

The Millennium Declaration, Rights,
and Constitutions



The Millennium Declaration, Rights, and Constitutions

YASH GHAI
JILL COTTRELL

with a Foreword by Professor PHILIP ALSTON

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

YMCA Library Building, Jai Singh Road, New Delhi 110 001

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur
Madrid Melbourne Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece Guatemala
Hungary Italy Japan Poland Portugal Singapore South Korea Switzerland
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Published in India
by Oxford University Press, New Delhi

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First published 2011

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ISBN-13: 978-019-806928-7
ISBN-10: 019-806928-6

Typeset in ITC Giovanni Std 9.5/12.7 by Jojy Philip
Printed in India by ...
Published by Oxford University Press
YMCA Library Building, Jai Singh Road, New Delhi 110 001

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Foreword

Debates over economic and social rights generally involve two competing narratives. The first, and for many years the dominant one, holds that ESR are not really 'rights' in the full sense of the term, but are essentially aspirations. Ideally, governments should take them into account, but it should be understood that no great urgency can attach to their realization. Their fulfilment will always be dependent upon the 'availability of resources', as the International Covenant on Economic, Social and Cultural Rights puts it, and the inescapable reality is that those resources will always be in scarce supply, thus making it impossible for any government to make more than halting and uneven progress towards the realization of economic and social rights for its citizens. This familiar narrative is reflected in the practice of the vast majority of governments, despite their regular protestations that they hold economic and social rights to be of the highest importance.

The second narrative is one that is put forward by enthusiastic proponents of economic and social rights and draws strength from the clear commitments contained in a range of international treaties, such as the Covenant and the Convention on the Rights of the Child. It posits that these rights can be considered in virtually all respects to be the equivalent of the more traditional civil and political rights, whose importance, at least in theory, is generally uncontested by governments and others. It can also be assumed that resources are or should be available. The challenge therefore is to ensure constitutional recognition, to adopt legislation, and to empower the courts to enforce economic and social rights in the same way that they treat other human rights. In essence, the expectation is that the legislators and the lawyers, acting hand in hand, can make the world a welcoming and hospitable place for economic and social rights.

The reality, however, which emerges very clearly from this wonderful book by Yash Ghai and Jill Cottrell, is much more complicated than either of these two competing narratives would suggest. In the first place, the availability or otherwise of resources to be devoted to the fulfilment of economic and social rights is not a matter for objective assessment, but

of political priorities. And those in turn depend on the structures of a society and the attitudes and strategies adopted by those competing for access to existing or potential resources. A society can choose to 'afford' to guarantee a decent minimum existence to even the poorest of its citizens if the political will is there. The political system is always about trade-offs; the problem is just that the interests of the poor are almost always traded off in favour of those of the elites. Poverty, as the authors put it so bluntly, 'is created by societies and governments. It is about exclusion, physical and economic insecurity, fear of the future, a constant sense of vulnerability.'

Understanding that reality also serves to highlight the essential interrelationship of civil and political rights with economic and social rights. Too often, proponents of the latter prescribe strategies and visions which separate out the two sets of rights, as though one could ever be achieved without the other. The point is not only that there are few, if any, compelling, watertight distinctions between the two types of rights, but that even those whose overwhelming concern is with economic and social rights will need to give careful consideration to the civil and political rights conditions which will be conducive to the achievement of their objectives. This emerges very clearly in the emphasis attached in this book to the need for meaningful public participation in the shaping of societal goals, and in the design and implementation of the means by which those goals can be brought to fruition.

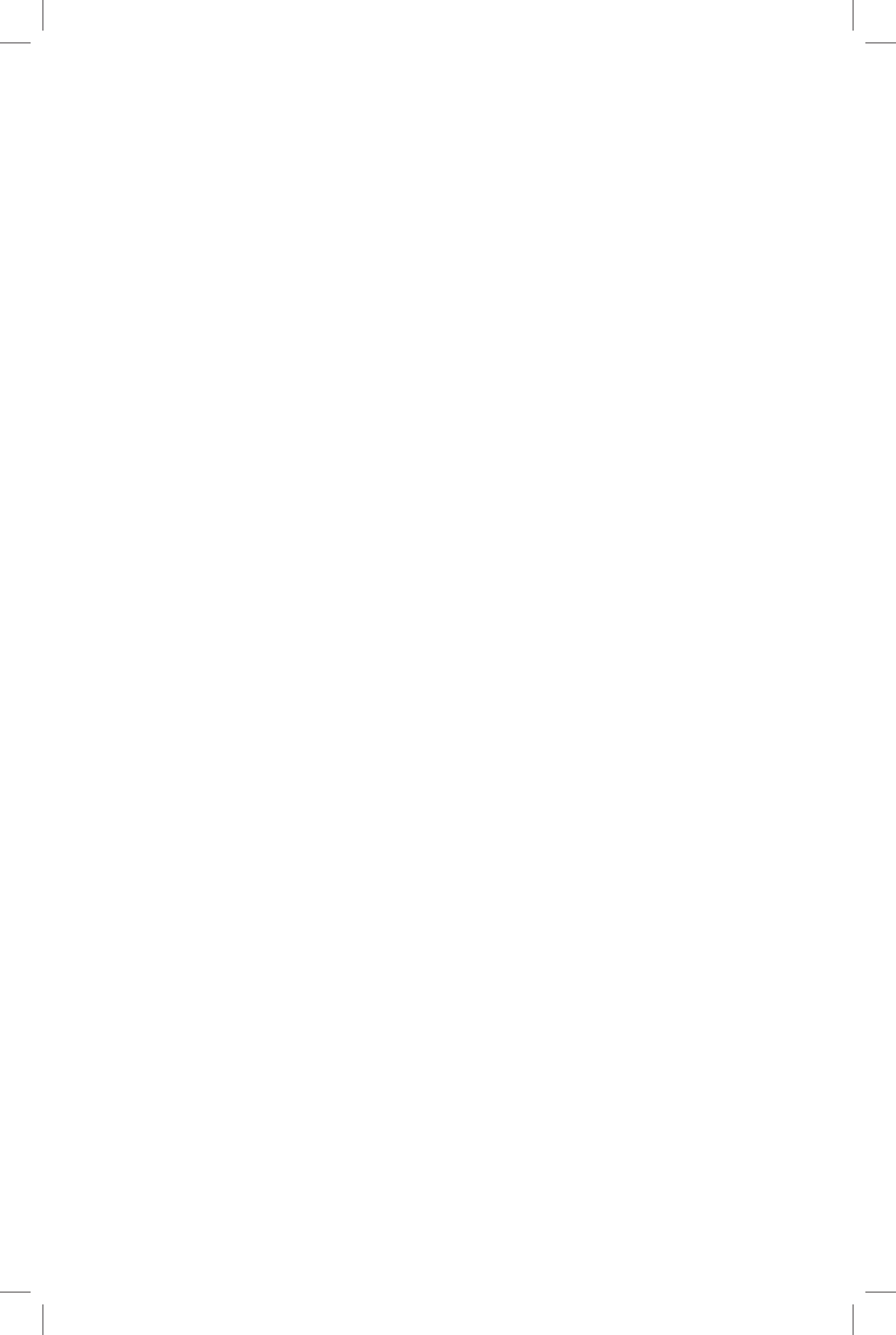
The authors speak with particular authority, insight, and persuasiveness when dealing with the challenges involved in giving constitutional significance to economic and social rights and to the principles underlying the MDGs. I doubt that any constitutional lawyer has been involved in the drafting of as many constitutions in diverse countries around the world as has Yash Ghai over a period of many years. Certainly none are as subtle and nuanced in their analysis of the issues that should be taken into account. Where others see a single model frozen in time, he sees a document which will and should change over time and which needs to reflect the true values and priorities of the peoples in whose name the constitution is to be adopted. Where others see the struggle for a constitution to be located essentially in the drafting and adoption processes, he wisely observes that the 'fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organizations, social structures, economic changes, traditions of constitutionalism.' In his vision, it is the people who are the ultimate guardians of the constitution. A dazzling set of constitutional provisions, a highly empowered judiciary, and sophisticated institutional arrangements are likely to amount to all

too little in the absence of social awareness and mobilization. Seen in this light, there is every reason why a commitment to the fulfilment of economic and social rights should be included in constitutions and the book offers a deeply informed and clear-sighted analysis of how this might be done.

A great deal of literature in recent years has addressed the issue of justiciability, or the role that judges can play in giving effect to economic and social rights provisions, whether constitutional or legislative in nature. Again, the authors eschew the unrealistic extremes which claim either that judges should have no role in such decision-making or that they should be comprehensively involved. Instead, while recognizing that the principal responsibility falls on 'politicians and administrations, and the sanctions will be primarily political', they nonetheless point to important, but carefully defined, roles that courts can and generally should play.

Perhaps the greatest strength of this book is that it explains in a readily comprehensible and unpretentious way the framework and assumptions of human rights law and policy and the ways in which they can be used to promote the realization of economic and social rights in general, and the Millennium Development Goals in particular. But the reader should also be aware that this straightforward and compelling presentation is based on a deep and sophisticated understanding, born of many years of practical engagement by the authors at every level in the enterprise of making a reality of all human rights across a wide range of developing societies. If read and acted upon by ordinary citizens, activists, and policy-makers, the prescriptions contained in this book can go a long way to bring about the deep transformation of the societies in which we live and thus to make a reality of the fine sentiments so often proclaimed in the name of human rights but so determinedly neglected in reality.

