



Women and Constitutions in Action

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“I really want to improve meaningful women’s participation, not only in constitution-building processes, but also in nation building processes. I think Constitution building is not writing a paper, it is putting it into action.”

Dr Nyo Nyo Thin (State Parliamentarian, Myanmar)

What is the significance of ‘the woman question’ to our understanding of constitutions in action? Recent work on women and constitution-building has focused on textual provisions for women’s equality and the participation of women in the process of constitution making. In contrast, this Policy Brief focuses on how constitutional governance in practice affects women. By shifting the focus in this way, we hope to respond to a broader range of challenges and opportunities that women encounter in ensuring that constitutional practices and institutions are inclusive of women, represent the interests of women, and respect women’s right to substantive equality.

This Policy Brief is informed by the insights gathered from the Australia-ASEAN Women in Constitution-Building Capacity Development Program (Women in Constitution-Building Program), designed and delivered by the Constitution Transformation Network (ConTransNet) in November 2019. The geographical focus on the ASEAN region reflects our conviction that comparative constitutional law should have a global reach, and that constitutional experiences from South East Asia contribute new and important insights.

This program brought together eight women from four ASEAN countries – two each from Indonesia, Myanmar, the Philippines and Thailand – who are engaged in democratic reforms, human rights advocacy and constitution building in their home countries. Over a week, participants and members of ConTransNet shared insights into the challenges and successes of constitutional transformation and its implications for women across South East Asia.

‘The woman question’ in constitutional law

Posing ‘the woman question’ is a process of inquiry used to examine women’s inclusion and exclusion, freedom and oppression in a given context or discipline. The woman question takes various forms but seeks to identify the implications for women of laws or practices that might otherwise appear to be neutral (Bartlett).

Gender analyses of constitutions tend to ask the woman question of constitutional provisions and their legal interpretation by courts. In this Policy Brief, we outline how the woman question can and should also be asked of constitutions in action.

This approach is consistent with feminist method: law, including constitutional law, is framed as neutral but gender inequality is often so embedded that it is only apparent when we see how the law actually operates in context. It also means considering ‘proximate’ constitutional institutions and practices which might not be expressly provided for in a written constitution, but which are integral to its operation in context.

In the Women in Constitution-Building Program we posed this question to ourselves as a way of examining how constitutional governance can be improved to provide substantive equality for women. In this Policy Brief we focus on women rather than on gender while being mindful of the limitations of the men-women binary as a category.

Women and constitutional texts

Asking ‘where are women in the constitution?’ tends to yield answers that focus on the language and provisions of written constitutions. These answers have evolved as both constitutions and feminist scholarship have developed over time. We can distinguish three steps in the treatment of sex and gender in constitutions:

- **Gender-exclusive constitutions** explicitly provide or implicitly assume that citizens are men. Women may be rendered invisible in the language of the constitution (eg the use of masculine pronouns only) or in its interpretation (eg where neutrally framed provisions are interpreted to exclude women). Older written constitutions tend to be gender invisible, reflecting the situation at the time that only men, and often men of a certain class, had political rights. Even today, in many country contexts, the sense persists that the public space in which constitutions operate – the space of government, leadership, representation and rights – is a space primarily for men.
- **Gender-neutral constitutions** include women and men on the basis of formal equality. Constitutions in this mode do not exclude women, but nor do they make special effort to redress past discrimination or take positive steps to ensure equal opportunities or outcomes. Sex and gender are regarded as irrelevant and inappropriate grounds for discrimination, both negative and positive.
- **Gender-sensitive constitutions** seek to promote substantive equality. They recognise that the circumstances of women as women are different to that of men, and that some of these differences should be addressed in the constitution. Gender-sensitive constitutions do this in two key ways. First, they define the right to equality in substantive rather than formal terms, to permit measures that discriminate in favour of women in order to address specific disadvantages. Secondly, they incorporate provisions that address issues faced only by women (such as maternal health) or which disproportionately affect women (such as reproductive rights, and sexual and intimate partner violence). Such issues are increasingly referenced in constitutional texts, often in separate sections on ‘women’s rights’.

