

# HUMAN RIGHTS AND CONSTITUTION MAKING



UNITED NATIONS  
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OFFICE OF THE HIGH COMMISSIONER

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## INTRODUCTION

States in many parts of the world regularly amend and in some cases write entirely new constitutions. This may happen for a variety of reasons. For example, it may reflect a desire to redefine the distribution of political power, hopefully with the aim that a constitution will be more democratic, have better checks and balances, and be more responsive to the wishes of the electorate. Constitutional change may also be undertaken after a period of conflict to establish a new constitutional order and to provide a vision on how to move forward to create a more equitable society. Or there may be a desire to update an existing constitution so that it will be more responsive to political, economic or social changes in society. Whatever the reason, a key part of any constitutional reform is ensuring the promotion, respect and protection of human rights and fundamental freedoms. Socrates wrote that freedom is the essence of democracy. It is as true today as it was over 2,000 years ago. And a good constitution can greatly assist in protecting those freedoms and providing the foundations for democratic governance.

This publication is designed to assist United Nations staff who provide human rights advice to States, which undertake to amend an existing constitution or write a new one. It should also be of use to States that undertake constitutional reform, including political leaders, policymakers, legislators and those entrusted to draft constitutional amendments or a new constitution. Further this publication should also facilitate advocacy efforts by civil society to ensure that human rights are properly reflected in constitutional amendments or new constitutions. Finally, this publication, along with the international human rights instruments, should not only provide a standard to measure whether constitutional amendments or a new constitution has appropriately reflected human rights and fundamental freedoms, but also assist in evaluating whether the processes used in constitutional reform are consistent with international procedural norms.



● **CONSTITUTIONAL  
REFORMS AND  
HUMAN RIGHTS**

## A. Why a rights-based approach to constitutional reform?

### 1. Framing the issue

Does the constitution guarantee human rights to people in a country? Do public authorities act in accordance with the constitution? These are two of the most frequently asked questions when measuring the overall situation in a country. They reflect the central place occupied by the constitution in the lives of a State's people.

Most legal orders are based on a hierarchical structure of legal acts with the constitution at the top. All legislation and other legal measures of a State must be compatible with the constitution. If a law or other legal measure adopted by the State is inconsistent with the constitution, then it should be declared null and void by the competent judicial institution.

Human rights are at the heart of the constitutional order of a modern State, not only determining relationships between the individual, groups and the State, but also permeating State structures, and decision-making and oversight processes. As a consequence, a bill of rights constitutes an integral part of a modern constitution. At the same time, gaps in the implementation of human rights at the domestic level, whether individual or where appropriate collective rights, often originate from shortcomings in the area of constitutional law.

The link between human rights and democratic constitutional order begins with the process leading up to the adoption of a constitution or a constitutional reform. Such a process promises successful results if it is based on the broad participation of all parts of society. Participants should be able to articulate their views freely and communicate with each other without impediments on the part of those in power. It is important that their opinions and views are considered in the framework of clear procedures, provided those responsible for overseeing the process are fair and impartial.<sup>1</sup> Such conditions can only be created when standards of freedom of expression, including the right to communicate one's opinion, freedom of speech and of the media, freedom of association and assembly, are upheld.

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<sup>1</sup> See Human Rights Committee, general comment No. 25 (1996).



Acting in accordance with the constitution means acting in conformity with human rights and fundamental freedoms in a fair and just manner. Public officials should be held accountable for conduct inconsistent with the constitution. This is a basic perception of the constitution as a yardstick for measuring action or inaction by public authorities, as well as the ultimate guarantee for the rights and fundamental freedoms of individuals and groups. The constitution is seen as the highest legal guarantee of people's well-being and interests, as well as a fundamental tool to shape the life of the society and to organize the State.

As the highest law of a country, the constitution is at the centre of the political and social life of the country and defines the relationship between the State and the society, and between the different functions of the State. In turbulent times the constitution should ensure a certain level of political and social stability. Particularly in post-conflict situations, the constitution often serves as a type of peace plan that, through democratic institutions and the protection of rights, should help to prevent the reoccurrence of tensions and conflict. In times of democratic transformation, the constitution is a tool to introduce changes in political and social life.

The current policy of the United Nations concerning constitutional reforms fully recognizes these mutual and complex links. The Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes states:

Constitution-making processes are a central aspect of democratic transitions, peacebuilding and state-building. For the United Nations, constitution-making is a broad concept that covers the process of drafting and substance of a new constitution, or reforms of an existing constitution. Both process and substance are critical for the success of constitution-making. The design of a constitution and its process of development can play an important role in peaceful political transitions and post-conflict peace consolidation. It can also play a critical prevention role. Constitution-making presents moments of great opportunity to create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability.<sup>2</sup>

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<sup>2</sup> Page 3.

According to the guidance note of the Secretary-General on constitution making, the United Nations should develop capacities to support constitution-making processes when requested by national and transitional authorities, through the provision of appropriate expertise and resources. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has been designated as part of this process. This publication has been specifically designed and developed in cooperation with United Nations agencies and programmes and other partners in order to provide United Nations staff and other national and international actors, in particular in the field, with a tool to effectively assist constitutional reform processes. The present contribution responds to the observation made in the guidance note of the Secretary-General on constitution making, according to which international legal and human rights assistance may include:

Provision of advice on the requirements of international human rights treaties and their respective treaty bodies, and other international obligations of the state (e.g., bills of rights, provisions on judicial independence, domestic effect of international treaties, rules on acquisition and loss of nationality, constitutionalization of national human rights institutions), including those applicable to new states.<sup>3</sup>

### CONSTITUTIONAL REFORMS

**Constitution making:** the process of drafting and adopting a new constitution.

**Constitution revision:** the process of thoroughly reviewing and changing the constitution, which may produce, to a large extent, a new text of the constitution.

**Constitutional amendments:** changing specific constitutional provisions or adding or deleting specific provisions to the existing text of the constitution (may be of an incidental or more general nature).

Constitutional reforms are usually understood as changes to existing constitutional law and practice. They are necessary when the parameters on which the life of the society are based are inadequate and constitute a burden to the effective functioning of the State, or when there is a need to resolve conflict or to restore State structures that have collapsed as a result of an internal conflict or aggression. As a consequence, reform of constitutional law takes place in different contexts: former autocratic forms

<sup>3</sup> Page 6.

of government transitioning to democracy; in the aftermath of a conflict where a new constitution to establish democracy is used to construct a sustainable peace; or in established democracies to advance reforms and promote social justice.

The ultimate goal of constitutional reforms is to reshape the State order by means of establishing or changing the constitution and related legislation, such as laws on key State institutions, human rights and fundamental freedoms, and electoral laws. These reforms can be successful only if they are transparent and inclusive, embrace the essential elements of democracy, and protect human rights and fundamental freedoms.

Therefore, in all practical situations, the necessary questions are: What kind of constitutional reforms are planned? What is the ultimate objective of the changes in the constitutional law? We already know that constitutional law is a powerful tool; yet, how it is used and for what purposes it is supposed to be designed remain essential questions. This publication focuses on constitutional reforms for the purpose of strengthening a modern democratic constitutional State. Some basic characteristics of such a State are highlighted below.

## 2. The constitutional State

Historically, virtually every country has had a constitution providing a legal framework of the State order, determining, at the very least, the source of State power and the structure of State organs. The last three centuries have, however, witnessed the emergence of written constitutions, usually adopted in the form of a single solemn act. Today, there are only a few exceptions, such as the United Kingdom of Great Britain and Northern Ireland and Israel, where, in the absence of a single act, constitutional matters are dealt with through a set of basic laws.

Contemporary democratic States do not stop at the minimum content of a constitution. With regard to the execution of power, they usually establish: (a) representative democracy, sometimes combined with forms of direct democracy (in particular, referendums); (b) the division of power, including in particular the checks and balances between the legislature (the parliament) and the executive (the Government), as well as the independence of the judiciary; (c) the principle of the rule of law; and

(d) the responsibility and accountability of office holders. Contemporary constitutions, however, go beyond merely establishing and regulating the relations between institutions and defining procedural processes. They have undergone a process of humanization, placing individuals and groups at the centre by having a bill of rights and fundamental freedoms as a core element of the constitution.<sup>4</sup>

A modern **constitutional State** is based on principles of democracy, human rights and the rule of law.

### 3. Functions of the constitution in the contemporary world

From an institutional perspective, a constitution can be compared to the articles of association regulating the governance of an organization. From a democratic perspective, a constitution should serve as a guarantee of the rights of people and a barrier against attempts to introduce authoritarian rule. From a political perspective, a constitution determines and legitimizes the sovereign power holder and the main institutions and procedures through which the sovereign acts. From an ethical perspective, a constitution gives expression to the fundamental values underlying the State and society. Finally, from a legal perspective, a constitution is the basic law of a country, and the anchor of its legal system. It is at the top of the hierarchy of legal sources, which means that statutory laws and other legal regulations must be consistent with the constitution. It establishes basic mechanisms for the enforcement and interpretation of the law in cases of violations or disputes.

The constitution is one of the key factors ensuring the political and social stability of the State.

Modern constitutions are often seen as “social contracts” which should govern the life of the society. Generally, in a democratic country in theory it is not so much a contract “between” the State and the people but rather a contract among people, determining how they should organize themselves, reconcile different interests and shape their State. In a way, these functions of the constitution become even more important in a society affected by

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<sup>4</sup> It should be noted that not every constitution uses the term “bill of rights”, and some constitutions may have a different title for the section that articulates human rights and fundamental freedoms. However, the term is sufficiently widespread that it will be used in this publication to describe the part of a constitution that specifies the human rights and fundamental freedoms to be enjoyed by individuals and groups.

tensions and conflicts. In such a situation, the constitution is expected to provide not only a set of legal rules but also an operational framework for the resolution of conflicts, including the principles and mechanisms that should be applied to that end. Several recent examples illustrate this observation. The negotiations concerning conflict resolution in, for example, Bosnia and Herzegovina, Haiti, Nepal, South Africa and Timor-Leste all showed signs of a widespread vision of the constitution, and in some cases the preparatory process was an essential tool to effectively and sustainably address the root causes of conflict and, through appropriate rules and mechanisms, to prevent the conflicting interests from degenerating once again into conflict and destroying the community life.

A human rights-based constitution may be an effective tool to prevent or sustainably resolve conflict taking its roots in the oppression of people by the government.

#### 4. The constitution and democratic governance

All societies are governed in one way or another. The purpose of a modern constitution is to provide a framework for a well-governed society. It is therefore not surprising that the concept of good governance is based on essential principles of modern constitutionalism. According to the World Bank, “good governance is epitomized by predictable, open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law.”<sup>5</sup>

The principles listed in the boxes below constitute a common denominator of modern constitutionalism and democracy.<sup>6</sup>

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<sup>5</sup> World Bank, *Governance: The World Bank's Experience* (Washington, DC, 1994), p. VII.

<sup>6</sup> Guidance Note of the Secretary-General on Democracy, pp. 2-8; Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance, pp. 4-7; Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes, pp. 4-5; Commission on Human Rights resolution 2002/46.

**Democracy:** a form of government in which the sovereignty and the related right to govern are vested in the people of a State and exercised directly or through their representatives.

**Participation:** the involvement of addressees of public policies and programmes in their elaboration, management and monitoring of such policies and programmes directly or through freely chosen representatives.

**Separation of powers:** a constitutional system based on the separation of the different branches of government (horizontal separation) and, in some cases, on the separation of power (vertical separation) between different levels of government, such as between the central government and provincial governments or local governments. In the latter case, there may be a recognition of different national, ethnic, linguistic or religious communities. A horizontal separation of powers is designed to prevent any branch of the government from gaining absolute power or from abusing its power. It is guaranteed by a set of checks and balances between the different branches of government.

**Rule of law:** “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.” Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance (April 2008), p. 1.

**Openness:** a principle that requires the disclosure of information to the general public and clarity of the rules, regulations and decisions adopted by public authorities, including the access by the individual to information relevant to him or her (to which the exceptions must be provided by law).

**Responsibility and accountability:** in a democratic State, each State organ and each public official should be responsible for acting in accordance with the constitution and laws. Constitutions also establish principles of political responsibility of holders of official functions to the entity from which they derive their authority. Public officials should be held accountable for misconduct in the framework of procedures established by the constitution or laws which foresee political or legal responsibility, or both.

## 5. Constitutional guarantees of fundamental rights

Contemporary constitutions embrace a bill of rights that determines the legal rights of the individual vis-à-vis the State and within the society. The role of a bill of rights, however, goes beyond that since it also serves as a proclamation of the fundamental values upon which the society is built, such as human dignity, freedom, equality, equity and justice. In harmony with these values, constitutional rights help to protect vital interests of individuals, such as the right to health, housing, security of the person and participation in the conduct of public affairs.

Moreover, the development of constitutionalism has been marked by a humanistic paradigm shift. While at its beginning the focus was on its institutional dimension, in particular regarding the organization of the State and its body of organs, today the key to the life of a society is the status of individuals and groups, as well as the well-being of people. Consequently, human rights guarantees have moved to the centre of constitutional law. Almost all reforms of the State, be it in the area of economy, security or political processes, are to be guided by rights-related considerations. This is not a burdensome obligation. When undertaking constitutional reforms or adopting a new constitution, human rights and procedural protections should be clearly articulated to facilitate implementation.

Bills of rights and related mechanisms and procedures may play a particular role in societies torn apart by conflicts, as well as in those facing challenges in their development. They should determine which values are to be taken into account and protected in case of conflicting interests, how and in which way to strike a balance between different values and interests, and between the will of the majority and the rights of minorities. A bill of rights drafted in this way, respected and implemented over a period of time, usually becomes not only an effective umbrella protecting the individual, but also the backbone of a harmonious and democratic society. As stressed by the United Nations Development Group:

A HRBA [human rights-based approach] leads to better and more sustainable outcomes by analyzing and addressing the inequalities, discriminatory practices and unjust power relations which are often at the heart of development problems. It puts the international human rights entitlements and claims of the people [the “rights holders”] and the corresponding obligations of the State [the “duty bearer”] in

the centre of the national development debate, and it clarifies the purpose of capacity development.<sup>7</sup>

The following point needs to be stressed in this context: since large-scale human rights violations are among the most frequent sources of internal conflicts, a bill of rights and its protection mechanisms and procedures, expressing the aspirations and interests of all parties, if duly implemented is one of the most effective tools to restore peace or to prevent conflicts from occurring.

Since, with few exceptions, contemporary conflicts are internal in nature, the timely and effective addressing of the sources of human rights violations may dramatically reduce their number and thus the scale of human suffering. Constitutional reforms are not only an important but in most cases an indispensable tool in this respect.

Still, another issue deserves to be emphasized here. Some constitutions address the question of the relationship between the individual and the State not so much by proclaiming individual rights but by articulating State duties. As explained in more detail below, even though human rights create duties on the part of the State, the content of constitutional provisions should not be reduced to the latter. Without discussing this matter in more detail here, it is worth stressing that in view of international human rights instruments, the empowerment and protection of people need to be based on the recognition of persons as rights holders and not only as recipients of State services.

### **FLASH**

*A rights-based constitutional reform means both that human rights frame the reform process and that human rights standards, principles and guarantees are placed at the core of the State's constitution.*

## **B. Human rights and the process of constitutional reform**

Human rights aspects of the process of constitutional reform need to be incorporated into the legal framework and organizational arrangements for the elaboration of a new constitution or new constitutional provisions. Depending on the circumstances under which these reforms are pursued, either specific

<sup>7</sup> United Nations Viet Nam, "Human rights and the human rights-based approach". Available from [www.un.org.vn/en/what-we-do-mainmenu-203/cross-cutting-themes-human-rights.html](http://www.un.org.vn/en/what-we-do-mainmenu-203/cross-cutting-themes-human-rights.html).



laws on constitution making/revision are adopted, or the relevant norms of the existing constitution are applied. When the reforms have a rather limited scope, they are usually entrusted to the parliament. However, in cases of drafting a new constitution or of a large-scale revision, on many occasions particular arrangements are put in place, for example in the form of a constitutional commission integrating various social actors, with a view to elaborating a draft constitution. The guidance note of the Secretary-General on constitution making provides important information on processes, and on the timing and sequencing of the processes for elaborating a new constitution. Nevertheless, it should be recognized that every situation will be unique and it should therefore be approached on this basis. In this section, there is a specific focus on those parts of the process for elaborating a new constitution or new constitutional provisions that have significant human rights implications. Helpful guidance may also be drawn from the human rights-based approach methodology, in particular while designing the reform process.<sup>8</sup>

### 1. Ownership of constitutional reforms

The underlying principle of a democratic State is that the people have the right of self-determination as it is defined in article 1 of both International Human Rights Covenants.

#### **Article 1 of both International Human Rights Covenants**

*1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

This article means that the people of a country should be the owners of the constitutional reforms. They might be supported in this endeavour by international or bilateral partners, including international experts. Notwithstanding the benefits of such international assistance, it is a State's sovereign right to formulate, adopt and implement constitutional reforms in consultation with its people and their representatives. Organizational arrangements for constitutional reform should ensure its inclusive character and mitigate the danger of marginalizing particular groups or communities. In

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<sup>8</sup> See chapter 1, section A.5, of the present publication.

addition, at least three specific factors make the ownership of the constitutional reforms by the population concerned critical, namely:

- The overall impact of the constitution on the life of the country.
- The role of the constitution in the consolidation of the society around common values and principles of governance.
- The dependence of the effectiveness of the constitution, including the legal and political systems based on it, on the people's recognition of the constitution as deriving from their will and reflecting their values, interests and aspirations.

*The UN should recognize that constitution-making is a sovereign national process, and that to be successful the process must be nationally owned and led. ... The options and advice provided must be carefully tailored to the local context, recognizing there is no "one size fits all" constitutional model or process, and that national ownership should include official actors, political parties, civil society and the general public.*

Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009), p. 4.

Two developments, occurring separately or jointly, may undermine this ownership: first, the alienation of the public from this process through the monopolization of constitutional reforms by a political elite, the army, the executive power, a tribe, an ethnic group, a community or any other domestic actor(s); and second, if the process is dominated by external powers, be it a patronizing State or an international organization. The latter risk should be seriously taken into account by managers of international assistance programmes and international experts. Even acting in good faith, but determined to achieve results and preoccupied with the attachment to what they see as universal experience, they may tend to bypass local priorities, sensitivities, traditions and needs. If this happens, the constitutional reform can easily be perceived as a sort of external imposition and can, at the very least, be emotionally rejected. It is therefore essential that effective procedures and processes be put in place to ensure that the people of a country will not only have the final say on the text of the constitution, but will also be involved, as appropriate, at key stages of the process of constitution making. This approach does not question the important contribution international or regional actors, in particular the United Nations, can make to constitutional reforms by assisting in capacity-building and facilitating dialogue among national stakeholders, if needed.

## 2. Public participation in constitutional reforms

The success of constitutional reforms strongly depends on the support they receive from different sectors of the society. Numerous examples provide evidence that constitutional reforms benefit from the engagement of the general public and should not be left exclusively to politicians, as the shared ownership of this process is an important value as such. Equally important, however, is the unique contribution that can be made by different social actors. Recent practice in many countries confirms that popular involvement in constitutional reforms has gained greater appreciation. The choice of the modality of public participation depends on the situation on the ground, including the constitutional traditions of the country, the specificity of the political situation and the constitutional process itself.

In order to approach this question in a systematic way, it is necessary to differentiate between the drafting of the constitution and its actual adoption. With regard to the adoption, voting by the citizens of the country (through a referendum) has recently become a more widely established practice. There are essentially three modalities: (a) the adoption of the constitution or of a constitutional amendment by referendum (in the case of a discrete amendment to an existing constitution, the use of a referendum is somewhat less common); (b) the approval by referendum of the constitution or of a constitutional amendment already adopted by the parliament or by a specially-established constitutional assembly; or (c) as a complementary step to the foregoing – the choice by referendum of options for some basic constitutional solutions prior to the adoption of the constitution or a constitutional amendment by the parliament or a constitutional assembly (such as in the case of a significant change to the electoral system).

The drafting of a constitution, which is most often ultimately entrusted to politicians and experts, should nevertheless be structured in such a way that input from different parts of society can be provided without impediments and can be duly taken into consideration. This requires the establishment not only of communication channels but also of other organizational capacities. Moreover, it is vital that the drafting process allow for a free and exhaustive debate on various options for constitutional solutions originating from different segments of society. Finally, it is important that different segments within the constituency have the right to participate in the debate and put forward proposals, and that they be encouraged and enabled to do so.

*National ownership should include “the official actors, political parties, civil society and the general public”, and “human rights defenders, associations of legal professionals, media and other civil society organizations, including those representing women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons, and labour and business” should be given a voice in inclusive and participatory constitution-making processes.*

Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009), p. 4.

Those responsible for the drafting process as well as their advisers need to be aware that public participation should serve to optimize the result. Although one can argue that participation may be seen as an important value in itself, caution should nevertheless be exercised since participatory procedures that are too complicated may have the potential to be subject to manipulation, significantly slow down the constitutional reform process or, in extreme cases, be misused with a view to obstructing the process. This means that an effective organizational framework for public participation needs to be established to ensure the smooth and effective progression of the drafting of a constitution. In cases of an ongoing conflict or unpredictable tensions, particular attention should be paid to the security risks, which may limit the degree and extent of consultations. Under such conditions, a wrongly conceived participatory process may jeopardize the planned reforms, may not necessarily be representative and may pose a serious danger to participants. The key arguments supporting public participation are:

- A constitution enjoys the highest degree of political legitimacy if it is the fruit of the involvement of the people.
- A constitutional order established with the participation of diverse segments of society benefits from public support and may be fuelled by the engagement of different groups in public affairs.
- If the constitution is part of a peace process, the participation of parties to the conflict may be one of the most effective tools to address the violent past and resolve existing problems so they do not lead to a future outbreak of violence.

