpreted to require substantive equality and not only formal equality.

The understanding of equality is key to promoting gender-responsive constitutional implementation. On a formal interpretation, equality requires that women and men be treated in the same way. However, treating women and men in a neutral manner does not result in equality where there are inherent, entrenched or historical differences between women and men. A substantive interpretation of equality recognizes that because the circumstances and experiences of women and men are different, different treatment of women may be necessary in order to achieve equal outcomes. Substantive equality requires equality of outcomes by acknowledging the effects of past discrimination against women; the political, economic and social barriers that women face in exercising their rights; and inherent differences between women and men (United Nations Economic and Social Council 2009; Fredman 2010).

Where a formal interpretation is adopted, laws that give preferential or special treatment to women might be held to violate the constitutional guarantee of equality. One example drawn from the case study countries is a decision of the French Constitutional Council to strike down legislation that sought to promote gender parity on company boards of directors on the basis that it violated principle of equality enshrined in the Constitution. A substantive interpretation of equality, on the other hand, permits laws that treat women and men differently in order to redress the effects of historical social, political and economic disparity or take account of relevant contextual differences between women and men.

2. Gender stereotyping is recognized and addressed

A gender stereotype is a 'generalized view or preconception about attributes or characteristics that are or ought to be possessed by women and men' (OHCHR: 2014). The application, enforcement and perpetuation of gender stereotypes are particularly harmful when they operate to deny benefits, impose burdens, degrade or diminish the dignity of women (Cook and Cusack 2010: 175). Gender stereotypes can also operate to reinforce gender hierarchies within societies.

One example of a pervasive and persistent gender stereotype is that women are care-givers, with the result that women are expected to be primarily responsible for childcare, care of the elderly and domestic work. These culturally enforced expectations limit women's participation in education and paid employment and so reinforce the feminization of poverty. This stereotype also affects the perception of women in authority and leadership roles and is a significant barrier to the involvement of women in public life.

When a state applies, enforces or perpetuates a gender stereotype in its laws, policies and practices, it condones and institutionalizes the stereotype (Cook and Cusack 2010: 36). Gender-responsive constitutional implementation requires all actors to acknowledge the existence of gender stereotyping and take steps to address it. This requires processes of implementation that treat women according to their individual needs, abilities and circumstances and not according to stereotypical generalizations (Cook and Cusack 2010: 173). These processes might require measures to train public officials to ensure that harmful stereotypes do not affect public decision-making; increasing the participation

of women in decision-making; and reforming practices and procedures across a range of sectors, including education, healthcare and justice (OHCHR 2014).

3. Institutions and processes are open and responsive to women

Achieving substantive equality and avoiding harmful gender stereotyping both require processes of constitutional implementation that understand and address the realities women face in society. The processes of constitutional implementation must understand that women and men have different needs; that different women have different needs depending on their age, ethnic identity, location, sexuality, disabilities, social background and other identity-based and contextual attributes; and must avoid harmful gender stereotyping. In order to do this, institutions and processes involved in constitutional implementation must be open and responsive to women so that women's needs and priorities are accurately understood and addressed.

The nature that this takes will depend on the institution. Processes must be transparent so that the work to implement the constitution is transparent and key actors are accountable. The legislature and the executive must consult with diverse groups of women so that the laws, policies and interpretations they adopt to implement the constitution are effective in meeting the needs of women. Courts must be open and accessible so that women and organizations representing them can bring cases and present evidence. Civil society must have the opportunity to represent the interests of their constituents to government. The inclusion of women in all state institutions and at all levels is a pre-requisite to ensure that women's views and needs are considered in all aspects of constitutional implementation.

These three requirements of gender-responsive constitutional implementation—substantive equality, understanding gender stereotyping, and institutions that are open and responsive to women—cut across the technical, interpretive and cultural dimensions of constitutional implementation and should frame the activities of all institutions and groups engaged in constitutional implementation.

3. Methodology and format

This paper uses the experiences presented at the workshop to provide some examples of how the requirements of gender-responsive constitutional implementation might be realized in practice. It does not evaluate the performance of any particular constitution in achieving gender equality or empowering women. This is because each country's constitution and its context at the time the constitution is made provide the baseline through which to understand the progress of implementation. In other words, 'success' can take different forms across countries, because each constitution imposes different constitutional obligations and each country faces specific challenges.

This paper focuses on how the processes of constitutional implementation undertaken by institutional and social actors can be responsive to gender equality, or conversely, resistant to it. Some of the challenges identified in this paper are challenges of constitutional implementation, while others are more specifically related to the challenges of gender-responsive constitutional implementation.

Country examples

The workshop took a comparative approach in order to uncover common challenges and opportunities in constitutional implementation and to share good practices and lessons learned across different jurisdictions. The selected countries—Afghanistan, Costa Rica, France, Kenya, Mexico, Nepal, South Africa and Tunisia—represent a wide geographic spread. These countries were chosen because of their recent experience with the implementation of gender-responsive constitutional provisions. Case examples from these countries appear in boxed text to illustrate the processes, successes and challenges of gender-responsive constitutional implementation.

Framing Rights

In order to focus the discussion and enable comparison between the experiences of different countries, the workshop used the implementation of two rights as lenses: the right to equality in political life and the right to health.

The right to equality in political life

What is the right to equality in political life?

Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that:

States shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

The Convention commits state parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country, including through constitutional entitlements to such rights and temporary special measures. Temporary special measures are legislative, executive or other regulatory actions that give special treatment to women or other groups in order to redress historic discrimination (CEDAW Committee, General Recommendation No 25, 2004). Other declarations and conventions provide additional objectives, including the Beijing Declaration and Platform of Action (1995) and UN General Assembly Resolution 66/130 (2011) on Women and Political Participation, which call on governments to implement measures to substantially increase the number of women in elective and appointive public offices and functions at all levels.

Constitutional provisions on equality in political life

Most constitutions provide a formal guarantee of equality of women and men. Using this right to promote equal participation of women in political life depends on interpretation and implementation by the legislature, executive and judiciary. Some constitutions also include a specific provision on equality in public life. For example, article 27(3) of the Constitution of Kenya states that ‘women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres’.

Some constitutions are more prescriptive and state a particular outcome to be achieved or measures to be taken to achieve equal participation in political life. Often, these provisions focus on increasing the number of women in elected representative bodies. Whether set out in constitutional texts or legislation, there are a range of different mechanisms to increase the political participation of women. The effectiveness of different options will depend on the nature of the electoral system and other contextual factors (International IDEA 2007).

Quotas require that women comprise a certain minimum number of candidates for election or members of a public body. Different types of quotas include:

- Voluntary candidate quotas adopted by political parties.
- Legislative candidate quotas, which require political parties to field a minimum number of women candidates. For example, Article 41 of Mexico’s Constitution requires political parties to put in place ‘rules to ensure gender parity in the nomination of candidates in federal and local congressional elections’.

- Reserved seats for women, which specify that women must comprise a particular number or proportion of seats in the legislature. For example, the Constitution of Nepal requires that at least one third of the total number of members elected from each political party represented in the national and state legislatures must be women (articles 84(8); 176(9)). Article 83 of the Constitution of Afghanistan provides that at least two females from each province shall be members of national legislature.
- Gender neutral quotas which set a maximum number of seats in the legislature that any one gender can occupy. For example, article 81(b) of the Constitution of Kenya provides not more than two-third of the members of elective public bodies shall be of the same gender.

Quotas may also be applied to appointed public bodies and institutions. For example, article 27(8) of the Constitution of Kenya provides that, in principle, not more than two thirds of the members of any appointive body shall be of the same gender. Quotas are often characterized as temporary special measures, in that they give women special treatment in order to correct for the historical and cultural barriers that have resulted in the underrepresentation of women in public life. As the name suggests, temporary special measures are regarded as time limited and cease when equal political participation is realized.

An increasing number of countries have adopted gender parity—the equal representation of women and men—as a fundamental principle. Examples considered in this paper include Costa Rica, France, Mexico and Tunisia. Parity is not regarded as a temporary special measure, but is instead regarded as a permanent condition of democratic government because the elected body reflects the gender balance of the wider community (Piscopo 2014: 1).

Why choose the right to equality in political life to examine constitutional implementation?

The right to equality in political life was selected as one of the rights through which to examine gender-responsive implementation for three reasons.

First, while equal political participation is often considered a civil and political right, its gender-responsive implementation requires positive and asymmetric action by the state. In many cases, it is not sufficient to remove discriminatory laws that prevent women participating in public life. Rather, specific laws and programs are needed in order to achieve equal participation. Further, the implementation of this right is not solely an end in itself, because the inclusion of women in public life works to ensure gender-responsive constitutional implementation across all areas of government.

Second, it is relatively straightforward to measure the implementation of the right to equal political participation by reference to the percentage of women in government institutions. Women are consistently underrepresented in national representative bodies. As of September 2016, women held an average of 23 per cent of parliamentary mandates, and only in 13 countries did they hold 40 per cent or more parliamentary seats (Inter-Parliamentary Union 2016).

The number of women in national parliaments is not the only measure of political participation. It does not take account of the presence of women in other state

institutions, such as the executive or sub-national representative bodies. Nor does the presence of women necessarily equate to increased influence and power for women. With these caveats in mind, the percentage of women in national parliaments can nevertheless serve as a useful measure of implementation of the right to equal political participation.

Third, the constitutional provisions and the measures to implement them vary considerably between countries, providing an opportunity for learning and comparison. The challenges for constitutional implementation are to develop measures that mobilize critical non state actors; to take account of the particular constitutional context; and to be sensitive to cultural barriers to women's political participation.

The right to health

What is the right to health?

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The right to health is not a right to be healthy. Rather, it is the right to control one's own health and body and the 'right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health' (United Nations Economic and Social Council 2000: para. 8).

At international law, the state has an obligation to take deliberate, concrete and targeted steps toward the full realization of the right to health. Such steps include (but are not limited to) the development of a national strategy and corresponding framework legislation, policies, indicators and benchmarks as well as accessible institutions and processes to provide remedies and accountability (United Nations Economic and Social Council 2000: para. 59).

Article 12 of CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women in the field of healthcare. Socio-economic rights such as the right to health are interpreted as a three-part obligation to respect, protect and fulfill the right. States respect women's right to health by not restricting women's access to healthcare; protect women's right to health by enforcing laws that address violence against women; and fulfill that right by taking all appropriate measures within available resources to ensure that women realize their right to healthcare, including reproductive healthcare (World Health Organization 2007).

Constitutional provisions on the right to health

Separately to their international legal obligations, many states have enshrined the right to health and/or healthcare in their constitutions. Globally, 55 per cent of constitutions guarantee or aspire to protect the right to health and/or healthcare (Heymann et al. 2013). There is, however, great variation in the way in which the right to health is recognized and protected in constitutional texts. Kinney and Clark (2004: 289–90) developed the following typology of provisions addressing health and healthcare in national constitutions:

1. A statement of aspiration, stating a goal in relation to the health of its citizens.
2. A statement of entitlement, stating a right to health, healthcare or public health services.
3. A statement of duty, imposing a duty to provide healthcare or public health services.
4. A programmatic statement, specifying approaches for the financing, delivery, or regulation of healthcare and public health services.
5. A referential statement, incorporating by specific reference any international or regional human rights treaties recognizing a human right to health or healthcare.

Constitutions increasingly recognize women's health rights. For example, article 38(2) of the Constitution of Nepal provides that 'every woman shall have the right to safe motherhood and reproductive health'. The constitutions of Kenya (article 43(1)(a)) and South Africa (article 27(1)(1)) specifically include the right to reproductive healthcare within the right to health. The Constitution of Mexico has specific provisions on the labour and social security rights to protect the health of pregnant women and mothers (articles 123(A)(V) and (B)(XI)(c)).

Why choose the right to health to examine implementation?

The right to health was selected as one of the rights through which to examine gender-responsive constitutional implementation for three reasons.

First, while the right to health and/or healthcare is not generally framed to be a gender-specific right and is essential for both women and men, it has strongly gendered dimensions. Women have particular healthcare needs due to their reproductive capacity. They also face financial, cultural and other restrictions on their access to healthcare. Gender inequality, including practices that lead to early marriage and pregnancy, is a key factor in poor health outcomes for women in many countries, and may be compounded by poverty and discrimination related to race, ethnicity, and caste (Fredman 2010).

Second, because the right to health is a socio-economic right, its implementation is framed by concepts such as 'progressive realization' of the 'highest attainable standard', 'subject to the resources of the state'. These concepts recognize that the realization of socio-economic rights is affected by the availability of state resources and so may require some time to achieve (Office of the United Nations High Commissioner for Human Rights 2008). This places specific kinds of obligation on the state in relation to implementation that stand in contrast with the implementation of constitutional civil and political rights. Responsibility for health related services lie not only with the government, but also fall upon publicly and privately funded healthcare bodies and non state actors such as medical practitioners, pharmaceutical companies and insurance providers (Gloppen 2008: 23). Because government bears the primary responsibility for respecting, protecting and fulfilling the right to health through regulation, this Paper focuses on the implementation of the right by institutions of the state.

Third, as with the right to equal participation in public life, constitutional provisions relating to the right to health and the measures taken to implement them vary

considerably between countries, providing an opportunity for learning and comparison. In particular, different courts have taken different approaches to interpreting and enforcing the right to health, which are explored further in Chapter 6 on the judiciary.

Five actors in constitutional implementation

In order to understand the processes of constitutional implementation and identify the range of opportunities and challenges for gender-responsive implementation, this paper is organized around five key actors engaged in constitutional implementation. These are the legislature, the executive, the judiciary, independent institutions and civil society. These actors have core functions and responsibilities that relate to constitutional implementation in different ways. No actor, however, operates in isolation from the other, and each has a role in checking, facilitating and supporting the implementation activities of other actors. While the nature of the actors and their specific responsibilities vary between constitutional systems, this paper seeks to define the role of each actor at sufficiently high level to enable comparisons between countries.