From paper to action

The three approaches described above represent progressive steps in understanding and responding to needs of woman in constitutions. They are, however, limited in how they respond to concerns of women in constitutional governance. The emphasis on equality as a response to the vulnerabilities of women risks marginalising women’s agency in public affairs. A focus on women’s vulnerabilities can have the unintended consequence of treating women primarily as victims rather than as an integral part of the constitution and the polity. Women are often categorised as a homogenous group that is to be accommodated within an already formed constitution or relegated to a special section. This approach, combined with a focus on the constitutional text, gives rise to a problematic assumption that issues of women’s rights can be resolved by a ‘quick fix’ to constitutional language rather than wholesale rethinking about constitutional design and implementation.

Article 2 of the *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* requires state parties to guarantee equality between men and women including through ‘national constitutions’ and take all appropriate action for ‘the practical realization of this principle’. International human rights law standards, as developed through the *Beijing Declaration and Platform for Action*, the *Women, Peace and Security Resolution 1325* of the United Nations Security Council (and subsequent resolutions) and the inclusion of gender equality in the *Sustainable Development Goals*, have moved the discourse beyond a narrow conception of ‘women’s rights’. Today, it is established that all aspects of governance including poverty, corruption, conflict, transitional justice and climate change are of concern to women and impact upon women as women in particular ways.

In constitutional law, this approach to women’s rights requires expanding the focus beyond constitutional guarantees of equality and non-discrimination. Often sidelined in advices on gender-sensitive constitution making and design is how choices about ‘general’ constitutional issues – the system of government, the

form of the state, the legal system – are gendered and have real consequences for women (MacKinnon). Just as developments in the international law space have expanded the focus of inquiry in women’s rights, it is necessary for the gender analysis of constitutions to also extend beyond the text and consider constitutions in action more broadly.

ASEAN Constitutions

Our focus in this Policy Brief is the constitutions of Indonesia, Myanmar, the Philippines and Thailand, which were the four ASEAN countries represented at the Women in Constitution-Building Program. Each of the four states are not presently engaged in constitution making per se. The focus of constitution building in these countries is therefore on the practice, interpretation, enforcement and potential reform of constitutions.

Provisions relating to women

The national constitutions of Indonesia, Myanmar, the Philippines and Thailand reflect a conventional approach to women. The Constitutions of all four states include equal protection clauses and prohibit discrimination. The Constitutions of Indonesia and Thailand expressly permit special treatment of disadvantaged groups to achieve equal outcomes (a mechanism of substantive equality).

In some countries, the right to equality is expressly limited. In Indonesia, rights may be limited by laws based on considerations of morality, religious values, security and public order in a democratic society (Art 28J(2)). In Myanmar, the Constitution prohibits discrimination in the recruitment of public servants but nevertheless permits the ‘appointment of men to the positions that are suitable for men only’ (Art 352).

Some constitutions include ‘protective’ provisions, directed at recognising specific state duties towards women. The Constitution of Thailand requires the state to assist women (among others) and protect them from violence and unfair treatment (Art 71). Article 351 of the Myanmar Constitution states that ‘mothers, children and expectant women shall enjoy equal rights as prescribed by law’; and the state is required to care

for mothers, as well as children, the aged and disabled (Art 32). The Philippines Constitution provides that ‘the State recognizes the role of women in nation-building’ (Art II, s 14) and includes protective provisions for women in their role as mothers (Art XIII, s 14). This language suggests that the state has a duty to protect women when they act in particular roles, most commonly as mothers.