The Human Rights Committee has stated that the citizen's right to take part in the conduct of public affairs includes constitutional processes. It has also recognized that the requirements of this right are met as long as important groups in society are represented and can participate.<sup>9</sup>

### **Preamble of the 2007 Interim Constitution of Nepal**

*Recognizing the mandate of the Nepali people expressed, from time to time, since before 1951 until now, through historical struggles and people's movements for democracy, peace and progress;*

*Having determined upon the progressive restructuring of the state in order to resolve the existing problems of the country relating to class, caste, region and gender;*

*Expressing our full commitment to democratic norms and values including a system of competitive multiparty democratic rule, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, full freedom of the press, independence of the judiciary and concepts of the rule of law;*

*Guaranteeing the basic rights of the Nepali people to frame a Constitution for themselves and to participate in the free and impartial election of the Constituent Assembly in a fear-free environment.*

### **3. The human rights framework for constitutional reforms**

All democratic processes require that human rights be respected and protected. This is true, for example, in the case of elections or referendums. Otherwise, their conduct and, more importantly, their outcome, may essentially differ from the options preferred by the people. Constitutional reforms are not different in this respect, and human rights must be respected and protected during this process. Therefore, bodies established to organize and conduct constitutional reforms, as well as other actors participating in the constitutional reform process, should attach the utmost importance to the human rights environment.

Essential in this respect are those human rights which enable people to communicate, meet and organize. Particular attention should therefore be paid to the freedom of expression, freedom of assembly and freedom of association. However, in order to empower people to participate, it is not enough that these rights are simply respected: they need to

<sup>9</sup> Communication No. 205/1986, *Marshall v. Canada* (CCPR/C/43/205/1986).

be effectively protected by the State against any interference from any actor, public or private.

In addition to those groups listed in the guidance note of the Secretary-General on constitution making, consideration should in principle also be given to the representation of persons with disabilities and victims of mass human rights violations. Most, if not all, of these groups frequently find expression of their rights or proposed policies in a draft constitution.

*The UN should make every effort to support and promote inclusive, participatory and transparent constitution-making processes given the comparative experiences and the impact of inclusivity and meaningful participation on the legitimacy of new constitutions.*

Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009), p. 4.

### ***Article 13 of the Constitution of Malawi as amended in 2010***

*The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:*

...

#### *(g) Persons with Disabilities*

*To enhance the dignity and quality of life of persons with disabilities by providing—*

- (i) adequate and suitable access to public places;*
- (ii) fair opportunities in employment; and*
- (iii) the fullest possible participation in all spheres of Malawian society.*

### ***Article 81 of the 2009 Constitution of the Bolivarian Republic of Venezuela***

*Any person with disability or special needs has the right to the full and autonomous exercise of his or her abilities. The State ... guarantees them respect for their human dignity, equality of opportunity and satisfactory working conditions, and shall promote their training, education and access to employment appropriate to their condition, in accordance with the law.*

### **Article 11 (“Protection of children and young people”) of the 1999 Constitution of Switzerland**

1. Children and young people have the right to the special protection of their integrity and to the encouragement of their development.
2. They may personally exercise their rights to the extent that their power of judgement allows.

### **Article 28 of the 1996 Constitution of South Africa**

- (1) Every child has the right–
- (a) to a name and a nationality from birth;
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that–
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be–
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
  - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
    - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

Moreover, they need to be fulfilled, which means that those who wish to participate in the constitutional process would actually be in the position to do so, for example by communicating their views through the media, the Internet or other means, by campaigning for their proposals in public meetings and by having the freedom to associate with others. Where possible, the authorities should facilitate these actions. Finally, procedures should be put in place to enable those who feel excluded from the process or claim that their rights have been abused to resort to remedies that should help them to restore their rights and provide redress.

In some countries there has been the adoption of particular laws which govern the setting up of the process of constitutional reform. If the political environment is generally respectful of human rights, such a law may focus only on the specific arrangements for this process. Otherwise, human rights guarantees, including related legal remedies and institutional arrangements to hear complaints, should be included in the law on constitutional reform.

Part of the human rights framework for constitutional reform should be the creation of conditions permitting the drafting process and the content of the constitution to be responsive to the needs of groups requiring specific legal protection. To that end, arrangements need to be made to ensure an effective representation of those groups in the debates preceding the adoption of the constitution or its amendments.

The following non-exclusive checklist, which is based on the guidance note of the Secretary-General on constitution making, may be helpful in this regard:

- Women
- Children
- Minorities (which would include national, ethnic, linguistic and religious minorities)
- Indigenous peoples
- Refugees
- Stateless and displaced persons
- Labour
- Business
- Human rights defenders
- Associations of legal professionals
- Media





● **CONSTITUTIONAL  
BILL OF RIGHTS**



## A. The constitutional bill of rights and international human rights standards

### 1. International human rights law

One of the essential criteria which should be applied while drafting a bill of rights or introducing amendments to it is its coherence with international human rights standards. The body of international human rights law has been extensively developed since the adoption of the Charter of the United Nations in 1945 and is rooted in the 1948 Universal Declaration of Human Rights, which is widely recognized as a source of international customary law and is thus legally binding. The Universal Declaration of Human Rights provides a normative basis for the assessment of the legal systems,

policies and practices of all States carried out in the framework of the universal periodic review conducted by the Human Rights Council.

There are nine core human rights treaties as well as a significant number of other international treaties directly related to human rights. States which have ratified these treaties are obliged to implement them through legislative and other measures and report on their implementation.

*The UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues. The UN should be the advocate of the standards it has helped to develop.*

Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009), p. 4.

### **Core human rights treaties**

- 1965** International Convention on the Elimination of All Forms of Racial Discrimination
- 1966** International Covenant on Economic, Social and Cultural Rights
- 1966** International Covenant on Civil and Political Rights
- 1979** Convention on the Elimination of All Forms of Discrimination against Women
- 1984** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1989** Convention on the Rights of the Child
- 1990** International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- 2006** Convention on the Rights of Persons with Disabilities
- 2006** International Convention for the Protection of All Persons from Enforced Disappearance

However, international human rights standards are not only set by legally binding treaties; numerous declarations and other resolutions adopted by the General Assembly contribute to the setting of these standards. Although they are not legally binding, these documents constitute the body of “soft law”<sup>10</sup> and enjoy a high moral and political authority. Therefore, their implementation should also guide national legislation and practice. It is worth noting that the human rights treaty bodies often refer to the standards articulated by soft law in the interpretation of their respective conventions.

All States are parties to some or all of the core human rights treaties. As of 10 January 2018, 169 countries had ratified the International Covenant on Civil and Political Rights; 166, the International Covenant on Economic, Social and Cultural Rights; 196, the Convention on the Rights of the Child; 189, the Convention on the Elimination of All Forms of Discrimination against Women; and 179, the International Convention on the Elimination of All Forms of Racial Discrimination. By ratifying international human rights treaties, States enter a legal commitment under international law to bring their legislation, policies and practices in conformity with standards enshrined

<sup>10</sup> Declarations, principles, guidelines, rules or codes of conduct adopted by United Nations bodies in resolutions.

### Examples of human rights “soft law”

- 1979** Code of Conduct for Law Enforcement Officials
- 1981** Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
- 1986** Declaration on the Right to Development
- 1992** Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
- 1993** Principles relating to the status of national institutions (Paris Principles)
- 2005** Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
- 2007** United Nations Declaration on the Rights of Indigenous Peoples
- 2015** United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

in these instruments. This includes making either their constitutional law or legislation consistent with the ratified international human rights standards.

## 2. Domestic law and its relationship to international human rights law

International human rights standards should not only provide overall guidance to national legislators, but should also be seen as a yardstick to evaluate the legal, policy and practical solutions adopted at the domestic level. With regard to national legislation, it is the duty of the State:

- To ensure that domestic law at all levels is consistent with the international human rights standards enshrined in the Universal Declaration of Human Rights and the international treaties it has ratified.
- To be guided by the non-binding international human rights instruments adopted by the competent organs of the international community.

**Consistent:** the lack of contradiction between the law of a lower rank with the law of a higher rank.

Does this mean that all international human rights standards should find a direct reflection in a constitution’s bill of rights? This would be a goal difficult to achieve given that there are at present nine core international

human rights treaties, some of which specify a large number of rights. While advising a constitution-making body, the following aspects should be considered:

- Neither international law in general, nor human rights treaties in particular, prescribe in precise terms how international human rights standards are to be reflected in domestic law. It is for each country to decide upon the methods of bringing its law in conformity with these standards. The reality that some rights articulated by international instruments may be reflected in a constitution while in other cases expressed in legislation is recognized in the provisions of human rights instruments (see, for example, article 2 of both International Covenants on Human Rights).
- However, while considering ways to ensure the conformity of domestic law with international human rights standards, every Member State should not only be guided by the letter of legal provisions but also by the overall principle adopted by States at the 1993 World Conference on Human Rights that the protection and promotion of human rights “is the first responsibility of Governments”<sup>11</sup>. This may be interpreted as an obligation of the State to do its best – in other words, to take optimal measures – to implement international human rights standards. In terms of domestic law, this means that the highest source of law – in almost all countries, the constitution – should guarantee these rights because this is the premise of the consistency of the entire body of law of the country with international standards. Accordingly, many contemporary bills of rights contain a large number of the human rights enumerated in the international human rights treaties.
- Moreover, the 1969 Vienna Convention on the Law of Treaties stipulates in its article 26 that “every treaty in force is binding

**Section 1, paragraph 1, of the Vienna Declaration and Programme of Action** Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

<sup>11</sup> Vienna Declaration and Programme of Action, section 1, paragraph 1.

upon the parties to it and must be performed by them in good faith." This means that a party to a human rights treaty cannot justify a possible non-compliance with the treaty by invoking its domestic legal regulations, including the constitution.

In which way, then, can the constitution proclaim the consistency of domestic law with international human rights standards? For the purposes of this publication, one can identify the following options, which are not mutually exclusive:

- Articulation in the constitution of specific human rights and fundamental freedoms that are mentioned in international human rights instruments.
- The explicit recognition in the constitution of the binding force of international human rights instruments that the State has ratified within the domestic legal order.

### *General references*

A number of constitutions refer to the Universal Declaration of Human Rights, regional instruments and international human rights treaties ratified by the respective country in, for example, the preamble or its own bill of rights.

Although somewhat vague, such references may become a vehicle for using these standards and instruments in the interpretation of the entire constitution, and, as a consequence, provide guidance to the law-making bodies, as well as the courts and administration.

#### **Preamble of the 2005 Constitution of Burundi**

*Proclaiming our attachment to the respect for fundamental rights of the human person which result from the Universal Declaration of Human Rights of 10 December 1948, International Covenants on Human Rights of 16 December 1966 and the African Charter of Human and Peoples' Rights of 18 June 1981.*

#### **Article 31 of the 1993 Constitution of Cambodia**

*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's rights and children's rights.*

### *Recognition of the binding force of international human rights instruments*

A significant number of recently adopted constitutions confer a binding force within the domestic legal order to international law. One can see in this action a clear tendency of contemporary constitutionalism in all regions to open the domestic area to international law and to ensure that the former will be brought into consistency with the latter. There are different ways of doing so, including by incorporating international law into the national legal order. The choice of a specific option depends on the system of law adopted in a given country, and on its legal traditions and culture.<sup>12</sup> Nevertheless, an increasing number of constitutions impart a direct binding force within the domestic legal order to the international treaties ratified by the State and usually place them higher than statutory law in the hierarchy of internal sources of law. In these cases, the ratification of a treaty is usually dependent on the parliament's prior consent.

**Incorporation** of international norms into domestic law, which may take place in different forms, makes them directly applicable by administrative organs and courts. In many recent constitutions, international norms prevail over domestic law in cases of conflict.

Generally, the influence of international human rights instruments within the domestic legal order is a consequence of the overall standing of international law. From the perspective of human rights protection, it is highly desirable to ensure the maximum impact of international standards at the country level in order to achieve at least the following objectives:

- That in the case of an inconsistency between domestic law and international human rights standards, the latter prevail;
- That in the case of a legislative gap in the domestic legal order the international human rights standards can be applied by courts and administrative authorities if the protection of the rights holder makes it indispensable.

<sup>12</sup> International law differentiates between monist and dualist approaches to the implementation of international law at the domestic level. In the first case, international treaties do not require any domestic act of law to become binding domestically if they are self-executing in character; that is, they can be applied directly in domestic law without any implementing legislation. In the second case, treaties need to be "transformed" into domestic law by an act of national law to become internally binding. For additional information on this subject, see chapter III, section A.1.

**Article VI of the 1787 Constitution of the United States of America**

*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*

**Article 91 of the 1997 Constitution of Poland**

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

**Article 15 of the 1993 Constitution of the Russian Federation**

4. The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.

**2002 Constitution of the Netherlands****Article 91**

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.

2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.

3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.

**Article 94**

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.



In treaty bodies, it has repeatedly been stated that incorporating human rights instruments into the national legal system is important for their domestic implementation. In this respect, the views formulated by the Committee on Economic, Social and Cultural Rights state that “while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.”<sup>13</sup> The Human Rights Committee took a similar stand: “Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.”<sup>14</sup>

In contemporary constitutions the following alternative legal approaches can be found:

- The international instruments are directly binding in the domestic legal order.

#### **Article 5 of the 1993 Constitution of Andorra**

*The Universal Declaration of Human Rights is binding in Andorra.*

#### **Preamble of the 1990 Constitution of Benin**

*We, the people of Benin, ... Reaffirm our attachment to the principles of democracy and humans rights, as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Humans Rights of 1948, by the African Charter on Human and People’s Rights adopted in 1981 by the Organization for African Unity and ratified by Benin on 20 January 1986 and whose provisions make up an integral part of the present Constitution and of Beninese law, and have a value superior to the internal law.*

<sup>13</sup> General comment No. 9 (1998), paragraph 8.

<sup>14</sup> General comment No. 31 (2004), paragraph 13.

- In case of inconsistency with the domestic law, the international human rights instruments should prevail over the former.

### **Chapter IV of the 1994 Constitution of Argentina**

*Section 75: Congress is empowered:*

...

*22. To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws.*

*The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Woman; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.*

- In case of legislative gaps in the protection of an individual, the international standards should be applied by public authorities to close these gaps.

### **Article 16 of the 1992 Constitution of Cabo Verde**

*3. The constitutional and legal norm concerning fundamental rights shall be interpreted and the gaps filled in conformity with the Universal Declaration of Human Rights.*

- The interpretation of the bill of rights should take into account international human rights standards.

**Article 39 (“Interpretation of Bill of Rights”) of the 1996 Constitution of South Africa**

(1) When interpreting the Bill of Rights, a court, tribunal or forum:

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) Must consider international law; and
- (c) May consider foreign law.

**Article 13 of the 1994 Constitution of Ethiopia**

2. The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

**FLASH**

Complementarity of international human rights law and a bill of rights is strongly influenced by a State’s approach to the relationship between domestic and international law. In this regard, the relationship between both legal orders needs to be on the agenda of a human rights adviser when constitutional reforms are undertaken.

## B. Drafting a constitutional bill of rights: General requirements

Although when drafting a constitution ample attention should be paid to constitutional traditions and other local specificities and circumstances, a bill of rights should in all cases meet basic requirements which stem from widely accepted principles of constitutional and international law.

### 1. Conformity with assessments dominating in the society

In a democratic State, it is generally expected that the laws reflect and protect the values and ideals underlying the life of the society and widely shared by the people. This is especially true for a constitution's bill of rights since it comprises that part of the constitution in which all of the basic values relevant to individuals or groups are supposed to be articulated. Therefore, as already stressed, the best way to ensure that a bill of rights enjoys widespread public support is to draft it in a process that involves the participation of all segments of the society in the constitutional debate.

However, the fact that a view is shared by a majority of a society should not lead to its imposition if such a measure would violate the human rights of the minority, or more specifically individuals or groups in the minority. It is vital that the drafters of a bill of rights seek to strike a balance between different options and to provide a clear explanation, accessible and understandable to all social actors, of the motivations underlying the adopted solution.

Under international human rights law, a bill of rights should prevent the adoption of laws that may result in discrimination against or social exclusion of individuals or specific groups. In particular, attention should be paid to prohibited grounds of discrimination specified in the Universal Declaration of Human Rights, which in article 2 include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>15</sup> With the adoption of the Convention on the Rights of Persons with Disabilities,

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<sup>15</sup> These same prohibited grounds of discrimination are found in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, and article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights.

discrimination on the grounds of disability has become an internationally prohibited grounds of discrimination.<sup>16</sup> Furthermore, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families formulated additional prohibited grounds of discrimination, including conviction, ethnic origin, age, marital status and economic position.

Although not specifically addressed in the text of any of the nine core human rights treaties, a number of human rights treaty bodies have determined that sexual orientation and gender identity are also prohibited grounds of discrimination.<sup>17</sup> More recent constitutions embrace a wider set of prohibited grounds of discrimination than those found in the Universal Declaration of Human Rights and the two Covenants.

It needs to be repeated in this context that all efforts must be made during the drafting process to avoid a legal or factual exclusion of some parts of the society who may have approaches differing from the views of the majority from the constitutional debate and decision-making.

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<sup>16</sup> See Amy Raub and others, "Constitutional rights of persons with disabilities: An analysis of 193 national constitutions", *Harvard Human Rights Journal*, vol. 29 (Spring 2016), pp. 203-240.

<sup>17</sup> The Human Rights Committee in the communication *Toonen v. Australia* determined that the term "sex" in article 2 of the International Covenant on Civil and Political Rights included sexual orientation, thereby making sexual orientation a prohibited grounds of discrimination under the Covenant. (CCPR/C/50/D/488/1992). Other human rights committees have made similar findings. See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) (E/C.12/GC/20), paragraph 32; Committee on the Rights of the Child, general comment No. 13 (2011) (CRC/C/GC/13), paragraphs 60 and 72(g); Committee against Torture, general comment No. 2 (2008) (CAT/C/GC/2), paragraph 21; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) (CEDAW/C/GC/28), paragraph 18. "Gender identity" has also been interpreted by several human rights committees as a prohibited form of discrimination. See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) (E/C.12/GC/20), paragraph 32; Committee against Torture, general comment No. 2 (2008) (CAT/C/GC/2), paragraph 21; Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (CEDAW/C/GC/28), paragraph 18.

**Article 26 of the 2013 Constitution of Fiji**

(3) A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her—

(a) actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others, or on any other ground prohibited by this Constitution.

**Article 14 of the 2009 Constitution of the Plurinational State of Bolivia**

I. Every human being, without distinction, has legal status and capacity under the law and enjoys the rights recognized in this Constitution.

II. The State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political affiliation or philosophy, civil status, economic or social condition, type of occupation, level of education, disability, pregnancy, and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.

**2. Compliance with international human rights standards**

The principle of *pacta sunt servanda* (“agreements must be kept”) requires that a bill of rights be consistent with the human rights treaties ratified by the State. However, the drafters of a constitution should go beyond this concept. First, since the Universal Declaration of Human Rights is widely recognized as the interpretation of the notion of human rights contained in the Charter of the United Nations and is part of the International Bill of Human Rights, it should be accepted as an inspiration and standard for the drafting of a national bill of rights. Second, international human rights treaty law does not bind all countries equally since some may choose not to ratify specific international instruments. Nevertheless, it is a product of the international community striving to develop the best possible legal framework for the protection of these rights. Therefore, it should be seen as a set of exemplary legal solutions even for those countries which are not legally bound by all of the legal instruments making up the body of international human rights treaty law.

Drafters of a constitution should not only make sure that the bill of rights does not explicitly contradict the international human rights standards but also avoid formulations that could be used as a basis for legal interpretations contrary to those standards. Finally, a bill of rights should be seen as a vehicle conducive to the optimal implementation of international human rights.

The drafters of a constitution may, however, be confronted with some tensions or even contradictions between the international human rights standards and the culture and traditions prevailing in the country. Cultural practices that do an irreversible harm to the human being, such as female genital mutilation, must not be allowed by the constitution. Moreover, if present in a given society, they should be explicitly forbidden by law. Constitutional reform should be used as an opportunity to bring customary law in line with international human rights standards. Such conformity should be defined as a constitutional goal, towards which cultural changes supported by educational and promotional activities should lead. At the same time, however, the constitution should prohibit customary law that contradicts international human rights standards.

#### **Section I, paragraph 5, of the Vienna Declaration and Programme of Action**

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The Constitution of Kenya provides an example of how this problem can be addressed at the domestic level.

#### ***Article 2 of the 2010 Constitution of Kenya***

*(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*

*(5) The general rules of international law shall form part of the law of Kenya.*

*(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*

### 3. Scope of the constitutional language

The scope of constitutional rights and freedoms has always been a challenge to drafters of constitutions. Drafters usually move between two temptations – to make the constitutional language clear and detailed, or to have language of a general character that could be subject to different interpretations. To strike an appropriate balance is not a simple task.

A comprehensive bill of rights is one in which the essential human rights and fundamental rights of individuals and groups are set out and given constitutional protection. Striving to achieve this goal should not, however, lead to as many rights as possible being added to the bill of rights. The drafters should avoid a constitution that is overly technical and not well understood by the general public. It is therefore advisable, in most cases, to be primarily guided by a balanced, if not cautious, approach.

Given that legal traditions, cultures and historical experiences are so diverse, it is not possible to develop a bill of rights that can be universally applied in all States. However, international law interpreted in the context of national legal and cultural traditions and contemporary constitutional needs should provide the overall guidance in this context. If the constitution gives the international human rights instruments a binding force within the domestic legal order, they can be used as a complementary source of rights and freedoms, if necessary. This limits the risk of possible normative gaps.

Nevertheless, even when taking into account the diversity of national legal and cultural traditions of States, the following categories of rights should be included in a bill of rights:

- Rights that are indispensable for the protection of human dignity and the development of the individual's personality and capabilities.
- Rights that establish the framework for the participation of the individual in the conduct of public affairs.
- Rights that protect socially acceptable sources of personal income and economic interests of the individual.
- Rights that provide the legal basis for the most important social and cultural services.