Philip Alston
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Preface

The UNDP Asia Pacific Regional Centre (APRC) in Bangkok in collaboration with the UN Millennium Campaign presented a challenge: they wanted someone to write a small book that looked at how achievement of the Millennium Development Goals (MDGs) might be enhanced through reliance on Economic, Social, and Cultural Rights (ESCR), and specifically through the incorporation of those rights into constitutions. The authors' academic backgrounds had, rather than convincing them that ESCR might achieve MDGs—or MDGs achieve ESCR—instilled in them some degree of scepticism. Surely MDGs were not really based on rights, they oversimplified the situation by focussing on specific goals and time frames, and ignoring the context of poverty, they were too 'top-down'. At best MDGs and rights were, in the words of the title of a famous article by Philip Alston 'Ships that pass in the night'.

Nonetheless, the challenge was irresistible. Having taught human rights, especially at the University of Hong Kong, including ESCR, and being involved at the time with the Constitution Advisory Support Unit in UNDP Kathmandu, advising on the constitution-making process in Nepal, we were also aware of the appeal that the idea of the MDGs has (indeed we walked to our offices every day past MDG posters). We believed passionately that a constitution, especially in developing countries, ought to address issues of poverty and marginalization. So we set aside our scepticism.

This book is not an academic book, but was written having in mind primarily people who might be involved in constitution-making or constitution-operation. It does not raise or confront the issues of the theoretical relationships between the MDGs and the ESCR; we worked within the premise set for us by UNDP. But we hope that the book also contains ideas and material of interest to students studying human rights, especially those who have an interest in 'National Protection of Human Rights'—to use the title of a course in which we both taught in Hong Kong, and that reflects what we believe is a fundamental aspect of human rights.

We are grateful to UNDP and UN Millennium Campaign for the stimulus, and specifically to Nicholas Rossellini, Deputy Regional Director, Regional Bureau for Asia and the Pacific, UNDP, Minar Pimple, Regional Director, the UN Millennium Campaign Asia and the Pacific Regional Office, and Pauline Tamesis, Democratic Governance Practice Leader, UNDP APRC for their valuable support of the project. Special appreciation should be given to R. Sudarshan and Ruangkhao Rycy Chanchai for patiently shepherding the project.

We are grateful also to the students in those Hong Kong classes (drawn from many countries), to the people with whom we have worked on constitution-making, especially in Nepal, and in Yash Ghai's case, especially in Kenya. Finally we are indebted to Philip Alston, whose distinguished career has included chairing the UN Committee on Economic, Social, and Cultural Rights, and being Special Adviser to the UN High Commissioner for Human Rights on the MDGs, for kindly agreeing to commit some of his time, so heavily committed in other ways, to write the Foreword.

Nairobi,
November 2010

Yash Ghai and Jill Cottrell

PART I

Human Rights and Human Development

In this part of the book, we look at the basic building blocks of our topic: the Millennium Development Goals (MDGs), the notion of rights, especially socio-economic rights, and constitutions. Some people may want to skim this part (as elementary) and concentrate more on Part II where the focus is on how one makes a constitution to achieve rights (and, thereby, the MDGs).

1. POVERTY: A REFLECTION

The MDGs are essentially about people who are caught up in poverty and have few means to extricate themselves from its tentacles. Therefore, it is important to understand the nature of poverty and its relationship to human rights. In this way, we build a link between MDGs and human rights, and then to the fulfilment of human rights within an individual nation, especially through its constitutional framework which is the main focus of this book

BOX No. 1.1 FROM THE MILLENNIUM DECLARATION

'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.' Para 11

Poverty is not, as some imagine, an original state, nor are the poor victims of their own faults and weaknesses, of shortcomings in personality or morality, or failures in family or upbringing. Poverty is created by societies and governments. It is about exclusion, physical and economic insecurity, fear of the future, and a constant sense of vulnerability. This

perspective on poverty is sustained by the concept of human rights which, with its overriding theme of human dignity, alerts us to the multiple dimensions of the human person. Indeed, to secure an insight into the nature of poverty we should examine how it negates the realization or enjoyment of human rights. The essential purpose of human rights and a life of dignity, is rendered impossible by extreme poverty. It is obvious that poor people enjoy disproportionately small measures of economic rights like education, health, and shelter. Moreover, they are equally unable to exercise civil and political rights, which require not only an understanding of the dynamics of society and access to public institutions, but, also, confidence in them. They are, for the most part, unable to use the legal process to vindicate their human and legal rights. Poverty may compel people into the violation of the rights of others, particularly of their own children and women. Millions of families, throughout the third

BOX NO. 1.2 POVERTY AND RIGHTS

‘Poverty must be viewed not just as a question of low income, but as a human condition characterized by the sustained deprivation of the capabilities, choices, and power necessary for the enjoyment of fundamental civil, cultural, economic, political and social rights.’—Mary Robinson

‘Poverty means not just insufficient income and material goods, but also a lack of resources, opportunities, and security which undermines dignity and exacerbates the poor’s vulnerability. Poverty is also about power: who wields it, and who does not, in public life and in the family. Getting to the heart of complex webs of power relations in the political, economic and social spheres is key to understanding and grappling more effectively with entrenched patterns of discrimination, inequality and exclusion that condemn individuals, communities and peoples to generations of poverty.’—Louise Arbour

‘Basic human rights—the right to a decent standard of living, to food and essential healthcare, to opportunities for education or decent work, or to freedom from discrimination—are precisely what the world’s poorest need most.’—Kofi Annan

‘We commit ourselves to the goal of eradicating poverty in the world, through decisive national actions and international cooperation, as an ethical, social, political and economic imperative of humankind.’—Copenhagen Declaration on Social Development, 1995

world, perceive child labour as essential to their survival and, increasingly, prostitution seems inescapable. Bonded labour is a direct result of poverty and its exploitation by the well off. Studies have shown that men, unable to support their families, can draw away, burdening the women with additional responsibilities. Poverty creates or reinforces divisions within the family in which the male members get priority over scarce family resources.

The daily struggles of the poor constantly humiliate them and register for them their helplessness in the face of the State and economy. Poverty is about the lack of qualities that facilitate a good life, defined in terms of access to the conditions that support a reasonable physical existence and enable individuals and communities to realize their spiritual and cultural potential—opportunities for reflection, artistic creativity, development of and discourse on morality, and contribution to and participation in the political, social, and economic life of the community.

Poverty is a mockery of the concept of the 'autonomous individual' which lies at the heart of the dominant tradition of human rights. Existence in hovels without the basic amenities of life, allows no time or ability for self-reflection which is essential for identity, for self-realization, or for making moral judgments, and undermines self confidence. Dependence, arising from extreme poverty, generates habits of subservience and docility, reinforcing a hierarchy in social and economic relations that denies, as do other aspects of poverty, the underlying premise of equality and dignity of all persons.

It was in the belief that poverty could be eradicated that the Heads of States and Governments committed the UN and its member states to the Millennium Declaration.

2. THE MILLENNIUM DECLARATION AND MDGS

As the old millennium closed, international bodies realized that for far too many people the new millennium would be as lacking in hope, as blighted by disease and war, and as hungry and thirsty as the old one. The Millennium Declaration is a sort of global New Year's Resolution, moved by a vision of a world in which the founding principles and Charter of the United Nations would become a reality. The Declaration was adopted by leaders of 189 member countries, including the heads of states or governments.

The vision includes:

- respect for human rights and fundamental freedoms
- the rule of law and good governance
- making the right to development a reality for everyone
- more generous development assistance
- sustainable development
- special regard for the neediest countries and people and for certain principles to guide international relations, which included:
 - Freedom—including dignity, freedom from hunger, and the fear of violence, oppression or injustice, which were best assured by democratic and participatory governance based on the will of the people
 - Equality for individuals and nations, and especially with equal rights and opportunities for women and men
 - Solidarity, meaning that costs and burdens of meeting the challenges must be fairly distributed in accordance with equity and social justice
 - Tolerance involving mutual respect among people, regardless of diversity of belief, culture, and language, cherishing of differences ‘as a precious asset of humanity, and promotion of a culture of peace and dialogue among all civilizations’
 - Respect for nature
 - Shared responsibility among all nations of the world for managing worldwide economic and social development, as well as threats to international peace and security.

The document was adopted without a vote. This meant that the Declaration won the full endorsement of the international community. However, it also reflected that it was not viewed as a legally binding document.

2.1 MDGs AND TARGETS

Out of the Declaration, with its ringing words about human rights and justice, was carved a series of more specific goals. These, and not the full Declaration, are what the MDGs mean. They were trimmed and slightly reshaped and took the following form:

1. Eradicate extreme poverty and hunger
2. Achieve universal primary education
3. Promote gender equality and empower women
4. Reduce child mortality

5. Improve maternal health
6. Combat HIV/AIDS, malaria and other diseases
7. Ensure environmental sustainability
8. Develop a global partnership for development.