The recently drafted Bangsamoro Organic Law, which operates as the Constitution for the region of Mindanao in the Philippines, provides greater recognition of women’s agency and participation in political life. These include quotas for women in the Parliament and representation in other decision making bodies (Art VII, s 7; Art IX, s 11); allocation of at least five percent of the budget to gender-responsive programs (Art XIII, s 5); and a requirement for gender responsiveness in all aspects of security and peace building (Art XIV, s 1). Thailand’s Constitution also includes a mechanism for political participation, requiring that women and women’s groups be represented on parliamentary committees considering bills that concern women (Art 128).

Constitutional context

Explicit provisions for equality and women’s rights only tell part of the story about how constitutions impact women. Further insights are obtained by considering proximate institutions and practices and the constitution in action and the context in which written constitutions operate. Two contextual features that have particular significance for constitutions in the four states are the movement between authoritarian and democratic rule, and the resolution of conflicts arising from societal differences.

The ASEAN region is diverse in culture, history, economies, religion and language. It comprises a variety of systems of government, ranging from established democracies to authoritarian regimes and states in different stages of democratic transition. Legal systems in the region often combine common or civil law with religious and customary law. In Thailand, the monarchy pre-dates the written constitutions and continues as an underlying source of authority. While

the four states are not intended to be representative of the entire region, their constitutional histories and contexts illuminate several shared challenges and features.

Transition between authoritarian and democratic rule

All four countries have experienced authoritarian rule and at least partial (and sometimes temporary) transitions to democracy. The Constitution of the Philippines was made in 1987, after ‘people power’ led to the restoration of democracy after authoritarian rule. Indonesia’s Constitution was made upon independence in 1945 and for many decades Indonesia was subject to authoritarian rule by a military-dominated government. However, over the period from 1998 to 2001, far reaching constitutional amendments were made in pursuit of democratisation.

Myanmar’s Constitution was made in 2008 by the ruling military government. The election to parliament of National League for Democracy leader Aung San Suu Kyi led to some democratic reforms. However, the military continues to exercise significant political power, entrenched through quotas for military representatives in the legislature, executive and sub-national governments.

Thailand has had many written constitutions as it has moved between military rule and democracy. The most recent Constitution of 2017 was made while the state was under military rule following a coup in 2014. The weak state of constitutional democracy in these countries has placed the rule of law under pressure. Advocates of constitutional change and human rights activists have been targeted by the state, including through criminal charges and threats of harm.

Diversity, conflict and peace

The four states are diverse in religion, ethnicity and history. While there is a predominant religion in all states (Buddhism in Myanmar and Thailand; Catholicism in the Philippines and Islam in Indonesia), all states include significant minorities with different religious affiliations and diverse cultural identities.

Diversity has posed challenges for states seeking to unify their peoples, under authoritarian or democratic rule. Myanmar is divided by territorially defined ethnic and religious groups, several of whom have long fought for power-sharing arrangements and for the exercise of self-determination. Conflict between government forces and ethnic armed groups continues in several parts of the territory. The government also stands accused of violent persecution of minority Muslim Rohingya peoples in Myanmar’s west.

In other states, special autonomy has been used as a way to resolve conflicts where ethnic or religious difference is a factor. In 2005-2006 Indonesia and the Free Aceh Movement signed a peace agreement to end decades-long conflict, providing the region of Aceh with self-governing autonomy within Indonesia. In 2014, the Philippines entered into a peace agreement to end the long-running conflict in the predominantly Muslim region of Mindanao. The Bangsamoro Organic Law to implement the peace agreement and give special autonomy to the region was passed in 2017.

Thailand has also experienced intra-state conflict, most notably in the south, where most of the minority Muslim population live. Some groups seek independence from Thai rule and a political settlement has not yet been achieved.

Gendered dimensions of the constitution in action

Drawing on the insights of women constitution-builders from the contexts described above, in this Policy Brief, we pose the woman question of constitutions in action by focusing on three institutions – the military, religion and political representation. These institutions might be recognised in the constitution or established through legislation. In each case, however, the operation in practice of these institutions draws significantly on custom, culture, convention and history.