#### 4. Internal coherence

Having coherence in the legal language articulating rights and freedoms means there are no contradictions in the language. This is one of the basic premises of the effectiveness of law. As a matter of principle, the coherence of a bill of rights should be ensured by its overall purpose, which is to protect human dignity. However, tensions may occur when constitutional rights are to be applied in concrete situations. It is useful to recall here classical dilemmas related to majority rule versus minority rights, dilemmas arising from the relationship between granting the right to health at the highest available level and universal access to health protection, and tensions which may occur between freedom of expression and the prohibition of incitement to violence.

Indeed, the observation that law is full of tensions in practice may apply to bills of rights when they move from the stage of enumeration to implementation. Sometimes, there is a temptation to avoid these sorts of problems by using very vague constitutional language. This may be a seemingly attractive solution since various stakeholders may be satisfied with such general language. However, in such a case the burden will be moved from the body adopting the constitution to other entities, principally the courts, which are called upon to apply its provisions. Hence, it is advisable while drafting a constitution to make all efforts to narrow down the possibility of tensions in the implementation of rights by expressing them in as precise a language as possible.

However, it is the nature of law that even if laid down in an optimal way, it will provide different parties with arguments to defend their contradicting interests. It is almost impossible to eliminate the collisions of rights if pursued by different actors in the same situation. Therefore, while the utmost importance should be attached to articulating a bill of rights in a way which would support its harmonized implementation, the ultimate coherence between rights may be achieved in the framework of legal procedures set up to protect these rights and resolve related conflicts of interest.

#### 5. Normative content

Most contemporary bills of rights, like the constitutions themselves, have generally ceased to be a kind of political manifesto with a limited legal impact. Today, rights contained therein are usually set to be directly applicable in the procedural framework established by the constitution

itself, as discussed below. However, in order to make this possible, the rights need to be articulated in such a way that they could be self-executing. In other words, the relevant provisions of the constitution need to have a clear normative content, making them applicable essentially in two situations:

- When there is no ordinary legislation enabling the rights holder to claim his or her rights.
- When the bill of rights provides criteria for the assessment of the conformity of ordinary legislation with the constitution.

- An international or constitutional norm is **directly applicable** if there is no need for implementing legislation enabling such a norm to be applied by a court or an administrative organ.
- A norm is **self-executing** if its normative content is sufficiently clear to be applied by a court or an administrative organ.

In order to be self-executing, a provision of the bill of rights should identify the rights holder and his or her legal entitlement, and, if need be, determine the limitations of the right and the basic ways of its implementation. The same requirements must be met by the provisions of international human rights treaties with a view to making them self-executing. The Human Rights Committee stresses in this context that “the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.”<sup>18</sup> There are numerous examples of self-executing provisions in both international law and constitutional texts.

### **Article 29 of the 1991 Constitution of Bulgaria**

*(1) No one shall be subjected to torture or to cruel, inhuman or degrading treatment, or to forcible assimilation.*

*(2) No one shall be subjected to medical, scientific or other experimentation without their voluntary written consent.*

Although gradually diminishing, the view continues to be represented by some commentators that the question of the self-executing nature distinguishes

<sup>18</sup> General comment No. 31 (2004), paragraph 15.

economic, social and cultural rights from civil and political rights. According to this view, many civil and political rights do not need any implementing legislation to be applied, while economic, social and cultural rights only acquire legal meaning through legislation.

Indeed, some constitutions, in particular the older ones, do not articulate economic, social and cultural rights. The argument brought to support this approach refers to the supposed vagueness of these rights which, as a consequence, cannot be directly applied and are therefore not self-executing. Guided by similar considerations, other constitutions while proclaiming social rights clearly state that they can be applied only on the basis of, and within the limits established by, ordinary legislation.

It is not the purpose of this publication to debate this issue, but it should be stressed that at both the international and the national levels the view that economic, social and cultural rights are justiciable and therefore directly applicable has gained ground. Nevertheless, it can also be said that the drafting of laws to provide for economic, social and cultural goods and services requires special attention with a view to giving them as precise a normative content as possible.

A constitutional right is **justiciable** if a legal claim based on it can be reviewed and decided upon by a court of law.

A convincing and greatly instructive jurisprudence of the highest courts has developed in some countries, such as India and South Africa. In the Grootboom case, the Constitutional Court of South Africa stated: "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis."<sup>19</sup>

The justiciability and enforceability of all rights largely depend, however, on the way they have been articulated, and on whether their normative content is clear enough. There is no single recipe for handling this matter because possible solutions are determined by, inter alia, the specific features of the legal system and the relevant legal traditions of the country. Nevertheless, there are practical considerations that should be taken into account when drafting constitutional rights concerning public services, and experience gathered during the drafting process of international instruments and

<sup>19</sup> *Government of the Republic of South Africa and Others v. Grootboom and Others* (2000).

contemporary constitutions can also help to clarify issues or to find solutions. Each of these options requires different legislative techniques (see chapter III, section B.5, of the present publication).

First, it is essential to determine what sort of legal effect is to be achieved and whether the planned provision of the constitution should primarily address the individual or the State.

Second, if it is possible to capture the matter under discussion in the form of an individual right, this form is preferable because it gives the rights holder the strongest position. On the basis of such a constitutional provision, the individual can effectively claim his or her right before competent organs, including in the framework of judicial proceedings. In this case, however, the right must have a more specific legal content.

***Article 53 of the 1996 Constitution of Ukraine***

*Citizens have the right to obtain free higher education in state and communal educational establishments on a competitive basis.*

Third, some social matters deserve to be embraced by the constitution, but laying down individual rights addressing them would be either impossible or premature. In such a case, the drafters may choose between two options. One is to formulate a legal duty of the State with a clear normative content. Through this, the State authorities can be held accountable for failing to implement the relevant constitutional provision. The drawback of this approach is that an individual usually does not have a legal entitlement to initiate a formal proceeding claiming its implementation.

***Article 13 of the 1990 Constitution of Benin***

*The state shall provide for the education of the youth by public schools. Primary education shall be obligatory. The state shall assure progressively free public education.*

The other option is to formulate a policy principle or guideline which the State is responsible for abiding by in order to achieve a given policy objective.

**Article 21 of the 1982 Constitution of China**

*The state develops medical and health services, promotes modern medicine and traditional Chinese medicine, encourages and supports the setting up of various medical and health facilities by the rural economic collectives, state enterprises and undertakings and neighborhood organizations, and promotes sanitation activities of a mass character, all to protect the people's health.*

Such constitutional provisions are not usually interpreted by the judicial organs as a basis for recognizing legal claims. Nevertheless, they may be called upon in political assessments, and in parliamentary and public debates. Finally, such provisions may also be instrumental in interpreting laws, including acts of parliaments regulating human rights matters. Therefore, it may be appropriate to include regulations in this form even though their legal content remains rather vague.

**FLASH**

*From the perspective of the enforceability of the bill of rights, it is vital, whenever possible, to set out individual rights with a specific legal content that can be asserted in the courts or other competent organs of the State.*

**6. Implementation and limitations**

Drafters of a bill of rights are often pressured by different sources, including constituencies, to promise more than what is feasible. Bowing to such pressures may be attractive for political reasons. Although popular support for a given provision in a proposed bill of rights may be desirable, it cannot be sought at the expense of the credibility of the constitution. Moreover, a proclamation of rights that is unrealistic undermines the value not only of the bill of rights but also of the constitution itself.

Two questions relate to whether a bill of rights can be implemented. The first is about the normative content of the relevant constitutional provisions, which is addressed above. The second question relates to the admissibility of limitations – or restrictions – of rights. This is one of the most sensitive issues in the area of human rights, since the interests of the society as a whole need to be duly recognized and respected. This means that in some cases limitations imposed on the enjoyment of rights may be inevitable.

Moreover, only a small number of rights must be guaranteed without any limitations, such as the prohibition of torture.

In this regard, a distinction should be drawn between inherent limitations of rights and limitations based on the assessment by State authorities. Without inherent limitations, such as the duty to respect the rights of others or the duty to respect the law while exercising one's own rights, the enjoyment of rights could easily lead to a state of anarchy which would make these rights illusory. Therefore, even if a provision of an international treaty or bill of rights does not explicitly refer to such inherent limitations, they are implicitly built in as one person's enjoyment of rights cannot come at the expense of another person's rights. This is a matter of individual responsibility.

### **Article 29 of the Universal Declaration of Human Rights**

*2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

The limitations based on the assessment made by State authorities constitute a delicate matter because, if they are misinterpreted, such limitations may lead to the abuse of power. The possibility, the scope and the grounds of such limitations should therefore be foreseen in the constitution itself in relation to each individual right in question. Otherwise, the power to introduce limitations would be entirely left to parliamentary or governmental acts or the courts, and the normative nature of constitutional rights might be put in question (see chapter II, section C.5).

Limitations of rights should be free from arbitrariness, which often results from an incorrect assessment of social realities or the interests of particular groups by public authorities. General guidance in this regard is provided by the international human rights instruments. The drafters of a bill of rights should remember that the willingness of the society to accept limitations imposed on the enjoyment of rights may differ with regard to specific categories of rights. For example, a limited implementation of social rights which results from the lack of adequate resources may be more easily understood than

the limitations imposed on the freedom of expression. Generally, it may be controversial to impose limitations on civil and political rights, particularly if there is the appearance or perception of arbitrariness or the preferential protection or non-protection of such rights. Therefore, it is important that in the constitution itself the admissibility of and conditions for the limitation of rights are outlined, or the criteria for this process are set out.

The Human Rights Committee has elaborated on this issue in several of its general comments. The most specific approach has been developed in general comment No. 22 on the right to freedom of thought, conscience and religion,<sup>20</sup> but it can also be applied in the case of other rights that permit limitations on specific grounds.

***Article 18 of the International Covenant on Civil and Political Rights***

*3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

The Committee set out the following principles: (a) limitations must be prescribed by law; (b) limitations are permitted only if necessary to protect at least one of the following interests: public safety, order, health or morals, or the fundamental rights and freedoms of others; (c) limitations are not allowed on grounds not specified by the Covenant, nor may they be imposed for discriminatory purposes or applied in a discriminatory manner; (d) limitations must be directly related and proportionate to the specific need on which they are predicated; (e) limitations may be applied only for those purposes for which they were prescribed; (f) limitations must not vitiate the right in question, that is, the limitations cannot undermine the core content of the right concerned; and (g) while determining the scope of limitations, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all of the grounds specified in articles 2, 3 and 26 of the Covenant.

In addition, the Committee explained that the concept of morals derives from many social, philosophical and religious traditions. Therefore, limitations for

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<sup>20</sup> See also general comment No. 10 (1983) on freedom of expression.

the purpose of protecting morals should not be based on principles deriving exclusively from a single tradition.<sup>21</sup>

## 7. Communicativeness

Historically, bills of rights were sometimes seen as political manifestos and citizens' guides. The Preamble of the 1789 French Declaration of the Rights of Man and of the Citizen illustrates this perception well.

### **Preamble of the 1789 Declaration of the Rights of Man and of the Citizen**

The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all. Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen ...

Although today, such solemn language is not often used, the educational function of bills of rights is still important. Rights holders should learn from a constitution about their rights and ways of claiming access to them. Duty bearers should derive instructions about their obligations, responsibilities and limits of their powers. A bill of rights should generally guide the society and the authorities. In order to fulfil this role, a bill of rights should be drafted in a form that would be clear and understandable to all stakeholders. Even if the intention to give the bill of rights a clear normative content should be welcomed, drafters must avoid to the extent possible using technical language that could be understood only by legal professionals. Otherwise, the educational function of the bill of rights may be lost and the feeling of ownership not only of the bill of rights but of the entire constitution may be at risk.

<sup>21</sup> General comment No. 22 (1993), paragraph 8.



**FLASH**

*The history of bills of rights is a history of human freedom. The 1996 Constitution of South Africa proclaims:*

*This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*

## C. Content of the constitutional bill of rights

Just as for constitution making in general, giving content and form to the bill of rights is a sovereign decision of the State and its people. There is no single master plan for a bill of rights which may be used as an ultimate yardstick. Yet, as stressed in section II above, the principle of State sovereignty does not waive the obligations of a State under the Universal Declaration of Human Rights and under the human rights treaties it has ratified. In addition, the inclusion of internationally recognized human rights in a constitution not only contributes to the adoption of international instruments but also helps to develop a common human rights culture. These two interlinked factors bring a high degree of commonality to the elaboration of a bill of rights. Even if the form may differ considerably, there are many similarities in the content of a number of recently adopted bills of rights.

### 1. The rights holder

#### *Human rights versus citizens' rights*

Contemporary bills of rights follow the principle underlying international law in defining rights holders. Thus, they serve to protect all people under the jurisdiction of the State, whether nationals or non-nationals. Technically, constitutions usually operate with such notions as "everyone" or "all" or "every person" in contradiction to "each citizen" or "citizens."

Again, as in international instruments, some political rights may be reserved only for citizens of the State. Traditionally, rights related to the conduct of public affairs belong to this category. The International Covenant on Civil and Political Rights (article 25) takes this position. In the same context, some constitutions also mention the freedom to form political parties and the right

to information about activities of public authorities as citizens' rights only. It should be pointed out, however, that increasingly either constitutions or electoral laws enable non-citizens who are legally staying in the country for a certain period of time to participate in local elections or referendums. Other rights which are usually categorized as political rights belong to every human being, including the freedom of expression and the freedom of assembly.

Other rights that various constitutions grant only to nationals include rights linked to citizenship, such as the right to be issued a national passport and to be protected while abroad, the right to vote in national elections, the right to run for national public office, the prohibition of expulsion and the prohibition of extradition.

***Article 15 of the 1992 Constitution of Mongolia***

*2. Deprivation of Mongolian citizenship, exile, or extradition of citizens of Mongolia shall be prohibited.*

With regard to developing countries, limitations vis-à-vis the enjoyment of human rights by non-citizens have been explicitly accepted under some conditions by the International Covenant on Economic, Social and Cultural Rights.

***Article 2 of the International Covenant on Economic, Social and Cultural Rights***

*3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*

Some countries benefit from this opportunity by granting, for example, the right to social security exclusively to their citizens. Nothing in article 9 of the Covenant, however, empowers States parties to act arbitrarily in this respect. An important clarification of this point has been made by the Committee on Economic, Social and Cultural Rights in its general comment No. 19 on the right to social security. While noting that non-nationals are groups "who traditionally face difficulties in exercising this right", the Committee makes the following points: (a) the Covenant prohibits discrimination on grounds of nationality; (b) referring to the concept of equity, the Committee emphasizes: "Where non-nationals, including migrant workers, have

contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in workplace"; (c) "Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care"; and (d) "Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."<sup>22</sup> Although the general comment specifically addresses the right to social security, the reasoning of the Committee could be applicable to other economic, social and cultural rights.

Some constitutions expand the application of the rights to juridical persons. They do this, however, due to the nature of such actors.

### **Article 9 of the 1992 Constitution of Estonia**

*2. The rights, liberties, and duties listed in the Constitution shall be extended to legal entities, to the extent that this is in accordance with the general aims of the legal entities, and with the nature of such rights, liberties and duties.*

Examples of the rights applicable to juridical persons are the right to the protection of correspondence, the right to the protection of reputation and the right to property.

### **FLASH**

*In the light of the provisions of international human rights instruments, and as reflected in the work of treaty bodies and many contemporary constitutions, all individuals under the jurisdiction of a given State should in principle be holders of the rights enshrined in the bill of rights. The reservation of the access to some rights for citizens of the country should be seen as an exception to this general rule.*

<sup>22</sup> Paras. 31 and 36-38.

### *Individual versus group rights: Minorities and indigenous peoples*

According to the traditional view, although human rights may be enjoyed collectively in some cases, only an individual can be recognized as their holder. There were two main reasons for this approach, namely: (a) the original sense attached to human rights as an instrument protecting human dignity which is inherent to every human being but is not attributable to groups of people, and (b) the fact that the defining component of a group right is its collective nature (that can be enjoyed and claimed essentially only by the group), meaning that such a right cannot be attributed to each human being, which is a feature of human rights. Article 27 of the International Covenant on Civil and Political Rights and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provide examples of the consequences of this approach. In both cases, the language used refers to “rights of persons belonging to minorities” and not to rights of minorities as groups.

Nevertheless, in recent decades the group dimension of some human rights have been increasingly recognized.<sup>23</sup> This has happened with regard to not only minorities and indigenous peoples but also other groups, such as disadvantaged or marginalized groups. While considering the reference to the rights of groups, the drafters of a constitution should, however, in each case analyse what is at stake. In particular, they should carefully examine whether in a given case the notion of a “right” would involve legal or political claims, and appropriate language should be used. It is also important to keep in mind that any protection of minority rights should be framed in a way that it does not deprive subgroups within the minority of the entitlement to claim the full range of human rights.

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<sup>23</sup> Endorsement of the 2007 United Nations Declaration on the Rights of Indigenous Peoples by its four initial opponents – namely, Australia, Canada, New Zealand and, later, the United States, all of whom voted against this Declaration in the General Assembly in 2007 – can be seen as a remarkable development in the support of group rights.

**Article 27 of the International Covenant on Civil and Political Rights**

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

**Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities****Article 2**

1. *Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.*

2. *Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.*

3. *Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.*

**Article 3**

1. *Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.*

**Article 1 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples**

*Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.*

Important standards have also been laid down in the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization.

The way in which the bills of rights establish the protection of minorities and indigenous peoples depends on the structure of the society and on national experiences. Some of these bills of rights go beyond merely proclaiming the protection of minorities' or indigenous peoples' identity and determine specific rights of these groups, as well as structural and procedural arrangements to make this protection effective.

## **2006 Constitution of Serbia**

### **Article 75 ("Rights of persons belonging to national minorities")**

*Persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution. Individual rights shall be exercised individually and collective rights in community with others, in accordance with the Constitution, law and international treaties.*

*Persons belonging to national minorities shall take part in decision-making or decide independently on certain issues related to their culture, education, information and official use of languages and script through their collective rights in accordance with the law.*

*Persons belonging to national minorities may elect their national councils in order to exercise the right to self-governance in the field of culture, education, information and official use of their language and script, in accordance with the law.*

### **Article 79 ("Right to preservation of specificity")**

*Members of national minorities shall have a right to: expression, preservation, fostering, developing and public expression of national, ethnic, cultural, religious specificity; use of their symbols in public places; use of their language and script; have proceedings also conducted in their languages before state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units, in areas where they make a significant majority of population; education in their languages in public institutions and institutions of autonomous provinces; founding private educational institutions; use of their name and family name in their language; traditional local names, names of streets, settlements and topographic names also written in their languages, in areas where they make a significant majority of population; complete, timely and objective information in their language, including the right to expression, receiving, sending and exchange of information and ideas; establishing their own mass media, in accordance with the Law.*

An interesting example of how the issue of indigenous peoples is addressed is provided in the Constitution of Brazil.

### **1988 Constitution of Brazil**

#### **Article 231 (“Native populations and lands”)**

*Indians shall have their social organization, customs, languages, creeds, and traditions recognized, as well as their native rights to the lands they traditionally occupy, it being incumbent upon the Republic to demarcate them and protect and ensure respect for all their property.*

#### **Article 232 (“Right of Indians”)**

*Indians, their communities, and organizations have standing to sue to defend their rights and interests, the Public Attorney’s Office intervening in all the procedural acts.*

Some constitutions, such as that of South Africa, address the rights of communities which are subject to traditional authorities and which observe a system of customary law.

### **Chapter 12 (“Traditional leaders”) of the 1996 Constitution of South Africa**

#### **Article 211 (“Recognition”)**

*(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.*

*(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.*

*(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*

#### **Article 212 (“Role of traditional leaders”)**

*(1) National legislation may provide for a role for traditional leadership as an institution at the local level on matters affecting local communities.*

*(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law:*

*(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and*

*(b) national legislation may establish a council of traditional leaders.*

**FLASH**

*When a State grants territorial or cultural autonomy to minorities or indigenous peoples, it is essential to ensure that the human rights of individual members of such groups are duly protected, including, if necessary, against autonomous action by such groups.*

**2. Duty bearers**

International documents speak of Governments as bearers of duties related to human rights since they represent States in international relations.

**Section 1, paragraph 1, of the Vienna Declaration and Programme of Action**

*Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.*

Bills of rights explicitly or implicitly identify public authorities as duty bearers. Responsibility for the implementation of constitutional rights is diffuse, however, and constitutions are often more specific with regard to the particular duties of different State bodies. Nevertheless, the actions of all public authorities are always taken in the name of the State.

The same can be said about the responsibility for the implementation of international human rights treaties. Although constitutions do not usually contain any specific stipulations in this regard, the overall coordinative role is often assigned to the ministry of foreign affairs, ministry of justice or another ministry responsible for a given substantive area (such as economic, social and cultural rights). From the international perspective, however, the Government remains the main actor responsible for fulfilling the international human rights obligations of the State.

In its general comment No. 31, the Human Rights Committee captures this principle very clearly:

The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local

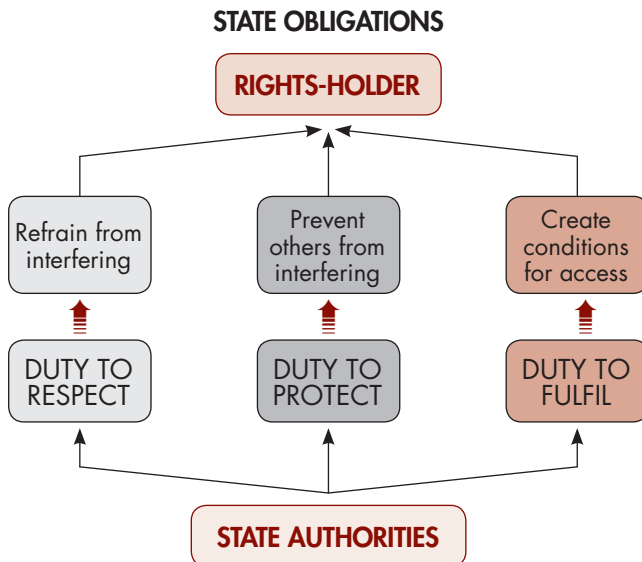


– are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.<sup>24</sup>

**Article 14 of the 1992 Constitution of Estonia**

*Guaranteeing rights and liberties shall be the responsibility of the legislative, executive, and judicial powers, as well as of local government.*

According to the interpretations by the human rights treaty bodies and academic experts, a State has three basic duties as far as the implementation of human rights is concerned: to respect, to protect and to fulfil.



