

Gender-Sensitive Approaches In Women's Involvement In Constitution-Making And Peacebuilding Processes In South Sudan

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Abstract

Constitutions play a pivotal role in shaping the political, economic, and social equality of both women and men. As the supreme law, they establish the state's framework, allocate political authority, delineate governance systems, dictate leadership selection, and safeguard fundamental rights. Constitutional reform presents a unique chance to reshape governance structures by enshrining women's rights, incorporating inclusive language, and establishing institutions that ensure and advance gender equality. In South Sudan, akin to many African nations, a pluralistic legal system merges customary practices, religious laws, common law, and statutory regulations. While customary and religious laws hold recognition, they remain unwritten, flexible, and often linked to ethnic concerns, varying across communities. Rooted in generations of tradition, these laws seek to uphold positive community values and norms. However, they frequently disadvantage women, despite the presence of traditional justice mechanisms that some argue are more accessible, cost-effective, prompt, and culturally apt. These alternative justice systems are deeply entrenched in patriarchal norms, often excluding women from comprehensive rights, including equitable participation in governance and decision-making bodies. Drawing lessons from post-conflict nations, this paper contends that the transformative potential of constitutions materializes when women capitalize on constitution reform opportunities to redefine the constitutional community's ambit, compelling the state to honor, safeguard, and fulfill women's rights.

Keywords: Rights, Law, Equality, Constitution, Constitutional reforms and Women's rights

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I. Introduction

In an era where the concept of citizen participation in governance extends to encompass constitutional reform, the evolution towards open and participatory constitution-building processes has gained momentum. Constitutions, serving as the cornerstone of the social contract between citizens and the state, now demand increased citizen engagement and comprehension during reform initiatives to ensure the legitimacy and effectiveness of resultant constitutional frameworks (Tamaru and O'Reilly, 2018). The process of constitutional reform presents an unparalleled opportunity to revolutionize the foundational structure of governance by embedding women's rights, fostering inclusive language, and establishing institutions and mechanisms that safeguard and advance the substantive equality between women and men (Allen, 2014).

The credibility of constitution-making endeavors hinges on the active involvement of local communities, necessitating informed participation and the sharing of perspectives that ultimately shape the content of the final constitutional document. At its core, citizen engagement possesses the transformative potential to redefine the boundaries of the constitutional community, compelling the state to unequivocally uphold, protect, and fulfill the rights of all individuals within its jurisdiction.

Role and Importance of Women's Participation

Evidence from global empirical studies highlights how the period of constitutional reform presents a crucial opportunity to effectively advocate for the integration and protection of women's rights (refer to Tamaru and O'Reilly, 2018; Miller, 2010; Waylen, 2015; Dahlerup and Freidenvall, 2009). Countries transitioning from conflict to peace, like South Sudan, must ensure that the constitution-making process is inclusive, encompassing diverse voices and perspectives from women, men, ethnic groups, indigenous communities, and more. A participatory approach not only enhances the legitimacy of the emerging constitutional framework but also serves

as an educational platform for citizens to grasp the tenets of constitutions and constitutionalism, fostering democratic values and behaviors while instilling a sense of national ownership.

Significantly, meaningful participation can enrich the constitutional discourse by incorporating varied experiences that enhance human rights standards, democratic institutions, and pave the way for the establishment of equitable constitutional frameworks essential for sustainable peace and development (Ginsburg et al., 2009; O'Reilly, 2015). Key provisions pertaining to gender rights can compel governments to uphold and safeguard these rights, thereby influencing legislative content, executive policies, and judicial decisions, thereby increasing the likelihood of rulings conducive to women's equality in the judiciary.

Women play multifaceted roles in this process, engaging as elected representatives, political party members, civil society activists, academics, and as active citizens and voters. Undoubtedly, their inclusion as pivotal actors and stakeholders is imperative for advancing gender equality, aligning with UNSC Resolution 1325 on Women, Peace and Security and Sustainable Development Goal 5. Inclusion not only facilitates the identification of gender disparities but also enables the development of monitoring and enforcement mechanisms to protect women's rights and address associated challenges. Furthermore, women's involvement at the local level establishes them as credible authorities, fostering community trust crucial for securing local support or rejection of the final constitutional document.