4. The legislature

Role in constitutional implementation

The legislature is a representative body whose constitutional role is to make laws. The legislature is often the first implementer of new constitutional provisions. The laws it creates give content to constitutional rights and regulate how they are practiced and enforced. Legislation may also establish new institutions and procedures. Lawmaking can be considered a technical implementation function, but often also requires interpretation of constitutional requirements.

The institutional function of representation taps into the cultural change dimensions of implementation, in the sense that the legislature represents the diversity of people and their views within the state.

Challenges to implementation

Lawmaking

The legislature is responsible for making and amending laws which give effect to constitutional provisions. In addition to this technical aspect of implementation, the legislature also engages in constitutional interpretation when it makes laws to fill gaps left in the constitution or give specific meaning to broadly-framed constitutional provisions. Constitutions might regulate lawmaking to implement the constitution through implementation schedules and requirements to review existing laws for compliance with a new constitution.

Implementation schedules

Some constitutions expressly confer specific law-making functions on the legislature. For example, article 1 of the Constitution of France provides that legislation should be passed to 'promote equal access by women and men to elective offices and posts as well as to position of professional and social positions'. Article 261 sets out the procedures to extend and enforce these timeframes. Article 47 of the Constitution of Nepal provides that the state shall make legal provisions for the implementation of constitutional rights within three years of the commencement of the Constitution. Article 148(5) of the Constitution of Tunisia requires that the Supreme Judicial Council shall be created within six months of the first elections, and the Constitutional Court within one year of the first elections. Some constitutions include a timeframe for the legislature to implement the constitutional provisions. For example, Schedule 5 of the Constitution of Kenya lists the legislation required to implement the constitution and the timeframe in which the legislature must enact the laws (see Box 4.1).

Box 4.1. Legislative implementation of the two-thirds gender rule in Kenya

Article 81(b) of the Constitution of Kenya of 2010 requires that not more than two-thirds of the members of elective public bodies shall be of the same gender. Article 27(8) places an obligation on the state to take legislative and other measures to implement this rule. Presently, women comprise 19 per cent of the members of Kenya's National Assembly and 26 per cent of the Senate.

Parliament debated the two-thirds gender rule when developing legislation to govern elections in 2013. Fearing that legislation to implement the rule would not be passed, the Attorney-General approached the Supreme Court for an advisory opinion on whether the Constitution required the implementation of the two-thirds gender rule for the 2013 elections. A majority of the Court held that the two-thirds gender rule was not a minimum requirement that had to be immediately implemented, but was rather an 'aspiration' to be progressively realized (Advisory Opinion No. 2 of 2012: para. 68). However, the Court applied the constitutional implementation schedule and directed that legislation to give effect to the two-thirds rule in the national parliament should be made within the five year constitutional deadline, by 27 August 2015.

The Court's decision placed the responsibility back on the legislature. A bill was developed by a specialist working group established by the Attorney-General, but was not submitted to the Parliament. In May 2015, a civil society organization, the Center for Rights Education and Awareness, applied to the High Court for an order to compel the Attorney-General and Commission for the Implementation of the Constitution (CIC) to prepare and introduce legislation to implement the two-thirds gender rule. The Court held that the failure to introduce legislation was in breach of constitutional requirements and directed the CIC and Attorney-General to table the bills before parliament within 40 days (*Center for Rights Education and Awareness v Attorney General* 2015).

A bill was introduced to provide for the nominations from party lists to meet the two-thirds gender rule. Despite lobbying and support from government institutions, civil society organizations and members of parliament, the bill was twice rejected by the National Assembly (Mumma 2016). The National Assembly extended the deadline for passing the legislation by one year to 27 August 2016. This deadline was not met and the Center for Rights Education and Awareness has again approached the High Court seeking orders to enforce the implementation schedule (Muthoni 2016).

Implementation schedules set the priorities for the legislatures elected under the new constitution. Without such schedules, priorities for legislation are left to be determined by the political leaders in office at the time and may be displaced by other priorities (Klibi 2015). An enforceable implementation schedule can help to ensure that the legislature passes necessary legislation in a timely fashion. It can provide a basis for independent institutions and civil society organizations to hold the legislature to account, including by appealing to the court. There are, however, some risks. The legislature might fail to comply with the deadlines. Tight timeframes and intervention by the courts might constrain debate and limit the legislature's ability to consider, review and amend the legislation. Tight timeframes might also limit the opportunities for civil society to engage in the law-making process. Strict compliance with the implementation schedule might mean that the legislature is not able to address other priorities. It is also important to acknowledge that the legislation made to implement the constitution must itself be implemented in practice.

Box 4.2. Legislative implementation of parity laws in Tunisia

Tunisia's 2014 Constitution makes two commitments to increase women's political representation. Article 34 provides that 'The rights to election, voting and candidacy are guaranteed, in accordance with the law. The state seeks to guarantee women's representation in elected councils'. Article 46 states that 'The state seeks to achieve equal representation for women and men in elected councils (parity)'.

The principle of parity was used for elections for the National Constituent Assembly in October 2011. The law governing those elections required that party or block lists alternate between women and men candidates in equal number (vertical parity). However, because in most lists a male candidate appeared as the first candidate and many parties won only one seat, only 68 of the 217 members of the Constituent Assembly were women.

The electoral laws passed in May 2014 followed suit, and similarly required vertical gender parity, in which the candidate lists prepared by each political party must alternate between women and men. The legislature rejected a proposal for horizontal gender parity, which would have required political parties to alternate between female and male candidates in the first position on candidate lists for each of Tunisia's electoral constituencies (Mekki 2014).

In 2016, the issue came before the legislature again when it considered new laws for municipal and regional elections. This time, however, the legislation included provisions to ensure both horizontal and vertical parity and was supported by 127 of the 134 representatives in the legislature.

What happened between 2011 and 2016 to change the legislature's approach to gender parity? First, women's rights groups conducted a strong campaign for parity laws for municipal elections, advocating for both vertical and horizontal parity (Kvinfo 2016). Second, in 2011, some MPs and political parties claimed that women were not good politicians or that there were not enough women who were suitable candidates. In response, civil society organizations collected the resumes of qualified women and provided training for female candidates (Claudet 2014). Third, women parliamentarians from different political parties voted unanimously on the laws and lobbied within their own parties to generate support for the new parity laws (UN Women 2016).

The legislative implementation of parity laws in Tunisia (see Box 4.2) demonstrates both the continued efforts needed from the legislature to implement women's right to political representation and the targeted civil society advocacy needed to influence the legislature's approach.

Reviewing existing laws

Constitutional implementation might also require the legislature to amend existing legislation to ensure it is consistent with new constitutional provisions. In this, a specialist parliamentary committee, the executive or an independent commission might assist the legislature. For example, in Nepal the Ministry of Law, Justice and Parliamentary Affairs is responsible for reviewing laws for constitutional alignment. This Ministry has prioritized 60 areas for review and appointed a team of experts to conduct the review. In Kenya, a Parliamentary Committee was established to oversee the implementation of the Constitution, assisted by an independent commission which advised the legislature and executive on the review of existing laws. While important, there are some risks if the review of existing laws is not conducted in a timely manner. In Zimbabwe, which made a new Constitution in 2013, delays in the project to 'align' laws with the constitution in effect led to a de facto suspension of the constitution, as

administrators delayed implementing the constitution while legislation was pending (Hofisi 2015). In such cases, an implementation oversight body might assist to hold both the legislature and executive to account (see Chapter 7).

When the legislature does not support gender-responsive constitutional implementation

A particular challenge to gender-responsive constitutional implementation arises where a majority of the representatives in the legislature are hostile to proposed legislation or lack the political will to enact certain laws. The members of legislatures represent different views and interests within the community, including views that are opposed to some of the rights of women. The self-interest of incumbent members of parliament (MPs) might also be a factor, as in the case of male MPs whose seats might become vulnerable if quotas or reserved seats for women are introduced. In these circumstances, there is a risk that gender-responsive laws proposed to implement the constitution will not be passed, or will be stalled in the legislative process.

There are several ways in which advocates for legislative change can educate and lobby representatives in the legislature in order to gain their support. One mechanism is for women MPs to create a cross-party caucus or grouping to agree on priorities for advancing women and women's rights and strategies to implement them. Another is to leverage political and party processes to ensure that laws for gender equality are on the agenda, for example by making gender equality part of the party platform or a condition of representatives' support. Finally, legislators can build alliances with civil society organizations, advocates and others outside the legislature to promote the call for change, leveraging the power of women voters, as half of the electorate. The effectiveness of such strategies will vary depending on context. For example, when lobbying for gender parity laws in Mexico, it was found to be more effective for women MPs from other political parties to lobby male MPs (Baldez 2004: 247), whereas in the Tunisian example, women MPs lobbied within their own parties for support.

Where the legislature is particularly hostile to a specific law and lobbying is not effective, it might be necessary seek to fulfil the desired outcome through alternative law-making institutions.

Some women activists and legislators considered that in order to consolidate the law, it should be ratified by the parliament. The law was included on the parliamentary agenda, but when several prominent MPs spoke against the law, the speaker removed it from the agenda, forestalling its defeat by parliamentary vote (Larson 2016: 17–19). The Elimination of Violence Against Women Law made by presidential decree is still administered and enforced as a law (Ministry of Women's Affairs 2014).

Box 4.3. Elimination of Violence Against Women Law in Afghanistan

In 2006 the Ministry of Women's Affairs developed a law on the elimination of violence against women, in consultation with Afghan women's rights activists, civil society organizations and international organizations. There was some concern that the draft law would be opposed by religious and conservative members of parliament. Instead of being submitted to the parliament, the law was made by presidential decree during a parliamentary recess.

Representation

The legislature is understood to represent, or even reflect, the diversity of the values, backgrounds and experiences of the population as a whole. In this representative role, the legislature contributes to constitutional implementation by bringing issues faced by members of the community to the attention of lawmakers and ensuring that laws meet the needs of the community. While representativeness is a core strength of the legislature, partisanship, majoritarian voting rules, and the influence of political parties can also hinder the ability of the legislature to act on behalf of particular groups, including women. The underrepresentation of women in national legislatures affects the ability of the legislature to understand and respond appropriately to women's needs and concerns and implement constitutional provisions in a gender sensitive way.

The presence of women in the legislature facilitates gender-responsive constitutional implementation. Women representatives are more likely to have a first hand understanding of the distinctive issues facing women and can convey these experiences to the legislature. The experience of the case study countries suggest that increased numbers of women in the legislatures has had a positive influence on lawmaking and has increased awareness of women's issues, such as health, abortion, violence against women and the exclusion of women from public life. Further, increasing the number of women in the legislature can have a 'cascade effect', in that more women are elected or appointed to executive and judicial positions. It also demonstrates to the wider community that women can be leaders in public life.

The case of the Elimination of Violence Against Women Law in Afghanistan (see Box 4.3) provides an example in which the law-making function was shifted from the legislature to the executive to achieve an outcome necessary for the protection of women. Not all constitutional systems permit executive law-making, and so this may not be an option in other countries. Even where it is an option, key actors might prefer to lobby for legislation, because legislation is endorsed by the people's representatives and might be more resilient to change. In the case of Afghanistan, executive law making was necessary to ensure the creation of a law to protect women while lobbying for legislative ratification continues.

For these reasons, the implementation of the right to equal political participation is critical. There are some challenges and risks however. One is that the focus on the number of women in legislatures is symbolic rather than substantive. There may be a concern that political parties only sponsor women who are 'quiet' and who support the status quo. There may also be a view that women who are MPs by virtue of a quota mechanism are not equal to other representatives. Another challenge is that the political space mimics the domestic space, and women politicians are given portfolios and roles that are seen as 'women's issues'.

Women in politics face gendered political violence, which can discourage them from a political career or limit their capacity to act effectively as legislators and leaders. These challenges demonstrate the deeply entrenched cultural barriers to women's equal political participation, which require structural and cultural change in response.

There are a number of ways to ensure that a legislature represents and reflects the needs and concerns of women, and that this is reflected in gender-responsive constitutional implementation. These might include:

- Establishing women's caucuses of women representatives across party lines, to deal with issues of concern to women in a non-partisan way.
- Ensuring women are represented on all parliamentary committees.
- Embedding gender analysis in the legislative process, for example by creating a mechanism to examine and report on the impact that the proposed law will have on gender equality and women's rights.
- Providing research services to improve members' understanding of the gender issues and the impact of legislation on women's rights.
- Working closely with independent institutions such as a Gender Commission or Human Rights Commission to identify and address systemic discrimination and inequality.
- Establishing thematic parliamentary inquiries to address women's disadvantage and substantive equality.
- Ensuring that legislative processes are transparent, well organized and accessible, so that the legislature can genuinely consult with civil society organizations, advocates and members of the public.

Establishing institutional mechanisms of these kinds within the legislature can improve the legislature's capacity to make gender-sensitive laws that protect and promote women's rights (United Nations Economic and Social Council 2015).