<sup>24</sup> Paragraph 4.

All of these duties should be performed within the realm of each State organ, as appropriate. Defining competencies is usually sufficient to frame the legal responsibilities of various public actors in the area of human rights. Yet, constitutions often go beyond that. Considering the importance of the rights, some constitutions describe the implementation of these rights as one of the fundamental objectives of the State.

### **Section 6 of the 2002 Constitution of Timor-Leste**

*The fundamental objectives of the State shall be:*

...

*b) To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic State based on the rule of law.*

Other constitutions directly articulate the implementation of constitutional rights as the duty of the State.

### **Article 7 (“Rights”) of the 1996 Constitution of South Africa**

*(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*

In a federal State, the bill of rights enshrined in the constitution of the federation is binding in the entire territory. However, some constitutions refer to the structure of the State in the context of individual rights and freedoms, requiring that the law of the constituent parts of the federation remain in conformity with the federal constitution.

**Article 28 (“Land constitutions – Autonomy of municipalities”) of the 1949 Basic Law of Germany**

(3) The Federation shall guarantee that the constitutional order of the Länder [parts of the Federation] conforms to the basic rights [individual rights and fundamental freedoms] and to the provisions of paragraphs (1) and (2) of this Article.

**Amendment XIV to the 1787 Constitution of the United States of America**

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Article 211 of the 1988 Constitution of Brazil**

The Union, the states, the Federal District and the municipalities shall cooperate in the organization of their educational systems.

Paragraph 1. The Union shall organize the federal educational system and that of the Territories, shall finance the federal public educational institutions and shall have, in educational matters, a redistributive and supplementary function, so as to guarantee the equalization of the educational opportunities and a minimum standard of quality of education, through technical and financial assistance to the states, the Federal District and the municipalities.

Paragraph 2. The municipalities shall act on a priority basis in elementary education and in the education of children.

Paragraph 3. The states and the Federal District shall act on a priority basis in elementary and secondary education.

Paragraph 4. In the operation of their educational systems, the states and municipalities shall establish forms of cooperation, so as to guarantee the universalization of the mandatory education.

Some constitutions also entrust particular responsibilities to specific organs. An example is the establishment of the competence of a constitutional court to consider complaints against alleged violations of constitutional rights (often referred to as constitutional complaints).

### **1949 Basic Law of Germany**

#### **Article 93 (“Jurisdiction of the Federal Constitutional Court”)**

*The Federal Constitutional Court shall rule:*

...

*4a. On constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority.*

#### **Article 94 (“Composition of the Federal Constitutional Court”)**

*(2) The organisation and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.*

Although the central responsibility for implementation of constitutional rights rests with the public authorities, not only State organs but also individuals, groups and juridical persons are obliged to respect constitutional rights. The scope and content of the resulting obligations depend on the status of the given actor.

#### **Article 8 (“Application”) of the 1996 Constitution of South Africa**

*(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*

Some constitutions establish specific obligations of non-State actors who deliver social services, such as private educational institutions, assigning them obligations similar to those of State-run institutions.

### **Article 29 (“Education”) of the 1996 Constitution of South Africa**

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

- (a) Do not discriminate on the basis of race;
- (b) Are registered with the state; and
- (c) Maintain standards that are not inferior to standards at comparable public educational institutions.

Another situation occurs when the implementation of a right demands a certain conduct on the part of non-State actors. An example is provided by duties imposed by law on employers regarding the rights of trade unions and the right to strike.

### **2010 Constitution of Angola**

#### **Article 50 (“Trade union freedoms”)**

1. It shall be recognized that all workers have the freedom to create trade union organisations to defend their collective and individual interests.
2. It shall be recognized that trade union associations have the right to defend the rights and interests of workers and to exercise the right to social dialogue, which must duly take into account the fundamental human rights of individuals and communities and the actual capacity of the economy, under the terms of the law.
3. The law shall regulate the founding, affiliation, federation, organization and closure of trade union associations and shall guarantee their autonomy and independence from employers and the state.

#### **Article 51 (“Right to strike and prohibition of lock-outs”)**

1. Workers shall have the right to strike.
2. Lock-outs shall be prohibited and employers may not bring a company totally or partially to standstill by forbidding workers access to workplaces or similar as a means of influencing the outcome of labour conflicts.
3. The law shall regulate the exercise of the right to strike and shall establish limitations on the services and activities considered essential and urgent in terms of meeting vital social needs.

Some constitutions also explicitly refer to the duty of specific groups of individuals to respect other people’s rights. The Constitution of Colombia, for example, expands the right to writ of protection.

**Article 86, paragraph 4, of the 1991 Constitution of Colombia**

*The law will establish the cases in which the writ of protection may be filed against private individuals entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest or in respect of whom the applicant may find himself/herself in a state of subordination or vulnerability.*

**FLASH**

*Effective protection of constitutional rights may require that the duty bearers be readily identifiable with regard to the obligations established by some rights.*

### 3. Fundamental principles

Contemporary bills of rights often explicitly formulate underpinning principles on which the body of rights is based. These principles usually follow similar provisions enshrined in the Universal Declaration of Human Rights and both International Covenants on Human Rights, among which are the principles of human dignity, freedom and equality. However, bills of rights may articulate principles drawn from other core human rights treaties, such as the best interests of the child from the Convention on the Rights of the Child. The set of principles articulated in a constitution may differ from country to country, depending on its cultural and legal traditions.

#### *Human dignity*

Many bills of rights refer to human dignity as a central value to be protected by constitutional rights, reasoning that the dignity of every human being is an end in itself.

**Article 30 of the 1997 Constitution of Poland**

*The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.*

Constitutional texts refrain from a more detailed specification of the content of human dignity, although this principle is sometimes contextualized, for example regarding persons deprived of liberty. Notwithstanding the vagueness of a constitutional provision calling for the respect of the inherent dignity of all persons, including it in the bill of rights may provide significant protection in practice.

To summarize, human dignity is perceived as:

- A fundamental premise of the inalienability of human rights because of its intrinsic nature in relation to the individual.
- An underlying value of the bill of rights, which should be taken into consideration when applying constitutional rights.
- A principle from which specific rights can be interpreted in the case of a normative gap.

### **FLASH**

*Human dignity as an intrinsic characteristic of every individual constitutes the basic premise of the universality of human rights, and thus is a source of the perception of constitutional rights as entitlements of every person under the jurisdiction of the State.*

### **Freedom**

Bills of rights give expression to the principle of freedom primarily by setting forth “specific” freedoms, such as the freedom of opinion and expression, the freedom of thought, conscience and religion, the freedom of assembly or the freedom of association. In addition, a number of constitutions articulate the general principle of freedom.

#### **Article 31 of the 1997 Constitution of Poland**

*(1) Freedom of the person shall receive legal protection.*

*(2) Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.*

There is no doubt that freedom is one of the underlying values of international human rights treaties and bills of rights in democratic countries. As to the substance, no bill of rights could be recognized as consistent with international standards if not based on this principle. Although it would be difficult to justify the view that the principle of freedom must be explicitly formulated in the constitution in addition to a list of specific freedoms, there are some important advantages of this option and among them three are particularly significant: (a) the principle of freedom sends a clear message that people are free in the light of the constitution and that any legal provision interfering with freedom is an exception to the rule and needs to be justified in the light of the constitution; (b) the principle of freedom essentially excludes regulatory systems which demand that a rights holder receive a prior concession or permission to enjoy his or her freedom by a specific action or inaction, unless such concession or permission is indispensable in a democratic society (see chapter II, section B.6, for comments on limitations on constitutional rights); and c) finally, the principle of freedom may be an important argument for an individual claiming freedom of action in areas not covered explicitly by law.

### *Equality and non-discrimination*

The principles of equality and non-discrimination have always been fundamental components of international human rights law, and are reflected in all of the core human rights treaties. They are also correspondingly enshrined, in one form or another, in most national constitutions.



## **1948 Universal Declaration of Human Rights**

### **Article 1**

*All human beings are born free and equal in dignity and rights.*

### **Article 2**

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

## **International Covenant on Civil and Political Rights**

### **Article 2**

*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

### **Article 3**

*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*

### **Article 26**

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

In the light of these provisions, the following are components of the principle of equality:

- The recognition of everyone as equal before the law. This is an imperative for all international and national organs, both legislative and when applying the law by the courts and the public administration, to recognize everyone as equal and with equal standing in all areas of law.

- The entitlement of all persons to enjoy the same rights proclaimed by legal instruments without any distinction on a prohibited ground.
- The right to equal treatment – the law must be applied to all in the same way.
- The right to equal protection of the law – all persons should have the same access to organs and procedures established to administer justice or otherwise protect people’s rights and interests and hold the same standing before them.

The prohibition of discrimination is one of the fundamental dimensions of the principle of equality. International instruments and, as a rule, constitutions therefore articulate the prohibition of discrimination as a separate principle. International human rights law is clear and unequivocal on the standard that should be met. “Discrimination” means any distinction, exclusion, restriction or preference which has the intention or effect of nullifying or impairing the equal recognition, enjoyment or exercise of rights.

***Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination***

*The term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

The basic elements of the definitional approach used in the quoted provision have been applied in a number of subsequently adopted human rights treaties.<sup>25</sup> The two Committees acting under their respective Covenants adopted a similar approach. The Human Rights Committee, in its general comment No. 18 on non-discrimination, describes the term “discrimination” as used in the International Covenant on Civil and Political Rights as “understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

<sup>25</sup> See for example article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (see the text box in the present publication).

*The UN should address the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons. For example, the principle of equality between men and women should be embedded in constitutions, and states should be encouraged to consider special provisions on children recognizing their status as subjects of human rights.*

Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009), p. 4.

status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>26</sup> While, in most cases, the need to include provisions relating to equality and non-discrimination in a national constitution will not be contested, the precise nature and wording of these provisions is a subject that requires careful attention. The principle of equality is one of the foundations of contemporary constitutions proclaimed explicitly either in a chapter dedicated to general principles of the State or within the bill of rights.

#### **Article 14 of the 1995 Constitution of Georgia**

*Everyone is free by birth and is equal before law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence.*

#### **Article 27 (“Equality and freedom from discrimination”) of the 2010 Constitution of Kenya**

*(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

<sup>26</sup> Paragraph 7. See also Committee on Economic, Social and Cultural Rights general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

The principle of non-discrimination means that, in order for States to guarantee adequate protection, discrimination must be prohibited both formally and substantively. Eliminating formal discrimination requires ensuring that a State's constitution does not discriminate on prohibited grounds. For example, constitutions should not grant women lesser rights than those accorded to men. Eliminating substantive discrimination requires prohibiting discrimination in practice. States must commit to adopting the measures necessary to eliminate the stereotypes, conditions and attitudes which cause or perpetuate discriminatory conditions in people's lives.

Some constitutions also provide a definition of discrimination.

**Article 16 ("Protection from discrimination") of the 1968 Constitution of Mauritius**

*(3) In this section, "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.*

Other constitutions confine themselves to the prohibition of discrimination.

**Section 16 ("Universality and equality") of the 2002 Constitution of Timor-Leste**

*2. No one shall be discriminated against on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition.*

**Article 27 ("Equality and freedom from discrimination") of the 2010 Constitution of Kenya**

*(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

Similarly to the international human rights instruments, constitutional provisions usually list the “prohibited grounds of discrimination”. A rather rare criticism against this approach refers to the risk that a list of prohibited grounds may give rise to interpretations according to which discrimination based on grounds other than those listed is admissible. Based on this assumption, some constitutions refrain from specifying the grounds on which discrimination is prohibited.

***Article 32 of the 1997 Constitution of Poland***

*(2) No one shall be discriminated against in political, social or economic life for any reason whatsoever.*

Advocates for listing the prohibited grounds of discrimination point to two main arguments. First, such a list helps to eliminate discrimination on specific grounds known from legal or social practice. It is therefore a direct response to existing needs. Second, the list should always be interpreted as exemplary only and thus open-ended, whether this is explicitly clarified by the relevant provision or not. Articles 2 of both Covenants resolve the problem by adding the words “or other status”. Some constitutions follow this example while others do not. In both cases, however, the admissible interpretation from the perspective of the principle of equality is the same. Nevertheless, the most certain way to ensure comprehensive constitutional protection is to provide a list of prohibited grounds and to specify the inclusion of “or other status”.

It is important to emphasize that, if a country wants to have a real impact on conditions of inequality, its constitution should embody the full spirit of the human rights definition of “non-discrimination”. For this reason, the Committee on the Elimination of Discrimination against Women has consistently recommended that States parties incorporate the definition given in the Convention into their constitutions.

**Article I of the Convention on the Elimination of All Forms of Discrimination against Women**

*For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

In most cases, contemporary constitutions not only set out the right to equality and non-discrimination in general terms but also specify the elements of these principles, either through provisions on specific dimensions of equality (for example, equality between men and women) or in the context of different constitutional matters (for example, regarding equal treatment in connection with the administration of justice, labour relations or ethnicity).<sup>27</sup>

**Article 19 of the 1993 Constitution of the Russian Federation**

*3. Man and woman shall have equal rights and liberties and equal opportunities for their pursuit.*

**Article 48 of the 1982 Constitution of China**

*1. Women in the People’s Republic of China enjoy equal rights with men in all spheres of life, political, economic, cultural, and social, including family life.*

*2. The State protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains and selects cadres from among women.*

<sup>27</sup> For the latter, see chapter II, section C.1, of the present publication.

In some cases, constitutional provisions are aimed at eliminating customs and practices that are discriminatory against women.

***Article 24 of the Constitution of Malawi, as amended in 2010***

- *Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as:*
  - (a) Sexual abuse, harassment and violence;*
  - (b) Discrimination in work, business and public affairs; and*
  - (c) Deprivation of property, including property obtained by inheritance.*

Many constitutions are also based on the common contemporary interpretation of the principle of equality, according to which the State should take measures to enable and empower all people to enjoy their rights. Human rights treaty bodies stress that States are obliged to adopt laws and policies which would correct inequalities in the enjoyment of human rights. To achieve real equality, States often grant a temporary advantage to groups that have been historically disadvantaged and to others who, without this sort of support, would suffer from the consequences of factual inequality. This is done to eliminate conditions that are perpetuating a lack of equal enjoyment of human rights by such groups, and to speed up the achievement of equality. Such provisions are often called “temporary special measures” or “positive measures”.

***Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination***

*4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*

The human rights treaty bodies also provide helpful clarifications in this regard, in particular the Committee on the Elimination of Racial Discrimination (CERD) (general recommendation No. 32), the Committee on Economic, Social and Cultural Rights (general comment No. 20) and the Human Rights Committee (general comment No. 18). As stated in CERD general recommendation No. 32: "The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms."

**Article 27 ("Equality and freedom from discrimination") of the 2010 Constitution of Kenya**

*(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

Some States may adopt quotas in their constitutions for the practical realization of the goal of equality.

**Article 10 of the 2003 Constitution of Rwanda, with amendments through 2015**

*The State of Rwanda commits itself to upholding the following fundamental principles and ensuring their respect:*

*4. building a State governed by the rule of law, a pluralistic democratic Government, equality of all Rwandans and between men and women which is affirmed by women occupying at least thirty percent (30%) of positions in decision-making organs.*

Some States may prefer to promote goals that are broadly formulated.

**Article 100 ("Promotion of representation of marginalized groups") of the 2010 Constitution of Kenya**

*Parliament shall enact legislation to promote the representation in Parliament of ... persons with disabilities.*



**FLASH**

*In practical terms, although the wording of the principles of equality and of non-discrimination should be determined by the experiences and legal traditions of the society concerned, the list of prohibited grounds enumerated in the Universal Declaration of Human Rights may serve as guiding benchmark.*

#### 4. Categories of rights and freedoms

Experience with drafting contemporary bills of rights has shown that the scope of protection of human rights has been strongly influenced by the following considerations:

- Compliance with international human rights standards and other relevant legal commitments of the State concerned.
- Recent experience of the society – many contemporary bills were drafted as part of historical processes, including transition to democracy, resolutions of conflict or rebuilding in post-conflict situations, or the emergence of new States.
- Legal, political and cultural traditions of a country.

The Universal Declaration of Human Rights and core international human rights treaties often play a key role in guiding national legislators. However, a constitutional assembly does not necessarily have to adhere to the list of rights laid down in the treaties to which the State is a party, since some of those rights may not be relevant in the given country for historical reasons, for example, the prohibition of slavery, servitude or imprisonment merely on the ground of inability to fulfil a contractual obligation.

Recently adopted bills of rights demonstrate a significant level of commonality and reflect many of the human rights set out in international instruments. Nevertheless, it is ultimately up to a State to decide in which way universally recognized human rights are articulated and protected by its constitution.

Drafters of constitutional reforms may greatly benefit from the wealth of expertise contained in the general comments adopted by the treaty bodies established under the core human rights treaties. The large majority of the general comments interpret the rights and principles laid down in the respective treaties and summarize the expertise gathered by the respective committees during their consideration of periodic reports presented by

States parties. As a rule, the committees consider in detail, inter alia, the normative content of rights and freedoms, the State party's obligations, ways of implementation, violations, remedies and accountability.<sup>28</sup>

### *Civil rights and freedoms*

This category embraces those rights which protect the life, liberty, privacy, physical security and personal integrity of the individual, as well as the rights establishing access to procedural protections. Although it does not reflect all of the rights proclaimed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights includes the broadest range of such rights.

#### **Rights in the International Covenant on Civil and Political Rights**

- Prohibition of discrimination in exercising civil and political rights
- Equal right of men and women to the enjoyment of civil and political rights
- Right to an effective remedy
- Right to life
- Prohibition of torture or cruel, inhuman or degrading treatment or punishment
- Freedom from being subjected without free consent to medical or scientific experimentation
- Prohibition of slavery and servitude
- Prohibition of forced or compulsory labour
- Liberty and security of person
- Right of a person deprived of liberty to be treated with humanity and with respect for his or her inherent dignity
- Prohibition of imprisonment on the ground of the inability to fulfil a contractual obligation
- Freedom of movement and to leave and return to one's own country

<sup>28</sup> With regard to the Committee on Economic, Social and Cultural Rights, general comment Nos. 3-7 and 9-21 may be particularly helpful when drafting a bill of rights. The drafters of the civil and political rights part of a bill of rights may benefit especially from Human Rights Committee general comment Nos. 5-9, 11, 14, 16, 19, 20-22, 27, 29 and 31-33.

- Right of an alien to be protected against arbitrary expulsion
- Right to equality before the courts and tribunals
- Right to due process and fair trial
- Rights of a person charged with an offence in a criminal proceeding
- Right to be recognized as a person before the law
- Right to privacy and non-interference with family, or correspondence, and to be protected against unlawful attacks on a person's honour and reputation
- Freedom of thought, conscience and religion
- Freedom of expression and the right to hold opinions without interference
- Freedom of assembly
- Freedom of association
- Right to marry and to found a family
- Right to equal rights and responsibilities of spouses as to marriage, during marriage and at its dissolution
- Right of every child to adequate protection

Also enshrined in the Universal Declaration of Human Rights are the right to property, the right to asylum and the right to nationality; however, their incorporation into the International Covenant on Civil and Political Rights turned out to be impossible during the negotiation process because of strongly diverging views on their content and function. Nevertheless, in view of the recent developments in international and constitutional law, those responsible for constitutional reforms should consider incorporating these rights as well. Also, some rights, such as the right to the protection of intellectual property, may be expressed in international treaties other than international human rights treaties, and drafters of constitutions may wish to include such rights as well.

Based on the rights enshrined in the International Covenant, civil rights are usually formulated as:

- A specific freedom protected by law, sometimes with the indication of grounds on the basis of which limitations on its enjoyment may be imposed, such as the freedom of movement (article 12).
- The protection of a certain value, such as the right to life (article 6) and the right to privacy (article 17).

- The prohibition of a specific attack against the dignity of, or interference with the freedom of, an individual, such as the prohibition of torture (article 7) and the prohibition of slavery (article 8).

The drafters of the International Covenant and of many bills of rights were concerned with making civil rights self-executing (see chapter II, section B.5, of the present publication).

**Article 4 (“Freedom of faith, conscience, and creed”) of the 1949 Basic Law of Germany**

*(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.*

*(2) The undisturbed practice of religion shall be guaranteed.*

*(3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.*

**Amendment XIII to the 1787 Constitution of the United States of America**

*Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

**Article 18 of the 1992 Constitution of Ghana**

*(2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of the rights or freedoms of others.*

**Article 23 (“Right to judicial protection”) of the 1991 Constitution of Slovenia**

*Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law.*

*Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual.*

Several civil rights are distinguished as absolute in the sense that they cannot be derogated even during a state of emergency (see chapter II, section C.6, of the present publication).

### *Political rights and freedoms*

The distinction between civil and political rights is sometimes unclear because several rights have both dimensions. For example, the freedom of association or the freedom of assembly are commonly perceived as political rights, but they can be used for non-political purposes as well, such as organizing a social group or pursuing a hobby with others. Similarly, the freedom of expression and the right to hold opinions without interference are often viewed as political rights, but they can also be employed in other contexts, such as cultural or sporting activities. However, while noting this consideration, this section addresses those rights which focus on freedom to participate in the conduct of public affairs.

As rights relating exclusively to the political sphere (political rights in the narrow sense), the right to take part in the government of the country and the right of equal access to public service are enshrined in article 21 of the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights is more specific in this regard.