South Sudan Institutional Mechanisms Promoting Women's Inclusion in the PCMP

In South Sudan, several institutional mechanisms have been established to promote women's inclusion in the Peacebuilding, Constitution-making, and Political Processes (PCMP), recognizing gender equality as fundamental to a democratic society. As a United Nations (UN) member state, South Sudan has ratified and signed various international and regional human rights instruments that bolster gender equality and women's rights, subsequently incorporating them into diverse policies and action plans. Noteworthy agreements include:

- i) UN Security Council Resolution 1325 on Women, Peace, and Security (2000): Ratified in 2015, South Sudan adopted a National Action Plan (NAP) spanning from 2023 to 2028 to implement this resolution. An Inter-ministerial committee, consisting of government ministries, commissions, UN agencies, and civil society organizations, oversees and monitors the NAP's execution;
- ii) Beijing Platform for Action (1995): Aims to enhance women's involvement in conflict resolution at decision-making levels;
- iii) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979): South Sudan ratified this convention in September 2014; and
- iv) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol, 2003): Ratified in 2017, this protocol guarantees extensive rights to women, including participation in the political process.

The Ministry of Gender, Child, and Social Welfare (MGCSW) at both national and state levels holds the mandate to champion gender equality, oversee its implementation, and report on progress. It supervises intergovernmental and interagency coordination structures at these levels to ensure women's inclusion in the PCMP. Notable initiatives and policies include:

- i) National Gender Policy (2013) and National Strategy 2022-2027; and
- ii) Transitional Constitution of South Sudan (TCSS) 2011: Contains provisions for gender equality and the protection of human, economic, social, and cultural rights. Article 16 stipulates:
 - a) Full and equal dignity for women;
 - b) Equal pay for equal work and related benefits; and
 - c) Equal participation of women in public life and representation in legislative and executive bodies by at least thirty-five percent as affirmative action to rectify historical imbalances.

The MGCSW has proposed the Gender Empowerment Bill to reinforce the implementation of the 35% gender quotas, submitted to the Ministry of Justice for review before presentation to Parliament for deliberation and approval. Other crucial provisions within the TCSS include rights of the child, rights to vote and be voted, right to own property, right to education, rights of persons with special needs and the elderly, right to public healthcare, rights of ethnic and cultural communities, housing, policy implementation, and resource allocation.

Additionally, key laws like the Local Government Act (2009), Penal Code (2008) addressing rape and sexual violence, Child Act (2008), Civil Service Act (2011), and Labour Act (2017) further reinforce the right to equal remuneration for work of equal value as guaranteed by the constitution. These institutional mechanisms collectively work towards advancing gender equality and women's inclusion in South Sudan's political processes and peacebuilding endeavours.

Existing Gaps in the TCSS and Key Areas of Consideration

The Transitional Constitution of South Sudan (TCSS) contains significant gender provisions, but there are notable gaps that fail to adequately ensure and protect women's rights across various spheres. Addressing

these gaps and considering key areas from a gender perspective is crucial for promoting gender equality and women's empowerment in South Sudan. Here are some key considerations based on the identified gaps:

- i) Customary Law vs. Constitution:
 - a) Issue: The coexistence of customary laws alongside the constitution can perpetuate practices that disadvantage women, such as early marriages and widow inheritance.
 - b) Recommendation: Reconciling individual and group rights while aligning customary laws with international obligations is essential. Ensuring that customary laws do not undermine women's rights is critical.
- ii) Women's Representation:
 - a) Issue: Despite provisions for women's representation in decision-making structures, the 35% gender quota is often not met during appointments.
 - b) Recommendation: Enforcing the gender quota through mechanisms like the Women's Empowerment Bill and establishing a Gender Equality Commission for monitoring can help ensure compliance and adequate representation.
- iii) Age of Consent:
 - a) Issue: Lack of specification on the age of consent in the TCSS contributes to the prevalence of child marriage.
 - b) Recommendation: Setting a minimum legal age for marriage, aligned with ensuring education completion, is essential to protect children's rights and well-being.
- iv) Marital Rights:
 - a) Issue: Women face disadvantages in marriage, divorce, and inheritance despite entering into marriages as equal partners.
 - b) Recommendation: Developing a comprehensive Family Law within the constitution can address issues related to marriage, divorce, inheritance, and safeguarding women's rights in marital relationships.
- v) Gender-Based Violence:
 - a) Issue: The absence of finalized legislation like the Anti Gender-Based Violence (GBV) Bill leaves gaps in addressing and criminalizing various forms of violence against women.
 - b) Recommendation: Swift finalization and implementation of the Anti-GBV Bill are crucial to combat and prevent gender-based violence effectively.
- vi) Property Ownership:
 - a) Issue: While statutory laws guarantee property rights, patriarchal customary laws often hinder women from owning property or controlling income.
 - b) Recommendation: Harmonizing statutory and customary laws to ensure women's equal rights to property ownership and inheritance is necessary for gender equality.
- vii) Citizenship Rights:
 - a) Issue: Citizenship laws may disproportionately affect women and children born in specific circumstances or through marriage.
 - b) Recommendation: Addressing citizenship rights in the constitution to ensure equal rights for women and children born in refugee camps, outside the country, or through marriage without discriminatory conditions is essential for gender equality and inclusivity.