If a large number of countries, with different interests and philosophies, are to agree to anything, it will usually have to be rather vague and non-controversial. No country could admit to disagreeing with any of these goals. In fact, all these goals interact with each other. For example, all of Goals 2–8 could be considered ways to achieve Goal 1. Goals 2, 4, and 5 will help achieve Goal 3. Goal 2 will help achieve Goals 4 and 5. We can represent this diagrammatically, using goals 1–7:

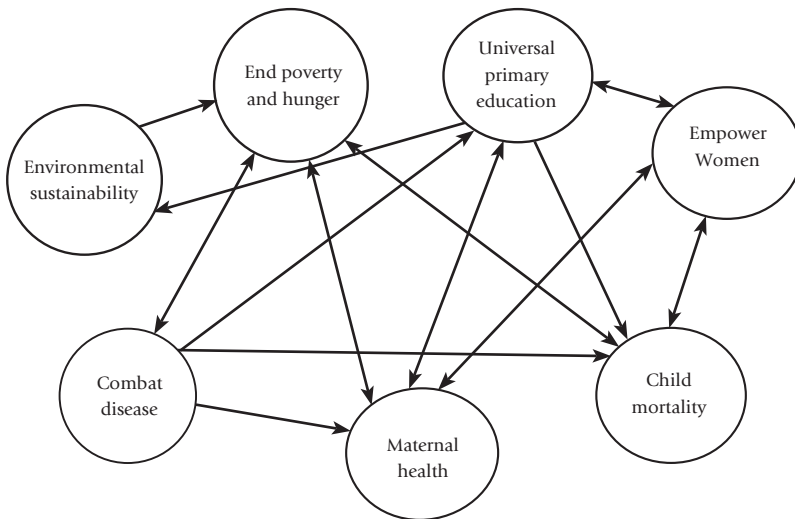


FIGURE 1.1 RELATIONSHIP BETWEEN THE MDGs

If the goals had been left like that, nothing more would have been achieved than by the thousands of resolutions entered into over the decades since the making of the UN Charter in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948. Astutely, it was realized that something more was needed to engage the specific commitment of countries, and the imagination of their peoples. That something more, it was decided, was a set of specific targets by fixed dates so that it was possible to know whether objectives had been achieved, or by how much the world had fallen short.

The targets have both kept the MDGs alive and have been the cause of the greatest criticism. For many targets the year 2015 was taken—so that, taking 1990 as a baseline, twenty-five years were given for the achievement of the targets. Here are the specific targets set against the goals:

-
- | | |
|---|--|
| 1. Eradicate extreme poverty and hunger | <ul style="list-style-type: none"> • Halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day • Achieve full and productive employment and decent work for all, including women and young people • Halve, between 1990 and 2015, the proportion of people who suffer from hunger |
| 2. Achieve universal primary education | <ul style="list-style-type: none"> • Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling |
| 3. Promote gender equality and empower women | <ul style="list-style-type: none"> • Eliminate gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015 |
| 4. Reduce child mortality | <ul style="list-style-type: none"> • Reduce by two-third, between 1990 and 2015, the under-five mortality rate |
| 5. Improve maternal health | <ul style="list-style-type: none"> • Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio • Achieve, by 2015, universal access to reproductive health |
| 6. Combat HIV/AIDS, malaria, and other diseases | <ul style="list-style-type: none"> • Have halted by 2015 and begun to reverse the spread of HIV/AIDS • Achieve, by 2010, universal access to treatment for HIV/AIDS for all those who need it • Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases |
| 7. Ensure environmental sustainability | <ul style="list-style-type: none"> • Integrate the principles of sustainable development into country policies and programmes; reverse loss of environmental resources |

- Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss
 - Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation
 - Achieve by 2020, a significant improvement in the lives of at least 100 million slum-dwellers
8. Develop a global partnership for development
- Develop further an open trading and financial system that is rule-based, predictable, and non-discriminatory
 - Include a commitment to good governance, development, and poverty reduction—nationally and internationally
 - Address the special needs of the least developed countries. This includes tariff and quota free access for their exports; enhanced programme of debt relief for heavily indebted poor countries; cancellation of official bilateral debt; and more generous official development assistance for countries committed to poverty reduction
 - Address the special needs of landlocked and small island developing states
 - Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term
 - In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries
 - In cooperation with the private sector, make available the benefits of new technologies, especially information and communications
-

There is nothing really new in any of these targets. However, except for Goal 8, the targets are reasonably clear and it would be reasonably possible to decide whether they had been achieved. It was not intended that the targets should be the end—if by 2015 half the people living without drinkable water and decent sanitation could have been taken out of that group, a lot of knowledge would have been gained about how to do it, and completing the process would, perhaps, be easier.

The document you are reading is not intended to analyse these goals critically but to serve a more immediately practical purpose, namely to be of use to the citizens of countries struggling to achieve the goals, and to organized civil society and officials and public bodies in those countries, especially those that are drafting new constitutions or revising old ones. It should be useful, even to those in countries that already have protection of the rights most relevant to the MDGs in their laws or constitutions.

2.1.1 Global or National Targets

These goals and targets are set in terms of improvement of the conditions of the world's population. That is an appropriate target for the UN and for donor countries. Nevertheless, for the countries where most of the deprived people live, the question is how were their targets to be set? These targets were not designed to be one-size fits all.¹ Countries were allowed to modify the targets for good reasons, and, 'No stigma should be associated with setting national targets that are less ambitious than the global MDGs'. Some developing countries had already achieved some of the goals—for example, universal primary education. Some countries have revised targets because of their special needs, such as countries with particularly serious HIV epidemics, which have laid even more emphasis on targets under Goal 6. Cambodia added a new goal, related to mine clearance, because of the problems remaining after various wars that had left the country scattered with mines that constantly maim people, especially children.

2.1.2 Indicators

A target is something one aims at. An indicator is a measure used to show whether one's arrow is heading for the target. The MDG targets are limited, indeed you could say they are themselves benchmarks of progress towards the goals. To take one example, if the proportion of people living on less than one dollar a day is halved, this is an indicator that progress is being made in tackling poverty. However, it is not the same as eliminating poverty.

More detailed indicators have been developed in order to assess whether progress is being made towards the goals. These are supposed to be relevant and robust measures of progress, to be clear and straightforward to interpret, provide a basis for international comparison, constructed from well-established data sources, be quantifiable, and be consistent to enable measurement over time.² They generally unpack the targets. For example, to measure progress towards Goal 2 of universal primary education, already having the target of 'ensuring that by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling', there are more specific indicators of whether the progress is 'on target':

- Net enrolment ratio in primary education
- Proportion of pupils starting grade 1 who reach grade 5
- Literacy rate of 15–24-year-olds

Each of these can be measured quite precisely in any country, assuming that figures are available. If only the first had been measured, we would not be sure that children were finishing school. If only the second was measured, we would not know how many children, who ought to be starting school, actually did so. Finally, the third measure helps judge whether children learn something useful at school. The World Bank has laid down guidelines for measuring these various social phenomena. Similar disaggregated measures exist for other targets. The information may be compiled by many different bodies, including agencies within the countries as well as international bodies.

So much importance is given to these ways of measuring progress that it is possible to consult various sources of information including an Online Atlas of MDGs.³ However, we can find more indicators as well. For example, staying with primary education, we find a map showing percentage of spending on primary education per student in relation to the Gross Domestic Product (GDP) per head, which may be as little as 10 per cent, or as much as 20 per cent or more. The highest is Mali at 30 per cent, and the lowest Ecuador and Republic of Congo (Brazzaville) at 3 per cent though information is missing for many countries.

2.1.3 Support for the MDGs

Achieving even the limited targets set out for the MDGs requires a huge investment, from the countries most closely concerned, from other countries in the global partnership, and from various international organizations that are also involved. Not just financial investment, but

investment in terms of planning, assistance, and monitoring. Even though the time scale is not long, it was decided not to wait until 2015 and then ask, 'Have we got there?' The idea was to coordinate and target support, and to watch constantly whether countries, and the world as a whole, were heading towards achievement of the goals.

Various organizations have their own mechanisms for supporting and monitoring the MDGs.⁴ A group of task forces prepared reports on how to achieve specific goals. Looking at education, as an example, there was a task force report on achieving primary education which offers a rigorous set of interventions that countries can choose from to help provide universal access to high-quality education by focussing on hard-to-reach groups of people, educating girls and women to break the cycle of low education, and strengthening educational opportunities for adolescents.⁵ The United Nations (UN) support responsibility has been taken over by the United Nations Development Programme (UNDP).⁶ Other UN agencies involved include UNEP, FAO⁷, WHO, and UNICEF (which produces a report card on Maternal Mortality).⁸

Overall, a huge international effort is focussed on the achievements of the MDGs. One 'half-way' report wrote of it as 'the greatest multilateral non-military campaign ever, and the most-ambitious concerted effort in history to address world poverty and underdevelopment'.⁹

3. RIGHTS

'I have a right' or 'we have a right' is a very special claim. It implies that the thing to which there is a right has priority over others' entitlements, or perhaps even a nation's interest. However, the question is what are rights, especially human rights and where do they come from?

There are at least three levels where human rights are protected: the international, the regional, and the national. They have become increasingly intertwined. We discuss, briefly, the three systems, but the primary focus here is the national system.

3.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS: WHERE THE CONTEMPORARY SYSTEM OF HUMAN RIGHTS BEGAN

One of the most remarkable developments of the last century was the adoption of the UDHR, in 1948, following the end of the Second World War and the establishment of the UN. The United Nations Charter had already committed its member states to respecting human rights, giving prominence to 'fundamental human rights, in the dignity and worth of

the human person'. The UDHR sets out the human rights that members must respect and protect (see Box 1.3).

However, its significance goes beyond listing rights, and includes the rationale of human rights and their implications for the relationship between a state and its citizens, as well as relations between states. It is clear that the UN intended to bring about a new world order in which the framework of rights would constitute the dominant element. The Declaration establishes the fundamental principles, based on a common understanding of rights and freedoms, for that world order. It provides directions for the future development of norms and institutions, in connection with human rights for the UN and member states, which have greatly influenced the international system of human rights.