#### ***Article 25 of the International Covenant on Civil and Political Rights***

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public service in his country.*

It is not surprising that the Covenant does not allow for any limitations to be imposed on the right to participate in public affairs for reasons applicable in the case of some other freedoms, such as limitations applicable to the freedom of expression, the right of peaceful assembly or the right to freedom of association, as they might challenge the principle of the sovereign power of people. In particular, limitations which could lead to the exclusion of parts of the society from the political process would be unacceptable (see chapter II, section C.5, of the present publication).

The rights mentioned in article 25 of the Covenant are principally reserved to citizens, although States may grant them also to non-citizens. This increasingly happens at the local level with regard to immigrants who live in a country for a certain period of time. Other rights which are relevant to political life are construed as accessible to everyone, whereby citizenship does not play any role (see chapter II, section C.1, of the present publication). The Human Rights Committee has referred on various occasions in this context to the freedom of association, the freedom of assembly and the freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of one's choice.

More often than in the past, contemporary constitutions specifically establish freedoms relating to political parties. Taking into account the role of political parties in the political mechanism of a State, the freedom to establish, join and leave political parties, as well as the right of parties to act freely, should be guaranteed by the constitution of the country. As a rule, constitutions do not allow political parties to conduct activities which are incompatible with the democratic order.

### **Article 13 of the 1991 Constitution of Burkina Faso**

*Political parties and formations create themselves freely.*

*They participate in the activity of political life, in the information and the education of the people, as well as in the expression of suffrage.*

*They conduct their activities freely within respect for the laws.*

*All the political parties and formations are equal in rights and in duties.*

*However, tribalist, regionalist, denominational, or racist political parties and formations are not authorized.*

### **Article 48 ("Right to associate") of the 1992 Constitution of Estonia**

1. Everyone shall have the right to form non-profit associations and leagues. Only Estonian citizens may be members of political parties.

...

3. Associations, leagues or political parties whose aims or activities are directed towards the violent change of the Estonian constitutional system or otherwise violate a criminal law shall be prohibited.

4. The termination or suspension of the activities of an association, a league or a political party, and its penalization, may only be invoked by a court, in cases where a law has been violated.

The political rights laid down in the international instruments usually constitute the core of this category of rights enshrined in bills of rights. However, the latter often go beyond the international blueprint, which should be interpreted as a minimum list of rights, representing a common denominator in a politically diversified world. Some constitutions attempt to address problems underlying political conflicts between various social or ethnic groups. For example, the concept of power sharing in a democratic framework is sometimes elaborated in detail, with measures designed to ensure the effective participation of different groups in government to provide stability. These additional rights to representation of particular groups have a political character that goes beyond the political rights that are expressed in the Covenant.

### **FLASH**

*Diversified political forms and historical experiences of contemporary States have prompted many constitutional assemblies to look for a country-specific fabric of political rights. It is vital, however, that these attempts recognize and implement international human rights standards in this area.*

### *Economic, social and cultural rights and freedoms*

The international debate on the nature and status of economic, social and cultural rights reached a turning point at the 1993 World Conference on Human Rights, when the principle of an equal value of all categories of rights – civil, cultural, economic, political and social – was reiterated with the support of all Member States of the United Nations.<sup>29</sup>

The catalogue of rights enshrined in the International Covenant on Economic, Social and Cultural Rights goes beyond the scope of the Universal Declaration of Human Rights.

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<sup>29</sup> See also Yash Ghai and Jill Cottrell, *The Millennium Declaration, Rights, and Constitutions* (New Delhi, Oxford University Press, 2011).

## Rights in the International Covenant on Economic, Social and Cultural Rights

- Prohibition of discrimination in exercising economic, social and cultural rights (article 2, paragraph 2)
- Equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3)
- Right to work (article 6)
- Right of everyone to the enjoyment of just and favourable conditions of work (article 7)
- Right of everyone to form trade unions and join the trade union of his choice (article 8, paragraph 1(a))
- Right of trade unions to function freely (article 8, paragraph 1(c))
- Right to strike (article 8, paragraph 1(d))
- Right of everyone to social security, including social insurance (article 9)
- Obligation of the State to accord protection and assistance to the family (article 10, paragraph 1)
- Right to free consent of the intending spouses to enter marriage (article 10, paragraph 1)
- Obligation of the State to accord special protection to mothers during a reasonable period before and after childbirth (article 10, paragraph 2)
- Obligation of the State to accord special measures of protection and assistance on behalf of all children and young persons (article 10, paragraph 3)
- Right of everyone to an adequate standard of living for himself and his family, including the right to adequate food, clothing and housing (article 11, paragraph 1)
- Right to be free of hunger (article 11, paragraph 2)
- Right to health (article 12)
- Right to education (article 13)
- Right to take part in cultural life (article 15, paragraph 1(a))
- Right to enjoy the benefits of scientific progress and its applications (article 15, paragraph 1(b))
- Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1(c))



It should be noted that, in addition to the above list, the Committee on Economic, Social and Cultural Rights has interpreted article 11 on the right to an adequate standard of living and article 12 on the right to health as providing for a right to water.

In some countries, even if they have made international commitments under the International Covenant on Economic, Social and Cultural Rights, there is continued resistance to incorporate this category of rights into their constitutional law. Specific entitlements are set out in legislation. In other countries, economic, social and cultural rights are not set out in constitutions, but the social situation of the population is addressed through the constitution declaring the relevant responsibilities of the State. As a matter of principle, this weakens the position of individuals since under this type of norm they appear only as recipients of social benefits provided by the State and not as holders of claimable rights.

Differences in legal systems and various doctrinal approaches contribute to this mosaic of constitutional approaches. However, the more prevalent choice among the drafters of many recent constitutions is to have a bill of rights which encompasses all categories of rights.

Drafting a bill of rights that includes economic, social and cultural rights requires additional considerations compared to drafting the provisions on civil and political rights.<sup>30</sup> Since rights dealing with economic, social or cultural benefits are strongly dependent on the capacities of the State, constitutional assemblies are particularly cautious when laying down norms in that regard. It is necessary to find the right formulas for addressing specific economic, social and cultural matters without making unrealistic and thus misleading promises (see chapter II, section B.5, of the present publication).

The International Covenant on Economic, Social and Cultural Rights as well as several bills of rights differentiate between stating rights and stating obligations, as shown in the examples provided below.

A right or freedom which is self-executing and which may be implemented with an immediate effect:

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<sup>30</sup> See OHCHR, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights* (New York and Geneva, 2008); and OHCHR, *Fact Sheet No. 16 (Rev. 1): The Committee on Economic, Social and Cultural Rights* (New York and Geneva, 1996).

**Article 8 of the International Covenant on Economic, Social and Cultural Rights**

1. *The States Parties to the present Covenant undertake to ensure:  
(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others conditions and procedures prescribed by the law. No one shall be compelled to join or remain in any association or union.*

**Article 27 of the 1973 Constitution of Bahrain**

*Freedom to form associations and trade unions on a national basis and for lawful objectives and by peaceful means shall be guaranteed in accordance with the conditions and procedures prescribed by the law. No one shall be compelled to join or remain in any association or union.*

The right to a social benefit:

**Article 12 of the International Covenant on Economic, Social and Cultural Rights**

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:  
(a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;  
(b) The improvement of all aspects of environmental and industrial hygiene;  
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;  
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

**Article 41 (“Right to health protection”) of the 1995 Constitution of Azerbaijan**

1. Every person shall have the right to health protection and medical aid. The State acting on the basis of various forms of property shall implement necessary measures to promote the development of all aspects of health services, ensure the sanitary-epidemiological security, create various forms of medical insurance. Authoritative persons shall be made answerable for concealing the facts and cases that create danger to life and health of people.

**Article 45 (“Social security”) of the 1982 Constitution of China**

1. Citizens of the People’s Republic of China have the right to material assistance from the State and society when they are old, ill, or disabled. The State develops the social insurance, social relief, and medical and health services that are required to enable citizens to enjoy this right.

An obligation of the State:

**Article 11 of the International Covenant on Economic, Social and Cultural Rights**

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

**Article 48 of the 2008 Constitution of Ecuador**

The State shall adopt for the benefit of persons with disabilities measures that ensure:

1. Social inclusion, by means of coordinated state and private plans and programs that promote their political, social, educational, and economic participation.
2. Obtaining tax credits and discounts or exemptions that enable them to start up and keep productive activities and obtaining study scholarships at all levels of education.
3. The development of programs and policies aimed at promoting their leisure and rest.
4. Political participation, which shall ensure that they are duly represented, in accordance with the law.
5. The establishment of specialized programs for the integral care of persons with severe and deep disabilities, in order to achieve the maximum development of their personality, the promotion of their autonomy and the reduction of their dependence.
6. Incentive and support for production projects for the benefit of the relatives of persons with severe disabilities.
7. Guaranteeing the full exercise of the rights of persons with disabilities.

A policy directive:

**Article 6 of the International Covenant on Economic, Social and Cultural Rights**

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right [right to work] shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

### **Article 21 (“Health”) of the 1982 Constitution of China**

1. *The State develops medical and health services, promotes modern medicine and traditional Chinese medicine, encourages and supports the setting up of various medical and health facilities by the rural economic collectives, State enterprises and institutions and neighbourhood organizations, and promotes public health and sanitation activities of a mass character, all to protect the people’s health.*

2. *The State develops physical culture and promotes mass sports activities to build up the people’s fitness.*

### **Article 16 of the 1999 Constitution of Nigeria**

(2) *The State shall direct its policy towards ensuring:*

...

*(d) That suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.*

Drafters of bills of rights should be aware of the possible diversity in normative approaches to economic, social and cultural rights and be guided by it. Preference should be given to the establishment of claimable rights and freedoms if the capacities of the State allow for that. However, it would be ill-advised to leave out a certain issue solely because the existing capacities do not permit the establishment of such a right. For example, if in a given situation it would be impossible to proclaim a claimable right to adequate housing, the constitutional assembly should examine other forms that might help to address this in the constitution, for example by formulating a State duty or policy. This could help to guide the developments regarding that issue and to hold the responsible authorities accountable. Moreover, the use of such constitutional language could pave the way for the establishment of a claimable right in the future when the level of available and required resources would be adequate.

The implementation of many economic, social and cultural rights may indeed be subject to a progressive process, as laid down in the International Covenant on Economic, Social and Cultural Rights.

**Article 2 of the International Covenant on Economic, Social and Cultural Rights**

*1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

In this respect, the interpretation of the Covenant by the Committee on Economic, Social and Cultural Rights provides drafters of a bill of rights with necessary guidance.<sup>31</sup>

According to the Committee, the clause contained in article 2 on the progressive implementation of rights cannot be used as an excuse to justify a failure in compliance with the standards enshrined in the Covenant. The following elements can be drawn from this analysis:

- The Covenant contains rights and other provisions that require immediate implementation, such as the elimination of discrimination (article 2, paragraph 2), the right to form and join trade unions and to strike (article 8), the right to protect children and young persons from economic and social exploitation (article 10, paragraph 3), the right to equal remuneration for work of equal value without distinction of any kind (article 7(a) (i)), the provision of free and compulsory primary education for all (article 13, paragraph 2(a)), the liberty of parents to choose schools for their children (article 13, paragraph 3), the liberty of individuals and bodies to establish and direct educational institutions (article 13, paragraph 4), the freedom indispensable for scientific research and creative activity (article 15, paragraph 3), and the development of a plan of action to ensure the provision of free and compulsory primary education for all (article 14).

<sup>31</sup> See CESCR general comment No. 3 (1990) on the nature of States parties' obligations.

- The Covenant establishes an obligation of result – to take steps “with a view to achieving progressively the full realization of the rights recognized [therein]” (article 2, paragraph 1).
- Since many States will not be able to fully realize all economic, social and cultural rights in a short period of time, the progressive implementation clause is to be interpreted as providing the necessary flexibility, reflecting realities but reiterating the overall objective of the Covenant (article 2, paragraph 1).

Finally, it should be pointed out that economic, social and cultural rights are addressed not only by core human rights treaties but also by other treaties, including conventions of the International Labour Organization and of the United Nations Educational, Scientific and Cultural Organization, which should also be taken into consideration in the process of a constitutional reform, where appropriate.

### **Other international instruments relevant for economic, social and cultural rights**

**1962** Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

### **International Labour Organization**

**1930** Forced Labour Convention (No. 29)

**1948** Freedom of Association and Protection of the Right to Organise Convention (No. 87)

**1949** Right to Organise and Collective Bargaining Convention (No. 98)

**1951** Equal Remuneration Convention (No. 100)

**1957** Abolition of Forced Labour Convention (No. 105)

**1958** Discrimination (Employment and Occupation) Convention (No. 111)

**1964** Employment Policy Convention (No. 122)

**1973** Minimum Age Convention (No. 138)

**1989** Indigenous and Tribal Peoples Convention (No. 169)

**1999** Worst Forms of Child Labour Convention (No. 182)  
United Nations Educational, Scientific and Cultural Organization

**1960** Convention against Discrimination in Education

## 5. Permissibility of limitations

As indicated above in chapter II, section B.6, limitations (restrictions) are permitted by international instruments in a number of situations. Article 4 of the Covenant on Economic, Social and Cultural Rights contains a general principle that, “in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” For example, as described in the Covenant, the right to form trade unions includes references to possible restrictions and the right to strike is guaranteed only in the framework of domestic law, but these restrictions are still governed by the general principle articulated in article 4.

### **Article 8 of the International Covenant on Economic, Social and Cultural Rights**

1. *The States Parties to the present Covenant undertake to ensure:*

*(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

...

*(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

*(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.*

2. *This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*



**Article 37 of the 1992 Constitution of Slovakia**

(1) Every person shall have the right to associate freely with other persons to protect their economic and social interests.

(2) Trade unions shall be independent of the State. There shall be no restrictions on the number of trade unions, and no encouragement of specific unions in certain companies or industries.

(3) The activities of trade unions and other associations formed to protect economic and social interests may be limited by law only where, in a democratic society, such measures may be necessary for the protection of the national security, public order, and rights and freedoms of other persons.

(4) The right to strike shall be guaranteed. The terms thereof shall be provided by law. Judges, prosecutors, members of the armed forces, and members of fire squads shall be disqualified from the exercise of this right.

The International Covenant on Civil and Political Rights foresees the possibility of limitations in provisions related to specific rights, and in particular to the freedom of movement, the right to a public trial, the freedom to manifest one's religion or beliefs, the freedom of expression, the freedom of assembly and the freedom of association. This means that such limitations are not permitted with regard to other rights, except for the derogation of rights in case of a state of emergency, as provided for in article 4 of the Covenant (see chapter II, section C.6, of the present publication). In the relevant provisions of the Covenant, grounds for permissible limitations are specified, and their articulation is adjusted to the content of the right and varies slightly. While drafting a bill of rights, it is desirable to consult the relevant provisions of the international treaties to avoid constitutional provisions allowing for limitations of rights in situations or on grounds not permitted by international standards.

## **International Covenant on Civil and Political Rights**

### **Article 12**

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*

### **Article 19**

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - (a) *For respect of the rights or reputations of others;*
  - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

### **Article 21**

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

Several domestic bills of rights refer to similar limitations.

**Article 24 of the 1995 Constitution of Georgia**

*4. The exercise of the rights enumerated in the first and second paragraphs of the present Article [freedom of opinion, media, the right to freely receive and impart information] may be restricted by law on such conditions which are necessary in a democratic society in the interests of ensuring state security, territorial integrity or public safety, for preventing of crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information acknowledged as confidential or for ensuring the independence and impartiality of justice.*

**Section 24 (“Restrictive laws”) of the 2002 Constitution of Timor-Leste**

- 1. Restriction of rights, freedoms and guarantees can only be imposed by law in order to safeguard other constitutionally protected rights or interests and in cases clearly provided for by the Constitution.*
- 2. Laws restricting rights, freedoms and guarantees have necessarily a general and abstract nature and may not reduce the extent and scope of the essential contents of constitutional provisions and shall not have a retroactive effect.*

A particular ground for limitations is referred to in article 25 of the International Covenant on Civil and Political Rights which proclaims the right to participation in the conduct of public affairs “without unreasonable restrictions”. A simple interpretation of this provision would say that “reasonable restrictions” are permitted. In its general comment No. 25, the Human Rights Committee does not define the meaning of these terms contained in article 25. By way of example, however, it mentions setting a minimum age for the right to vote as a reasonable restriction. The general comment also provides several examples of possible “unreasonable restrictions”, including discriminatory requirements from candidates in elections (for example, education, residence, descent or membership in a specific party), or the drawing of electoral boundaries and the method of allocating votes which would unreasonably restrict the right of citizens to choose their representatives freely. One can say that “unreasonable” in this context means incompatible with the essence of the right, or in violation of the other rights contained in the Covenant.

The introduction of limitations of rights is a very sensitive issue and can have a significant impact on the enjoyment of rights. It is therefore important that the bill of rights, especially in countries in transition, which have not had a fully established legal doctrine in this respect, set forth principles for the adoption of such limitations.

### **Article 31 of the 1997 Constitution of Poland**

(1) Freedom of the person shall receive legal protection.

(2) Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.

(3) Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

### **FLASH**

Limitations of rights may be necessary, but to be justified they must meet strict criteria established by international instruments. If limitations should be admissible it would be clearer to articulate this and set appropriate criteria in the bill of rights. However, the following opinion of the Human Rights Committee should be borne in mind: "On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party." (General comment No. 29 (2001), paragraph 7)

## **6. Protection of rights and state of emergency**

There can be natural or man-made emergencies which require the suspension of some rights or elements of them, situations which are envisaged in article 4 of the International Covenant on Civil and Political Rights.

### **Article 4 of the International Covenant on Civil and Political Rights: The derogation clause**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

The rights and prohibitions which cannot be derogated in accordance with this provision are: the right to life (article 6); the prohibition of torture, or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent (article 7); the prohibition of slavery, slave-trade and servitude (article 8); the prohibition of imprisonment on the ground of inability to fulfil a contractual obligation (article 11); the prohibition of being held guilty of any criminal offence if the deed did not constitute a criminal offence at the time when it was committed (article 15); the right to recognition everywhere as a person before the law (article 16); and freedom of thought, conscience and religion (article 18). Measures of derogation must not involve discrimination on the grounds specified in article 4, paragraph 2, of the Covenant.

A State party which declares a state of emergency is obliged to immediately inform the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons for the imposition of these measures. A further communication shall be made by the State party to the Secretary-General on the date of the termination of such derogation.

The Human Rights Committee has clarified that the derogation clause allows the State party to unilaterally derogate part of its commitments under the Covenant, but makes any derogation subject to a legal regime and review procedure by the international community. The Committee highlights two basic conditions for a derogation of rights which must be met – namely, that the public emergency must amount to a threat to the life of the nation and that the aforementioned notification has been made. Further, the Committee stresses that measures derogating from the Covenant “are limited to the extent strictly required by the exigencies of the situation.”<sup>32</sup>

General comment No. 29, from which these views have been drawn, further expands the list of rights excluded from derogation with the rationale that the category of peremptory norms of international law extends beyond the list of non-derogable articles contained in article 4, paragraph 2. As examples, the Committee lists violations of humanitarian law, hostage-taking, imposing collective punishments through the arbitrary deprivation of liberty or deviating from fundamental principles of fair trial, including the

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<sup>32</sup> General comment No. 29 (2001), paragraph 4.

presumption of innocence.<sup>33</sup> Furthermore, it is the opinion of the Committee that elements of provisions other than those listed in article 4 cannot be subject to derogations, and it refers in this context to the following: (a) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person; (b) the prohibitions against the taking of hostages, abductions or unacknowledged detention; (c) elements of the international protection of the rights of persons belonging to minorities; (d) the prohibition of deportation or the forcible transfer of a population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present; (e) the prohibition of the engagement by a State party contrary to article 20 in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence; (f) the right to remedies against violations of non-derogable rights, including procedural and judicial guarantees.

**Peremptory norms:** norms of international law from which States cannot deviate (*jus cogens* – no derogation is permitted).

While drafting a constitution, it is important to consider article 4 of the Covenant as well as the guidance provided in general comment No. 29, irrespective of whether a state of emergency is addressed within the bill of rights or elsewhere in the constitution, such as in a separate chapter. In fact, contemporary constitutions often do follow the concept adopted by the International Covenant on Civil and Political Rights by listing non-derogable rights or rights which can be derogated. Both solutions seem to be acceptable.

<sup>33</sup> Ibid., paragraph 11.

### **Section 25 (“State of exception”) of the 2002 Constitution of Timor-Leste**

1. *Suspension of the exercise of fundamental rights, freedoms and guarantees shall only take place if a state of siege or a state of emergency has been declared as provided for by the Constitution.*
2. *A state of siege or a state of emergency shall only be declared in case of effective or impending aggression by a foreign force, of serious disturbance or threat of serious disturbance to the democratic constitutional order, or of public disaster.*
3. *A declaration of a state of siege or a state of emergency shall be substantiated, specifying rights, freedoms and guarantees the exercise of which is to be suspended.*
4. *A suspension shall not last for more than thirty days, without prejudice of possible justified renewal, when strictly necessary, for equal periods of time.*
5. *In no case shall a declaration of a state of siege affect the right to life, physical integrity, citizenship, non-retroactivity of the criminal law, defence in a criminal case and freedom of conscience and religion, the right not to be subjected to torture, slavery or servitude, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the guarantee of non-discrimination.*
6. *Authorities shall restore constitutional normality as soon as possible.*

### **FLASH**

*A state of emergency, including the derogation of rights and freedoms, may only be imposed as an exceptional and temporary measure. The constitution must be clear that this measure should be lifted as soon as the exigency no longer exists. It is critical that exceptional legal measures that derogate rights and freedoms be lifted with the termination of the state of emergency, at the latest.*

## **7. Legal duties of the individual**

The concept of responsibility is inscribed in human rights. As indicated in sections B.6 and C.2 of the present chapter, freedom does not mean anarchy and has its limits in the duty to respect the rights and freedoms of others. This means the enjoyment of individual rights and freedoms must be undertaken with a minimum degree of responsibility. Moreover, there seems to be little doubt that every individual is not only a rights holder but also a duty bearer, reflecting the imperative of human responsibility vis-à-vis, for example, the family, the society, and the State and its institutions. Many of these duties have an ethical nature, such as the duty to support family

members in certain situations. Some have been recognized to have such a relevance to the society that they have been articulated in the law of some States and have become legal duties. Parents, for example, have a legal duty to provide and care for their children until their majority in the laws of most States, and in some States there may be a legal duty of grown children to take care of their aged parents.