In the realm of constitution-making and peacebuilding, critical considerations must be taken to ensure gender sensitivity and active participation of women. One pivotal aspect is the use of gender-sensitive language, which not only symbolizes commitment to gender equality but also challenges prevailing stereotypes in leadership roles. Additionally, the composition of the judiciary is essential, necessitating gender balance, transparent appointment processes, and considerations of jurisdiction to promote diversity within this foundational branch of governance. Furthermore, independent commissions should prioritize gender balance and women's representation, ensuring clear mandates, transparent appointments, and appropriate qualification criteria to effectively address gender-related issues.

When designing electoral systems, prioritizing proportional representation over majoritarian systems can significantly enhance women's representation in decision-making bodies. Innovative approaches like zebra lists and special seat models can further bolster gender inclusivity in electoral processes. Safeguarding women's rights during states of emergency is crucial, highlighting the need for structural provisions that guarantee gender equality and protection even under challenging circumstances.

In the context of federalism and decentralization, incorporating gender-sensitive mechanisms is vital to ensure women's active participation in shared-rule mechanisms and to safeguard their rights across different levels of governance. Establishing a robust system of separation of powers and checks and balances is fundamental in guaranteeing gender equality and facilitating meaningful women's participation in governance processes. Moreover, integrating international legal frameworks like CEDAW and the Maputo Protocol into constitutional provisions can offer essential guidance on gender equality, judicial interpretation, and policymaking aligned with global standards.

Through considering these multifaceted aspects in constitution-making and peacebuilding processes, stakeholders can craft a more inclusive, gender-sensitive, and rights-based constitutional framework that reflects the diverse needs and perspectives of society, particularly women. Such comprehensive measures are crucial for fostering a society where gender equality is not just a principle but a reality, ensuring that women have a substantive role in shaping the laws and institutions that govern their lives.

Women's Engagement in Peace Process and Constitution-making in South Sudan

Women in South Sudan have historically faced challenges in actively participating in peace processes and constitution-making endeavors. Studies have shown that between 1990 and 2015, only 19% of members involved in constitution-reform bodies were women, underscoring a significant gender disparity in these critical decision-making arenas. While there has been a gradual increase in the number of women engaging in broader peace efforts globally, their presence in early stages, humanitarian dialogues, and ceasefire negotiations remains limited. Moreover, women have been notably underrepresented as signatories in peace agreements, comprising only 4% of signatories from 1992 to 2018.

In the context of South Sudan, women played pivotal roles during the peace negotiations that led to the signing of the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS). Noteworthy achievements included successfully advocating for an increase in the affirmative action quota for women's political participation from 25% to 35% across all government levels. Furthermore, women were granted signatory status in the R-ARCSS, marking a significant milestone in their formal inclusion as key stakeholders responsible for monitoring the implementation of the peace agreement.

The R-ARCSS saw increased representation of women in crucial positions, with 33% of negotiators, 20% of signatories, and 27% of parliamentary seats held by women. This enhanced inclusion provided women with leadership opportunities and challenged traditional patriarchal norms regarding leadership roles. One notable example was Angelina Teny's appointment as the Chairperson of the Strategic Defence and Security Review Board, symbolizing women's growing influence in traditionally male-dominated spheres.

Women's active involvement in peace processes and constitution-making not only promotes gender equality but also enhances governance effectiveness by incorporating diverse perspectives and priorities. The increased representation of women in decision-making structures sets a precedent for ongoing advancements in gender equality and women's empowerment within South Sudan. Continued efforts to amplify women's voices and ensure their meaningful participation are vital for fostering a more inclusive and peaceful future for the nation.