The context for the UDHR was the World War II and the terrible atrocities committed by the Nazis in Germany on Jews and other minorities, denying their humanity, 'barbarous acts which have outraged the conscience of mankind'. An awareness had emerged that violation of rights is not only unjust to persons or communities who are oppressed, but also produces conflicts within, and between states and societies. There was also the memory of the Great Depression of the 1930s during which

BOX NO. 1.3 UNIVERSAL DECLARATION OF HUMAN RIGHTS

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

Whereas ... advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Article I

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

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
3. The will of the people shall be the basis of the authority of government.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.

people suffered great economic hardships and the state was unable to provide sufficient assistance.

3.1.1 Basis of Rights

Rights are important for stability, for if they are not protected people will resort to rebellion against tyranny and oppression. In an increasingly interdependent world, the relations among states must also be based on respect for human rights—and for this a common understanding of rights needs to be established. The reasons for a compact on human rights were, therefore, pragmatic. Nevertheless, a moral element was introduced in the form of the concept of human dignity.

Human dignity encapsulates various ideas distinguishing the human person from other creatures, linking, for believers, the human person to God, or emphasizing the essence of the human person who seeks acknowledgement and self-respect, and is indirectly related to community and human solidarity. It supplied a theoretical basis for the human rights movement. Every society has a concept of human or individual dignity, so that it has a sort of universal endorsement, and promotes universal acceptance and inter-cultural dialogue. Inspired, no doubt, by the prominence given to human dignity in the UDHR, many other instruments, national as well as international, refer to human dignity. Dignity can be used to help interpret a specific human right. It may sometimes be used to limit the restrictions that can be placed on human rights. It can sometimes be used as a way to bring a rule of international norm into national law, occasionally with adjustment to local circumstances. Human dignity may even, though rarely, be used to develop a new right.¹⁰

An important way in which the concept has been used is to highlight the necessity of meeting the basic needs of all persons. There are many declarations by international and national tribunals that poverty denies those trapped in it any prospect of dignity. This truth is recognized in the Millennium Declaration in its first value, freedom, as follows: 'Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice.'

The UDHR implies that without rights there can be no 'existence worthy of human dignity'. The full development of the human personality entails the growth of capacities and capabilities, and the ability to participate in the social, economic, and political process. These rights are inherent in all human beings and cannot be taken away by anyone. However, the Declaration does not see the human person pursuing individual rights, selfishly and in isolation from society. It emphasizes the equality of all

persons, of men and women, that can hardly be achieved other than through social programmes. In its view, rights express human solidarity (the UDHR describes all persons as members of the human family), which the Declaration reinforces by committing all peoples and states to respect for a common scheme of human rights and freedoms. It emphasizes the social character of the individual by reminding us, 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'

By these formulations the UDHR avoids sectarian explanations and justifications of human rights, whether based on religious or secular ideas. By placing the human person's aspirations, potential, and capacities at the core of human rights, the UDHR aims to provide a basis on which all can come together to acknowledge the importance of rights and pledge to defend them.

The Declaration was drafted by an international committee and endorsed by the General Assembly—by representatives of governments. Nevertheless, it is important to remember that rights are not bestowed by governments, but are the product of the struggles of peoples and communities against unjust regimes. It is the poor and the downtrodden who have been at the forefront of struggles, for it is they who are most in need of protection of their rights. The rich and the powerful can generally take care of their interests in other ways, by their control or influence over those who exercise state power—and, indeed, by violating the rights of others. This is as true in the present stage of globalization as it was in earlier periods of history. The primary function of human rights at first was to protect those well placed in society against unfair and arbitrary acts of the government, often of autocratic monarchs. Later, the primary function of human rights became the protection of those marginalized in society, and the need for protection extended beyond the policies and acts of the government.

The Declaration proclaims the civil, political, and cultural rights of the people for freedom from fear, and social and economic rights for the freedom from want. It sees no conflict in these rights, rather they are regarded as mutually supportive—the Declaration promises the promotion of 'social progress and better standards of life in larger freedom.' Civil and political rights, economic and social rights are equally binding and enforceable. Obligations and duties that arise from human rights are to bind all states and every individual and every organ of society is to advocate for and protect human rights. The Declaration recognizes different interests and provides a framework for their balancing; community interests balanced

with individual, social and economic rights with civil and political rights, based on the framework of human dignity, the full development of individuals' personality, and democratic principles.

Unfortunately, ideological and material conflicts between the western capitalist and communist states, dominant international forces in the period immediately after the UN was established, obscured the unity of rights and led to the denigration of economic and social rights. Now, the MDGs, although not cast in the language of rights, have pointed to the importance of a life of dignity with adequate material resources. The Millennium Declaration has drawn attention to the social and economic rights by having Heads of States and Governments commit themselves to, 'To respect fully and uphold the Universal Declaration of Human Rights' (Para 25 of the Millennium Declaration).

3.1.2 COMMITMENT TO RIGHTS AND FREEDOMS

The UN saw the significance of the UDHR as going beyond rhetoric. This is obvious from its concern with implementation and remedies. The preamble notes the pledge of member states to respect and protect human rights and states that human rights must be protected by the rule of law. It requires effective remedies by the competent national tribunals for acts violating the fundamental rights of a person. Even more radically, it grants to every one 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' This means no less than that all values and institutions of a state¹¹ and the global system of international relations, including the economic order, must be human rights friendly, giving primacy to the imperatives of human rights and freedom, including social justice.

3.2 INTERNATIONAL, REGIONAL, AND NATIONAL SYSTEMS OF HUMAN RIGHTS

The UDHR provides, as we have seen, a holistic conception of rights, of the diversity of entitlements which speak of different human needs and aspirations, of the obligations and mechanisms that make rights effective, and of international responsibility and cooperation for the promotion and protection of human rights. Although the intention was to provide the agenda for future programmes at the national and the international levels, the UDHR has achieved the status of a resolution that is binding on and in all states, regardless of whether they voted for it or not. It was followed by a number of international conventions and institutions to advance its objectives and procedures. There is a considerable widening of the range of entitlements of citizens and others, transforming people from supplicants

to citizens. The broadening of human rights has focussed attention on the state, not merely as protector and facilitator but also as provider. The logic of social, economic, and cultural rights is a positive obligation of the state, necessitating an active role to ensure basic needs of people and, thus, their dignity. With globalization and the shift of economic and even political power to large corporations and international financial institutions, their obligations to respect and observe human rights have received increasing attention.

3.2.1 The International System

Human Rights Norms

Although the UDHR is, in a sense, binding on all members states, that binding quality has no real teeth. This is why the UN decided to develop binding treaties on rights, including the two Covenants in 1966. Over the years, as a range of new treaties have been developed, dealing with the rights of specific sections of society. Many of these include socio-economic rights. By no means have all of these states accepted all the various human rights treaties. Table 1.1 shows how many states are parties to various treaties.

TABLE 1.1: MAJOR HUMAN RIGHTS TREATIES

<i>Treaties and Conventions on Rights</i>	<i>No. of Countries</i>
International Covenant on Civil and Political Rights (ICCPR) (1966)	156
International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)	159
Convention on the Rights of the Child (1984) (CRC)	193
Convention for the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW)	185
Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD)	173
Convention on the Rights of Persons with Disability (2006) (CRPD) (138 countries had signed but some had not yet ratified)	44

These are the best known and include the main ones with socio-economic rights. Others include the Genocide Convention (1948) and the Convention against Torture (1984). Other notable developments are

instruments for the protection of the indigenous peoples (the International Labour Organization [ILO] conventions and the Declaration of the Rights of Indigenous Peoples) and Minorities (the Declaration of the Rights of Minorities), which provide rights both for individuals belonging to these communities and the collective rights of the communities. The covenants and conventions, unlike Declarations, are legally binding on member states which have ratified them. In this way states have assumed responsibility for a large number of rights of different kinds.

However, states sometimes limit their commitment to these instruments. For example, the CRC, the most ratified of human rights treaties, has also been accepted only with certain reservations by some seventy countries. Many of these are Islamic countries reserving the right to apply Islamic law, even if not compatible with the Convention. Several say they may not always be able to separate child from adult prisoners. Canada says that provisions about regulating adoption may not be compatible to indigenous people's childcare practices. India undertook to implement the provision on minimum age for employment only progressively. Kiribati said the rights of the child to express views, hold opinions, assemble, associate with others, and privacy should be exercised only with respect for parental authority. Singapore reserved the right to free primary education only for the children of its citizens. The reservations by some countries were so extensive that other countries have suggested their commitment to the Convention was not real.

Institutions

Each of these international human rights treaties establishes a committee (treaty body), consisting of independent experts, for periodic review of the observance by individual states of their treaty obligations. This review, generally based mainly on submissions by the government, can result in criticism of its conduct and the making of recommendations by the committee. It is possible for a member state to bring a complaint before the committee for violation of treaty obligations by another member state—but this hardly ever occurs. Under some treaties, an individual can bring a complaint before the committee against a government for treaty violation. The committee's decision is not strictly binding, but a state is expected to comply with it—though compliance rates vary. Considerable use is made of this procedure, which has enabled the committee to interpret treaty provisions, to clarify, and sometimes expand the scope of the right. Committee may also issue general comments on particular rights, contributing to the general understanding of the right. International

and national courts are making increasing use of such interpretations and decisions as precedents.

Another initiative by the UN to develop the content of rights and ensure their observance is the system of Special Representatives of the Secretary General of the Council on Human Rights to conduct periodic reviews of the observance of rights, either in a specific state or in respect of a specified right, and to make recommendations for improvement or offer specific assistance. They submit their reports to the Council on Human Rights, although the council cannot do much about the report or recommendations.