Table 4.1. Key lessons

Implementation challenge	Possible facilitating factors and strategies
Failure to make or amend laws to implement the constitution as a result of lack of political will or entrenched opposition to women's rights	<p>Provide for and enforce a constitutional implementation schedule</p> <p>Educate and lobby for change utilizing political mechanisms such as cross party women's caucuses; influencing party agendas; and building alliances with civil society</p> <p>Consider alternative options to achieve the outcome, such as legislative compromises or alternative means of lawmaking</p>
Limited representation of women in parliament	<p>Legislate and implement constitutional requirements for quotas, reserved seats or parity</p> <p>Promote cultural changes to encourage greater acceptance of women's political leadership within political parties, legislatures and society at large</p>
Legislature lacks knowledge and awareness about issues of gender and the needs and concerns of women	<p>Increase the number of women representatives in the legislature</p> <p>Establish networks or meetings for women MPs across party lines</p> <p>Ensure women are included on all parliamentary committees.</p> <p>Embed gender analysis in the legislative process to assess the impact of proposed legislation on women.</p> <p>Provide specific research services to improve members' understanding of the gender issues and the impact of legislation on women's rights.</p> <p>Support thematic gender inquiries by a specialist parliamentary committee or independent institution.</p> <p>Ensure that legislative processes are transparent, well-organized and accessible, so that the legislature can genuinely consult.</p>

5. The executive

Role in constitutional implementation

The executive branch is responsible for administering the laws made by the legislature and governing the state. Its functions in relation to constitutional implementation include:

- determining policies and guidelines, including providing the funding to support them and evaluating and reviewing performance;
- service delivery; and
- making appointments and determining the composition of the executive.

The executive's role in constitutional implementation spans across all three dimensions of implementation. Policymaking and service delivery are largely technical, but in the course of performing its function as the executor of laws and the principal institution for governance, the executive also makes decisions that require constitutional interpretation.

The executive has an important role in mainstreaming human rights and furthering the cultural changes required to achieve gender equality. All government officials must abide by the constitution and have a key role in integrating constitutional principles, including respect for gender equality and women's rights, in all activities of the state. As a key employer and service provider in many states, the executive can model practices that support gender equality, such as gender balance across all government positions, gender-responsive employment conditions and proactive policies and programs to support women.

In this Chapter, the right to health is used as the primary lens, because implementation of this right more directly engages the executive and so highlights a range of challenges, as well as responses, to gender-responsive constitutional implementation.

Challenges to implementation

Policymaking

The executive is responsible for developing policies, plans and guidelines for the implementation of laws and government priorities. Policymaking includes developing a budget and allocating sufficient resources to administer the policies on the ground. It also includes evaluating policies to ensure that their purposes are achieved efficiently and fairly.

Box 5.1. Policymaking to implement health as a constitutional right in Kenya

The Constitution of Kenya 2010 included a specific right to health for the first time in that country's constitution. Article 43 sets out a range of socio-economic rights, including that 'every person has the right to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare'.

After the Constitution came into force, the Commission for the Implementation of the Constitution (CIC) requested every ministry to revise existing laws for compliance with the new Constitution (see Chapter 7 for an overview of the CIC and its role in constitutional implementation). The CIC worked closely with the Ministry of Health to develop a general health policy, as well as to draft legislation relating to health, reproductive health and mental health.

One challenge to be met in order to implement the new right to health was to build the capacity and knowledge of policy makers so that they understood the difference between a policy focused on delivering healthcare and a policy that implemented healthcare as a constitutional right. The Commission met with policy makers and organized workshops with human rights experts to develop policies that reflected the understanding of health as a human right across the entire health policy.

This required policymakers to address questions such as what progressive realization of the right to healthcare means, and how it might be measured; what are the key indicators of the right to health; and how a staged approach might be developed in order to achieve progressive realization. The CIC also provided education and training and facilitated connections between agencies and experts to build the executive's knowledge of the new constitutional framework and capacity in implementation.

Where there is a new constitutional text or provisions, it is necessary to build policymakers' understanding of the new framework, as the example from Kenya demonstrates (see Box 5.1). Constitutional provisions, and socio-economic rights in particular, are framed in broad language. The executive must translate these broad provisions into practical actions. This is often a large and complex task, involving multiple government agencies and external stakeholders. For example, the right to health is implemented through various different policies, including to provide for state-funded healthcare services; to regulate the delivery of healthcare services in public and private sectors; to ensure that health services are safe and effective; and to ensure adequate and non-discriminatory access to healthcare. Specific policies may deal with different aspects of healthcare, from preventative healthcare to emergency healthcare to palliative care. Policies might also be gender-specific, taking into account women's different healthcare needs, particularly in relation to sexual and reproductive health.

Policies and programmes need to be developed within the parameters of the resources available to support them. Policies and budgeting are particularly important when it comes to implementing socio-economic rights, such as the right to health, which are to be progressively realized, within the available resources of the state. This might initially require a plan of action and structured or staged implementation plans.

Some constitutional texts set out priority actions for the executive to implement. For example, article 51 of Nepal's Constitution sets out the basic policies of the state.

It includes four major priorities in relation to health: state investment in the public health sector; ensuring easy, convenient and equal access by all to quality health services; promoting traditional medicines; managing private sector investment in the health sector; research; and increasing average life expectancy by reducing maternal and infant mortality rates while encouraging family planning (article 51(h)(5)-(10)). Other constitutional texts simply empower or direct the executive to take actions to implement constitutional provisions. For example, article 21 of Kenya's Constitution obligates the state to put in place policies, legislative measures and standards for the progressive realization of rights, including the right to health.

Constitutional implementation can require significant rethinking of existing policies. One example arises in Kenya, where the existing health policy had to be transformed from a policy focused on delivering healthcare to a policy focused on protecting and promoting the right to health (see Box 5.1).

Another example of the implementation of constitutional rights requiring significant policy changes comes from South Africa. There, the Constitutional Court stepped in to give practical meaning to the principle of progressive realization with respect to the right to health which the executive then used to develop a policy framework to address HIV/AIDS in South Africa. In this case example, the executive's conduct in designing and implementing this programme, and revising it in light of rulings from the Constitutional Court and expert evaluations, demonstrates good policy making practice. Within the broader context of constitutional implementation, this case example shows how gender-sensitive policymaking to secure the right to health protects and promotes women's rights. In this way, successful policymaking has the potential to secure an urgent public good and build public confidence in both the government and the constitution (see Box 5.2).

The case examples suggest some challenges to gender-responsive constitutional implementation in the course of executive policymaking. One challenge relates to capacity and knowledge. Where there is a new constitutional text or provisions, it is necessary to build policymakers' understanding of the new framework. As the example from Kenya demonstrates, policy makers need to be supported when transforming a healthcare policy into a policy for the implementation of the right to health. In addition, policymakers need the knowledge and capacity to understand and respond appropriately to the gendered dimensions of constitutional implementation.

Ways to build policymakers' knowledge and capacity include working closely with specialist agencies such as commissions for constitutional implementation or gender ministries (see further below), for example through joint workshops, exchanges of personnel, and coordination and collaboration on policymaking. Another is to deliver training on specific gender issues relevant to the policy, for example on the impact of violence or poverty on women's access to healthcare.

There is a risk that the gendered dimensions of a policy and its impact on women will be overlooked or marginalized in the policy making process, particularly where the implementation task is great and the institutions and processes of government have to be established anew. It is important that rather than being seen as something that can be added later, gender is built into every new policy, institution and process.

Box 5.2. Policymaking to address the HIV epidemic in South Africa

South Africa has faced one of the largest HIV epidemics in the world. The South African government has developed a range of programs to respond to the epidemic, including the largest government provided antiretroviral treatment program in the world (AVERT 2015). The prevalence of HIV is nearly twice as high amongst women as men, with rates of new infections among women aged 15–24 more than four times higher than for men of the same age. Reasons for the disparity include poverty, violence against women and women's lower societal and economic status (AVERT 2015).

One way in which government policy has sought to address this disparity and reduce the incidence of HIV across the population is through a program to reduce mother to child transmission of HIV. Initially, under this program, women received a single dose of the anti-retroviral drug nevirapine during labour. Women were also discouraged from breastfeeding. This program had several shortcomings. The high costs of baby formula and problems accessing it led to babies developing other health problems. Further, the program was initially restricted only to two public hospitals in each province, meaning that not all women and children could access it (Coovadia and Pienaar).

In 2002, in *Minister of Health v Treatment Action Campaign II*, the Constitutional Court held that the restrictions on access to the program were inflexible and unreasonable and did not meet the constitutional requirement that the state take reasonable measures, within available resources, to achieve the progressive realization of the right to access to healthcare services (the approach of the South African Constitutional Court to constitutional review in the Treatment Action Campaign case is discussed in more detail in Chapter 6 on the judiciary). The Court ordered the government to develop a new policy that included (a) the provision of nevirapine to women in all public hospitals and clinics where medically indicated and (b) measures for testing and counselling pregnant women and women living with HIV on the options available to reduce the risk of mother to child transmission of HIV.

Since 2002, the government has revised its policy several times to implement the orders of the Constitutional Court as well as recommendations from the World Health Organization and experts. The guidelines issued in 2013 provide for effective treatment to prevent mother to child transmission of HIV. Pregnant women can receive testing, treatment and counselling at any public hospital or clinic; breastfeeding is now encouraged; and the programme includes post-natal care to support women living with HIV and their families (Coovadia and Pienaar). Challenges remain, however, including shortages of trained healthcare workers and public health infrastructure, and lower resourcing of rural areas (Evans 2013).

One way for the executive to meet this challenge is to develop and implement a national action plan for gender equality and the advancement of women (see Box 5.2). National action plans set out the government's commitment to gender equality and serve to guide executive policymaking across diverse areas of government. For example, the National Action Plan for the Women of Afghanistan 2007–2017 (NAPWA) recognizes that the women of Afghanistan are among the worst off in the world, particularly in the areas of health, deprivation of rights, protection against violence, economic productivity, education and public participation (NAPWA: 7). It details the programs, projects and activities required 'to eliminate discrimination against women, develop their human capital, and ensure their leadership in order to guarantee their full and equal participation in all aspects of life' (NAPWA: 14), as well as specifying the timeframes and allocating responsibilities to government agencies.

Another way in which the executive can be supported in gender-responsive constitutional implementation is through specialist agencies for gender equality.

For example, Afghanistan, Nepal and Tunisia have established dedicated women's ministries. While the structure and mandates of women's ministries vary, they are responsible for mainstreaming gender equality through their work to 'design, promote the implementation of, execute, monitor, evaluate, advocate and mobilize support for policies that promote the advancement of women' (Beijing Declaration and Platform for Action 1995: para 196). Women's ministries can provide advice and training to executive policy makers on the impact of policy proposals on women and women's rights. They can review policies from a gender perspective to identify areas of systemic discrimination against women and circumstances in which gender neutral policies perpetuate a discriminatory status quo.

Women's ministries may also be responsible for evaluating government policy on gender equality. This might be a constitutional requirement: for example, article 281 of the Constitution of Nepal requires the government to periodically review the implementation of special rights for women every ten years. Finally, the coordination efforts of women's ministries might extend beyond government agencies to include building relationships with civil society organizations, so that government can better understand and address issues facing women on the ground.

In some countries, such as Kenya and South Africa, these functions are conferred on an independent gender commission with its own legislative mandate and a higher degree of separation from the executive. Regardless of the nature of the ministry or commission, to be effective, it requires a clear mandate and sufficient resources and authority to carry out this mandate and influence other areas of government (United Nations Economic and Social Council 2015: paras 237–38).

Service delivery

The executive is responsible for delivering state-funded services, including healthcare services. Some constitutions set out standards for service provision. For example, article 10 of Kenya's Constitution and article 195 of South Africa's Constitution set out values and principles that govern public administration that bind all public officers involved in implementing the constitution. Even without specific provisions, all persons and agencies delivering services on behalf of the state will be bound by the constitution and must comply with its provisions.

Gender can affect access to health services in different ways. In some cases, this is related to women's care-giving roles: women with responsibility for caring for children and other family members have particular healthcare requirements. In other cases, it is affected by the particular circumstances of women, including where gender intersects with other characteristics, such as poverty, rural or urban living, or age that act as barriers to women's access to healthcare services.

Women require access to specific kinds of healthcare services relating to sexual and reproductive health. Deeply embedded cultural norms about the control of women's sexuality and reproduction and the place of women in familial and social groups more generally, affect women's access to healthcare services. For these reasons, fair and equal access to healthcare requires that service delivery is customized to meet the particular needs of women (see Box 5.3).

Box 5.3. Gender-responsive healthcare service delivery in Afghanistan

Marie Stopes International, an NGO with a mandate to provide safe sexual and reproductive health services globally, has developed specific programs in order to provide healthcare services to women in Afghanistan, including maternal and child health services. In Afghanistan, 80 per cent of the population lives in rural areas, which comprises both secure areas of the country and insecure areas controlled by the Taliban. Many women are unable to leave their homes, so female healthcare workers go door-to-door to provide services directly to women. This has required training women doctors, midwives and healthcare providers in areas such as maternal healthcare, children's health and mental health.

Marie Stopes International has also trained local community leaders, primarily men, to assist in service delivery in the field of sexual and reproductive rights. In insecure areas, conflict resolution committees, which include older women as representatives, have been created to ensure that healthcare workers are safe. By ensuring local participation, Marie Stopes International has worked not only to deliver health services to women, but also to begin to change some of the entrenched cultural and religious norms about women and their role in the society.

Shared responsibility for service delivery

While the executive might provide health services directly, for example by establishing hospitals and directly employing professional healthcare staff, it is also common to share service delivery with other entities, such as other levels of government, private bodies or NGOs. This presents challenges for the executive in implementing constitutional provisions relating to service delivery.

Decentralized service delivery

It is common for responsibility for different aspects of healthcare to be spread across different levels of government, including local, municipal, provincial and national governments.

For example, the Constitution of Nepal establishes a federal system of government, with three levels of government at the federal (national), state (provincial) and local levels. The responsibilities of each level of government are listed in schedules 5 to 9 of the Constitution. The federal government is responsible for health policies, health services, health standards, quality and monitoring, national or specialized service providing hospitals, traditional treatment services and communicable disease control. The state level of government is responsible for health services; while the local level of government is responsible for basic health and sanitation. Health is listed as a concurrent power of all three levels of government, indicating that health is a shared responsibility.