The Universal Declaration of Human Rights recognizes the duties of an individual to the community, as well as the role of the community in the development of the individual.

***Article 29 of the Universal Declaration of Human Rights***

*1. Everyone has duties to the community in which alone the free and full development of his personality is possible.*

The 2006 Convention on the Rights of Persons with Disabilities refers to the individual duties in similar terms.

**Preamble of the Convention on the Rights of Persons with Disabilities**

*Realizing that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights ...*



The Convention on the Rights of the Child establishes that the parents or legal guardians are responsible for the upbringing and development of the child, as well as for securing, within their abilities, the conditions of living necessary for the child's development (article 18, paragraph 1, and article 27, paragraph 2). However, broadly speaking, the international human rights treaties generally abstain from singling out specific individual duties.

Interestingly, both the African and Inter-American human rights instruments refer to the individual's duties both in general and in specific terms. First, they attempt to reconcile individual rights and duties.

**Preamble of the 1981 African Charter on Human and Peoples' Rights**

*Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone ...*

**Preamble of the 1948 American Declaration of the Rights and Duties of Man**

*The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.*

Second, these instruments set forth several specific individual duties.<sup>34</sup>

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<sup>34</sup> See also articles 29-38 of the American Declaration of the Rights and Duties of Man.

## 1981 African Charter on Human and Peoples' Rights

### Article 27

*1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.*

### Article 28

*Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.*

### Article 29

*The individual shall have the duty:*

- 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;*
- 2. To serve his national community by placing his physical and intellectual abilities at its service;*
- 3. Not to compromise the security of the State whose national or resident he is;*
- 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;*
- 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;*
- 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;*
- 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;*
- 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity. The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.*

A number of countries have included in their constitutional texts, be it in the bill of rights or elsewhere, some basic duties of individuals to the State or the community. The individual duties that appear most often in constitutional texts are related to respect for the law, the payment of taxes, and the defense of the country. In some cases, however, the constitutional duties go beyond this exemplary list which depends on a given society's traditions and experiences. Moreover, such texts include catalogues of duties of both a legal and, primarily, an ethical nature. It seems that countries in transition, in a way re-establishing their statehood, quite often attach great importance to the constitutional proclamation of citizens' responsibilities towards the State. On the other hand, in a number of States the legal framing of individual duties has been left to ordinary legislation and the constitutional texts remain silent in this respect.

### **Article 24 of the 1999 Constitution of Nigeria**

*It shall be the duty of every citizen to—*

- (a) abide by this Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge, and legitimate authorities;*
- (b) help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required;*
- (c) respect the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood;*
- (d) make a positive and useful contribution to the advancement, progress and well-being of the community where he resides;*
- (e) render assistance to appropriate and lawful agencies in the maintenance of law and order; and*
- (f) declare his income honestly to appropriate and lawful agencies and pay his tax promptly.*

### **Article 67 (“Responsibilities and duties”) of the 2008 Constitution of Maldives**

*The exercise and enjoyment of fundamental rights and freedoms is inseparable from the performance of responsibilities and duties, and it is the responsibility of every citizen:*

- (a) to respect and protect the rights and freedoms of others;*
- (b) to foster tolerance, mutual respect, and friendship among all people and groups;*
- (c) to contribute to the well-being and advancement of the community;*
- (d) to promote the sovereignty, unity, security, integrity and dignity of the Maldives;*
- (e) to respect the Constitution and the rule of law;*
- (f) to promote democratic values and practices in a manner that is not inconsistent with any tenet of Islam;*
- (g) to preserve and protect the State religion of Islam, culture, language and heritage of the country;*
- (h) to preserve and protect the natural environment, biodiversity, resources and beauty of the country and to abstain from all forms of pollution and ecological degradation;*
- (i) to respect the national flag, state emblem and the national anthem.*

*Every person in the Maldives must also respect these duties.*

Constitutions often make a difference between duties of all people under the jurisdiction of the State and those of its citizens. In case of such a differentiation, a constitution may impose only on its own nationals the duties associated with the particular links between a citizen and the State.

## **The 2004 Constitution of Afghanistan**

### **Article 42**

*Every Afghan shall pay taxes and duties to the state in accordance with the provisions of the law.*

### **Article 49**

*Active participation, in times of war, disaster, and other situations that threaten public life and comfort shall be among the national duties of every Afghan.*

### **Article 55**

*Defending the country shall be the duty of all citizens of Afghanistan. Conditions of compulsory service shall be regulated by law.*

### **Article 56**

*Observance of the provisions of the constitution, obedience of laws and respect of public order and security shall be the duty of all citizens of Afghanistan.*

## **D. Institutional and procedural guarantees of rights**

### **1. Implementation of the constitution and human rights**

The full implementation of human rights requires both a conducive social order and a set of guarantees specifically designed to protect them. The Universal Declaration of Human Rights includes rights that are conducive to a stable social order and provides procedural guarantees to ensure that its human rights provisions are protected.

## **1948 Universal Declaration of Human Rights**

### **Article 8**

*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*

### **Article 10**

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

### **Article 28**

*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.*

A democratic constitution plays a central role in establishing such a conducive social order. It is therefore vital to ensure that constitutional reforms enhance the protection of democratic governance and human rights, and that measures are foreseen to ensure that constitutional reforms, once adopted, are implemented in practice. Determination on the part of the political elites and civil society to give the community new foundations should not expire with the signing ceremony. The implementation of the constitution needs, on the one hand, institutional safeguards (see section 2 below) and, on the other hand, a programme of legislative and capacity-building measures, as well as continuing engagement and vigilance on the part of civil society.

It must be stressed that the responsibility for the observance and implementation of the constitution, including its bill of rights, rests with all public authorities, at both the central and the local level. Depending on the constitutional role assigned to the various actors, be it legislative, executive and judiciary, the specific tasks and responsibilities differ. In section 2 below, some fundamental institutional and procedural safeguards of rights and freedoms, which should be considered during the process of constitution making, are presented. However, an individual or a group claiming its rights or defending them against abuse is primarily in contact with public authorities at the local level. It is at this level where the water supply is managed, public order and safety are enforced, social services are provided, and the freedom of assembly and association is enjoyed. It is therefore essential to include in constitutions provisions establishing the responsibility of all State and territorial self-government actors for the protection and implementation of the bill of rights.

### **Article 21 (“Implementation of rights and fundamental freedoms”) of the 2010 Constitution of Kenya**

(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

Note: See also articles 10, 19 and 20 of this constitution.

### **FLASH**

*The drafting of a new constitution is only the first phase of a constitutional reform. Its faithful implementation is the reality check of the reform endeavour.*

## **2. Institutional safeguards**

There is an indivisible linkage between human rights and democracy. Human rights cannot be fully protected under an authoritarian rule, as State action is not meaningfully subject to control by judicial, legislative or administrative institutions. The institutions of democracy as well as the due process inherent in the judicial and administrative processes play a particularly important role in creating a framework supportive to human rights by the constitution.

*Democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.*

General Assembly resolution 62/7.

### *Democratic form of government: Division of powers*

The division of powers in the State (see chapter I, section A.2, of the present publication) guarantees the central role of the parliament as the representative of the people and as the legitimate institution capable of enacting legislation. This division also provides for the independence of the judicial power which, as discussed further below, is the ultimate tool for the protection of an individual or groups claiming their constitutional rights and freedoms. Finally, this principle of divided power serves to ensure that each part of the State – the executive, the legislative and the judiciary – confines its actions to its constitutional mandate, thereby limiting the concentration of power that can lead to unchecked and arbitrary action by the State. The division of powers is rarely expressed as such in constitutions, but the way the legislative, the executive and the judiciary are placed within the structure of the State and equipped with competencies ensures the necessary autonomy of the different powers and prevents their concentration. Nevertheless, people in countries in the process of democratic transformation frequently wish to articulate a clear proclamation of the elements of the new political and social order, and may wish to include these principles in the text of the constitution.

#### ***Article 49 (“Division of powers”) of the 1917 Constitution of Mexico***

*The supreme power of the Federation is divided, for its exercise, into legislative, executive, and judicial branches. Two or more of these powers shall never be united in one single person or corporation, nor shall the legislative power be vested in one individual except in the case of extraordinary powers granted to the Executive, in accordance with the provisions of Article 29.*

### *Role of the parliament*

Parliaments perform several functions that have an important impact on the protection of human rights. First, they adopt laws to implement constitutional rights and freedoms. Some constitutions stipulate that this is an exclusive competence of the parliament and in this way entrust the body representing the sovereign through elections (and not the executive) to lay down the detailed legal norms giving effect to constitutional rights. In a growing number of constitutions the consent of parliament is also required for the ratification of the most important international agreements, including human rights treaties.



### **Article 34 of the 1958 Constitution of France**

*Statutes shall determine the rules concerning:*

- *civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties; freedom, diversity and the independence of the media; the obligations imposed for the purposes of national defence upon the person and property of citizens;*
- *nationality, the status and capacity of persons, matrimonial property systems, inheritance and gifts;*
- *the determination of serious crimes and other major offences and the penalties they carry; criminal procedure; amnesty; the setting up of new categories of courts and the status of members of the Judiciary.*

### **Section 95 (“Competence of the national parliament”) of the 2002 Constitution of Timor-Leste**

*2. It is exclusively incumbent upon the National Parliament to make laws on:*

...

- d) Citizenship;*
- e) Rights, freedoms and guarantees;*
- f) The status and capacity of people, family law and descent law;*

...

- l) The bases for the education system;*
- m) The bases for the health and social security system;*
- n) The suspension of constitutional guarantees and the declaration of the state of siege and the state of emergency.*

In many countries, parliaments provide central platforms for the elaboration of policies that should serve to implement rights and freedoms. They also make a crucial contribution to setting up the human rights infrastructure. In particular, close ties link parliaments with national human rights institutions. Parliamentary support often has a decisive impact on the effectiveness of such institutions. Oversight functions give parliaments another opportunity to contribute to the enforcement of constitutional rights and freedoms. With a view to carrying out these tasks, many parliaments have established specialized parliamentary human rights committees which are also open for submissions from rights holders.<sup>35</sup>

<sup>35</sup> Helpful information and advice can be found in Inter-Parliamentary Union and OHCHR, *Human Rights: Handbook for Parliamentarians* No. 26 (Geneva, 2016).

There are many examples that illustrate the potential of parliaments to safeguard human rights. Actors involved in constitutional reforms should draw their attention to the possible need to make references in the constitution to some aspects of the parliamentary responsibilities in the protection of human rights.

### *Independence of the judiciary*

As a rule, the independence of the judiciary from other State bodies is guaranteed in one form or another by the constitution. This principle has a particular place within the concept of the division of powers. While the modalities of the relationship between the legislative and executive can strongly vary from country to country, according to traditions and as a result of deliberate choices concerning the form of the government, the judiciary cannot perform its functions without being fully independent from other power holders. This is the basic requirement to guarantee the impartiality of court decisions, fairness in proceedings and equal positions of parties which must underlie the administration of justice.

In some cases, constitutions address two interlinked principles – namely, the independence of the judiciary as a set of bodies performing the administration of justice (courts) and the independence of judges in the performance of their judicial functions. Although these are two dimensions of the same general principle – the independence of the judicial power – it may be preferable to articulate these constitutional guarantees separately.

**Article 24 of the 1945 Constitution of Indonesia**

(1) The judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice.

**Article 97 (“Judicial independence”) of the 1949 Basic Law of Germany**

(1) Judges shall be independent and subject only to the law.

(2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

**Article 120 of the 1984 Constitution of Guinea-Bissau**

4. In the exercise of their jurisdictional function, tribunals are independent and only subjected to the law.

The establishment of specialized courts or procedures, including military ones, may have the potential under certain circumstances to create a risk to the independent, impartial and equitable treatment of a defendant brought before them. In its general comment No. 32,<sup>36</sup> the Human Rights Committee states that military courts should not in principle try civilians, although it also recognizes that there may be exceptional situations under narrowly defined circumstances in which such trials can take place. It is therefore important that, if such judicial bodies or procedures should be established, the Constitution clearly address this possibility, thus narrowing down the risk of infringement of the principles of independence, impartiality and fairness.

<sup>36</sup> General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.

**Section 130 ("Military courts") of the 2002 Constitution of Timor-Leste**

1. *It is incumbent upon military courts to judge in first instance crimes of military nature.*

2. *The competence, organisation, composition and functioning of military courts shall be established by law.*

**Article 175 of the 1997 Constitution of Poland**

(1) *The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.*

(2) *Extraordinary courts or summary procedures may be established only during a time of war.*

**Control of constitutionality of law**

Only when the law of a country is in accordance with the constitution can its bill of rights be properly implemented. Therefore, another institutional safeguard is the adoption of a mechanism that would allow for the control of the constitutionality of law. In a number of the countries with the common law tradition, the courts have the right to examine the constitutionality of law on the basis of which a case should be considered. In many other countries, special courts, often referred to as constitutional courts, have been established to perform such control, and in still other countries, competence in this respect has been vested in the supreme court. Drafters of the constitution should be advised about the need to consider the appropriateness of the adoption of either solution.

**Article 87 of the 1992 Constitution of Czechia**

(1) *The Constitutional Court shall rule on:*

a) *repeal of laws or individual provisions thereof should they contravene the constitutional order,*

b) *repeal of other legal regulations or individual provisions thereof should they contravene the constitutional order or the law.*

(2) *The Constitutional Court shall also decide on the conformity of international agreements under Section 10a and Section 49 with the constitutional order prior to their ratification. Until a ruling of the Constitutional Court is delivered, an agreement cannot be ratified.*

### **Section 167 (“Constitutional Court”) of the 1996 Constitution of South Africa**

*(4) Only the Constitutional Court may–*

...

*(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;*

...

*(d) decide on the constitutionality of any amendment to the Constitution;*

*(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.*

In order to ensure the stability of the constitution text and to avoid early amendments, countries in transition in particular may apply so-called “sunset clauses”, according to which some legal acts or rulings contained therein will terminate after a specific date or an event unless new legislation provides otherwise. For example, the Constitution of Nepal enshrines several such provisions.

### **2007 Interim Constitution of Nepal**

#### **Article 162 (“Provisions regarding judiciary”)**

*(1) The Supreme Court, Appellate Court and District Courts subsisting at the time of the commencement of this Constitution shall be deemed to have been constituted under this Constitution, and this Constitution shall not hinder the making of the decisions by the concerned courts on cases filed prior to the commencement of this Constitution.*

*(2) The Judges working in the Supreme Court, Appellate Courts and District Courts, after the commencement of this Constitution, shall take an oath of commitment to this Constitution as determined by the Government of Nepal. Any Judge who declines to take the oath shall ipso facto cease to hold office.*

*(3) Necessary legal arrangements shall be made on the basis of democratic norms and values to bring about gradual reforms in the judicial sector to make it independent, clean, impartial and competent.*

**Article 164 (“Existing laws to remain in operation”)**

(1) Decisions made and work performed by the reinstated House of Representatives that are not inconsistent with this Constitution shall be deemed to have been made and performed in accordance with this Constitution.

(2) All the laws in force at the time of commencement of this Constitution shall remain in operation until repealed or amended. Provided that laws inconsistent with this Constitution shall, to the extent of inconsistency, ipso facto, cease to operate three months after the commencement of this Constitution.

**3. Specific guarantees**

In view of international human rights law, it is primarily for domestic law to establish effective guarantees for the implementation of human rights. Although international human rights law does not prejudice by which legal acts the guarantees should be established, in contemporary democratic States the most important guarantees of human rights are expected to have constitutional rank. This results from the requirement of safeguarding human rights at the level allowing for their most effective protection and equipping them with commensurate tools of protection.

In principle, international human rights treaties neither envisage any specific system of institutional or procedural guarantees nor establish any preferences as far as specific guarantees of rights are concerned. It is essential to make available an effective remedy to each person whose rights have been or are at substantial risk of being violated.

**Article 2 of the International Covenant on Civil and Political Rights**

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Provisions of the International Covenant on Civil and Political Rights indicate that decisions impacting the right to life, the personal freedom of an individual or the trial and imposition of a criminal penalty on a person should be taken by a competent, independent and impartial court or tribunal.

## **The International Covenant on Civil and Political Rights**

### **Article 6**

*2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*

### **Article 9**

*3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

*4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

### **Article 14**

*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

In view of contemporary human rights doctrine, including its development by the human rights treaty bodies, there is a widely supported concept that institutional and procedural guarantees of human rights should be established at the domestic level. The texts of recently adopted constitutions support this observation. The list of the most frequently recognized institutional and procedural guarantees contained in contemporary constitutions includes the right of access to the courts, the right to appeal, the right to make a constitutional complaint, the right to petition, the right to compensation and the principle of accountability of perpetrators of human rights violations. The establishment of independent national human rights institutions should also be mentioned in this context.

*Right of access to the courts, right to appeal, right to constitutional complaint and public interest litigation*

The judiciary lies at the heart of human rights guarantees. First, it protects the individual or entitled groups against arbitrary action by the State such as the deprivation of liberty, expropriation without legal basis and/or just and fair compensation, or the unjustified deprivation of social services. Second, the judiciary offers the individual or entitled groups the opportunity to have their cases reviewed and decided upon by an independent, competent and impartial body. Third, the judgments of the judiciary, in particular those adopted by the highest court of appeal or constitutional courts, can influence public policies and legislation, for example while reviewing the constitutionality of law or decisions, or considering public interest litigations. Therefore, both international human rights law and contemporary constitutionalism attach great importance to the right of access to the courts, the right to appeal and the right to constitutional complaint.

*Right of access to the courts*

International human rights treaties refer to the right to have a case decided by a judge in some specific cases, including those related to criminal proceedings and to suits at law. The weight given to criminal proceedings is understandable since any interference with personal liberty or life is perceived as a particularly severe limitation of rights, and as such must not, as a matter of principle, be left to the discretion of the executive power.



The right to court access goes even further by guaranteeing that the individual can bring each case involving his or her rights to a judicial body. Access to the courts may be provided in situations for which courts are exclusively competent (in particular cases related to civil and criminal law). In addition, the right to court access extends to bodies competent to review the legality and, in some cases, the substantive elements of administrative decisions.

The right of access to the courts is widely recognized as the highest form of institutional protection of human rights. More recent constitutions often establish this right explicitly. Many constitutions do not limit themselves merely to proclaiming this right but further specify its elements, in particular those relating to the status of courts and judges and to procedural due process in all matters relevant to ensuring a fair trial in a criminal or civil matter.

**Article 45 of the 1997 Constitution of Poland**

*(1) Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.*

The right of access to the courts requires judges to be fully independent in their decisions, not only from parties to the proceedings but also from any other external influence. In order to safeguard the independence of judges, constitutions often establish, inter alia, the personal immunity of judges, the principle of their irremovability from office except in cases of serious misconduct, and various forms of autonomy for the judiciary.

In general, due process means that State authorities must use fair procedures when taking actions that affect the interests of a specific individual or group. Due process in judicial proceedings is based on the premise that the decision affecting an individual (or a group) will be based on the applicable procedural and substantive law by a competent, independent and impartial court or tribunal, and that the hearing will be fair and equitable taking into account the facts and circumstances of the case. The procedural guarantees underlying due process are often elaborated in parliamentary acts, rules of criminal and civil procedure, and the jurisprudence of the courts. These procedural guarantees contribute significantly to legal security for individuals and groups, and therefore its meaning for the enjoyment of human rights and the functioning of the constitutional State cannot be underestimated. Due process rights are set out in, inter alia, article 14 of the International Covenant on Civil and Political Rights.

## 1787 Constitution of the United States of America

### Amendment V

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

### Amendment VI

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.*

### *Right to appeal*

An important guarantee against arbitrariness is the principle according to which each decision of the case related to an individual in the first instance should be subject to review by a higher instance. The right to appeal relates to both administrative and court proceedings.

Although this principle is recognized as an integral element of the rule of law, some constitutions articulate it separately. In some cases, the judicial review of administrative decisions is also embraced by the notion of the right to appeal (from the administrative organ to a court).

**Article 33 of the 1992 Constitution of Ghana**

*(1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.*

...

*(3) A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court.*

**Article 78 of the 1997 Constitution of Poland**

*Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.*

***Constitutional complaint (amparo)<sup>37</sup> and writ of habeas corpus***

Many contemporary constitutions of States within the civil law system provide the right of an individual to lodge a constitutional complaint, that is, to claim his or her constitutional rights before a competent court. This procedure is vital for protecting the rights contained in a bill of rights. Generally, there are two models of such complaints – a broader one and a narrower one.

In the first case, the individual can claim constitutional protection if the final decision after appeal still violates his or her constitutional rights – for example, if an unconstitutional law had been applied or the decision on the merits violated one or more rights set out in the bill of rights. In the case of a narrower model, a complaint may be lodged only because of the inconsistency of the applied law with a provision of the bill of rights. A constitutional complaint is usually considered either by a constitutional court empowered to review the constitutionality of laws, or the Supreme Court if it is within its competence.

<sup>37</sup> *Amparo*: a remedy for the protection of constitutional rights established in various States of Latin America.