The military and militarization

The military has a direct impact on constitutional governance in several jurisdictions in ASEAN, for

example in the form of quotas (Myanmar) or successive coup d'état (Thailand). The direct and indirect influence of the military on constitutional governance poses several challenges when considering the perspective of women and constitutions in action. Two of the most pressing concerns are as follows.

First, the military has historically been a male dominated institution. In the ASEAN region, in countries such as Thailand and Myanmar, it is only recently that women have been recruited to the military. In this context, the direct participation of the military in constitutional governance becomes another means by which women's opportunity to participate in constitutional governance is limited. An interesting contrast to consider is Art XIV s 1 of the Bangsamoro Organic Law which recognises state obligations to 'observe, promote, and ensure gender-responsiveness in all aspects of security and peace building, including the participation of women in decision-making'.

Secondly, in states where the military has general political, social and in some cases economic influence, democratic institutions can be subjected to militarization. Militarization has been described as a condition in which military-like systems and values determine political and social values and behaviour (Wallenstein). Military values and military-systems such as respect for hierarchy, compliance with orders and strict discipline are antithetical to constitutional governance (as a system and as a set of values). The notion of a 'disciplined democracy' in Myanmar is an example of how a constitutional democracy can be qualified through militarization. Militarization of political and social institutions and values therefore can be an obstacle for promoting substantive equality for women, for ensuring women's equal participation and for their representation.

Shifting the focus of the woman question from women's participation in constitution-making and the text of the constitution to constitutional governance reveals the day to day, often implicit issues that women encounter in relation to the military and due to militarization.

Religion and the state

During discussions at the Women in Constitution-Building Program, the relationship between religions, the constitution and the state emerged as critical in the ASEAN region. Some constitutions expressly recognise and give special status to the religion of the majority (Thailand, Myanmar). Other constitutions are 'secular' (Indonesia, the Philippines), but nevertheless the majority religion and religious institutions influence the conduct of public affairs. Moreover, autonomous regions such as Aceh (Indonesia) and Mindanao (the Philippines) afford special status to Shari'ah (Islamic law) even where the federal government is 'secular'. The interpretation of these religious beliefs has often resulted in discriminatory treatment of women for instance in relation to marriage and reproductive rights.

Seeking remedies for such discriminatory treatment can be difficult for at least three reasons – normative, structural and practical. From a normative point of view, religious principles (that conflict with the right to equality and non-discrimination), as interpreted by religious authorities, may have precedence over constitutional principles. Such arrangements may be available through specific constitutional provisions. Structurally, the jurisdictions of religious courts may be exclusive and/or appeals from religious courts may be available only in limited instances. Practically, women may face barriers with regard to access to justice where legal institutions such as the judiciary and the legal profession are not sensitive to women's rights issues.

Furthermore, religious institutions in Buddhism, Catholicism and Islam (the predominant religions in this region) tend to be led by men and often deny women access to positions of leadership or authority. Consequently, raising issues that concern women within such institutions can be difficult. In these contexts, freedom of expression, access to justice and the right to freedom of information assume added significance, as they support the exercise of constitutional and legislative rights that enable resistance to the discriminatory effects of religious practices on women.

Political representation

Asking ‘where are the women?’ in politics tends to yield answers that focus on numbers. On this measure, women are underrepresented in the national parliaments in all four ASEAN states. The Philippines parliament has by far the highest proportion of women at just under 30%, but in the other three states the figure stands at 17% or less.¹ Strategies to address political representation tend also to focus on increasing the number of women representatives. Indonesia (candidate quotas) and the subnational Bangsamoro parliament (reserved seats) are the only parliaments in the four jurisdictions that have quotas for women.

However, asking the ‘woman question’ of the *concept* of political representation yields reflections on the quality and meaning of representation itself. Discussions at the Women in Constitution-Building Program provided insights into the nature of political representation in the four states.