Spreading the responsibility for health across different levels of government serves several purposes. Where the central government is responsible for setting standards and broad policies, it ensures that the same standards of healthcare are provided across the entire country. Giving local governments responsibility for delivering health services allows them to tailor services to the specific needs of their community, which might

Box 5.4. Implementing healthcare as a human right and a devolved function in Kenya

Article 10 of Kenya's Constitution sets out national values and principles of governance that bind all public officers involved in implementing the constitution, including: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.

In order to implement the rights-based approach to service delivery set out in article 10 in the new devolved system of government, the Commission for the Implementation of the Constitution (CIC) worked directly with county governments to review existing approaches to health service delivery and develop new practices consistent with the Constitution. The CIC did this by working with public health consultants and human rights and communications experts to audit health facilities at the local level. The feedback provided to the county facilities covered matters such as how hospital admissions procedures could be more inclusive and capture information relevant to the specific healthcare requirements of patients; measures to ensure that the dignity of patients is respected and that patients receive an acceptable standard of care; and revisions to charters and service delivery frameworks. The CIC used the information obtained from this process to develop a model of the rights based approach to service delivery and produce a manual on implementing healthcare as a human right and a devolved function under the Constitution of Kenya as part of its responsibility to monitor the implementation of the new constitutional system of devolved government (CIC 2014).

differ depending on whether the community is urban or rural, its economic position, and demographic features such as age. This reflects the position in Kenya, where county governments have responsibility for health services, while the national government has responsibility to develop health policy (Constitution, schedule 4; see also Box 5.4).

Decentralization presents challenges for constitutional implementation. It requires coordination between the agencies responsible for different aspects of implementation in order to avoid confusion about which level of government is responsible for providing a service or unnecessary duplication. Where one level of government provides funding to another, the amount of funding provided and restrictions on how it is used might affect the kinds of services provided. Despite these challenges, decentralization also has potential benefits for constitutional implementation. One is shared learning between localities: a program that is successful in one locality might then be picked up in other areas. Implementation needs might differ from region to region, however, so what works in one locality might not be a useful model for others, depending on the context.

Service delivery by NGOs

The executive might outsource aspects of service delivery. In relation to healthcare, private bodies might provide services that are funded, in part or in full, under a government scheme. In some cases, of which Afghanistan provides an example, NGOs might assume a key role in delivering healthcare services (see Box 5.5). There are, however, a range of challenges to constitutional implementation by contracting out the delivery of health services. Contracting service delivery might be a necessary short-term

Box 5.5. Service delivery by NGOs in Afghanistan

Article 52 of the Constitution of Afghanistan provides that 'the state shall provide free preventative healthcare and treatment of diseases as well as medical facilities to all citizens in accordance with the provisions of the law' and further that the 'establishment and expansion of private medical services as well as health centres shall be encouraged and protected by the state in accordance with the provisions of the law'.

However, due to the ongoing conflict and limited financial and personnel resources in the public system, the government does not have sufficient capacity or infrastructure to provide health services directly in all local areas. As a result, the government contracts with local and international NGOs to deliver health services. The executive is responsible for managing contracts and monitoring the delivery of services rather than directly providing the services itself. The government has been able to use contracts to promote good outcomes for women, for example by requiring contractors to provide accessible health facilities and employ female healthcare professions in order to improve women's access to health services.

solution, particularly where state institutions are not established or strong. However, the medium- to long-term goal of transition to direct provision and/or funding of healthcare services by the government requires building local capacity and ownership of the health system. Where different NGOs are separately contracted to provide health services there is a risk of duplication, inefficiency and gaps. Co-ordination and accountability mechanisms and basic standard rules for service provision are required to mitigate these risks (Sabri et al. 2007).

Service delivery is one of the most visible areas of constitutional implementation. It is the area in which most people directly interact with the executive and in which constitutional principles are directly put into practice. Where service delivery is understood as constitutional implementation, the executive can frame a rights-based and gender-responsive approach to service delivery. The example from Kenya, in which the CIC supported local service providers with practical and targeted advice on how to provide healthcare services as a human right and devolved function, demonstrates one way in which service delivery can be tied directly to constitutional implementation (see Box 5.4).

A key challenge identified in this area is the co-ordination of service providers across government departments, levels of government and public and private service providers. One way to address this challenge is to develop clear common standards on the quality and processes of service delivery that are applicable across all service providers, including standards that address the gendered aspects of service delivery. Common standards also provide a baseline for the executive and others, including civil society organizations, to monitor and evaluate service delivery. Another is to prioritize coordination among government and non-government actors in specific service delivery sectors.

Inclusive appointments

A third executive function relating to constitutional implementation concerns appointments to leadership positions in the government, such as Ministers, Cabinet

members and senior public servants. Ensuring gender balance across all institutions of government demonstrates a commitment to non-discrimination and equal opportunities. It facilitates gender-responsive constitutional implementation because women in leadership and public decision-making positions can shape executive functions to take account of the particular needs of women.

Constitutional provisions might place responsibility on the executive to adopt measures to accelerate the advancement of women in political and public life. For example, article 27(8) of the Constitution of Kenya provides that, in principle, not more than two thirds of the members of any appointive body shall be of the same gender and requires the state to take 'legislative and other measures' to meet this quota. It further provides in article 232(1)(i) that the values and principles of the public service include adequate and equal opportunities for women and men for appointment, training and advancement at all levels of the public service. Article 38(4) of Nepal's Constitution provides that women shall have the right to participate in all bodies of the State on the basis of the principle of proportional inclusion. The Constitution also sets out quotas for women members of village, municipal and district executive bodies in articles 215(4); 216(4) and 220(3).

Despite such constitutional provisions, there are still barriers to the appointment of women to executive positions. Significant barriers include the lack of adequate parental leave and allowances to support women to combine their professional and family responsibilities, discrimination against women in certain employment sectors (such as the military or police services), systemic discrimination against women in education, and entrenched cultural views about the role of women in public life. A key part of gender-responsive constitutional implementation requires addressing these barriers and appointing women to executive positions, including senior executive positions, so that the executive itself reflects and promotes gender equality.

Table 5.1. Key lessons

Implementation challenge	Facilitating factors/strategies
Policymakers lack knowledge and understanding of the new constitutional framework or provisions, including gender provisions	<p>Work closely with specialist commissions for constitutional implementation and/or women's commissions</p> <p>Joint collaborations of policymakers across relevant government agencies</p> <p>Expert advice and exchange programmes</p>
The gendered dimensions of policymaking are overlooked or marginalized in the constitutional implementation process	<p>Develop national action plans for gender equality and the advancement of women to guide work across all government agencies</p> <p>Establish dedicated women's ministries or commissions to advise, monitor and evaluate policies for women</p> <p>Provide policymakers with training on gender issues relevant to their policy responsibilities</p>
Responsibility for service delivery is spread across multiple agencies, levels of government and public and private entities	<p>Prioritize coordination across government and non-governmental actors in specific service delivery sectors</p> <p>Develop clear overarching standards on the quality and processes of service delivery that are applicable across all service providers, including standards that address the gendered aspects of service delivery</p>
Services are not delivered in a way that adequately responds to the needs of women or the principles of the constitution	<p>Service providers work closely with local communities to understand and address women's needs for specific services</p> <p>Empower a specialist agency to audit current service delivery and make recommendations in consultation with service providers</p>
Underrepresentation of women in the executive	<p>Adopt appointment procedures that value and enhance gender diversity within senior executive roles and the civil service</p> <p>Address systemic barriers to women's advancement within the executive, including discrimination and cultural expectations about the role of women in public life</p>

6. The judiciary

Role in constitutional implementation

The judiciary is the independent branch of government responsible for adjudicating disputes according to law. It includes courts of all levels, from criminal and civil courts where disputes are initially heard, to courts of appeal. It might also include specialist courts, such as an electoral court or a specialist Constitutional Court.

The judiciary's core function in constitutional implementation is interpretation. In many constitutional systems, the judiciary has the power to interpret the provisions of the constitution and to make final decisions about whether legislation or executive conduct meets the requirements of the constitution. Litigation is a potential avenue for individuals and civil society to hold government actors accountable for constitutional implementation. In performing its interpretative function, the court has the opportunity to interpret the constitution in a manner that protects and promotes substantive gender equality and facilitate gender-responsive constitutional implementation.

The institution of the judiciary must itself meet constitutional requirements designed to guarantee the independence and impartiality of the judiciary. For the courts to be effective constitutional implementers, the public must have confidence in their independence, integrity and expertise. Corruption, delay, and ineffective decisions can harm public confidence, and potentially turn people away from the courts to other (legal or extralegal) forms of dispute resolution. Building public confidence in the judiciary takes time and requires building the capacity of personnel within the judiciary and the support of other institutions of government and the community (Widner: 2001, ch 19).

Challenges to implementation

Judiciaries face a range of challenges when seeking to interpret the constitution in a gender-responsive way. These challenges, and the possible solutions, will be different in different contexts. There are significant points of difference in the way that judiciaries of different constitutional systems approach the task of constitutional interpretation and constitutional review. Often, these differences are deeply embedded in the particular constitutional and legal system. These understandings of the court's role and traditions of constitutional interpretation influence rules about access to courts, procedures for hearing and determining cases, and the outcomes in particular cases.

Constitutional interpretation

Courts in different constitutional systems take different approaches to constitutional interpretation. For example, some constitutional traditions privilege the original meaning and intention of the text of the constitution, while others are more comfortable

Box 6.1. Constitutional interpretation and gender parity laws in France

The 1958 Constitution of the French Fifth Republic enshrined the principle of equality, but did not include specific provisions for women's political participation.

In 1982, the Constitutional Council struck down legislation that required a maximum of 75 per cent representation for either sex on the list of candidates contesting municipal elections. It held that the law violated provisions of the Constitution that required suffrage to be 'universal, equal and secret', and the guarantee of equality. The Constitutional Council interpreted these constitutional principles to 'preclude any division of persons entitled to vote or stand for election into separate categories' and on this basis, the quota laws were unconstitutional (Constitutional Council Decision 82-146 DC, 18 November 1982).

After political lobbying for quotas and then parity, France instituted reforms to increase the number of women represented in public bodies. In 1999, article 3 of the Constitution was amended to provide that 'the law favours equal access of women and men to electoral mandates and elective positions' and article 4 to provide that political parties are to 'contribute to the implementation [of this principle] under the conditions set by the law' (Constitutional Law no. 99-569, 8 July 1999). The amendments provided the constitutional basis for new parity legislation, which requires all parties to list 50 per cent women and 50 per cent men as candidates on their lists for elections to the European Parliament, regional and Senate elections and municipal elections (Sineau: 123–25).

In 2006, legislation for gender parity for corporate boards of directors was also struck down by the Constitutional Council, which held that while the constitutional amendments made in 1999 authorized quotas for elected offices, it did not authorize quotas in other domains. In response, the Constitution was again amended (Constitutional Law no 2008-724, 23 July 2008). Article 1 now provides that 'Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'. The placement of this amendment in Article 1 is significant, as it positions gender equality as one of the fundamental principles of the Republic.

interpreting the requirements of the constitution in light of wider social changes within the state, or by drawing on international and comparative law.

In several of the case study countries, courts have reviewed legislative provisions which aim to increase the numbers of women in legislatures at the national, provincial and local levels by introducing quotas or gender parity. Two case examples, from France (see Box 6.1) and Costa Rica (see Box 6.2) demonstrate how courts have interpreted constitutional equality provisions in ways that support, or alternatively hinder, the implementation of the right to equal political participation through quotas or parity laws. In contrast to the restrictive interpretative approach taken by the French Constitutional Council, courts in Costa Rica have played an active role in interpreting and overseeing the implementation of the right to equal political participation.

A striking difference between these two cases lies in the approaches taken by the courts to interpreting constitutional equality provisions. The decisions of the French Constitutional Council demonstrate a formal conception of equality that focuses on the equal treatment of women and men. In contrast, the decisions of the Costa Rican courts emphasize that equality requires substantive equality and the need for affirmative action to redress historical discrimination against women in public life.

Box 6.2. Constitutional interpretation and gender parity laws in Costa Rica

The Supreme Electoral Tribunal of Costa Rica is an independent agency established by the Constitution. It is responsible for overseeing elections, political parties, the registration of voters and the conduct of political campaigns and has the power to make final decisions on the interpretation of constitutional and legislative provisions (Constitution, article 102).

Amendments to the Electoral Code in 1996 required that party lists of candidates for national and provincial elections include 40 per cent women. The Code did not specify further details on how this quota would be implemented. In 1997, the National Women's Institute (then called the Center for Women and Family) applied to the Supreme Electoral Tribunal to clarify the requirements of the quota law. In particular, the Women's Institute wanted to ensure that women were listed in ballot positions which gave them a real chance of being elected. The Tribunal upheld the 40 per cent quota, but did not issue directions about the position of women candidates on the ballot. While the number of women elected to the national legislature increased in 1998, women made up only 19 per cent of the members of the legislature.

After this result, the National Women's Institute again approached the Tribunal for an interpretation of the quota laws. The Tribunal revised the approach taken in 1997 and issued a resolution directing how political parties should implement the quota laws. The Resolution was drafted by the first woman judge appointed to the Supreme Electoral Tribunal, Magistrada Anabelle Leon Feoli. Her opinion cited Costa Rican constitutional provisions on gender equality as well as international treaties and held that affirmative action was necessary to address the unequal participation of women and men in political life. The resolution provided that women must be listed in electable positions on all ballots and that the 40 per cent quota must be met in each district, cantonal and provincial assembly and was not to be calculated as an overall total. The Tribunal directed political parties to make the required changes to their by-laws before the next elections. Later resolutions provided guidance on how parties should determine 'electable positions' on the ballot and confirmed that the 40 per cent quota was a minimum which could be exceeded (Resolution 2837, cited in Facio et al. 2005: 110). As a result, the percentage of women representatives in the national assembly increased to 35 per cent following the 2002 elections (Quesada 2003).