In South Sudan, women have been actively advocating for their inclusion in the establishment of a Hybrid Court to address issues related to sexual and gender-based violence (SGBV) and other war crimes. Despite the court not being established as of January 2020, calls for its formation persist. Women argue that this court would serve as a crucial avenue to achieve justice for the significant portion of South Sudanese women, approximately 65%, who are survivors of SGBV.

Research indicates a strong correlation between women's participation in peace processes and the quality of resulting agreements. Studies by O'Reilly et al. (2015) and Krause et al. (2018) suggest that when women are involved, peace accords tend to feature more inclusive provisions, undergo broader consultation, exhibit higher implementation rates, and are more enduring. However, in many peace negotiations, women and gender equality agendas are often excluded from the peace talks, except at the local level. The majority of agreements made since 1990 do not address women's concerns or mention them explicitly.

In South Sudan, there have been instances of progress regarding women's involvement in peace processes. During the 2015 peace talks, for example, 15% of negotiators were women, and three women were part of the opposition's 10-person delegation, although no women were present in the government's delegation. Through advocacy efforts and unconventional approaches, the South Sudan Women's Bloc eventually became a formal observer and signatory to the Agreement on the Resolution of Conflict in South Sudan.

In subsequent peace processes, such as the 2018 renewed negotiations, women comprised 25% of official delegates, a milestone made achievable by a provision in the 2011 Transitional Constitution mandating at least 25% representation of women in all political bodies. Throughout these processes, women have advocated for measures to address gender-based violence, gender quotas, increased representation in leadership roles, and protections for children.

The involvement of women in the Permanent Constitution-making Process (PCMP) in South Sudan has been a focal point, with considerations for their inclusion in the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) of 2018. Historical limitations in women's participation in previous constitutional processes have been addressed in the R-ARCSS, which includes provisions for women's representation now enshrined in the Transitional Constitution of the Republic of South Sudan as amended in 2020.

Despite challenges faced in previous constitutional processes, efforts are being made to ensure women's voices are heard in shaping South Sudan's constitutional framework. Initiatives like the National Constitutional Review Commission (NCRC) have aimed to involve women in these processes, although interruptions such as

the 2013 conflict have hindered progress. The ongoing efforts to include women in constitution-making processes reflect a broader movement towards gender equality and women's empowerment in South Sudan.

Women and Key Mechanisms for Drafting Permanent Constitution

The process of drafting a permanent constitution for South Sudan must address the shortcomings of the Transitional Constitution, which contained progressive provisions but lacked enforcement mechanisms for women's rights. As the country embarks on developing a new constitution, it is essential to ensure broad participation, particularly by engaging women's voices. However, challenges exist in securing women's mandated representation due to the dominance of men in the current R-TGoNU and the complexities of negotiating gender-sensitive elements in the constitution.

Contenders for power often seek to restructure the state to gain political power and resources. In the context of peace processes, the existing status quo may favor specific groups over others. Women seeking a fairer and more equal state must employ a multifaceted approach, collaborating with partners to develop common agendas and advocacy strategies. Consensus-building on critical issues like inheritance, divorce, and citizenship is crucial for women to influence the final constitution effectively.

In some instances, international interventions have facilitated greater female representation in constitution-making bodies. For example, in Syria, the establishment of a Constitutional Committee with significant female participation was influenced by international mediation efforts. Similarly, innovative strategies, such as providing incentives for parties to increase women's representation, have been employed in places like East Timor to overcome contentious issues around quotas.

Women in South Sudan can impact the Permanent Constitution-making Process (PCMP) through various structures, including the Revitalized Joint Monitoring and Evaluation Committee (R-JMEC), the Women's Parliamentary Caucus, the National Constitutional Review Commission (NCRC), the National Constitutional Conference (NCC), the Constituent Assembly (CA), and relevant line ministries. By engaging with these entities, women can advocate for gender equality provisions and ensure their representation in the development of the permanent constitution, fostering a more inclusive and equitable legal framework for the country.

Global Lessons Learned: Insights from Around the World

According to Tamaru and O'Reilly (2018), successful constitutional reforms hinge on elite support but are best achieved through participatory processes involving stakeholders and donors. International donors and technical supporters can enhance inclusive constitution-making by offering flexible funding, backing women's early mobilization efforts, boosting training initiatives for advocacy and messaging, and accommodating diverse women's perspectives to foster agreement on shared priorities.