**Article 48 of the 1949 Constitution of Costa Rica (as amended in 2011)**

*Every person has the right to present writs of habeas corpus to guarantee his freedom and personal integrity and writs of amparo to maintain or re-establish the enjoyment of other rights set forth in this Constitution as well as those of a fundamental nature established in international human rights instruments, enforceable in the Republic. Both writs shall be within the jurisdiction of the Chamber indicated in Article 10.*

**Article 87 of the 1992 Constitution of Czechia**

*(1) The Constitutional Court shall rule on:*

...

*d) Constitutional complaints filed against final decisions and other interventions by agencies of public authority, violating constitutionally guaranteed fundamental rights and freedoms.*

Countries that use the common law system usually do not have such a procedure since each judge is competent to consider the question of the consistency of law to be applied in a given case with the constitution and to base decisions on this assessment.

**Section 38 (“Enforcement of rights”) of the 1996 Constitution of South Africa**

*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –*

- (a) anyone acting in their own interest;*
- (b) anyone acting on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interest of its members.*

Many countries have included in their constitutions another important institution to protect an individual against unlawful deprivation of liberty (arrest or detention) – namely, writ of habeas corpus. On this basis, a detainee questioning the legality of arrest or detention can request the court to order his or her release. This right is also reflected in the International Covenant on Civil and Political Rights in article 9, paragraph 4.

***Article 5 of the 1957 Constitution of Malaysia***

*(1) No person shall be deprived of his life or personal liberty save in accordance with law.*

*(2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.*

***Article 31 of the 1976 Constitution of Portugal***

*(1) The remedy of habeas corpus is available before a court of law or court martial, according to the case, against any wrongful use of power in the form of unlawful detention.*

*(2) Habeas corpus may be demanded by the prisoner or by any citizen in enjoyment of his political rights.*

*(3) The court rules on a motion for habeas corpus within eight days at a hearing in the presence of both parties.*

***Public interest litigation***

In general, public interest litigation serves to bring issues not only of individual interest but also of public interest for judicial review. In order to litigate public interest, the acting party (for example, an individual, a group or an organization) does not need to demonstrate a direct interest in the outcome of the litigation (sometimes referred to as “standing” or a “legal interest”) in the case. What is essential is proving that the matter embraces an important public interest and that it would benefit from a court decision. This procedure has been advanced in India during the last three decades in connection with, inter alia, article 39A of the Constitution of India and has been applied in an increasing number of countries.

**Article 39A of the 1949 Constitution of India**

*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.*

The purpose of public interest litigation is to obtain a judicial ruling on an issue that affects the public interest, particularly when the applicable law may be interpreted in a number of different ways. It has often been used by organizations to try to obtain a favourable court judgment on specific issues that concern disadvantaged or marginalized people. In such situations, either those directly involved may pursue their interests before the appropriate court or their interests may be taken up by others. In public interest litigation, the court may decide on a specific issue and render a judgment as in any case before the court, or in complex matters it may issue one or more interim orders and possibly appoint commissioners to analyse the situation, monitor the implementation of the interim order(s) and report back to the court. The Supreme Court of India, for example, has granted protection of constitutional rights and freedoms for persons who suffer from poverty or are otherwise disadvantaged in the framework of public interest litigation.<sup>38</sup>

*Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right [...] and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court [...] and in case of breach of any fundamental right of such person or class of persons [...] seeking judicial redress [...].*

*S.P. Gupta v. President of India and Ors. on 30 December, 1981, paragraph 17.*

<sup>38</sup> See, for example, *People's Union of Civil Liberties v. Union of India and Others*, Writ Petition (Civil) No. 196 of 2001, widely known as the "right to food case".

### *National human rights institutions*

National human rights institutions established in accordance with the Paris Principles<sup>39</sup> have been widely recognized as an important guarantee of human rights. These institutions include a range of bodies whose legal status, composition, structure, functions and mandates vary. The most typical ones are the ombudsperson and national human rights commission. All national institutions should act independently from State powers, especially the executive. They are usually competent to: make recommendations and proposals to State authorities; present their assessments and evaluations concerning violations and the implementation of human rights, based on their own inquiries; and act upon individual or group complaints of human rights violations. In some countries, several bodies of this profile have been put in place (such as the general ombudsperson or the ombudsperson for children, a commission with a general mandate, and special commissions for national minorities or the rights of women). It is important, however,

#### **1994 Constitution of Malawi**

##### **Article 123**

*(1) The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court or by way of appeal from a court or where there is no other practicable remedy.*

##### **Article 126**

*Where the investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall –*

- (a) direct that appropriate administrative action be taken to redress the grievance;*
- (b) cause the appropriate authority to ensure that there are, in future, reasonably practicable remedies to redress a grievance;*
- (c) direct a court to adjudicate on an issue or on the quantum of compensation; or*
- (d) refer a case to the Director of Public Prosecutions with a recommendation for prosecution, and, in the event of a refusal by the Director of Public Prosecutions to proceed with the case, the Ombudsman shall have the power to require reasons for the refusal.*

<sup>39</sup> Principles relating to the status of national institutions (Paris Principles), adopted by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.

**Article 130**

*The Human Rights Commission shall, with respect to the applications of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under this Constitution, but shall not exercise a judicial or legislative function and shall not be given powers so to do.*

that all human rights be covered by the mandates of national human rights institutions active in the country.

In recognition of their role, national human rights institutions have been included in a number of constitutions. This step is crucial for giving them the appropriate standing with the authorities of the State and in the society. The constitution should guarantee the independence of a national institution, specify its basic competencies as necessary to fulfil its mission, and establish a transparent and participatory process for appointment of its leadership. In case of a national human rights commission, the constitution should also ensure its representative character, making it inclusive for all sectors of the society.

**Section 27 (“Ombudsman”) of the 2002 Constitution of Timor-Leste**

- 1. The Ombudsman shall be an independent organ in charge of examining and seeking to settle citizens’ complaints against public bodies, certifying the conformity of the acts with the law, preventing and initiating the whole process to remedy injustice.*
- 2. Citizens may present complaints concerning acts or omissions on the part of public bodies to the Ombudsman, who shall undertake a review, without power of decision, and shall forward recommendations to the competent organs as deemed necessary.*
- 3. The Ombudsman shall be appointed by the National Parliament through absolute majority votes of its members for a term of office of four years.*
- 4. The activity the Ombudsman shall be independent from any means of grace and legal remedies as laid down in the Constitution and the law.*
- 5. Administrative organs and public servants shall have the duty to collaborate with the Ombudsman.*



### *Right to petition*

In many countries the right of citizens to address requests, proposals or demands to State authorities, in particular to the parliament or organs of central or local administration, is called the right to petition.<sup>40</sup> By enjoying this right, rights holders benefit from another avenue – in addition to access to courts and national human rights institutions – to influence State action in the area of human rights violations.

#### **Amendment I to the 1787 Constitution of the United States of America**

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

#### **Article 18 of the 1976 Constitution of Portugal**

*(1) The right of petition is guaranteed; everybody has the right to address himself or herself, or jointly with other individuals, organs of the State or of local self-government with requests, proposals and complaints in matters of public or other common interest.*

*(2) A petition may not be used to interfere with the independence of the courts.*

Petitions are not usually subject to a detailed procedure and the standing of a petitioner's author is weaker than that of the rights holder as a party to procedures before independent State organs, where the petitioner is placed on equal footing with the State entity whose actions are at issue. Nevertheless, in many countries addressees of the petition are obliged by law to respond to the petitioner within a prescribed time and provide information about any action taken or planned to be taken.

The right to petition may be used by individuals, non-governmental organizations and the wider civil society to lobby for the adoption of legal and policy solutions conducive to human rights. Internet and mobile telephones have opened new possibilities to mobilize public opinion and are thus additional means to benefit from the right to petition.

<sup>40</sup> The title "petition" is sometimes given to a legal pleading lodged with the court to initiate a proceeding before it (for example, petitions before the European Court of Human Rights). This is, however, not the subject addressed here.

### *Accountability and compensation*

Responsibility for human rights violations is an underlying principle of human rights law, which has as its corollary the rejection of impunity for perpetrators.<sup>41</sup> In addition, human rights law provides that victims of human rights violations have the right to a remedy and reparations, which is frequently in the form of compensation.<sup>42</sup> Victims also have the right to the truth. The United Nations has embraced the importance of the principle of accountability of perpetrators of human rights violations, which has been articulated in resolutions of the General Assembly, the Commission on Human Rights and its successor the Human Rights Council. Some international human rights instruments explicitly refer to the accountability of perpetrators in terms of the obligations of States parties.

#### ***Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

*1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*

*2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.*

#### ***Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance***

*Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.*

<sup>41</sup> See Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher: Addendum, E/CN.4/2005/102/Add.1.

<sup>42</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147, Annex).

The human rights treaty bodies have also emphasized the obligation of States to hold perpetrators accountable and the right of victims to have a remedy and reparation. For example, in its general comment No. 31, paragraph 15, the Human Rights Committee states: “A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.” In paragraph 18, the Committee goes on to state:

*Impunity for human rights violations may well be an important contributing element in their recurrence.*

Human Rights Committee, general comment No. 31 (2004), paragraph 18.

Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).

Impunity is an issue often dealt with specifically in constitutions of States in transition from a violent or authoritarian past to the establishment of a democracy. The way in which this matter is addressed depends on the specificity of the country, but should be consistent with international law and the principles adopted by the United Nations in this regard. Countries may opt for various institutional solutions within this framework.

### **Chapter 16 (“National unity and reconciliation”) of the 1993 Interim Constitution of South Africa**

*In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 Oct 1990 and before 6 Dec 1993 and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.*

## 2002 Constitution of Timor-Leste

### Section 160 (“Serious crimes”)

*Acts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts.*

### Section 161 (“Illegal appropriation of assets”)

*Illegal appropriation of mobile and fixed assets that took place before the entry into force of the present Constitution is considered crime and shall be resolved as provided for in the Constitution and the law.*

### Section 162 (“Reconciliation”)

- 1. It is incumbent upon the Commission for Reception, Truth and Reconciliation to discharge functions conferred to it by UNTAET Regulation No. 2001/10.*
- 2. The competencies, mandate and objectives of the Commission shall be redefined by the Parliament whenever necessary.*

Some international human rights instruments establish an obligation of States parties to ensure compensation in specific cases – mainly those related to violations of the right to personal integrity or liberty.<sup>43</sup>

The right to compensation in some constitutions is established in general terms as related to any illegal act of public authorities. There is an ongoing discussion whether this right is also applicable with regard to acts of parliament which violate rights and freedoms enshrined in the bill of rights, but it has not as yet found its expression in contemporary constitutions.

<sup>43</sup> See also article 24 of the Convention on the Rights of Persons with Disabilities.

## **International Covenant on Civil and Political Rights**

### **Article 9**

5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

### **Article 14**

6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

### **Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. *Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*

2. *Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*

### **Article 77 of the 1997 Constitution of Poland**

(1) *Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.*  
(2) *Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.*

Some other constitutions refer to the right to compensation in the context of specific situations.

### **2002 Constitution of Timor-Leste**

#### **Section 31 (“Application of criminal law”)**

*6. Anyone who has been unjustly convicted has the right to a fair compensation in accordance with the law.*

#### **Section 54 (“Right to private property”)**

*3. Requisitioning and expropriation of property for public purposes shall only take place following fair compensation in accordance with the law.*

#### **4. Access to bodies and procedures established under international law**

An important human rights guarantee is provided by an unimpeded access to bodies and procedures established under international law. Unfortunately, the law and in particular the practice at the domestic level often provides examples of violations of the right of the individual to seek international assistance if the national protection fails to provide satisfactory results.<sup>44</sup> In this context, a constitutional guarantee of an unimpeded access to such assistance may play an important role. However, few constitutions recognize the right of access to international bodies. This may be because it has only recently been recognized that the protection of human rights requires access to international bodies, in addition to domestic courts.

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<sup>44</sup> See Report of the Secretary-General on cooperation with the United Nations, its representatives and mechanisms in the field of human rights (A/HRC/14/19). This document provides information about cases reported to the Secretary-General.

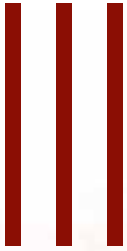
**Article 2 of the 1995 Constitution of Bosnia and Herzegovina****Section 8 (“Cooperation”)**

*All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.*

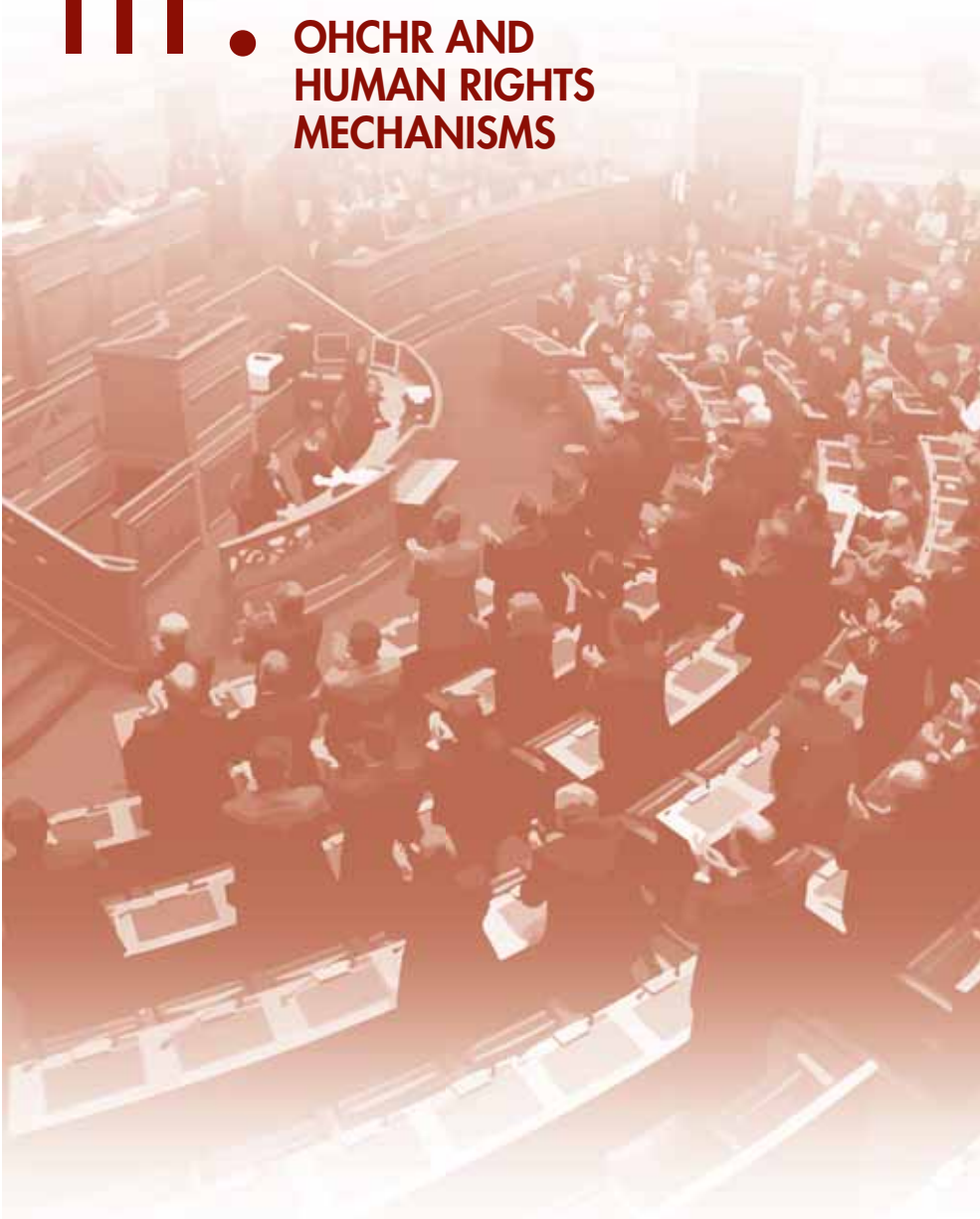
It should be noted that “Annex I” mentioned in the quoted provision lists all of the core international human rights treaties, the Geneva Conventions of 1949 and other treaties relevant to human rights, including the 1992 European Charter for Regional or Minority Languages and the 1994 Framework Convention for the Protection of National Minorities.







● **OHCHR AND  
HUMAN RIGHTS  
MECHANISMS**



## A. Contribution of human rights mechanisms

Human rights treaty bodies, Special Procedures of the Human Rights Council and the Universal Periodic Review all have the potential to influence constitutional reform by States. These human rights mechanisms often make recommendations to States concerning their constitutions in a variety of ways. Recommendations have addressed the nature of the application of human rights law at the national level as well as the substantive protection of human rights.

Drafters of a national constitution would be well advised to consult the recommendations of human rights mechanisms during the process of drafting a constitution to ensure that human rights issues are appropriately addressed. These recommendations may assist drafters to formulate precise and detailed constitutional provisions to protect and promote the observance of human rights.<sup>45</sup>

### 1. Application of international human rights law by States

Issues concerning the application of international human rights law at the national level have frequently involved the status of international human rights treaties in domestic law. International treaties take precedence over domestic law, although some States do not fully recognize this. While States broadly recognize that international treaties take precedence over domestic law, some States have taken the position that this does not include the State's constitution.<sup>46</sup>

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<sup>45</sup> The Universal Human Rights Index provides a summary of the recommendations of the different human rights mechanisms (available from <http://uhri.ohchr.org>). The examples in the text are non-exhaustive and were chosen to illustrate some of the issues that could arise in drafting a constitution.

<sup>46</sup> CCPR/C/KAZ/CO/1 (2011). The decision of the Constitutional Council of the State party established the supremacy of the constitution over international treaty law and declared unenforceable any treaty provision that is in conflict with the constitution. See also CERD/C/NIC/CO/14 (2008). The International Convention on the Elimination of All Forms of Racial Discrimination had the status of ordinary law and was not included among the international treaties listed in the pertinent article of the State party's constitution as having constitutional status.

Nevertheless, international treaties do take precedence over the provisions of a national constitution,<sup>47</sup> although where a State party makes a reservation to an international human rights treaty with respect to a specific article or provision prior to a treaty's ratification or accession, this is in compliance with international law when the reservation is not incompatible with the object and purpose of the treaty in question.<sup>48</sup>

Another question concerning the application of international human rights law by States relates to the issue of whether a State follows the monist tradition or the dualist tradition of international law. The monist tradition provides for the direct application of international law in the courts provided that the right in question is capable of being self-executing, which means that the provision in question can be applied directly without any implementing law at the national level.<sup>49</sup> The monist tradition is frequently used in civil law States. The dualist tradition, alternatively, requires that all of the rights contained in an international treaty be adopted into domestic law before the provisions of the treaty can become binding and invoked in the courts.<sup>50</sup> The dualist tradition is followed in most common law States.<sup>51</sup>

The dualist tradition can create an unusual situation where a State has ratified or acceded to a human rights treaty, but part or all of its provisions are not binding in domestic law and cannot be invoked in the State's courts.

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<sup>47</sup> A/56/44. The constitution of the State party provided for the supremacy of international human rights instruments over domestic law, including the State's constitution. See also CERD/C/60/CO/3 (2002).

<sup>48</sup> Article 2(1)(d) of the Vienna Convention on the Law of Treaties; General comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the optional protocols thereto, or in relation to declarations under article 41 of the Covenant (CCPR/C/21/Rev.1/Add.6), paragraph 6.

<sup>49</sup> CAT/C/KGZ/CO/2 (2013). The State party provided in its constitution that international treaties are directly applicable in domestic law.

<sup>50</sup> CEDAW/C/PNG/CO/3 (2010). Concern was expressed when an international human rights convention had been ratified by the State party in 1995 but subsequently had not been accorded the status of domestic law because the State party, which followed the dualist tradition, had not adopted implementing legislation or amended its constitution.

<sup>51</sup> Benedetto Conforti and Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague, Martinus Nijhoff Publishers, 1997), p. 9.

This is because there has been either no or only partial adoption of domestic law to implement the treaty in domestic law.<sup>52</sup>

However, the differences between the monist and dualist traditions are not as great as they may appear initially. In States where the monist tradition is followed, often a substantial number of provisions of a human rights treaty are not self-executing. Therefore, a State needs to adopt a domestic law to implement the provisions of the treaty for the human rights provision to be applied in the courts. Even when a provision is self-executing, States may be urged also to adopt legislation as a means of advancing the implementation of a particular human right.<sup>53</sup> While the Human Rights Committee has expressed its preference that States use the principle of direct applicability, it has acknowledged that the International Covenant on Civil and Political Rights imposes no obligation to do so.<sup>54</sup>

Another fundamental question that has arisen concerns the right to a remedy for violations of the human rights articulated in international treaties. Human rights treaty bodies have concluded that States parties must provide for remedies for such violations in order for human rights to be truly applicable domestically, and when the right to a remedy has been established in a State party's constitution this has been welcomed.<sup>55</sup>

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<sup>52</sup> CRC/C/ERI/CO/4 (2015). Considering the State party's dualist system, concern was expressed that, without effective implementation of the constitution and the adoption of legislative reforms, the provisions of the Convention on the Rights of the Child would not be legally binding in domestic legislation.

<sup>53</sup> CAT/C/LIE/CO/3 (2010). Noting that constitutional amendments prohibited torture, and inhuman or degrading treatment or punishment, and that this prohibition was absolute and may not be undermined by law or by emergency decree, and that according to the monist legal system of the State party the provisions had become part of domestic law, it was still recommended to the State party to incorporate into domestic law the distinct crime of torture based on the definition contained in the Convention against Torture to advance the Convention's overarching aim of preventing torture or ill treatment.

<sup>54</sup> General comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13.

<sup>55</sup> CERD/C/63/CO/10 (2003). The State party had a constitutional provision that any individual alleging his or her constitutional rights had been violated could apply for redress in the High Court. See also CAT/C/TUR/CO/3 (2011). The State party amended its constitution to provide for the right to appeal to the constitutional court with regard to alleged violations of fundamental rights and freedoms.