Costa Rica's Supreme Court has also supported the implementation of the right to equal political participation. For example, in 2008 the Court held that a political party violated the quota law when it relegated women candidates to low positions in their list. The Court emphasized that affirmative actions were required in order to achieve 'the equality of results, especially when the equality of opportunities cannot succeed even in removing formal barriers' (Sala Constitucional, Decision 9582-2008, quoted in Piscopo 2014: 12). Similarly, in a 2012 case, the Court held that alternating between women and men did not violate men's rights to equal treatment. It held that alternation was not special treatment for women, but was designed to achieve substantive equality, and that the right to elections affected the democratic system as a whole (Piscopo 2014: 12).

In 2009, a new electoral law was made to provide the principle of parity would apply to all elections after 2010. This law required that party lists alternate between female and male candidates. The law also required that political parties incorporate the principles of gender equality, non-discrimination and parity into their party structures (Electoral law No. 8765 of September 2009). However, political parties generally listed a male candidate first, resulting in the election of more men than women. In 2016, the Supreme Elections Tribunal held that parties must meet 'horizontal parity', by alternating between women and men as their first listed candidate on each of the seven provincial ballots (Arias 2016).

In Costa Rica, the judgments draw also on the principles of democracy, stating that the equal right of women and men to election was not just a right affecting individuals, but ‘the democratic system as a whole’ (Piscopo 2014: 12).

The Costa Rican judgments also demonstrate how openness to international human rights law can assist courts to interpret constitutional provisions in a gender-responsive way. The provisions on gender equality in the Costa Rican Constitution are very minimal, and provide only a guarantee of equal treatment before the law. However, most Latin American constitutions contain specific provisions that incorporate international human rights law into domestic constitutional law (Villagran 2015). Courts in the region therefore draw heavily on international human rights law, CEDAW and interpretations by international and regional bodies, when determining the constitutionality of laws and executive actions. The direct influence of international and regional human rights law is a significant reason why the courts in Costa Rica have interpreted minimal constitutional provisions on equality in a way that supports substantive equality and gender balance in public life.

The degree to which international law can be brought to bear on domestic constitutional adjudication will differ across constitutional systems. In monist states, international treaty commitments take direct effect in domestic law. In dualist states international treaty commitments must be incorporated into domestic law by legislation. In both cases, courts might look to international law for guidance when interpreting the meaning of constitutional rights provisions. Some constitutions, such as the South African Constitution, expressly require courts to consider international law when interpreting constitutional rights (article 39(1)(b)). Where it is not specified, the court itself might determine when it is appropriate to consider international law and how much weight it is given.

Another way to encourage gender-responsive constitutional interpretation is to raise awareness of constitutional provisions on gender equality and international and comparative law. This is particularly important where the constitutional provisions are new. Training judges, court staff and the legal profession can raise awareness of the new constitutional rights frameworks and develop their capacity and confidence to consider, test and interpret the new provisions. Workshops on social awareness, for example about issues faced by women such as violence or poverty, and training on gender equality, can enhance the ability of actors within the judiciary to develop gender-responsive constitutional interpretations. Training can be delivered in a number of different ways, through formal judicial education bodies, peer-to-peer mentoring, judicial exchanges and judicial conferences.

Constitutional review

Judiciaries also have different approaches to constitutional review, the process by which legislation and executive conduct is assessed for compliance with the provisions of the constitution. Some judiciaries take a robust approach to constitutional review, in that the court is willing to intervene in matters which raise questions of policy or politics and to issue remedies that direct and constrain government actors. In other systems, the judiciary might take a more deferential or cautious approach, interpreting the constitution and leaving the next steps of implementation to other branches of government.

Box 6.3. Constitutional review of gender parity laws in Tunisia

In order to implement the Tunisian Constitution's commitment to achieve equal representation of women and men in elected councils (article 46), in 2014 the legislature passed laws requiring vertical parity, i.e. that candidate lists alternate between men and women. There was a concern that this would not achieve parity because most party lists would list a male candidate first. The legislature rejected a proposal for horizontal gender parity, which would have required political parties to alternate between female and male candidates in the first position on candidate lists for each of Tunisia's electoral constituencies (Mekki 2014).

A group of members of parliament appealed to the l'instance provisoire chargée du contrôle de la constitutionnalité des lois (the provisional authority in charge of determining the constitutionality of laws) claiming that the legislature's decision to reject horizontal parity was unconstitutional. The Provisional Authority, which acts as Tunisia's interim Constitutional Council, upheld the laws as passed by the legislature, but did not give detailed reasons for its decision.

Cases presented at the workshop illustrate some different approaches. The first group relates to the review of legislation to implement the parity principle in Tunisia (see Box 6.3) and quotas in Costa Rica (see Box 6.4). The second relates to the review of actions taken by the South African government to implement the right to health (see Box 6.4).

The Tunisian provisional authority was unwilling to consider whether the methods chosen by the legislature to achieve the goal of parity were the best to give effect to the principle or to direct political parties and other branches of the government to take specific action to meet the constitutional requirements of parity (see Box 6.3). This approach may be contrasted to the approach taken by the Costa Rican courts, described above, which undertook to make detailed directions about how political parties should implement the quota laws, effectively filling in the gaps in the electoral code. There are many reasons for the difference, including the different nature and mandates of the judicial authorities and the different ways in which each court understands its constitutional role within the broader system of government.

The South African Constitutional Court has taken a robust approach to reviewing government actions to implement the Constitution, including the implementation of socio-economic rights such as the right to health (see Box 6.4). The Court has developed progressive and wide-ranging jurisprudence on the interpretation and implementation of constitutionally protected economic and social rights. Litigation on the right to health has served to hold governments accountable for their policy decisions and the manner in which they implement them (Gloppen 2008: 24). It provides an avenue for individuals and groups, including women, whose needs are marginalized by generalized policies to ensure that the executive understands and addresses their concerns.

This approach presents some challenges for the court and for constitutional implementation. One challenge is that courts are not 'institutionally equipped' to make the kinds of policy decisions that have wide social and economic consequences for the community (TAC case; paras 37–38). For this reason, courts need to confine themselves to the focused role of ensuring that the state meets its constitutional obligations. Even here, the court needs to rely on wide-ranging evidence from a range of government and

Box 6.4. Constitutional review of the implementation of HIV/AIDS policies in South Africa

In 2002 the Constitutional Court of South Africa heard a challenge to the South African government's healthcare program to reduce the transmission of HIV/AIDS from mothers to their children. The policy was developed as part of a wider response to the HIV/AIDS epidemic facing South Africa. The policy developed a program to provide voluntary HIV counselling and testing to pregnant women, prescribe and provide nevirapine (a drug which reduces the transmission of HIV from mothers to new-born children), and offer formula feed to HIV positive mothers who choose this option. The program was to be implemented in only two selected hospital sites in each province, one rural and one urban.

The Treatment Action Campaign, a civil society organization that campaigns for access to healthcare for people with HIV/AIDS, joined with other civil society organizations to bring a case to the Court (*Minister of Health v Treatment Action Campaign II 2002*). It argued that by restricting access to nevirapine only to the two selected sites per province, the government was not meeting its constitutional obligations. Article 27(1) of the Constitution provides that everyone has the right to access to healthcare services, including reproductive healthcare, while section 27(2) requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

The Constitutional Court held that confining the use of nevirapine in the public health system only to the selected sites was inflexible and unreasonable, because it denied mothers and babies at other public hospitals and clinics access to the medication. The Court held that the Constitution required the government to devise and implement within its available resources a comprehensive and coordinated program to realize the rights of pregnant women and their new-born children to have access to health services to combat mother to child transmission of HIV. It ordered to the government to formulate a new policy that included the provision of nevirapine to women in all public hospitals and clinics where medically indicated and training on the use of nevirapine for all counsellors in the public health sector. The South African executive's role in developing and implementing HIV policies, including its response to the Treatment Action Campaign case, is discussed in more detail in Chapter 5 on the executive.

non-government sources in order to evaluate the policy and determine whether it is consistent with the constitution. One way of meeting this challenge is to ensure that all interested groups can present evidence to the court, as discussed in relation to 'Access to Courts' below.

Another challenge is the risk that the government does not comply with the court orders, because it disagrees with the approach directed by the court or because of bureaucratic inefficiencies. Non-compliance with court judgments leaves those whose constitutional rights have been found to have been violated without redress and can undermine confidence in the judiciary and the Constitution. Courts can develop a range of strategies to mitigate this risk. One is to ensure that the remedy ordered by the Court is targeted to what is required to redress the constitutional violation. This might be different in different contexts and cases. In some cases, a declaration that a particular policy or action violates the constitution might be sufficient to cause the government to act to remedy the issue. In other cases, the court might have reason to be more prescriptive in its orders and outline the minimum requirements for the policy, as the South African Court did in the case in the Treatment Action Campaign case. Even

here, the Court formulated its order to acknowledge the need for flexibility, and left the executive free to change its policy if equally appropriate methods for achieving its purpose became available (TAC case: para. 114). In some jurisdictions, the court may exercise ‘supervisory jurisdiction’ and oversee compliance with its orders, for example by permitting or requiring the government to report to the court on its progress in implementing the policy. In any case, the court should take care to give reasons for its decision and explain its orders to increase the likelihood of compliance. Civil society can take up a role in monitoring compliance with court orders and raise issues of compliance with the courts or directly with the government or agency in question (see Chapter 8).

Finally, courts are limited to deciding the cases brought before them. Generally, litigation requires financial resources and knowledge of the law. There is then a risk that the law will be developed to protect the rights of advantaged social groups and marginalize those that cannot bring a case to court. Public interest litigation is one way in which civil society organizations can redress this imbalance (see Chapter 8). Another concern is that by focusing on one individual case, courts undermine long term national planning and priorities towards implementing the right to health (Gloppen 2008: 24). Both courts and litigants need to balance the outcomes for the individual and the wider social implications of the court’s decision.

Access to courts

People need to be able to access courts in order to seek redress for constitutional violations. As such, courts need to provide timely and accessible avenues for litigation. Courts are generally unable to investigate cases on their own motion and rely on litigants to bring constitutional issues before the court. Gender-responsive constitutional implementation requires that courts interpret constitutional provisions contextually, having regard to context and consequences of the law in question, including impact upon individuals and groups. The kinds of people who can bring constitutional cases before the courts, and how easy it is for them to do so, has a direct effect on how the judiciary can contribute to gender-responsive constitutional implementation.

There are many barriers to people seeking access to justice, including the costs of litigation, physical access to legal advice and courts and limited awareness and knowledge about constitutional rights. Civil society organizations have a key role to play in addressing some of these barriers (see Chapter 8). The judiciary itself can also facilitate access to courts. First, courts can develop or interpret the rules for standing broadly, so as to allow a wide range of individuals or organizations

to approach the courts for redress. In some countries, standing is narrowly interpreted so that only a person directly affected by a law or policy may bring a case to court. Where standing is interpreted broadly, courts can accept cases brought by individuals or groups, including women’s advocacy and human rights groups, or anyone seeking to act in the public interest.

Second, courts involved in interpreting constitutional provisions can accept submissions from interveners, that is, organizations who are not parties to the litigation but who have an interest in the outcome of the case. Interveners can provide the court with social context and experience of the law in practice. Intervention is an important avenue for

women's rights groups to ensure that courts consider women's interests in constitutional litigation.

Third, specialist courts and procedures may help to make remedies more accessible and timely. For example, the specialized electoral tribunals in Costa Rica and Mexico have processes designed to ensure they can deliver timely decisions during the electoral process, rather than making litigants wait until after the election, when it may be too late for the remedy to be effective. The amparo process is a feature of Latin American judicial systems. It provides a specific, relatively inexpensive and quick procedure to protect constitutional rights. Amparo decisions bind only in the individual case and the remedy provided is often to compel a particular action, rather than compensation.

Composition of courts

Women are under-represented on the highest courts of most countries. The presence of women judges is important for gender-responsive constitutional interpretation and implementation. Women judges bring different knowledge, experience and values to bear on their decision-making, and diversity allows the court to develop the law in a way that reflects the needs and concerns of women as well as men. A judiciary that reflects the gender and other forms of diversity of the community is more likely to have the public's confidence. The presence of women judges demonstrates that appointments to the judiciary, as well as other constitutional offices, are made on an equal basis without discrimination (Rackley 2013: 23–28).

There are a number of ways to facilitate the appointment of more women judges. Some constitutions impose requirements for gender balance on courts. For example, article 174(2) of the Constitution of South Africa states that 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'. Methods to increase the number of women judges should be adapted to the conditions of the particular legal system. It is generally not sufficient to remove formal discriminatory barriers, as the reasons for the underrepresentation of women is due to entrenched gendered understandings of the judicial role and gender imbalances in other parts of the legal profession (Rackley 2013). An open and transparent appointment process and a representative appointing body (as article 171 of Kenya's Constitution requires) can foster greater diversity on the courts.