Case Study 1: Nepal's Women's Inclusion

In Nepal, women played vital roles in the prolonged conflict between Maoist insurgents and government forces. Despite progressive agreements on gender equality, the initial interim constitution drafting committee lacked female representation. Public protests led to the reorganization of the committee, resulting in the inclusion of 4 women out of 16 members. This more diverse committee crafted the 2007 Interim Constitution, mandating a minimum of one-third female candidates for the Constituent Assembly elections.

Case Study 2: Myanmar's Military Role

Certain constitutions, like that of Myanmar, reserve roles for the military within political structures. In Myanmar, where military representatives hold governmental positions, reserved seats effectively act as quotas for men, emphasizing the military's influence within political institutions.

Case Study 3: Kenya's Women's Mobilization

In Kenya, women actively engaged in campaigns both supporting and opposing the 2010 constitution draft. They demonstrated awareness of pertinent issues, engaging communities to garner support or rejection based on specific concerns.

Case Study 4: Zimbabwe's Women as Advisors

In Zimbabwe, a female legal advisor strategically supported traditional leaders in the constitution-making process. Her insights from the main committee informed and empowered women in key groups, facilitating their active participation. Continuous monitoring and preparatory efforts, including knowledge-sharing conferences with the UN, enhanced the involvement of civil society organizations and policymakers.

Case Study 5: Zimbabwe's Engagement with International Partners

International partners played a significant role in Zimbabwe's constitution-making process, participating in project board meetings and serving as observers in critical conferences. Their involvement ensured the audit and validation of provisions based on consultation outcomes, reinforcing the inclusivity and credibility of the drafting process.

Case Study 6: Tunisia's Media Role

Despite women's active participation in Tunisia's constitutional debates, media attention often favored male voices. Recognizing and promoting women as equal contributors in constitutional processes is vital. Ensuring women's full recognition and proactive media engagement can amplify their influence and visibility in the public discourse.

Case Study 7: Myanmar's Capacity Building

In Myanmar, capacity building among women involved in the constitution-making process extended beyond traditional gender issues. Training on technical aspects of contested political matters empowered these women to become knowledgeable resources within their delegations, broadening their impact and expertise beyond gender-related concerns.

II. Concluding Insights And Recommendations

In practice, constitution-making is a vital aspect of peacebuilding processes, representing a national endeavor owned by the people. It presents a unique opportunity for women and advocates of gender equality to engage in shaping democratic governance, addressing present challenges, and articulating visions for a future where women's political, economic, and social equality is achieved. Experiences from post-conflict and democratic transition countries underscore the transformative power of constitutions when women actively participate in reform efforts to redefine the constitutional community's scope, ensuring the state commits to upholding women's rights.

Women's involvement in peacebuilding significantly influences their roles in constitution-building, embedding their strategic interests in constitutional provisions. As educators and social influencers, women can extend the women's movement's agenda beyond gender equality and rights to encompass critical areas like inheritance, citizenship, land, economy, and customary practices. Collaboration with allies and partners is pivotal, necessitating stakeholder mapping to engage traditional and faith-based groups and identify influential women leaders for effective advocacy.

Based on these considerations, the following recommendations are proposed:

- i) **Government Engagement:** Ensure women's integral involvement in the Peacebuilding Commission and its processes, fostering awareness of constitutional obligations to facilitate meaningful participation in discussions and consultations.
- ii) **Inclusivity Enhancement:** RJMEC should broaden representation in the Constitution Workshop to encompass women and other stakeholder groups not part of the R-ARCSS signatories. Development partners should aid in stakeholder mapping to identify key groups for inclusion, enhancing the process's legitimacy and inclusivity.
- iii) **Gender Balance:** Parties and stakeholders in the Constitutional workshop must maintain gender balance in delegate nominations, observing a minimum 35% gender quota. Transparent processes, citizen contributions, and public consultations should be integral throughout the constitution-making process.
- iv) **Legal Enforcement:** Enforce constitutional provisions, including gender quotas, to combat discrimination and ensure gender equality. Implement national action plans aligned with international frameworks, like the Beijing Declaration, with adequate resources for effective implementation.
- v) **Legal Safeguards:** Establish a Constitutional Court and robust legal protections for women's rights, guaranteeing equal treatment with men. National tribunals and institutions should safeguard women against discrimination and take measures to eliminate all forms of gender-based bias.
- vi) **Codes of Conduct:** Develop and enforce codes of conduct for public and private officials to uphold principles of equality and non-discrimination based on gender, ethnicity, marital status, or disability, ensuring respect for all individuals' rights and dignity.

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