## 2. Protection of substantive human rights

### *Civil and political rights*

Human rights mechanisms have made recommendations on a wide variety of issues that should be included in a constitution. In terms of civil and political rights, States have been asked, for example, to provide constitutional protection of the rights of freedom of expression, association and peaceful assembly.<sup>56</sup> States have also been asked to ensure the constitutional protection of the freedom of religion or belief,<sup>57</sup> including for non-traditional faiths.<sup>58</sup> Also welcomed was the recognition, in an article of a State's constitution, of conscientious objection to military service as part of the freedom of religion or belief.<sup>59</sup>

Recommendations have also been made concerning the constitutional protection of limitations on pretrial detention,<sup>60</sup> the prohibition of

<sup>56</sup> CRC/C/CUB/CO/2 (2011). It was recommended that the State party consider amending its constitution to expand the protection of the rights of freedom of expression, association and peaceful assembly. A/HRC/15/16 (2010). The State was urged to fully implement the provisions of its constitution on freedom of expression, protect all journalists from harassment, and create an enabling environment for the operation of free media, including through the simplification of registration and accreditation procedures. A/HRC/10/71 (2009). It was recommended that the State end all restrictions on political activities and meetings and allow the registration of political parties, as recognized under the constitution.

<sup>57</sup> A/HRC/7/10/Add.4 (2008). The State's law discriminated against religious minorities and was not in conformity with international standards or the State's constitution.

<sup>58</sup> A/HRC/13/23/Add.1 (2010). Concern was expressed when the State recognized traditional faiths on the grounds of freedom of religion, but did not accord the same freedoms to those of faiths that were considered non-traditional such as Jehovah's Witnesses, Baptists, Evangelicals and Scientologists.

<sup>59</sup> CCPR/C/PRY/CO/2 (2006). The State party's constitution recognized conscientious objection to military service and provisional measures had been passed by the Chamber of Deputies to guarantee respect for conscientious objection because of the lack of specific regulations governing this right.

<sup>60</sup> CAT/C/CR/34/UGA (2005). Concern was expressed about pretrial detention that extended beyond the 48-hour limit specified in the constitution, and the possibility of detaining treason and terrorism suspects for 360 days without bail. A/HRC/25/6 (2013). The State was urged to ensure that all detainees who were kept in pretrial detention were brought before a judge within the deadlines stated in its constitution, and in accordance with the provisions of the International Covenant on Civil and Political Rights.

torture,<sup>61</sup> the independence of the judiciary<sup>62</sup> and the right of lawyers to freely exercise their profession without intimidation or harassment.<sup>63</sup>

In addition, recommendations have been formulated concerning the right to life,<sup>64</sup> the prohibition of slavery,<sup>65</sup> and the non-derogable nature of the specific rights identified as such in the International Covenant on Civil and Political Rights.<sup>66</sup>

### *Economic, social and cultural rights*

Through human rights mechanisms, recommendations on economic, social and cultural rights have also been formulated, particularly when a State's constitution contained no reference to such rights<sup>67</sup> or when

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<sup>61</sup> A/HRC/21/5 (2012). A State in the process of elaborating a new constitution was requested to consider including provisions against torture and effective redress for victims of torture.

<sup>62</sup> CCPR/CO/72/PRK (2002). Constitutional and legislative provisions seriously endangered impartiality and independence of the judiciary in the State party, notably where the constitution limited tenure for judges to five years, the central court was accountable to the Supreme People's Assembly and judges could be subject to criminal liability for "unjust judgments". CAT/C/QAT/CO/2 (2013). Despite provisions in the constitution and national law providing for the independence of the judiciary, there was a lack of independence of the judiciary essentially due to the insecurity of the tenure of judges.

<sup>63</sup> CAT/C/BLR/CO/4 (2011). Concern was expressed where lawyers were subject to intimidation and interference in the discharge of their professional functions and where bar associations, although independent by law, were in practice subordinate to the Ministry of Justice and several lawyers had been disbarred after representing individuals in connection with a protest event.

<sup>64</sup> CCPR/CO/79/LKA (2003). Concern was expressed that the right to life was not mentioned in the State party's constitution. CCPR/C/SLE/CO/1 (2014). While welcoming the State party's continued moratorium on the death penalty and the commitment expressed to abolish it, regret was expressed at the slow progress in the process to abolish the death penalty and to remove the provision from the State party's constitution.

<sup>65</sup> A/HRC/17/15 (2011). It was recommended to a State to make all possible efforts to guarantee compliance with the interdiction of slavery in the new constitution.

<sup>66</sup> CCPR/C/79/Add.120 (2000). It was recommended to the State party to amend its constitution and its law on emergency situations to fully protect all non-derogable rights enumerated in the International Covenant on Civil and Political Rights.

<sup>67</sup> CERD/C/63/CO/10 (2003). Concern was expressed when the State party's constitution did not contain reference to economic, social and cultural rights.

restrictions on the interpretation of such rights were contained in a constitution.<sup>68</sup>

In terms of substantive rights, without being exhaustive, reference has often been made to the right to education,<sup>69</sup> the right to health,<sup>70</sup> the right to food and access to water,<sup>71</sup> and the right to housing.<sup>72</sup>

### *Discrimination on prohibited grounds*

As already discussed, constitutions normally contain the prohibition of discrimination on a wide range of grounds that are set out in the Universal Declaration of Human Rights and the two International Human Rights Covenants, as well as other prohibited grounds of discrimination contained in later international human rights treaties or established through interpretation by human rights treaty bodies (see chapter II, section B.1, of the present publication). Nevertheless, treaty bodies have addressed issues of discrimination in depth when there exists a human rights treaty focusing on a particular aspect of discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.

<sup>68</sup> E/C.12/VNM/CO/2-4 (2014). Where the State party's constitution had an article that placed restrictions on the exercise of economic, social and cultural rights, the State party was urged to review such restrictions provided for in the constitution and in implementing legislation and regulations so as to bring them into line with the Covenant.

<sup>69</sup> CRC/C/NGA/CO/3-4 (2010). It was recommended that the right to free and compulsory primary education be incorporated in the constitution within the context of the State party's constitutional review and to abolish school fees to ensure that primary education was effectively free. E/C.12/POL/CO/5 (2009). Although the State party's constitution guaranteed free education, higher education in State-run universities was not completely free and this had a disproportionately negative effect on disadvantaged and marginalized groups, especially in rural areas.

<sup>70</sup> A/HRC/14/20/Add.4 (2010). It was recommended that the State party include the right to the enjoyment of the highest attainable standard of health in its constitution.

<sup>71</sup> E/C.12/SLV/CO/3-5 (2014). It was recommended to the State party that its parliament complete the ratification of the constitutional amendments guaranteeing the right to food and access to water in the constitution.

<sup>72</sup> E/C.12/KEN/CO/1 (2008). It was recommended to the State party to add a provision to its draft constitution to ensure that evictions were used only as a last resort.

With regard to racial discrimination, issue has been taken when the constitutions of some States had definitions of racial discrimination that did not fully conform to the definition in the International Convention on the Elimination of All Forms of Racial Discrimination;<sup>73</sup> or when citizenship to children born in a State was granted on the basis of colour or racial origin;<sup>74</sup> or when the rights of certain ethnic or racial groups were limited,<sup>75</sup> or when incitement to racial, religious or ethnic hatred was not prohibited in practice.<sup>76</sup>

Concerning discrimination on the basis of sex or gender, the Committee on the Discrimination against Women has recommended that States parties include in their constitutions or legislation provisions prohibiting all forms of direct and indirect discrimination against women, include sanctions for such discrimination and repeal all existing discriminatory laws.<sup>77</sup> It has also recommended the repeal of constitutional provisions which allow discrimination based on sex in matters related to adoption, marriage, divorce, burial, devolution of property, death and other matters that fall within the provisions of personal law.<sup>78</sup> Further, the Committee on Human Rights noted positive developments, such as an article in a State party's constitution which prohibited customs or traditions that were incompatible with the dignity, welfare or interest of women.<sup>79</sup>

<sup>73</sup> CERD/C/63/CO/6 (2003); CERD/C/PER/CO/18-21 (2014); CERD/C/JPN/CO/7-9 (2014).

<sup>74</sup> CRC/C/LBR/CO/2-4 (2012). The State party continued to restrict the grant of citizenship to children born in the State party on the basis of colour or racial origin according to provisions of the constitution that were incompatible with the Convention on the Rights of the Child.

<sup>75</sup> CERD/C/TCD/CO/16-18 (2013). A provision of the constitution of the State party, which provided that "all propaganda of an ethnic, tribal, regional or religious nature that seeks to undermine national unity or the secularity of the State shall be prohibited", could be interpreted to dissuade members of ethnic or racial groups from asserting the rights that are guaranteed by the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>76</sup> A/HRC/7/19/Add.4 (2008). The State was urged to fully apply the prohibition of incitement to racial, religious or ethnic hatred in the constitution.

<sup>77</sup> CEDAW/C/PAK/CO/4 (2013).

<sup>78</sup> CEDAW/C/LSO/CO/1-4 (2011).

<sup>79</sup> CCPR/CO/80/UGA (2004).



Constitutional provisions which have had the effect of perpetuating the woman's primary role as a mother and homemaker have been called into question,<sup>80</sup> as well as provisions that did not allow a woman to transmit her nationality to her foreign spouse on the same basis as a man.<sup>81</sup> Constitutional provisions and electoral laws in some States that have established numerical quotas or targets for women's participation in political and decision-making posts have been welcomed.<sup>82</sup>

Recommendations have also been made to States to review their constitutions and legislation to ensure that discrimination on the grounds of sexual orientation and gender identity is prohibited.<sup>83</sup>

Concerning the rights of persons with disabilities, recommendations have focused on including the prohibition of discrimination on the basis of disability in the constitutions and legislation of States.<sup>84</sup> Concern has also been expressed regarding the obstacles to overcoming discrimination against children with disabilities, including their often poor living conditions, the lack of integration in schools and society, and the prevailing discriminatory attitudes towards them in society.<sup>85</sup> Concern has also been expressed that persons with disabilities face particular discrimination with regard to fully exercising their electoral rights.<sup>86</sup>

### *Rights of protected groups*

Certain protected groups such as children, migrants, indigenous peoples and minorities have specific rights in human rights law. The Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the United Nations Declaration on the Rights of Indigenous Peoples articulate specific rights for these groups. The International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination have provisions protecting minorities.

<sup>80</sup> A/57/38 (2002).

<sup>81</sup> CEDAW/C/NGA/CO/6 (2008); CEDAW/C/SWZ/CO/1-2 (2014).

<sup>82</sup> CEDAW/C/IRQ/CO/4-6 (2014); CEDAW/C/RWA/CO/6 (2009).

<sup>83</sup> CCPR/C/BLZ/CO/1 (2013); CEDAW/C/MKD/CO/4-5 (2013).

<sup>84</sup> CRC/C/15/Add.168 (2001); CRC/C/15/Add.213 (2003).

<sup>85</sup> CRC/C/15/Add.241 (2004).

<sup>86</sup> CCPR/C/AGO/CO/1 (2013).

Constitutions often have articles addressing the rights of these groups, and recommendations have been made through human rights mechanisms as to which types of protection should be established in constitutions for these groups.

Regarding the rights of the child, the Committee on the Rights of the Child noted positively when the principle of the best interests of the child had been reflected in a State's constitution,<sup>87</sup> as well as when there are constitutional provisions for the protection of children, including those born out of wedlock.<sup>88</sup> The Committee expressed concern when a constitutional provision provided that in case of necessity all able-bodied citizens could be recruited for military service, since this could open-endedly lower the age of military recruits.<sup>89</sup> It was noted in a different State that, although the constitution prohibited child labour, which was positive, no labour law prohibited harmful or hazardous work for children under 18 years of age.<sup>90</sup>

Regarding migrant workers and their families, concern was expressed where a State's constitution provided that the executive branch had exclusive powers to expel from the national territory immediately and without need for a prior court decision any foreigner whose stay in the country was deemed undesirable.<sup>91</sup> A State was positively noted when its new constitution included rights for national and foreign migrant workers, and recognized migration as a right.<sup>92</sup> Further, when a State's constitution provided that all children born on its territory were citizens at birth, regardless of the nationality of the parents, concern was expressed that many civil registry officials refused to register the births of children of undocumented migrant workers.<sup>93</sup>

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<sup>87</sup> CRC/C/NAM/CO/2-3 (2012); CRC/C/GHA/CO/2 (2006); CRC/C/15/Add.241 (2004).

<sup>88</sup> CRC/C/TLS/CO/1 (2008).

<sup>89</sup> CRC/C/OPAC/SLV/CO/1 (2006).

<sup>90</sup> CRC/C/PRK/CO/4 (2009).

<sup>91</sup> CAT/C/MEX/CO/4 (2007).

<sup>92</sup> CMW/C/ECU/CO/2 (2010).

<sup>93</sup> CMW/C/MEX/CO/2 (2011).

Recommendations concerning indigenous peoples have included urging States to amend their constitutions to give legal and political recognition to indigenous peoples.<sup>94</sup> Where a State party included a provision that it was the duty of the State to adopt measures to protect the rights and interests of indigenous peoples, especially the lands and forests where they had settled, this was welcomed.<sup>95</sup> Similarly, it was welcomed when a constitutional article provided for the right of indigenous peoples to elect their own representatives, although it was noted that this right should not be unduly restricted.<sup>96</sup>

Concerning the rights of minorities, an article in a State party's constitution was noted because it, and the State Languages Act, guaranteed the right of persons belonging to minorities to be taught in their own languages.<sup>97</sup> Where a State party's constitution recognized three main linguistic communities, the Committee on Economic, Cultural and Social Rights recommended to the State party also to protect the cultural diversity of all minority groups.<sup>98</sup> Moreover, where a State party's constitution provided for the representation of two national minorities in its parliament, the Committee on the Elimination of Racial Discrimination expressed concern with regard to the representation of other minorities in parliament and regional elected bodies.<sup>99</sup>

## **B. Objectives, forms and methodology of assistance programmes**

Drafters of a bill of rights can benefit from the wealth of international and comparative national experience and, in practice, usually do so. This takes place in more and less institutionalized forms. Institutionalized assistance is usually provided in various cooperation frameworks by the United Nations system, regional organizations, governments, specialized institutions and non-governmental organizations. Otherwise, assistance from individual

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<sup>94</sup> E/C.12/SLV/CO/3-5 (2014); E/CN.4/2006/78/Add.2 (2005).

<sup>95</sup> CERD/C/HND/CO/1-5 (2014).

<sup>96</sup> CERD/C/MEX/CO/16-17 (2012).

<sup>97</sup> CERD/C/KGZ/CO/5-7 (2013).

<sup>98</sup> E/C.12/BEL/CO/3 (2008).

<sup>99</sup> CERD/C/SVN/CO/6-7 (2010).

international experts is sought by governments or other parties to the constitutional reform processes.

There are some general principles that should guide international assistance to constitutional reforms, which are very much in line with the overall framework of technical cooperation. Although some have already been addressed above, it is useful to summarize here the relevant policy principles as elaborated in the guidance note of the Secretary-General on constitution making:

1. Seize the opportunity for peace building in conflict and post-conflict countries – constitution making may open new opportunities to address the root causes of conflict and to design sustainable solutions. In many situations, human rights-based constitution making is one of the processes that make a conflict resolution feasible.
2. Encourage compliance with international norms and standards – international cooperation should promote international human rights standards as an essential reference for constitutional reforms and address the rights that have been established under international law for groups that have been subjected to discrimination and marginalization.
3. Ensure national ownership – the basic requirement for success is country ownership of the constitution-making and reform process. International actors should make international knowledge and expertise available while refraining from imposing them on national partners and should demonstrate understanding for national priorities, as well as for national legal systems and traditions.
4. Support inclusivity, participation and transparency – these requirements have an essential impact on the legitimacy of constitutional reforms. The process of reform should integrate not only public authorities but also all parts of society, including indigenous peoples and minorities, organizations representing women, non-governmental organizations, academia, political parties, media organizations, professional legal organizations and others.

5. Mobilize and coordinate a wide range of expertise – effective assistance requires contribution by a wide range of actors. Efforts should therefore be made by all those involved to harmonize constitutional assistance.
6. Promote adequate follow-up – constitutional reforms do not end with the adoption of a new constitution, but need to be supported by subsequent efforts in the area of public education, professional training and other forms of capacity-building.
7. Ensure transparency and accountability of international assistance – this is one of the basic prerequisites of the credibility of external advice.

The overall objective of providing assistance in drafting a bill of rights is to enhance the capacity of national partners to make their draft constitution or draft constitutional amendments fully consistent with international human rights standards, taking into account their interpretation by human rights treaty bodies as well as other human rights mechanisms. International human rights standards should not only provide national legislators with inspiration and overall guidance, but also be seen as a yardstick for evaluating the legal, policy and practical solutions adopted at the domestic level. As pointed out in the guidance note of the Secretary-General on constitution making: “The assistance that may be required can range from technical legal expertise, to facilitation of negotiations among stakeholders on the structure of the process and on key constitutional principles. It can also involve assistance in setting up public education and consultation campaigns, the provision of administrative, financial and legal support to the constitution-drafting body, and support for procedures of final adoption.”

Offering international assistance is a challenging task. Some national actors may be inclined to resent the presence of international advisers because they view the constitution-making process as a sovereign act which they are capable of conducting. In addition, international assistance often suffers under a lack of coordination. It is essential for international actors to understand national actors driving the constitution-making process and to respect their stance and aspirations. With this understanding, international actors may be appreciated for the role that they play as a mediator, advocate or supplier of specialized expertise on a given subject. For example, positive

action can include: conducting workshops that are focused on the specific issues to be addressed in the draft constitution; providing reference books and other documents that could be used as a library for national actors involved in the process; and providing support to produce documents and other materials that could, for example, be used for civic education on the constitution-making process and on the content of a draft constitution once finalized.

Other examples of positive experience include providing information about other States' experiences with constitution making. This could include, for example: providing information on how other countries had addressed the issue of accountability for crimes in the framework of an ethnic conflict; providing information on truth and reconciliation commissions; providing information on international standards and mechanisms; and, at the implementation stage, providing technical assistance for the establishment of institutions or for the drafting of implementing legislation. In providing assistance, international actors must be sure to understand the domestic political environment, given that constitution making is ultimately and primarily a national political process.

The United Nations country teams (UNCTs), in cooperation with OHCHR, play a crucial role in providing international assistance. Human rights, gender equality and women's empowerment make up one of the four core underlying principles arising from the norms and standards that the United Nations is tasked to uphold and promote, and which should inform all programming at the country level.<sup>100</sup> These human rights principles provide a framework for integrating the need for constitutional reforms into the common country assessments and the United Nations Development Assistance Frameworks. Depending on the country involved and the particular situation in a given State, the United Nations Development Programme, the United Nations Children's Fund (UNICEF), the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the United Nations Department of Political Affairs and the

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<sup>100</sup> The other three core underlying principles are sustainable development and resilience, leave no one behind, and accountability. See United Nations Development Group, *Interim United Nations Development Assistance Framework Guidance* (2016), p. 7. Available from <https://undg.org/wp-content/uploads/2016/09/Interim-UNDAF-Guidance-2016.pdf>.

Department of Peacekeeping Operations may play particularly important roles in constitution making and may seek in this regard the cooperation of OHCHR on human rights related issues.

### **C. Partnerships**

As outlined in the 2017 United Nations Development Assistance Framework Guidance, country ownership and national priorities should be taken into account in the context of partnerships. While pursuing national priorities, a UNCT should help to shape those priorities in a way to reflect, *inter alia*, the Government's obligations under international human rights and other instruments. With a view to making their assistance the most effective and efficient, all international partners to constitutional reforms should make efforts to cooperate with each other and to facilitate the active participation of national partners. UNCTs are also expected to engage in cooperation with regional organizations that have developed their own expertise in constitutional matters, often closely related to national approaches in their respective regions. Such partnerships are an important guarantee of both a successful drafting process and the effective implementation of a bill of rights.

## SOURCES AND REFERENCES

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1965 International Convention on the Elimination of All Forms of Racial Discrimination

1966 International Covenant on Economic, Social and Cultural Rights

1966 International Covenant on Civil and Political Rights

1979 Convention on the Elimination of All Forms of Discrimination against Women

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

1989 Convention on the Rights of the Child

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

2006 Convention on the Rights of Persons with Disabilities

2006 International Convention for the Protection of All Persons from Enforced Disappearance

The core international treaties are available from [www2.ohchr.org/english/law/index.htm#core](http://www2.ohchr.org/english/law/index.htm#core).

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Committee on the Elimination of Racial Discrimination

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All general comments are available from [www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx).

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Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance

Guidance Note of the Secretary-General on Democracy

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Czechia – Constitution of 1992

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Georgia – Constitution of 1995  
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Guinea-Bissau – Constitution of 1984  
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Mexico – Constitution of 1917  
Mongolia – Constitution of 1992  
Netherlands – Constitution of 2002  
Nepal – Interim Constitution of 2007  
Nigeria – Constitution of 1999  
Poland – Constitution of 1997  
Portugal – Constitution of 1976  
Russian Federation – Constitution of 1993  
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Serbia – Constitution of 2006  
Slovakia – Constitution of 1992  
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South Africa – Interim Constitution of 1993; Constitution of 1996  
Switzerland – Constitution of 1999

Timor-Leste – Constitution of 2002

Ukraine – Constitution of 1996

United States of America – Constitution of 1787

Venezuela (Bolivarian Republic of) – Constitution of 2009

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International Constitutional Law

[www.servat.unibe.ch/icl](http://www.servat.unibe.ch/icl)

International IDEA: ConstitutionNet

[www.constitutionnet.org](http://www.constitutionnet.org)

Refworld

[www.refworld.org](http://www.refworld.org)

World Intellectual Property Organization

<http://wipo.int/wipolex>

## **Examples of human rights websites offering access to international and regional instruments and jurisprudence**

Office of the United Nations High Commissioner for Human Rights  
[www.ohchr.org](http://www.ohchr.org)

Universal Human Rights Index  
<http://uhri.ohchr.org>

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