Table 6.1. Key lessons

Implementation challenge	Possible facilitating factors and strategies
Courts need to interpret constitutional provisions in a way that supports substantive and not just formal equality	<p>Utilize relevant international and comparative law on gender equality when interpreting constitutional provisions</p> <p>Ensure that court processes enable interested people, organizations and experts, including civil society organizations representing women, to present submissions and evidence</p> <p>Train judges, court staff and the legal profession in new constitutional frameworks to develop their capacity and confidence to consider, test and interpret the new provisions</p> <p>Provide training to judges on issues of gender equality and women's rights</p>
Non-compliance with court orders	<p>Courts clearly explain the reasons for their decisions and orders</p> <p>Court orders are clear and targeted to what is required in order to redress the constitutional violation</p> <p>Avenues for interested parties, including civil society organizations, to monitor compliance and return to court if necessary</p>
Women struggle to access courts because of procedural or financial barriers or lack of knowledge about their constitutional rights	<p>Courts adopt broad standing rules so that a wide range of individuals and organizations can approach the courts on constitutional cases</p> <p>Courts permit interested parties to intervene in constitutional cases to provide information and make submissions</p> <p>Establish specialist courts and tailored procedures to deal with specific kinds of constitutional cases, such as electoral matters or rights violations</p>
The composition of the court does not reflect the gender diversity of the community	<p>Increase the number of women judges through quotas, inclusive appointment procedures and/or removing discrimination and systemic barriers that prevent women taking up judicial positions</p>

7. Independent institutions

Role in constitutional implementation

Independent institutions are an increasingly common feature of new constitutions. They provide a range of accountability and transparency mechanisms directed to monitoring and reviewing the laws made by the legislature and the actions of the executive. They may also have an advocacy function and provide advice and recommendations to parliament and the executive.

Examples of independent institutions include a National Human Rights Commission, Ombudsman, Auditor-General and Electoral Commission. Some constitutions establish specific Women or Gender Commissions, mandated to develop policies and programs, report on compliance with international treaties relating to gender equality, monitor and evaluate the mainstreaming of gender issues across government, and conduct research. For example, the National Women Commission in Nepal is a constitutionally established body with a mandate to formulate and review policies and programs concerning the rights and interests of women and make recommendations for effective implementation; monitor compliance with international obligations relating to women; and recommend law reforms (Constitution of Nepal: articles 252–53).

The National Gender Equality Commission of Kenya has a legislative mandate to monitor and advise on the integration of gender equality and freedom from discrimination in all national and county policies, laws and regulations. It also has powers to investigate complaints and to conduct research and education activities. It works with other government institutions to develop standards to implement policies for the progressive realization of economic and social rights, and for example was involved in setting standards and indicators for implementing the right to health (National Gender Equality Commission of Kenya 2016).

Independent institutions perform various roles in constitutional implementation. As independent agencies, they can provide impartial information to other branches of government, including the parliament and the courts, to inform policies and decision making. They can identify gaps and advocate for reforms, particularly where an issue might not be considered a priority by political leaders or in mainstream social discourse. For example, in 2007 the South African Human Rights Commission initiated a public inquiry into Access to Healthcare Services. It took written submissions, conducted public hearings and visited over 100 healthcare facilities in order to assess the realization of the right to access healthcare in South Africa. The Commission made specific and wide ranging recommendations for reform, covering decentralization, the interaction between public and private health sectors, overcoming shortcomings in resources, and addressing discrimination against vulnerable groups in the provision of healthcare services (South African Human Rights Commission 2007).

One innovation from Kenya is the Commission for the Implementation of the Constitution (CIC), which was constitutionally mandated and established by legislation for a five-year term. The CIC had a wide mandate to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the constitution, guided by the implementation timeline in Schedule 5 of the Constitution. The CIC coordinated with the Attorney-General and the Kenya Law Reform Commission to prepare implementing legislation. One example of the CIC's work in this area is its work to develop legislation to implement the two thirds gender rule in the national parliament, discussed in Chapter 4 of this paper. The CIC also worked to review and reform administrative procedures. An example is its work with county healthcare providers to implement the right to health, discussed in Chapter 5.

The CIC regularly reported to a select committee of parliament, the Constitutional Implementation Oversight Committee, on the progress of constitutional implementation and published quarterly and annual reports on its activities. The CIC took a wide-ranging approach to its mandate. In particular, it emphasized cooperation between the Commission, government agencies and other actors involved in implementing the constitution. It undertook a program of structured and continuous public engagement in order to facilitate public involvement in constitutional implementation. It conducted public workshops and consultations, published advisories on constitutional matters, and issued guidelines on how members of the public could effectively engage in the implementation process (CIC 2012: 3.2–3.3).

Afghanistan has also established a commission to oversee constitutional implementation. Article 157 of the Constitution of Afghanistan provides that an independent commission for the supervision of the implementation of the Constitution is to be set up by law and its members appointed by the President. The Independent Commission for Overseeing the Implementation of the Constitution was established in 2010. The Commission has taken on a role in interpreting constitutional provisions and supervising the observance of the Constitution by government and non-government actors. The exercise of this power by the Commission is controversial and the relationship between constitutional interpretations issued by the Commission and those by the Supreme Court remains unclear (Hamidi and Jayakody 2015: 29–31).

Challenges to implementation

Independent institutions can be a strong advocate for constitutional implementation and gender-responsive policies and laws. Their effectiveness in this role depends on a range of factors, including the terms of their mandate, independence from government, resources (both personnel and financial) and ability to work with the wide range of stakeholders engaged in constitutional implementation. In order to support gender-responsive constitutional implementation, independent institutions need a strong understanding of gender and how it affects law making, policy development and service delivery.

There are some potential risks in relying too heavily on independent institutions to fulfil outcomes such as constitutional implementation or substantive gender equality. No single institution can be the panacea to all deficiencies and systemic problems at all levels of the state. Rather, independent institutions should be regarded as supporting, and if necessary holding to account other government institutions responsible for

constitutional implementation. Independent institutions to oversee constitutional implementation might be particularly useful where there are concerns about executive overreach and judicial independence or where there have been deficiencies in the constitution-making process (Hofisi 2015). Independent institutions with specific responsibility for promoting gender equality can perform functions similar to those of women's ministries discussed in Chapter 5, but independence from government might enable women or gender commissions to perform additional functions such as dispute resolution, audits or independent inquiries.

One risk is that the existence of a specialist commission may discourage efforts to infuse the values of constitutionalism and/or gender across all levels of government and all agencies. There may also be some pushback from existing institutions who perceive the independent institution to be taking over functions that belong to them. It is therefore important that independent institutions cooperate with all agencies of government to support, rather than assume, their functions within the government. The Kenyan CIC sought to do this by working collaboratively across all relevant government agencies as well as civil society and by conducting workshops and training to build capacity in constitutional implementation across the whole of government. Another way to address this concern is to make it clear that the implementation commission is transitional and that its responsibilities will be transferred to other agencies once the initial implementation phase is complete.

Finally, it is important to ensure that independent institutions are in fact independent and have the confidence of both government and the public. Independence can be supported in different ways. One is to establish the institution and enshrine its mandate in legislation or in the constitution itself. The independent institution must have a guaranteed source of funding so that the institutions funds and work are not dependent on another government agency. Appointments to the independent institution should be based on merit and reflect the diversity of the community, including gender balance. Their appointments should be for a specified term and protected from arbitrary termination. The independent institution needs working practices and procedures that enable it to work within government and within the wider community, for example by providing regular public reports, building sustainable links and collaborations with government and non-government organizations, and conducting workshops to educate stakeholders about the function and practices of the institution.

Table 7.1. Key lessons

Implementation challenge	Facilitating factors/strategies
The existence of an independent commission might risk that other government agencies abrogate their responsibilities for constitutional interpretation	The independent institution works with and supports other government agencies to meet their responsibilities by working collaboratively across government agencies; and providing training to build capacity in gender and/or constitutional implementation across government
The institution needs the independence, resources and authority within government and the wider community in order to effectively fulfil its mandate	Design and operate the institution to promote independence through appointment processes, secure funding and resources, and working practices that build sustainable links with government and civil society

8. Civil society

Role in constitutional implementation

Civil society encompasses social movements, non-governmental organizations, public interest organizations, academia and the media. In some countries, civil society organizations are defined and regulated by law. The diversity of civil society means that it might perform a variety of different roles in constitutional implementation. Civil society engages with all government institutions to support their constitutional implementation responsibilities and to hold them to account. Civil society actors may advocate for law reform; assist in the delivery of services; monitor and report on government conduct; and engage in public interest litigation to test and uphold constitutional provisions.

A particular strength of civil society is its direct connection to the public. As such, civil society actors have a core role in the cultural change aspect of constitutional implementation and can work directly with the public to raise awareness and encourage social action on specific issues. Through their work, many civil society organizations also have direct knowledge of the communities that they serve and represent, and can therefore provide the information and evidence to inform government policies that meet the actual needs of women and communities and educate government actors to promote cultural change within government institutions.

Challenges to implementation

Advocacy and education

Entrenched stereotypes and cultural expectations about women and their place within society present a significant and multifaceted barrier to gender-responsive constitutional implementation. Civil society organizations which represent women or particular groups of women and advocate on gender issues work in different ways to raise gender awareness in the community to support constitutional implementation. The form of advocacy and education will depend on the local context and the nature of the issue. Two examples—one from Mexico on the implementation of the right to equal political participation and the other from Afghanistan on the gender-responsive implementation of the right to health—serve as diverse examples of ways in which civil society organizations work within their particular contexts. In the case example from Mexico (see Box 8.1), the advocacy work of civil society organizations was directed at political parties and government institutions to promote the legal and structural changes necessary to increase the representation of women in elected legislatures. The case example from Afghanistan (see Box 8.2) illustrates a different dynamic, in which the advocacy work of civil society is directed to community-based institutions.

Box 8.1. Advocacy for gender parity in Mexico

Mexico introduced voluntary quota laws for political parties in 1993 and compulsory quotas in 1996. Although the compulsory quota laws were strengthened over the 2000s and the number of women in parliament increased, women were still underrepresented (Lucio 2014). One reason for this was that the Electoral Law permitted political parties to avoid the quota when candidates were directly elected by the party. In 2011, a group of women legislators and activists challenged this exemption before the Electoral Tribunal of the Judicial Power of the Federation. The Electoral Tribunal held that direct internal party election of candidates did not exempt political parties from complying with the quota laws, which required women fill 40 per cent of the candidate list. The members of some political parties resisted this decision, claiming that there were no women candidates available. In response, women's activists published a list of 1000 women who were available to run as candidates and women quickly registered as candidates.

Broad and inclusive coalitions of women from different political parties, public servants, academics, lawyers and others cooperated to advocate for Mexico to adopt parity laws. A particular strength of the movement was that it was focused not on the rights of individual women candidates or one political party, but on the broader societal goal of constitutional change to implement gender parity.

In 2014, article 41 of the Constitution of Mexico was amended to require political parties to make rules to ensure gender parity in the nomination of candidates for national and local legislative elections. Legislation was enacted to give effect to this constitutional provision, requiring that 50 per cent of the candidates on all party lists were women and that lists alternate between women and men candidates. The parity principle was implemented for the 2015 elections and 211 women were elected to the House of Representatives, comprising 42.2 per cent.

Civil society organizations can have a profound impact on the community's understanding of their constitutional framework and their rights. Without community awareness of the constitution and its impact on women and women's rights, there is a risk that the concept of constitutional rights and gender equality are words on a page and are very distant from the practical lives of women. Civil society organizations can operate across many different layers of activism and education. They can advocate for change within the community through education, providing services and raising awareness about women's rights. They can also advocate for change to government by lobbying government and mobilizing community support. Often, civil society organizations combine both aspects, bridging the gap between government and community in both directions.

Civil society organizations face many challenges in their work. Challenges specific to their role in gender-responsive constitutional implementation relate first, to how civil society groups are organized and linked within the community; and secondly how they access and work with government.

A significant challenge for civil society organizations is developing sustainable ways to engage with the community. One way to meet this challenge is to conduct research in order to understand the particular community. For example, in Afghanistan, research showed that many people access information through radio or through their local mosques and civil society organizations have used these findings to target their messages. Another way to meet this challenge is to identify trusted institutions within the community and work with them, as illustrated by the case example from Afghanistan

Box 8.2. Working with religious communities in Afghanistan

In Afghanistan, local and international NGOs work to provide healthcare services to women. Islam is the official religion of Afghanistan and article 3 of the Constitution provides that 'no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan'. There is entrenched opposition to women's rights from sectors of the community, deriving from different views and understandings of Islam.

It is therefore important that NGOs could engage with religious leaders to change the cultural and religious attitudes that constituted barriers to women's rights and access healthcare services. NGOs that advocate for women's rights have worked to identify religious leaders who support women's rights and worked with them to form local committees to develop achievable goals that protect and promote women's rights and respond to local issues. The committees are based on the values of respect and working together, and there have been some successes as local communities take small steps towards understanding and implementing women's rights at the local level.

(see Box 8.2), where advocates have established committees with local religious leaders. This approach has been described by the United States Institute of Peace as the 'three pillar' approach, bringing together political activists, legal advocates and religious leaders to develop strategies to sustainably advance women's rights (Kakar and Nozell 2015). Different contexts will require different approaches to sustainable cultural change.

Civil society organizations vary in size, funding and the nature of their mandates and constituencies. The case example from Mexico shows that coordination with other civil society groups can produce a powerful lobby for change. There are two broad approaches to building alliances. One is to create an umbrella organization that can act as a peak body to coordinate and represent a range of organizations with similar interests. The other is to build alliances of diverse organizations around a single issue. Working with diverse groups with different interests and mandates, ranging from grass roots advocacy movements to political and religious organizations to the media, present challenges but can potentially broaden community support and foster deeper cultural change.

Particularly difficult questions for civil society organizations can arise where alliances and collaborations potentially make them and their message a target for criticism. Some civil society organizations have to find a difficult balance between maintaining their commitment to their core purpose and the trust of their constituents, and working with organizations that may not share the same values. Taking up a role in constitutional implementation may mean working closely with and receiving funding from a government whose policies the organization does not always support. In some contexts, the receipt of international donations and funding can expose civil society organizations and their message to local criticism. In order to maintain public confidence, civil society organizations need to manage their public image, be transparent about sources of funding and support, and clearly affirm their mandate, values and practices.