The Council on Human Rights has the general responsibility to promote human rights, including the audit of the record of member states through a peer review process. The change to this body from the former Commission on Human Rights was intended to provide a more effective body committed to human rights, although it is too early to assess its impact. It is served by the Office of the High Commissioner for Human Rights, which also assists the treaty bodies and special representatives and rapporteurs, and manages a few country offices to monitor the human rights situation and to provide assistance to countries such as Cambodia, Nepal, and the South Pacific states.

The UN bodies are very important. The work of the various treaty bodies and the special rapporteurs has been crucial in developing the ideas set out in the various human rights treaties in a rather broad way. A country that is thinking of ratifying a human rights treaty, or including new human rights provisions in its constitution or law, will find a great deal of help from the work of these bodies in understanding what the implications are. However, the entire mechanism is seriously underfunded. There is not enough time to consider the record of individual countries. The preparation of regular reports is a considerable burden, even on states with efficient bureaucracies. Developing countries often fall seriously into arrears. Now, the treaty bodies will consider a country's record on the basis of other information as well as on submissions by national Non Governmental Organizations (NGOs) and others. However, this defeats one of the objectives of the system, which is to prompt an internal reflection on a country's own record. Within many countries, reporting to the treaty bodies and their comments is a non-event. Little effort is made to publicize this at the national level and the media either does not understand or ignores the system.¹²

A major weakness is the lack of effective machinery for dealing with redressals for violation of rights in a routine sort of way. Apart from the

individual complaints mechanisms—recently adopted for the ICESCR, but not yet in force,¹³—some special rapporteurs on specific rights will take up individual cases or issues, raising them with the government concerned, though they have no power to require any response.¹⁴

An increasingly important aspect of the international role in protecting rights is giving guidance to individual countries or to countries, generally, about how to bring their obligations home, in the form of laws, policies, and practices. The making of national laws is often called the domestication of international law. Various UN bodies, international NGOs (INGOs), and academic bodies collect examples of ways in which international laws have been brought into national law. The quality and sophistication of these endeavours varies considerably.

3.2.2 Regional Systems¹⁵

Some of these omissions are or can be made good at the regional level. Why regional systems? Suggestions from a regional body may perhaps be less resisted than from an international body which may seem colonialist; there may be greater understanding from neighbour countries with similar problems, belief systems, and values. Publicity from a regional body may be more effective than from a global one and regional political compromises may undermine principles less than those at a global level. Administration may be simpler, because fewer languages are used than at the global level. The only broad region without its own treaty is the Asia/Pacific.¹⁶

Europe has the oldest and most effective system based on the European Convention of Human Rights, 1950. There is the American Convention on Human Rights and the African Charter on Human and People's Rights. There is also a somewhat inactive Arab system, in which the operative treaty came into effect only in 2008.

The main elements of regional systems are a human rights treaty (sometimes more than one) and one or more regional bodies with varying functions, such as education, monitoring, receiving and studying reports from states, receiving complaints from groups of individuals, adjudicating, sometimes awarding compensation. Table 1.2 compares the main features of the four systems that exist.

These various supra-national systems of human rights protection do not work as rivals but generally in complementary ways. For example, the African Commission makes considerable use of the work of the UN committees, including that on the elaboration of rights. Indeed, its Charter directs it to draw inspiration from international instruments and to use international precedent.

TABLE 1.2: MAIN FEATURES OF REGIONAL SYSTEMS

<i>Region/ Group of Countries</i>	<i>Associated with</i>	<i>Founding Documents, Date in Force (No of States)</i>	<i>Scope</i>	<i>Bodies</i>	<i>Role/Process</i>	<i>Comments</i>
Africa	African Union	African Charter on Human and Peoples' Rights 1986 (53) ¹⁷	Civil and political; economic, social, and cultural; environment;	African Commission on Human and Peoples' Rights	Research and education activities; interpreting Charter at the request of a State Party, hearing inter-State communications and by individuals and specified non-State actors, concerning violations of Charter rights; receives national reports (supposedly, every 2 years)	Many reports seriously in arrears. Not clear how up to date Commission is in making observations
				African Court on Human and Peoples' Rights (11 judges) (To be replaced by African Court of Justice and Human Rights when 15 states have ratified Protocol to Charter)	Hears cases brought by the Commission, member states or African inter-governmental organizations. Will also hear cases brought by individuals. Will be able to award compensation	

(Contd)

Table 1.2 *contd*

<i>Region/ Group of Countries</i>	<i>Associated with</i>	<i>Founding Documents, Date in Force (No of States)</i>	<i>Scope</i>	<i>Bodies</i>	<i>Role/Process</i>	<i>Comments</i>
Arab	Arab League	Arab Charter of Human Rights 2008 (7)	Civil and political rights, right to education, some rights in work	Committee of Experts on Human Rights	Receive country reports every three years	UN says in some respects is not fully compliant with international standards
Europe	Council of Europe	European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (47)	Mainly civil and political rights	European Court of Human Rights. Forty-seven judges. European Commissioner for Human Rights	Hears individual and group complaints, against member states. Delivered 1543 judgments in 2008. Can award compensation to promote human rights; identify shortcomings in law and practice, provide advice	Is wider than European Union membership.
		European Social Charter 1965 (27) ¹⁸	Economic, social and cultural rights, especially rights in connection with work	Committee of Social Rights ¹⁹	Receives regular reports from members countries, and collective complaints from European bodies,	

(*Contd*)

Table 1.2 contd

<i>Region/ Group of Countries</i>	<i>Associated with</i>	<i>Founding Documents, Date in Force (No of States)</i>	<i>Bodies</i>	<i>Role/Process</i>	<i>Comments</i>
			Governmental Committee	registered international NGOs, employers' organizations and trade unions, and (if country has accepted) national NGOs. (57 have been received over 11 years)	
			Council of Ministers	Considers national reports and decisions that there is non-compliance; proposes to Council of Ministers recommendations to states concerned. Adopts resolution directed towards country concerned on basis of decision on complaint or of comments on national reports	

(Contd)

Table 1.2 cont'd

<i>Region/ Group of Countries</i>	<i>Associated with</i>	<i>Founding Documents, Date in Force (No of States)</i>	<i>Scope</i>	<i>Bodies</i>	<i>Role/Process</i>	<i>Comments</i>
	European Union	Charter of Fundamental Rights	Civil and political and some economic, social, and cultural; emphasis on property and work			Not legally binding
Inter- America	Organization of American States	American Convention on Human Rights (1978) + ²⁰		Inter-American Commission on Human Rights	Examines complaints or petitions specific cases of human rights violations; can take cases to Court	
				Inter-American Court of Human Rights (7 judges)	Can adjudicate individual complaints; can give advisory opinions to states	

There has been a concern that proliferation of regional systems might fragment the global system and weaken the universality of human rights. These apprehensions do not appear to have been realized. The regional systems are able to complement the weaknesses of the UN system. The European system is especially strong, with its full-time court and other bodies. The decisions of its Court of Human Rights are quite widely cited in national courts, even outside Europe.

3.2.3 National Systems of Human Rights Protection

In one sense, national protection is the most critical. Despite the development of international and regional systems, the primary responsibility for human rights remains that of the State and it is at the national level that policies and decisions are made which have the greatest importance for the enjoyment of rights. Therefore, the constitution and laws, and local enforcement methods will be the main focus for the citizen of a particular nation seeking recognition of human rights, and it is on the actions, or inactions, of the national governments that the main criticisms by international or regional bodies will concentrate.

A national system of human rights protection will be far more complex than any international or regional mechanism. It will involve not only institutions and rules that are designed for human rights protection, but a whole range of bodies, laws, and practices. In Part II we look briefly at the constitution as a whole, in terms of its protection of rights. Here, it is enough to note that in a particular country human rights and their protection may depend on:

- The constitution and other major laws (in some countries there are organic laws that have a status between the constitution and ordinary laws)
- Bodies for accountability including parliament, the ombudsmen, human right commissions, police complaints bodies, anti-corruption bodies, and so on
- The institutions of democracy, such as the electoral system, political parties, and local government
- Bodies for law enforcement, including the Attorney General, the police, prosecutors, and the courts
- Administrative policies and practices—the way in which the laws and the institutions actually operate
- The political culture—traditions, attitudes, and practices in public life

- The media—how they work, who owns them, how they are regulated, and what are their traditions and cultures
- Business and commercial activity, and the world of work—who controls what, how far the economy is controlled locally or by international forces, how far the state has a direct stake in the economy, how far the state controls the economy and regulates the forces that affect incomes and resources
- Civil society—that part of society that stands between the individual and public institutions, that is not official but is not purely private or family; associations, religious groups, and so on; and what part it plays by virtue of law, tradition, or conviction in the life of the nation, and in supporting the role of the members of society in that national life
- The education system—which can play an important role both in teaching people about their own rights and in developing respect for the rights of others
- The international community—the UN, INGOs, international aid agencies, and so on.

