



TERMS OF REFERENCE

TENDER REFERENCE NO. 258-16/56

A GLOBAL EXPLORATORY STUDY OF CONSTITUTIONAL JURISPRUDENCE RELATED TO GENDER EQUALITY AND WOMEN'S EMPOWERMENT

1. Institutional background

The International Institute for Democracy and Electoral Assistance (International IDEA), founded in 1995, is an intergovernmental organization of 29 member states with a mission to support sustainable democracy worldwide. The objectives of International IDEA are to support stronger democratic institutions and processes, and more sustainable, effective and legitimate democracy. International IDEA is the only global intergovernmental organization with the sole mandate of supporting democracy; International IDEA's vision is to be the primary global actor in sharing comparative knowledge and experience in support of democracy.

International IDEA produces comparative knowledge in its key areas of expertise: electoral processes, constitution building, political participation and representation, and democracy and development, as well as on democracy as it relates to gender, diversity, and conflict and security. International IDEA brings this knowledge to national and local actors who are working for democratic reform, and facilitates dialogue in support of democratic change. International IDEA's work is non-prescriptive and International IDEA takes an impartial and collaborative approach to democracy cooperation; emphasizing diversity in democracy, equal political participation, representation of women and men in politics and decision making, and helping to enhance the political will required for change.

International IDEA has been providing assistance to constitutional reform processes since 2004. In recognition of the growing importance of constitutional reform as part of the wider process of democracy building, in 2006 International IDEA became the first organization to establish a specialized unit to focus exclusively on constitutional processes. As a result, it has emerged over the last ten years as the global thought leader with the experience, network, partnerships, capacity and the knowledge to provide the most effective assistance in constitutional processes. International IDEA is a specialized expert knowledge provider and capacity builder in the field of constitution building and constitutional transitions.

2. Assignment background

International IDEA, in the context of a joint project with UN Women, seeks a consultant or consultants to conduct research and provide a report on constitutional jurisprudence related to gender equality.

Constitutions serve as the foundation and frameworks for the formulation and implementation of national legislation and policies. They possess the status of the highest norms against which all state acts and omissions are evaluated. A substantial number of constitutions are inspired by the international human rights obligations of States, and therefore reflect a broad range of social, economic, cultural, political and civil rights and guarantees of public goods. The importance of these rights and guarantees are often reflected in chapters designated as the bill of rights and/or principles of state policy.

The 20 year review of the Beijing Declaration and Platform for Action demonstrates that a number of States have introduced reforms to their constitutions so as to enshrine the principle of equality between women and men and the prohibition of discrimination on the basis of sex. Building on the prohibition of discrimination, some States have introduced provisions in constitutions to promote specific areas of gender equality, including representation in national parliaments, economic and social rights, access to justice, equality in the family and marriage and the creation of gender equality mechanisms. Countries have continued to introduce broader equality or anti-discrimination legislation, at the national and subnational levels, which prohibits discrimination on the basis of sex in many areas including employment, education and access to public services and provides for positive duties or temporary special measures to accelerate the achievement of gender equality.

UN Women's constitutional database demonstrates significant developments in constitutional reforms as they relate to women's rights. An analysis of data indicates that of the 195 constitutions analyzed, 192 contain provisions on equality and/or non-discrimination, 84 on affirmative action, 44 on sexual and reproductive rights and 23 on standalone provisions on women's rights. A range of countries have also enacted enabling legislation to give effect to their constitutional provisions or policies. To date, 125 countries outlaw domestic violence, 32 outlaw female genital mutilation/cutting, at least 117 countries have equal pay laws, 173 guarantee paid maternity leave, and 117 outlaw sexual harassment in the workplace. Women have equal rights to own property in 115 countries and have equal inheritance rights in 93.

The judiciary plays an important role in enforcing these constitutional provisions and laws. In as many as 193 countries, constitutional review bodies have been created to determine the constitutionality of an action or inaction of both public and private entities and individuals. In the past 25 years, such bodies have contributed to the emergence of gender equality constitutional jurisprudence across a number of areas of law, including citizenship, reproductive rights, education and decision-making.

With the increase in international support to constitution building processes, there has been a concomitant rise in the dissemination and adoption of comparative constitutional practice. However, the broad dissemination of comparative constitutional interpretation and implementation – through constitutional case law in particular – especially as it relates to gender equality, has not reached the same level.

Gender equality advocates and States understand the importance of the domestication of international legal obligations and the application of useful examples from comparative constitutional practice. However, the potential impact of international standards and comparative constitutional practice is diminished due to the lack of knowledge available on comparative constitutional interpretation by courts and subsequent implementation. In response, International IDEA, supported by and in collaboration with UN Women, will implement the global exploratory study of constitutional jurisprudence related to gender equality and women's empowerment.