One concern was that the focus on the quantity of women, rather than the quality of women representatives and their substantive role in constitutional government, shielded practices harmful to both women and the constitutional system. In several jurisdictions, in the ASEAN region and beyond, the women who successfully enter politics are connected to men who themselves hold great political power. In the Philippines, for example, despite the return to democracy, family dynasties continue to dominate politics at all levels of government, with attendant risks of corruption, nepotism and real questions about the ‘representative’ credentials of an elected government of elites. Indonesia and the Philippines both have laws to prohibit dynasties, but they are proving difficult to displace. For women themselves, election or appointment to public office by way of dynastic manoeuvres, or indeed by operation of party room gender quotas, can cast a shadow over women’s actual or perceived agency in public office.

Where quotas are unaccompanied by training for women new to representative democracy and constitutional governance, there is further risk of harm

to individual women and to social perceptions of the suitability of women in public office.

In some contexts, deeply held stereotypes about women’s capacity for leadership inhibit opportunities for women to take on leadership roles. During the Program, participants discussed how women, and particularly young women, are seen as incapable of leadership and subject to violence and abuse (in public and domestic spaces). Their expertise and experiences are often underestimated. In some cases, a woman who assumes a public role as an activist, leader or politician is regarded as stigmatised. Gender stereotypes, social preconceptions about the attributes and characteristics that are, or ought to be, possessed by women and men (Cook and Cusack), can be deeply entrenched and restrict women’s choices and opportunities in public life.

Re-gendering constitutions?

A shared conclusion of discussions at the Women in Constitution-Building Program was that constitutional change, in itself, was insufficient to make a real difference in the lives of women in Indonesia, Myanmar, the Philippines and Thailand. Cultural change, across diverse spheres of life – families, religious institutions, politics, workplaces – is needed.

Constitutional change can support institutional and legal reforms, but without changes in dominant social beliefs and values, constitutional change alone is unlikely to succeed in making a sustainable difference.

Clearly, constitutions cannot address all issues of women’s rights, particularly where gender inequality pervades social norms. However, a gender analysis of constitutions in action does suggest that more can be done to identify and address the extent of gender inequalities inherent in constitutional practices and institutions. It also highlights the need to look beyond the text, for both problems and solutions, and resist the urge to seek to address women’s disadvantage simply by accommodating women in the status quo or inserting specific provisions into the constitutional text.

Western feminist scholars have explored how the public – including the public space occupied by the constitution – is gendered masculine, while women, and those qualities deemed feminine, are removed to the domestic space (Rodríguez-Ruiz and Rubio-Marín, 199-202).

In South East Asia, the superimposition of western institutions of representative democracy over older customs, cultures and religious practices further complicates the discourse on women's rights. For instance, Jones explains how in Aceh, prior to colonisation, women held powerful positions in the family, village and as sovereign sultanahs. Dutch and Indonesian patriarchal policies shifted attitudes to women's leadership. Although Acehnese women fought in the recent conflict, women were marginalised in the peace process and in the transition, which saw combatants and revolutionaries become political leaders.

In the ASEAN region, notions of patriarchy and matriarchy combine with notions of nationalism, religion and indigeneity to produce complex challenges when seeking answers to the woman question in constitutional governance. Reclaiming and reworking these different approaches to governance to investigate un-gendered – or re-gendered – conceptions of constitutional governance, therefore, remains a challenge.

Asking the woman question of constitutions in action not only complicates the practice of constitution making, design and implementation; it complicates policy interventions and scholarship as well. As MacKinnon (402-3) points out, '[i]f a gendered perspective calls for deeper and more complex approaches to constitutions, many barriers obstruct connecting constitutions with lived outcomes in the gendered domain. Gender, and the inequality based on it, is so pervasive in law and life that positing any link risks overdetermination.' Combining comparative constitutional study with feminist inquiry, as we have sought to do here through the lens of 'constitutions in action' might provide one way to understand where the women are, and could be, in constitutional governance.

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¹ Statistics are from <https://data.ipu.org/>.

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