More narrowly, a national system of human rights protection may be involved in some of the following:

- Formulation and adoption of human rights norms: mostly through the constitution and other laws. Rights have traditionally been set out in the constitution. In fact, one of the first modern constitutions, that of Virginia, consisted almost entirely of human rights. In New Zealand and the UK, where there is no written constitution, human rights have been adopted through ordinary laws, the Bill of Rights Act and the Human Rights Act
- An important aspect of that national adoption of human rights is how far those rights are derived from international or regional treaties. Historically, rights were a national affair but now it is common to look to international and regional instruments, though not necessarily to their precise words (see pp. 90 and 104)
- Constitutions and major human rights laws are not the end of the law-making aspect of human rights protection. It is Parliament's responsibility to give effect or, more precise, effect to human rights; to protect, promote, and fulfil; to enact legislation for this purpose and to desist from making laws that violate human rights; to set up mechanisms for the enforcement of rights, particularly the jurisdiction of courts as well as non-judicial bodies; to hold

government accountable; to determine the scope of rights by providing reasons and procedures for limitation

- It is also the role of the executive authority to protect and implement human rights in accordance with the constitution and laws (as it is its duty to implement other aspects of the constitution and laws). It should provide resources for human rights fulfilment; it should protect citizens against violations by state officials as well by non-state actors. It is often said that human rights should form the framework for the development and the carrying out of policy (see pp. 50–3)
- The judiciary has as one of its basic functions the protection of human rights. This is not its only function. It resolves disputes about commercial matters and many issues that may have no obvious human rights dimension. However, the way it carries out those functions, it must have regard to human rights.
- There will usually be other bodies specifically created to promote and protect human rights. These may include human rights commissions, ombudsmen, specialized bodies such as gender commissions, minorities' commissions, equal opportunities commissions, environment and land commissions, special tribunals, and so on.

The Special Role of Courts

The courts are so important that it is worth saying a little more about their role. They protect and implement the constitution and laws (including human rights provisions). In most systems, they have the power, in certain circumstances at least, to decide whether existing (or perhaps proposed) laws and policies are compatible with the constitution (including human rights). Mostly, they do this because some party has brought a case arguing that a law or policy is unconstitutional, or the issue has arisen incidentally in a case. For example, even in a divorce case, where a decision must be made about which parent is to have custody of a child, it may happen that the child (or a parent) insists that under the constitution or under the Convention on the Rights of the Child, the best interests of the child, not the wishes of the parents alone, are to be paramount. In some countries, a law may go before a court (usually the highest or the constitutional court) even before it is finally passed, or brought into force, to determine whether it is constitutional. Sometimes the power to bring such a case is restricted, perhaps to the president of the country.

A declaration by a court that a law passed by a democratically elected parliament is unconstitutional is a rather dramatic act! In fact, it is relatively rare (and in some systems is not possible). More often the courts will find that they can interpret the law in a way that is compatible with human rights. In South Africa the constitution and in the UK the Human Rights Act, direct the courts to interpret the laws in a way that is compatible with human rights, if possible. In some countries, the law is partly the creation of the judges. A judge-made law is something mainly associated with England and countries that have English law, but this is a complex subject. In making, or developing, that law, must the judges be guided by human rights? In South Africa, the constitution says that they must [section 8(3)]. In Canada, the courts have said that the Charter of Rights applies to the common law, but this is true only where the case involves the State, not in cases between citizens.²¹

Less dramatically, but more commonly, the courts will be faced with cases about administrative actions, rather than law-making. In some countries it may be not just the actions of the state organs that are judged by human rights standards, but even those of ordinary citizens. Again, the South African constitution says that the Bill of Rights applies horizontally—that is, not just the State but private persons and bodies can be obliged to respect human rights. We can also think of the courts as performing an educational function. Through their decisions, the state, its organs, and citizens learn about human rights. The courts are the site of a sort of conversation about rights.

Usually, the judiciary responds to complaints by others, unlike the executive and the legislature that can act on their own initiative. The courts are also dependent on the arguments raised by lawyers for the parties, though, the courts can put points to the lawyers and, thus, elicit certain arguments. To enforce criminal law, they are dependent almost always on the police, both to investigate violations and to protect the people. If no one chooses to bring a particular violation to court, there is nothing the courts can do. In many countries, there is a serious problem of impunity or deliberate failure to enforce the law, especially against the already rich, powerful, and well connected. Sometimes, the courts can assert themselves a bit. For example, in some countries, in relation to a criminal case that is already before the court, the court may refuse to permit the attorney general or the prosecutor to take over the case or even stop it, until the court has itself scrutinized the reasons for this action.

The courts can only be effective in protecting the citizen against the State, or the powerful person or body, if they are independent, that is,

not subject to state influence, not prepared to take bribes, and viewing themselves as owing their duty to the constitution and the law only. Competence and integrity are as essential as independence, but are perhaps harder to ensure. Much depends on the ethics of the judiciary, and of the legal profession. In some countries, faith in the judiciary survives when faith in the government and parliament has gone. However, in some countries, unfortunately, the judiciary has alienated the people and lost their trust by corruption, lack of independence from the government and powerful interests, by incompetence, or by all of these. The lack of confidence and trust in the judiciary was vividly demonstrated in Kenya following the improper declaration of Kibaki as the president by the electoral commission. The opposition protested against the declaration but refused to go to court when challenged by Kibaki on the basis that the

BOX NO. 1.4 PUBLIC INTEREST LITIGATION (PIL): INDIA

Indian PIL is a mixture of the substantive and the procedural, animated by the spirit of the Constitution.

The key procedural features of PIL have been:

- the ability of organizations or groups to bring cases on behalf of others who are unable because of disadvantage to do so
- informal means of beginning cases, even by letter or postcard, and sometimes the courts have themselves initiating a case on the basis of newspaper reports
- proactive ways of finding out the facts, including the courts appointing or ordering the appointment of committees of experts to produce reports, sometimes over a period of years
- requiring public bodies to report back on their own performance in response to court orders
- wider range of remedies than the courts would traditionally have allowed.

Individuals, and more often NGOs, have brought before the courts, especially the Supreme Court, cases involving workers in conditions amounting to bonded labour, pavement dwellers, the starving, the mentally ill, those denied emergency medical treatment, and pollution, among others. The constitutional basis in terms of substance has generally been Article 21 (right to life), often expanded by reference to the Directive Principles.

In a case that has been before the Supreme Court, since 2001, it held that there was the right to food, and it has over the years issued a large number of orders on all sorts of food-related topics and to various state bodies. The early directives were to carry out existing commitments. The Court's orders have

(Contd)

Box 1.4 (*contd*)

related to food distribution in emergencies, school meals for children, and the position of pregnant women, for example. It also appointed commissioners on the Right to Food, who presented their 8th report in 2008—on the right to food for various marginalized groups such as single women (including widows), the poorest Dalits, primitive tribal groups, urban homeless, and slum-dwellers.

The environmental cases have been a bit more mixed. Some have benefited all sections of society and this, probably, includes the famous Delhi bus case in which the Supreme Court ordered the replacement of all diesel buses with compressed natural gas buses. However, orders to remove polluting businesses outside the city centre, to stop all activity in a forest, including by tribals, and the demolition of slum dwellings have been pro-middle class rather than pro-poor decisions and, thus, strayed from the original conception of PIL.

From an approach that involved directing the state to carry out its own existing commitments, the courts have moved towards directing the state to make law, or itself laying down elaborate sets of rules. These have included criteria for foreign adoption of babies, and guidelines for dealing with emergency cases in hospital.

The issues under PIL are far removed from the sort of cases that would normally be heard by the courts. They often involve the interests of various groups. There is a risk that, as is usual, the interests of the already articulate and well-represented are best presented to the courts. They are the sorts of issues that, if being decided by a government or legislature, would involve masses of material, public submissions, committees of inquiry, and detailed legislative debates. Even the most complicated of Supreme Court inquiry procedures will not rival what ought to be the level of sophistication of executive/legislative inquiry (though such inquiries are not always so sophisticated in the governmental processes of developing polities). What happens when the highest court itself makes the legislative decisions? Here is where the separation of powers issue becomes particularly acute. There are also serious problems about implementation. The right to food cases, especially on school meals, has been successful partly because of backup from civil society campaigns. The extent and direction of judicial activism has depended in part on the personality of individual judges and on other factors in the national and international environment—though this can be true of ordinary litigation, too.

The verdict on Indian PIL, therefore, remains mixed. Justice Bhagwati once observed:

We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance, and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements.

judiciary would undoubtedly rule in favour of Kibaki (the chief justice having sworn in the president in a private ceremony minutes after the declaration by the commission). The majority of Kenyans empathized with the opposition and, subsequently, Kenya paid a terrible price, in life, property, and in terms of inter-ethnic harmony, for the corruption and collapse of the judiciary.

Going to the law is expensive and often the most disadvantaged groups are the least likely to know about their rights, or to have the means to pursue them through the courts. In many countries, however, a tradition has developed of Public Interest Litigation. In fact, this means many different things. The basic idea, however, is that cases can be taken to the courts that affect not just one or a few individuals but many people, and that the case may be pursued by individuals or groups that are not even personally directly affected. India was a pioneer in this sort of development; in fact the Supreme Court itself stimulated it (see Box 1.4). Later in this book, there will be some examples of PIL and quite a number of them are from India. Some of what the courts have done has been controversial but the courts in other countries have been less innovative.

Methods and Obstacles at the National Level

How a national system of human rights protection is actually used and how far it is effective will depend less on the constitution, international treaties, and national institutions than it does on the behaviour of citizens. We return to this in Part II. Here we simply note that citizen action may include:

- action at the international level—using the treaty bodies , including the procedures that may exist for individual complaints, shadow reporting, lobbying other international agencies, donors, and the like
- using the international machinery at the national level—publicizing the comments and recommendations of treaty bodies
- action purely at the national level—lobbying for laws to be passed, policies to be made, laws to be respected and implemented, which will require networking, negotiating, political action, and perhaps even legal action; publishing annual reports on the state of human rights.