3. Objectives of the Assignment

In the light of the impact of judicial decisions on constitutional issues affecting the lives of women, this project aims to create awareness of the content, trends and patterns of these decisions as well as the individual and multiplier effect of related public interest litigation on women's lives and the achievement of substantive equality.

The overall objective of the analysis of key constitutional cases related to gender equality within a comparative framework is to explore trends and patterns of constitutional review court jurisprudence related to gender equality within and across regions. More specifically, this exploratory study aims to:

- examine the content and scope of constitutional provisions that have had the greatest impact(s) and which issues are more effectively addressed through the courts, including identifying innovative approaches and landmark cases which reaffirm gender equality and other gender-related rights.
- Explore the extent to which the Convention on the Elimination of All Forms of Discrimination has been used as a basis on which to bring cases, to decide cases and to inform legal reasoning.
- Propose areas of further research to strengthen the comparative analysis of gender equality constitutional jurisprudence.

4. Scope of Work

The output of the project will be an exploratory study of approximately 50 pages using a regional comparative framework.

The Contributor will undertake a desk review and analysis of existing gender equality constitutional jurisprudence globally, through an examination of the content, trends and patterns within and across countries and regions. The research should focus on primary sources, i.e. judicial decisions. The selected candidate will draw on various sources, such as the Avon Global Center's Women & Justice Collection, and ensure that the most recent determinations or judgements of such cases are used in the research. The Contributor will outline questions for further study and a research agenda and support in the dissemination of the findings of the analysis in various fora jointly identified with International IDEA.

Together, International IDEA and the Contributor, in consultation with UN Women, will agree on the selection of countries to be included, based on the following criteria: 1) Number of available relevant judicial decisions available; 2) relevance of constitutional provisions; and 3) geographic balance.

Using qualitative data analysis, the study will focus on how constitutional provisions related to gender equality have been interpreted and applied by the constitutional review courts to address issues related gender equality such as, but not limited to, citizenship, political

participation and representation, employment, access to public goods such as health and housing, sexual and reproductive health, special measures, and positive obligations of the state. Relevant references to CEDAW and other international instruments in judicial decisions will be given special attention. The focus will be on landmark cases including what may be considered positive and as well as negative outcomes for gender equality.

The proposed analysis is based on the following assumptions:

- The domestication of international gender equality obligations and the protection of women's rights in constitutions is frequently undermined by existing legislation, customary practices, and non-implementation by the legislature and the executive branch. As a result, the judiciary plays a crucial enforcement role.
- Constitutional provisions – including those drafted in broad language – can be instruments for the judiciary to advance and expand the protection of women's rights through innovative legal reasoning and evolving understandings of State obligations and social relations.
- When undertaking constitutional review, the courts' understanding of their role in relation to other branches of government and to society conditions their approach to constitutional interpretation and may impact their willingness to undertake a transformative role in the implementation of women's rights.
- The judiciary can potentially play a regressive role *vis-à-vis* women's rights, even in the presence of progressive constitutional protections. The positive role of the judiciary is not predetermined.
- Where courts play a positive role, decisions can play a signaling role signifying the establishment of new norms to public officials and private citizens alike.
- The prevailing legal opportunity structure, such as access to the courts, impacts the ability of social movements to engage in public interest/strategic litigation and therefore impacts the role of the courts in enforcing the women's constitutional rights.
- There exists an increasing migration of constitutional ideas, through which courts and constitutional designers learn from innovations and approaches in other jurisdictions.

As an exploratory study, it will not seek to be exhaustive, and will identify the gaps in available data for future research.

As the study will be global in scope with a regional framework, an advanced version of the study will be circulated for peer review among recognized experts in the fields of constitutional law and gender from each geographical region.

5. Work Plan

The duration of the work for the consultant(s) will be from 1 July 2016 – 30 April 2017. The approximate number of work days of the Contributor is 31 days.

Expected final work plan, inception report: within two weeks upon commencement of the contract (15 July 2016)

Expected first draft: 30 September (subject to approval and acceptance by International IDEA).

Expected second draft: 15 December (subject to approval and acceptance by International IDEA).

Expected final report: 31 January (subject to approval and acceptance by International IDEA).

The period February 1st to April 30th 2017 is a contingency period to allow for any follow up required in relation to approving drafts and the final report.

6. Deliverables

The language of the assignment is English. The methodology, work plan, inception report, working drafts and final draft shall be delivered in Microsoft Word format.