A second set of challenges relates to how civil society organizations work effectively with the institutions of government, both to support their work in constitutional implementation and to hold them accountable for their constitutional obligations.

In order to fulfil this function, civil society organizations need to understand the constitutional processes in their country, including law and policy, service delivery and litigation (see Box 8.3). Civil society organizations can productively intervene in these processes to enhance the government's understanding of gender issues and needs of the community by providing first hand evidence and expert views. In order to do this, civil society organizations need to be able to access the institutions of government. Government can foster access by adopting transparent procedures that are open and responsive to input from women and civil society organizations that represent them and Chapters 4 to 6 outline some specific ways in which the legislature, executive and judiciary can support public participation and meaningful consultation. Finally, civil society needs space and freedom to act and speak in order to serve and represent their constituents. Laws and policies that limit freedom of expression and which restrict civil society organizations' capacity to organize or access funding and resources hinder the capacity for civil society organizations to advocate and assist in constitutional implementation.

Public interest litigation

One specific way in which civil society can have a significant impact on constitutional implementation is through public interest litigation. Public interest litigation arises where a civil society organization supports an individual to bring a case that has wide ramifications for the rights of disadvantaged groups. Public interest litigation can support gender-responsive constitutional implementation in a range of different ways. It provides access to justice for disadvantaged groups who may not be aware of their legal rights or have the financial and other resources to commence litigation themselves. It provides the court with an opportunity to interpret constitutional provisions and consider, for example, the meaning of equality or the specific requirements of women's right to health. Public interest litigation can hold the government to account by challenging laws and policies that violate the constitution, or by identifying areas where governments have failed to act. Litigation can be a focal point for civil society organizations to raise awareness about women's rights issues and lobby for change.

FIDA Kenya's involvement in public interest litigation (see Box 8.3) demonstrates that it is a powerful mechanism to ensure that constitutional implementation meets the needs of disadvantaged women who would otherwise be marginalized and discriminated against by government and hospital policies and practices. The cases demonstrate some of the benefits of the involvement of civil society organizations in litigation. Organizations can identify pressing issues for litigation and petitioners to bring the case. They can bring social, cultural and economic contexts to the attention of the court so that the court understands how the constitution and the laws are affecting women in practice. They can use the litigation to raise awareness about the issue, for example through press releases and information sheets.

There are some barriers to public interest litigation. Court rules that restrict the right to bring a case to court only to victims or persons directly affected by the issue limit the ability of civil society organizations to commence litigation. Litigation is costly, and civil society organizations may not have the funds to support a case. One risk of public interest litigation is that a legal dispute over the meaning of a constitutional provision can delay the implementation of the right, as has occurred in the abortion debate in

Box 8.3. FIDA Kenya's litigation on women's right to health

The Federation of Women Lawyers (FIDA) Kenya is women's rights organization with over 30 years' experience in providing legal aid services to women and advocating for structural, institutional and legal reforms to protect women's rights and gender-responsive laws and policies. FIDA Kenya engages in public interest litigation as a means to address widespread and systemic constitutional violations affecting women. In some cases, it has commenced litigation, in others it has intervened as an interested party to advocate for women's rights. Two examples concern women's right to healthcare services, including reproductive healthcare, as provided by article 43(1)(a) of the Constitution.

Access to safe legal abortions

In 2015, FIDA Kenya launched a constitutional case against the Ministry of Health, the Attorney General and Director of Medical Services seeking to protect women's health by ensuring women have access to safe legal abortions (*FIDA Kenya v Attorney General*, Petition No 266 of 2015, High Court of Kenya). The 2010 Constitution legalized abortion services when the life or health of a woman is in danger and in cases of emergency. However, the Ministry of Health withdrew its 'Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya', which clarified when medical professionals could perform safe abortion services under the Constitution. The Director also wrote a memo to all public and private healthcare workers stating that the Constitution makes abortion on demand illegal and that it was also illegal for health workers to participate in training on safe abortion or the use of drugs for medical abortions. FIDA Kenya asked the court to determine whether these actions violate women's right to health and to order the government to develop guidelines on access to safe legal abortions and associated healthcare under the Constitution. In order to bring the case, FIDA Kenya identified three petitioners, two healthcare workers and a 15 year old girl who became pregnant after being raped and had an unsafe abortion and as a consequence suffers from chronic kidney disease. The High Court has accepted the petition and will hear the case. In association with the case, FIDA Kenya has produced press releases and information sheets explaining why they are bringing the case and the urgency and importance of the issue for women in Kenya.

Detention of women unable to pay for maternal healthcare

Another public interest case challenged the practice of detaining women at maternity hospitals when they are unable to pay their medical bills (*Millicent Awuor Omuya v Attorney General* (2015) Petition No 562 of 2012, High Court of Kenya). The two women who brought the case were poor and unable to pay their maternity bills. Both were detained at the hospital in poor conditions, in which they shared beds with other women and their babies or slept on the floor, were given insufficient food and medical attention, and separated from their families. The High Court held that the detention of the patients was not authorized by any law and violated their constitutional rights to freedom and security of the person. It also found that the women had been treated in a cruel and degrading manner in violation of their right to dignity. The judgment also considered the right to health, and drew on studies showing that user-fees for health services disproportionately affect women who incur the costs of reproductive healthcare. The Court stated: 'We have not, as a society, clearly internalized the fact that denial or neglect to provide interventions that only women need is a form of discrimination against women. As such, the lack of state provision or facilitation of access to affordable maternal healthcare, including delivery and post-natal care, is a facet of discrimination against women' (para. 184). The court ordered the government to develop clear procedures for implementing a fee-waiver system and to take legislative, administrative and policy measures necessary to eradicate the practice of detaining patients who cannot pay their bills. The court also awarded compensation to the two women.

During the course of the litigation the government issued a directive to remove all charges in respect of maternity services in public hospitals. Despite this, some hospitals continue to detain women who cannot afford to pay for their bills. In such cases, FIDA has written to the hospital to bring the Court's decision to their attention, and where necessary, brought legal proceedings.

Kenya. Because public interest litigation is strategic, those bringing it need to consider the wider political and social context and plan what to do if the court rejects the case or interprets the constitution in a way that is not gender-responsive or favourable to the rights of women. Finally, even where the court's judgment is favourable, there is a risk it will be ignored or not implemented in practice. The involvement of FIDA in following up further cases of unlawful detention of mothers in hospitals is an example of how civil society organizations can monitor the implementation of court decisions, and ensure that the judgments are followed in practice.

Table 8.1. Key lessons

Implementation challenge	Facilitating factors/strategies
Building sustainable links within the community in order to represent the community and to promote cultural change, particularly relating to social norms about women and their role in society	<p>Build alliances across diverse civil society organizations to mobilize support on specific issues</p> <p>Create a peak body to coordinate and represent a range of different organizations</p> <p>Civil society organizations are transparent about their mandate, objectives and sources of funding</p>
Working effectively to support and monitor the work of government actors towards gender-responsive constitutional implementation	<p>Civil society understands government processes for law and policy making, service delivery and litigation</p> <p>Government processes that are open and responsive to civil society</p> <p>Civil society has freedom to speak and act to organize and represent all groups within the community</p>
Bringing public interest litigation to protect the constitutional rights of disadvantaged groups and to raise awareness about a particular issue	<p>Combine legal knowledge and awareness of issues facing women in order to identify issues, petitioners and opportunities for strategic litigation</p> <p>Mobilize around public interest litigation to raise awareness in the community and build a movement for change</p>

9. Conclusion

Chapters 4 to 8 of this paper examine the role of five key actors—the legislature, the executive, the judiciary, independent institutions and civil society—in constitutional implementation. In each chapter, case examples were used to identify some of the specific challenges to gender-responsive constitutional implementation facing each actor and to suggest some facilitating factors and strategies to meet these challenges.

The discussion in each chapter demonstrates that the challenges of constitutional implementation, and the potential solutions, vary depending on the particular context of the country, its particular needs, the structure of its institutions and the social, economic and political circumstances. As such, there is no one-size-fits-all approach to gender-responsive constitutional implementation. However, the analysis in this paper suggests seven overarching practices that, when adapted to suit particular contexts, can facilitate gender-responsive constitutional implementation by all actors.

Recommendations

1. Women should be involved in all aspects of constitutional implementation

Gender-responsive constitutional implementation requires government actors to understand and respond to the specific needs of women. In order to do so, government actors need to include women in constitutional implementation. Women must be represented in all decision-making bodies. Government institutions should actively engage women through consultations, information sharing and links with civil society and should provide women real access through transparent and open processes.

2. Shared responsibility for gender-responsive constitutional implementation

Constitutional implementation is the responsibility of all and the efforts of all actors need to be coordinated towards the shared goal of substantive gender-equality. It cannot be the responsibility of a single branch of government or left solely to a specialist commission. All institutions of government and civil society have a role in the technical, interpretative and cultural change dimensions of constitutional implementation. These institutions are interrelated, so that if one institution does fulfil its role in constitutional implementation other institutions operate to hold it to account.

3. Incorporate gender into all stages of constitutional implementation

Where there is a new constitution to implement, there might be pressure to establish institutions and make laws first and think about gender later. There is a risk that the gendered dimensions of constitutional implementation and its impact on women will be marginalized in the process, particularly where the implementation task is great and the institutions and processes of government have to be established anew. It is important that rather than being seen as something that can be added later, gender is built into all constitutional implementation processes from the beginning.

4. Work within the particular context

Constitutional implementation cannot be isolated from the political, economic and cultural context of the state and its people. Constitutions take practical effect over time and in different ways, depending on how they are technically implemented, interpreted and culturally embedded. The same constitutional provision can be implemented differently in different contexts. There is no single best path of constitutional implementation that produces substantive gender equality. Rather, the processes of constitutional implementation need to work with the challenges of the particular context and be based on an understanding of how institutions work within that society.

5. Seize the momentum of constitutional change

Constitutional implementation requires political will, technical knowledge and capacity, resources, and a sense of ownership of the constitution. Making a new constitution is often a time of great promise, particularly where the constitution making process engages civil society and the wider public. However, a new constitution marks the beginning, and not the end, of transformation. The processes of constitutional implementation need to harness the momentum of constitution making and continue to engage the public. Civil society organizations need to continue to advocate for the realization of goals reflected in the new constitution as early as possible before other priorities take over.

6. Constitutional drafting with an eye to implementation

Constitutional drafters might consider including specific provisions relating to implementation in the text of the constitution. In particular, constitutional drafters might consider including an implementation schedule. Before adopting this approach, drafters should consider potential limitations, including that it is likely to focus only on technical implementation; that it must permit some flexibility to allow government to respond to changing priorities; and the need to create accountability mechanisms. Constitutional drafters might also consider establishing an independent implementation commission to monitor and provide advice on the processes of constitutional implementation. To be effective, such a commission must be able to work across all institutions of government and civil society and with the public. To foster sustainable constitutional implementation, it is important that the commission is not regarded as responsible for constitutional implementation, but rather that its role is to support and facilitate the implementation functions of all institutions of government and civil society organizations.

7. Constitutional drafting with an eye to gender-responsive implementation

Gender-responsive constitutional implementation is supported by gender-specific constitutional provisions, including but not limited to provisions for substantive gender equality, special measures to promote women's participation in public life, and recognition and protection of specific women's rights. Institutions, including the legislature, executive, judiciary and independent institutions, must be designed so they are open and accessible to women. Constitutional drafters might also consider establishing specific gender commissions to advise, monitor and advocate for gender-responsive constitutional implementation; or including gender in the mandate of an overarching constitutional implementation commission.

Areas for further research

Constitutional implementation is an under-researched aspect of constitution building. This Paper makes an early comparative contribution to discussions on constitutional implementation as a distinctive step in constitution building, but there is scope for further research.

There is a need for a systematic study on the processes of constitutional implementation. The challenges of implementation are not unique to constitutions and have been analysed in the literature on legal transplants and law reform. Bringing the insights of this literature to bear on the specific task of constitutional implementation would help to develop a better understanding of the processes and challenges of constitutional implementation.

This paper focused on the role of five actors in constitutional implementation. Various other actors have institutional or social responsibilities for constitutional implementation in different country contexts. Targeted comparative research into, for example, the role of prosecutorial offices, lawyers associations, specialist implementation agencies and political parties in constitutional implementation could illuminate the role of these actors in constitutional implementation and highlight the importance of context to understanding constitutional implementation.

Those engaged in constitutional design and drafting are keen to understand how constitutional design affects constitutional implementation. While there is clearly a link between design and implementation, the case examples discussed in this paper suggest that a range of other factors, including the manner and context of technical implementation, constitutional interpretation and cultural dimensions, inform the way in which constitutional text is realized in practice. A comparative study that controlled for these variations is necessary to shed light on the impact of design choices on implementation.

Finally, Chapter 2 of this paper set out three requirements of gender-responsive constitutional implementation—substantive equality, understanding and addressing gender stereotyping, and institutions that are open and responsive to women—to frame the activities of those engaged in constitutional implementation. There is scope to further develop the criteria for assessing gender-responsive constitutional implementation, drawing on existing gender analyses of constitutions, laws and institutions.