What are the possible obstacles to the achievement of rights? The powerful, very often, have no interest in reform or in the welfare of

the marginalized. Superficial political differences conceal the ultimate unity of interest between politicians and the wealthy in society. Political differences may centre around personal or ethnic interests; class interests are more powerful even than these, and class solidarity extends beyond politicians to the economic elite, and even to the courts and the professions. Exploitation of poverty, short-term grievances, and despair of the poor, divide the proletariat and marginalized groups, obscure the realities, weaken their resistance to oppression, and their will to struggle. If politics is ethnicized, the people lose sight of their real interests, convinced that the problem is people of a different ethnic group. Various marginalized groups may become a vote bank or even the reserve army of politicians (prepared to exercise their votes or terrorize others in return for small, often illusory, financial, or other benefits). Those, including the media, activists, and lawyers, who stand up for their own rights or those of others, may be threatened. The institutions of the state designed to protect rights (such as the police, the courts, and the prosecuting authorities) may be undermined by corruption. They may even become active protectors of violators of rights as the courts, commissions of inquiry, and prosecuting authorities are used to sanitize violations and exonerate the guilty. As a result, the rights of the marginalized are not enforced and respected, and violators benefit from institutionalized impunity. The poor lack knowledge of their rights, lack confidence in their own abilities and in the system, lack access to the legal system, and lack the ability to make effective use of the political process.

The Role of Civil Society

At all three levels (international, regional, and national), the importance of civil society is enormous. It offers the individual and the community a way to work together that does not depend on the support of vested interests, whether class or political. Civil society has become, in its many forms, the key actor in the realization of human rights by advancing proposals, auditing the performance of the public and, often, private sectors, enforcement (that is, through the use of public interest litigation), and other such actions. This is not to ignore the fact that civil society has its weaknesses. It can be co-opted, or even created, by the very powerful groups it purports to oversee. It must be funded, and in poor countries much of that funding is likely to come from overseas, from sources that may not understand the dynamics of the country where they are operating and that have their own purposes in providing funding. Furthermore, civil society groups, precisely because of that funding, may be viewed by some

as fair game. If people are foolish enough to give us money, why should we not make the most of this chance?

Many NGOs justify their existence on the need to promote rights. It is the regime of rights which has enabled NGOs to perform their promotional and investigative role, which has generally proved more effective than internal state mechanisms, for accountability. It can be said, fairly, that human rights regime has sustained civil society in its confrontation with the state. Rights are a way to mobilize and empower the disadvantaged. In many parts of the world, this is their principal function. The language of rights makes people conscious both of their oppression and the possibility of change. Rights have been extraordinarily effective as a basis of networking, in and across states. They have demonstrated the possibility of international solidarity, particularly for women and the indigenous peoples.

One of the most important functions is developing a consensus on rights and interests to be protected. This is often done by interest groups—women, minorities, migrants, corporations, etc. In recent years, NGOs have played an important role in lobbying for the recognition of particular interests—many norms on indigenous peoples, minorities, protection against torture, and the like, owe their origin to the efforts of NGOs, both national and international. Later, these ideas may be picked up and ultimately put into international conventions, resolutions, or declarations.

3.3 WHAT RIGHTS ARE WE TALKING ABOUT

We saw that the UDHR viewed all rights as similar; freedom from want is not different in kind from freedom from fear. It is regrettable that soon after it was adopted, because of international tensions and ideological differences, controversy crept into international discourse and when detailed treaties were negotiated, to make the UDHR rights legally enforceable, it was impossible to agree on one treaty. The result was that two treaties came about: the ICCPR, and the ICESCR, both signed in 1966. Civil and political rights (as set out in the first treaty) include:

- the right to life
- rights against torture, and inhuman and degrading treatment
- slavery and forced labour
- personal liberty and security
- proper treatment for people arrested, charged with crimes, or detained

- freedom of movement
- fair trials
- freedom from improper interference with personal privacy or reputation
- freedom of thought, conscience, or religion
- freedom of peaceful assembly
- freedom of association
- equal rights to marry and form a family, to choose whom to marry, and to equality within marriage
- equality generally, and the absence of discrimination from the law and practices of the state (it mentions grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status)
- rights of children to be protected
- rights to take part in public affairs and to vote and to serve the public
- rights of minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The other Covenant includes the

- right to work
- right to fair conditions in work
- right to organize for work purposes, by forming trade unions or employers associations, or to belong to them
- right to strike
- right to social security
- protection of the family and mothers
- protection of children from exploitation
- right to an adequate standard of living including adequate food, clothing, and housing, and to the continuous improvement of living conditions
- right to enjoyment of highest attainable standard of health
- right to education, including free primary education and education that develops and respects the human person
- right to take part in cultural life, to benefit from scientific and other advances, and to protection for work that he or she produces.

Because the focus of this book is the MDGs, rights, and constitutions, we shall not explore in detail the question of cultural rights (though, we shall occasionally refer to cultural issues). Henceforth we shall use the

expression socio-economic rights. However, it is important to appreciate that the recognition of the culture, or a community, or people, may be very important for their self-confidence, and for their ability to play a full part in society and, thus, to achieve development. Some of the international measures in connection with culture are not perhaps thought of as human rights issues. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions is an international convention produced and adopted under the auspices of United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2005.²² Article 7 reads:

ARTICLE 7

1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:
 - (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;
 - (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.

Though, this convention was conceived of as being centrally concerned with the protection and promotion of human creativity, its relationship to human rights is clear, even if it does not use the language of rights other than in its Preamble:

Celebrating the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other universally recognized instruments.

The 1966 covenants do not cover the full range of rights now recognized by international law. We mentioned some of the other treaties earlier. Many of these spell out in relation to particular groups the rights in the 1996 covenants and also they sometimes add to those rights. We cannot look in detail at how the sectoral human rights treaties differ from the UDHR and the two covenants. Nevertheless, we can illustrate it by taking one or two examples from the CRC (the treaty signed by the largest number of countries), concentrating on socio-economic rights.

Some of the changes show the impact of developments in thinking about rights over the years. Some reflect the specific needs of the group in question. In the CRC there are some other rights that have no clear counterpart in the ICESCR, such as about adoption (Article 21) or protection from sexual exploitation (Article 24). When we discuss specific

TABLE 1.3: COMPARING THE COVENANT AND THE CHILDREN'S CONVENTION

<i>ICESCR</i>	<i>CRC</i>
<i>Article 12</i>	<i>Article 24</i>
<p>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.</p> <p>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:</p> <p>(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;</p> <p>(b) The improvement of all aspects of environmental and industrial hygiene;</p> <p>(c) The prevention, treatment and control of epidemic, endemic, occupational, and other diseases;</p> <p>(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.</p>	<p>1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.</p> <p>2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:</p> <p>(a) To diminish infant and child mortality;</p> <p>(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;</p> <p>(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;</p> <p>(d) To ensure appropriate prenatal and post-natal health care for mothers;</p> <p>(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene, and the prevention of accidents;</p>

(Contd)

Table 1.3 *contd*

<i>ICESCR</i>	<i>CRC</i>
	<p>(f) To develop preventive health care, guidance for parents, and family planning education and services.</p> <p>3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.</p> <p>4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.</p>
<i>Article 9</i>	<i>Article 26</i>
<p>The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.</p>	<p>1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.</p> <p>2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.</p>
<i>Article 11</i>	<i>Article 27</i>
<p>1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing</p>	<p>1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development.</p>

(Contd)

Table 1.3 *contd*

ICESCR	CRC
to this effect the essential importance of international co-operation based on free consent.	
<p>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:</p> <p>(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;</p> <p>(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.</p>	<p>2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.</p> <p>3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing, and housing.</p> <p>4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.</p>

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;

(Contd)

Table 1.3 *contd*

ICESCR	CRC
<p>fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic, or religious groups, and further the activities of the United Nations for the maintenance of peace.</p>	<p>(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;</p> <p>(c) Make higher education accessible to all on the basis of capacity by every appropriate means;</p> <p>(d) Make educational and vocational information and guidance available and accessible to all children;</p> <p>(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.</p>
<p>2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:</p> <p>(a) Primary education shall be compulsory and available free to all;</p> <p>(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;</p> <p>(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;</p>	<p>2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.</p>

(Contd)

Table 1.3 *contd*

ICESCR	CRC
<p>(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;</p> <p>(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.</p>	
<p>3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.</p>	<p>3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.</p>
<p>4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.</p>	

(Contd)

Table 1.3 *contd*

<i>ICESCR</i>	<i>CRC</i>
Article 14	Article 29
<p>Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.</p>	<ol style="list-style-type: none"> 1. States Parties agree that the education of the child shall be directed to: <ol style="list-style-type: none"> (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language, and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups, and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

constitutional provisions, we shall consider how far a national constitution can and ought to make provisions about the rights of particular groups (see pp. 94–6).

Some new rights are not specific to particular groups, but reflect changing priorities and consciousness. A striking example of this is the idea of environmental rights. One might say that the environment was recognized in the ICESCR in the ideas of health, and environmental and industrial hygiene. However, a broadly accepted conception of the environment, as embracing more than drains and absence of pollution as a matter of international concern, really dates from the early 1970s. The Stockholm Declaration on the Human Environment of 1972 speaks of Man having the fundamental right to freedom in an environment that permits a life of dignity and well-being. This comes close to recognizing a right to a healthy environment. Interestingly, the Rio Declaration on Environment and Development twenty years later speaks of an *entitlement* (perhaps a weaker word than ‘right’) to a healthy and productive life in harmony with nature. The idea of a right to a healthy or decent environment was picked up by various national constitutions, one of the earliest being the Philippines in 1987 (see more at pp. 135–7). An important aspect of the environment is that it is not something that only an individual enjoys, but will inevitably be something that affects a community, a region, or the planet as a whole (‘Man’, as the Stockholm Declaration puts it).