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Annex. Workshop agenda

Gender-Responsive Constitutional Implementation

‘From paper to lived reality: Implementing women’s constitutional rights’

26–28 February 2016, Kathmandu, Nepal

Day 1: Friday 26 February 2016

9:00 – 9:45	Breakfast and registration
9:45 – 10:20	Opening and Welcome
	<p>Welcome: gfr Sheri Meyerhoffer, Head of Mission, International IDEA Key messages: Melanie Allen, Programme Officer, International IDEA Opening remarks: Hon Minister Agni Prasad Kharel, Minister of Law, Justice and Parliamentary Affairs</p>
10:20 – 10:30	Group photo

10:30 – 12:00	<p data-bbox="443 280 965 309">Session I: Women’s political participation rights in Nepal</p> <p data-bbox="443 342 831 371">The Session will address following issues:</p> <p data-bbox="443 409 1225 539">How does the current constitution of Nepal approach the rights of women to political participation? How does it approach the rights of women from marginalized communities? Does this represent an advancement in the legal protection of women’s political rights?</p> <p data-bbox="443 577 1189 640">What is the status of women’s political participation and representation in Nepal today? What are the key challenges?</p> <p data-bbox="443 678 1139 741">What are the implications of the new federal structure on women’s political participation and representation?</p> <p data-bbox="443 779 1214 842">What will political parties need to do in order to fulfill women’s constitutional rights to political participation?</p> <p data-bbox="443 880 1117 943">Moderator: Tek Prasad Dhungana, Secretary, Ministry of Law, Justice, and Parliamentary Affairs</p> <p data-bbox="443 981 533 1010"><u>Speakers:</u></p> <p data-bbox="443 1048 1187 1111">Sapana Pradhan Malla, Former Member of the Constituent Assembly-Legislative Parliament I, Senior Advocate</p> <p data-bbox="443 1149 1118 1211">Mohna Ansari, Commissioner and Spokesperson, National Human Rights Commission</p> <p data-bbox="443 1249 1225 1312">Lucky Sherpa, Former Member of the Constituent Assembly-Legislative Parliament I, Women’s rights activist</p>
12:00 – 12:15	Break

12:15 – 13:30	<p>Session II: Implementing constitutional provisions on gender equality in political and public life – Institutional dynamics of constitutional implementation</p> <p>The Session will address following issues:</p> <p>Which constitutional design and institutional factors were instrumental to positive outcomes in these cases?</p> <p>What factors determined the adoption of effective enabling legislation?</p> <p>Despite high numbers of women in politics (national and subnational), what are the outstanding challenges?</p> <p>Moderator: Nana Kalandadze, Programme Officer, International IDEA</p> <p><u>Speakers:</u></p> <p>María Del Carmen Alanis Figueroa, Judge, Electoral Tribunal of the Federal Judiciary, Mexico</p> <p>Réjane Sénac, Chair of the Commission for Parity, High Council for Gender Equality, France</p>
13:30 – 14:45	Lunch
14:45 – 16:00	<p>Session III: Constitutional provisions on gender equality and their implications on political parties as key gatekeepers of equality in political participation</p> <p>The Session will address following issues:</p> <p>Do parties self-identify as subjects of constitutional provisions on gender equality?</p> <p>What direct and indirect effects have the constitutional provisions on gender equality had on the behavior of political parties in elections and in internal party management?</p> <p>What role have the political ideologies of various parties played in this regard?</p> <p>What methods has the state used to encourage positive actions from political parties? How to sustain such measures over time?</p> <p>Moderator: John Lovdal, Senior Program Manager, National Democratic Institute Nepal</p> <p><u>Speakers:</u></p> <p>Salsabil Kelibi, Vice President, Arab Association of Constitutional Law Constitutional Law, Faculty of Law, Political and Social Sciences of Tunis, Tunisia</p> <p>Nana Kalandadze, Programme Officer, International IDEA</p>

16:00 – 16:15	Break
16:15 – 17:30	<p>Session IV: Role of the judiciary in the implementation of women's constitutional rights to political participation</p> <p>The Session will address following issues:</p> <p>What has been the role and approach of the judiciary to gender equality in political and public life?</p> <p>What has influenced the judiciary's positive and progressive stance on this issue or vice versa?</p> <p>Are court decisions effectively implemented by all actors?</p> <p>Is litigation being strategically used by various groups? Is litigation available for low-income groups?</p> <p>Moderator: Phuspa Bhusal, Former Member of the Constituent Assembly-Legislative Parliament I and Central Executive Committee Member of the Nepali Congress Party, Nepal</p> <p><u>Speakers:</u></p> <p>Anabelle León-Feoli, Former Justice at the Supreme Electoral Tribunal, Costa Rica</p> <p>Catherine Mumma, Former Commissioner, Commission for the Implementation of the Constitution, Kenya</p>
18:15	<p>Welcome dinner</p> <p>Keynote address: Tirtha Man Shakya, Former Chief Secretary of the Government of Nepal, Former Chairperson of Public Service Commission, Constitutional expert</p>

Day 2: Saturday 27 February 2016

9:00 – 9:10	<p>Convening Session</p> <p>Brief summary of the key points from day 1, and outline of objectives of Day 2</p>
9:10 – 10:35	<p>Session V: Nepal</p> <p>What are the rights and protections for health, both general and gender-specific, in the constitution? What are the gaps with regard to the right to health in the constitution? Do the rights provisions in the current constitution represent an advancement from the previous constitution?</p> <p>What are the main health challenges facing women vis-à-vis reproductive and sexual health, maternal health, and access to healthcare? What are the economic, social, and cultural causes of these challenges?</p> <p>What opportunities/challenges will the new federal structure present regarding the fulfillment of women's right to health?</p> <p>Moderator: Tania Hoerler Perrinet, Advisor for Peace Building, Embassy of Switzerland in Nepal</p> <p><u>Speakers:</u></p> <p>Indu Tuladhar, Advocate and Gender Expert</p> <p>Geeta Pathak Sangroula, Executive Director, Kathmandu School of Law, Professor of Law and Human Rights</p> <p>Jagannath Lamichhane, Mental Health Rights Activist</p>
10:35 – 10:50	Break

10:50 – 12:15	<p>Session VI: Kenya</p> <p>In addition to addressing the relevant issues among the guiding questions above, the session on Kenya will explore:</p> <p>How has the Commission for the Implementation of the Constitution worked to ensure that the constitution is implemented in a gender-responsive manner and that health rights are met?</p> <p>What has been the role of the Kenya National Commission on Human Rights and the National Gender Equality Commission, both independent bodies, in the implementation of women's constitutional health rights?</p> <p>What role has access to justice played in the realization of women's constitutional health rights?</p> <p>Moderator: Genoveva Hernandez Uriz, Ambassador/Deputy Ambassador European Union, Nepal</p> <p><u>Speakers:</u></p> <p>Catherine Mumma, Former Commissioner, Commission for the Implementation of the Constitution,</p> <p>Enid Muthoni, Country Director, International Development Law Organization</p> <p>Teresa Omondi, Deputy Executive Director & Head of Programmes, Federation of Women Lawyers (FIDA Kenya)</p>
12:15 – 13:15	Lunch

13:15 – 14:40	<p>Session VII: South Africa</p> <p>In addition to addressing the relevant issues among the guiding questions above, the session on South Africa will explore:</p> <p>What role has the judiciary played in the constitutional implementation of women’s health rights and socio-economic rights more broadly? Have the remedies offered by the courts been effective in addressing racial and economic disparities?</p> <p>How has the state conceptualized and implemented the ‘progressive’ nature of the right to healthcare? In what ways has this met or not met the needs of women?</p> <p>Moderator: Khimlal Devkota, Former member of Constituent Assembly-Legislative Parliament I, Spokesperson of New Force Party, Nepal</p> <p><u>Speakers:</u></p> <p>Ebenezer Durojaye, Professor of Law, University of the Western Cape</p> <p>Saras Jagwanth, Gender and comparative constitutional specialist</p> <p>Faraaz Mahomed, Senior Researcher, South African Human Rights Commission</p>
14:40 – 15:00	Break
15:00 – 16:30	<p>Session VIII: Afghanistan</p> <p>In addition to addressing the relevant issues among the guiding questions above, the session on Afghanistan will explore:</p> <p>Which state institutions have been able to most effectively respond to the challenges of implementing women’s constitutional right to health?</p> <p>How does the state approach the fulfillment of its constitutional obligations to women’s health in the conflict context?</p> <p>How does the state work with religious and other social leaders on these issues?</p> <p>What are the most effective entry points for civil society in their efforts to ensure women’s constitutional health rights are implemented?</p> <p>Moderator: Firoz A. Siddiqui, Gender and Inclusion Specialist, International Foundation for Electoral Systems (IFES)</p> <p><u>Speakers:</u></p> <p>Shukria Barakzai, Ambassador of Afghanistan to Norway</p> <p>Palwasha Kakar, Senior Program Officer, Religion and Inclusive Societies, United States Institute of Peace</p> <p>Farhad Javid, Country Director, Marie Stopes International</p>

Guiding questions for Day 2 case presentations

<p>Setting the context</p>
<p>What are the rights and protections for health, both general and gender-specific, in the constitution? What are the gaps with regard to the right to health in the constitution? Do the rights provisions in the current constitution represent an advancement from the previous constitution? What are the main health challenges facing women vis-à-vis reproductive and sexual health, maternal health, and access to healthcare? What are the economic, social, and cultural causes of these challenges? How are the health challenges experienced by women caused or compounded by gender discrimination, discrimination on the basis of ethnicity, by poverty, by the rural-urban divide?</p>
<p>Role of executive branch</p>
<p>How were implementation priorities set? Was there a sustained level of political will? Who took the lead in developing relevant legislation and policy? Did the relevant ministries undertake efforts to ensure that implementing legislation and policies were gender-sensitive / gender-responsive? Were there capacity or resource gaps? What was the role of international support? Did the experiences of other countries serve as a reference point?</p>
<p>Role of legislature</p>
<p>How were legislative agendas and priorities set? How were specialized committees organized? What was the process of legislative review? How did specialized committees work with executive ministries? Did the presence (or absence) of women legislators impact the process? How did the presence or absence of a women's caucus affect implementation? Was public consultation or other forms of communication with constituents part of the implementation process? Were there capacity or resource gaps? Did pressure from political parties influence the implementation of health provisions as they relate to reproductive, sexual, and maternal health? What were effective forms of advocacy from civil society (from the point of view of legislators)? Since the promulgation of the constitution, what have been the major 'successes', in other words what –legislation implementing the right to health from a gender perspective has been passed? How was the legislation developed and did civil society play a role? Were there any major political challenges to the draft legislation and if so, how were these overcome? Since the promulgation of the constitution, what have been the major challenges to the development and passing of legislation to implement the right to health from a gender perspective? What are the dominant and alternative ideas around gender equality and women's empowerment that impact legislation?</p>
<p>Role of independent institutions</p>
<p>What are the relevant independent institutions in place? What is the mandate and scope/authority of the institution? What are the remedies that the institution can offer? Are resource gaps a challenge to fulfilling the mandate? Who sets the priorities of the institution? What have been the main challenges that the institution has faced in fulfilling its role vis-à-vis the right to health? Has the institution experienced political pressure? Has the institution been able to function independently? What is the relationship of the institution with citizens, and to what extent is the institution accessible to citizens, especially to women?</p>

Role of judiciary
<p>What is the approach of the judiciary to gender equality and to socio-economic rights (transformative? low-intensity?) Have the courts been willing to impose structural remedies? To what extent are decisions of the courts implemented? Is the judiciary independent, or is it subject to political pressure? Is litigation primarily used by marginalized persons to gain fair access to medical services, or is it more often the means by which those persons with more resources pursue access to treatment that is not otherwise provided due to expense? What 'policy gaps' ('discrepancies between states' legal obligations under international law and national constitutions, and laws to respect, protect and fulfill the right to health') have the courts addressed and with what outcome? What 'implementation/enforcement gaps' ('discrepancies between stated policy and implemented policy') have the courts addressed and with what outcome? What remedies have the courts offered (e.g. declaratory orders, mandatory orders, supervisory orders, structural judgements)? What kind of enforcement mechanisms exist to ensure compliance with court rulings? To what extent does litigation affect health policy and service delivery?¹</p>
Role of civil society
<p>How has civil society promoted constitutional implementation? What has been the role of civil society in the development of implementing legislation? In the development of national strategies and policies? What elements of civil society have been most active and most effective? What strategies have they used to promote constitutional implementation? Have coalitions and strategic alliances been effective?</p>

Day 3: Sunday, 28 February 2016

9:00 – 9:15	Convening Session
9:15 – 10:30	<p>Session IX: Working group 1</p> <p>Participants will divide into three groups and each group will discuss and identify lessons learnt, initial recommendations, and questions for additional research on one of the following topics:</p> <p>Designing for equality – Constitutional design to increase the likelihood of gender-responsive implementation</p> <p>Facilitator – Melanie Allen</p> <p>Rapporteur – Katalin Dobias</p> <p>Improving the effectiveness of legislators to meet constitutional obligations of gender equality</p> <p>Facilitator – Nana Kalandadze</p> <p>Rapporteur – Melissa McKay</p> <p>From the streets to the halls of power – Strategies for effective civil society mobilization in support of gender-responsive constitutional implementation</p> <p>Facilitator – Sheri Meyerhoffer</p> <p>Rapporteur – Adil Khan</p>
10:30 – 11:45	<p>Session X: Working group 2</p> <p>Participants will remain in three groups, and will address one of other questions above.</p>
11:45 – 12:00	Break
12:00 – 13:00	<p>Session XI: Conclusion and Closing</p> <p>Presentations from rapporteurs of the three working groups</p> <p>Final reflections and way forward</p>
13:00 – 14:00	Lunch

About the author

Anna Dziedzic is a PhD Candidate at Melbourne Law School, University of Melbourne. She is also co-convenor of the Constitution Transformation Network at Melbourne Law School. She holds a MA (Human Rights) from University College London and first class honours degrees in Arts and Law from the Australian National University. She has previously worked as a legal policy officer for Australian Government agencies and as a Research Fellow at Melbourne Law School on projects relating to comparative constitutional law. She has published academic and policy papers on comparative constitutional law, constitution making and public law, with a particular focus on the Asia-Pacific region.

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The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

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2. assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
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