Rights, as enjoyed by a community, have featured in other international instruments. The ICCPR does mention that persons belonging to ethnic, religious, or linguistic minorities ‘shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’ However, the right is that of the persons, and rarely would an individual exercise the right alone. More recently, rights of communities as such have been recognized. This is particularly so for indigenous peoples. In the 2007 UN General Assembly Declaration on the Rights of Indigenous Peoples, a distinction is repeatedly drawn between the rights of peoples and the rights of individuals. For example article 14 reads:

BOX NO. 1.5 FROM THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. (ARTICLE 14)

Some rights really apply only to a group as a whole—either because this is the way they are expressed, as with Article 14(1) of the declaration or because of their nature. Nevertheless, other rights may be exercised by individuals because they are part of a group and may not be claimed as rights of the group, as such. Group rights have been controversial—many people believing that rights can only belong to individuals and not to groups.

3.3.1 Economic, Social, and Cultural Rights: Myths and Prejudices

Talking to lawyers about socio-economic rights can often be a discouraging business. You might hear them say things like:

‘Socio-economic rights are only aspirations. They are not legally binding’, or ‘Socio-economic rights are a new-fangled idea; civil and political rights are the real, traditional rights.’

These attitudes may come from ignorance about human rights (because few lawyers are really well educated about them), from some hostility towards international law, or from legal conservatism, or political conservatism (the legal profession does not tend, in general, to be socially or politically radical). As a result of such attitudes, you may find lawyers arguing that when it comes to constitution-making, it is not necessary to have a lot of public participation. Why not? Because the people, especially in poorer countries, will say that what they really care about is food and water, education for their children, medical services, roads (especially so they can have markets for their goods), and being able to work and earn for themselves and their families. In other words, what many people really want to see in a constitution are precisely the things that the lawyers think have no place there! It is our purpose here, without overstating the case or ignoring difficulties, to suggest that the constitution can usefully include these rights and that they will support the achievement of development, including of MDGs or similar objectives.

Response to Objections

Socio-economic rights are first of all not as new as some people think. As long ago as the nineteenth century, it was suggested that states had a responsibility to protect their citizens’ health, though those countries that negotiated over the spread of infectious diseases would not have accepted the idea of health as a citizens’ right. Perhaps, many lawyers’ ideas of what should be in a constitution are shaped by their knowledge of the

US constitution, but very soon after that was adopted, the French adopted their own constitution of 1793, which said,

The constitution guarantees to all Frenchmen equality, liberty, security, property, the public debt, free exercise of religion, general instruction, public assistance, absolute liberty of the press, the right of petition, the right to hold popular assemblies, and the enjoyment of all the rights of man.

The Declaration of the Rights of Man and Citizen, of 1793, also included that no type of labour, culture, or commerce could be forbidden, and 'Public relief is a sacred debt. Society owes maintenance to unfortunate citizens, either procuring work for them or in providing the means of existence for those who are unable to labour' (Article 17), and 'Education is needed by all. Society ought to favour, with all its power, the advancement of the public reason and to put education at the door of every citizen'. Who says that the right to education is a new idea?

By the middle of the twentieth century, aware of the serious consequences of the Great Depression, leaders such as the President of the United States, Franklin Roosevelt, were insisting on the need to protect the rights of people from want, as well as their rights to express their views and their beliefs. However, it was the Universal Declaration of Human Rights that really put socio-economic rights in focus, containing the rights in both lists above, and also a statement that

Everyone, as a member of society, ... is entitled to realization, through national effort and international co-operation, and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

In 1948, an iron curtain was descending over Europe, and the rest of the world was held captive by Europe's ideological divide, while the unity of rights that we find in the Universal Declaration was lost and the conviction developed that socio-economic rights were for communists.

So the argument here is that to reject socio-economic rights on the basis of history or ideology is to misunderstand the past, and limit the possible ways to contribute to the development of the human person imagined by the founders of the UN and by earlier constitution-makers. Some of the other objections that may be raised to what we could call constitutionalizing socio-economic rights still merit serious discussion. This discussion is to be found in later chapters of this book, but let us briefly examine some standard objections against socio-economic rights.

Socio-economic 'rights' don't belong in a constitution. As we shall show, many countries have included these rights, and in some countries at least they have been used in a valuable way, politically and legally (see pp. 116–43).

Socio-economic rights are only aspirations. They are not legally binding. For countries that have adopted the various international agreements that include socio-economic rights, they are legally binding obligations in international law (see pp. 14–6) and it is the main purpose of this book to show how they can be made legally binding within an individual country's legal system (see pp. 114–43).

Socio-economic rights may be all right for international law, but inside a country it is politics that matter. We shall discuss how rights can be relevant to politics (see Part III). In later chapters on constitutions and enforcement of constitutional rights, we shall show how these rights can be a matter for law.

You can't have rights unless someone has a duty and it is not clear who has the duty. The question of the duty holder can be clarified, as in the ICESCR and in many constitutions, although it is important to remember that rights have political as well as narrowly legal force (see pp. 97–100).

There is no way that courts are suitable to deal with socio-economic rights. It is true that there are many decisions that courts are not competent to make but will need to be made in order to satisfy rights. While it may not be for the courts to decide how rights are satisfied, they are often capable of deciding that authorities have not done enough to satisfy the needs of their citizens (as we show in Part II).

It's nonsense to suggest that governments have a duty to feed the hungry, clothe the naked, and make everyone healthy. This is true—and no-one is suggesting that any government has a duty to ensure that no-one is hungry, everyone has adequate clothing, and that no-one is sick. However, people expect governments to have policies to support its citizens' ability to feed and clothe themselves, to have some sort of safety net for the most vulnerable.

Protecting civil and political rights just requires the state to restrain itself. Protecting socio-economic rights requires the state to make policies and spend money, and is best left to the electorate when they choose their leaders. The invalidity of this sort of supposed distinction between civil and political and socio-economic rights is discussed at pp. 46–8.

More positively, there are various reasons why socio-economic rights have won increasing acceptance. Practical experience, research, intellectual ideas, human determination, and global politics have all played their part. Throughout history, ideas and scope of rights have been modified and adjusted to changing realities and ideologies. They are, one might say, a conversation with and about the critical issues of the time. Liberal-individual rights arose against the dominance of the state at the time markets were expanding. Social rights were advanced and found ready justification in socialist systems. Now, the pressing issues of the day relate to the elimination of poverty and the dignity of all persons.

There has been a tremendous amount of research on the nature of poverty and there is greater realization of its complex and multi-layered nature. The work of thinkers like Amartya Sen has focussed on rights or entitlements, and socio-economic rights are seen as the necessary implications of this line of thought.

A person starves *either* because he does not have the ability to command enough food, *or* because he does not use this ability to avoid starvation. The entitlement approach concentrates on the former [and] concentrates on those means of commanding food that are legitimized by the legal system.

Amartya Sen, An Essay on Entitlement and Deprivation

It is impossible to ignore globalization, which, though it may have led to economic growth in some countries, has also caused growing disparities of income and opportunities and the lack of opportunities for millions of people. Some see socio-economic rights as a counterbalance to globalization. Paradoxically, perhaps and also in response to the negative effects of globalization, global movements have focussed on the needs of the poor and have highlighted alternative development paradigms. So, we have the Copenhagen Declaration on Social Development and the Right to Development. The former was a precursor of the Millennium Development project, and stressed that in meeting the needs for social development—the material and spiritual needs of individuals, their families, and the communities in which they live—a commitment to human rights was essential and central. The latter has been described as bringing together civil and political, economic, social, and cultural rights, revisiting the UDHR one might say.

The end of the Cold War was also significant. No longer was it possible to dismiss socio-economic rights as an obsession of the Soviet bloc. As the countries of Eastern Europe, most of them decisively rejecting their Soviet or Soviet-dominated immediate past, made or amended their constitutions, many of them insisted on retaining socio-economic rights (about which, often, their American advisers were unhappy). Though they wanted to move to political freedom, they did not want to entirely abandon a commitment to ensuring that the basic minimum of human needs of citizens was satisfied. This approach, for example, is reflected in the jurisprudence of the Hungarian Constitutional Court, which held that these socio-economic rights are vested rights.

Still on the international level, the various sectoral human rights treaties protecting the rights of women, children, indigenous peoples, immigrants, and the disabled, draw attention to their exclusion and

vulnerability and prescribe special measures to end exclusion and inequality, and also elaborate how rights in the other treaties apply to the specific groups. In this way, they have breathed life into the economic, social, and cultural rights. Those treaties have been achieved as a result of lobbying by minorities of different kinds and, sometimes on their behalf, by international organizations and international and local NGOs.

In various countries and on the international level, experience of and reflection on the core values of human rights, dignity, and equality have brought the realization that passive rights, meaning that the state must not discriminate or act against the dignity of its citizens, are simply inadequate. More is needed. The idea of 'substantial equality' or 'true equality' often requires the state to engage in affirmative action, and this very often necessitates new economic and social policies (rooted in economic redistribution). In other words, the state must do something to ensure that education, health, access to resources, and so on, without which formal equality is of little value.

The last few decades have been characterized by constitution-making in almost every part of the world and, popular participation has been a theme of many of these exercises. This, a marked departure from the process of making most past constitutions, has been supported by international law and a belief that the right to take part in the conduct of public affairs under the ICCPR includes a right to participate in making one's country's constitution. Whenever a constitution is made, especially, but not only, in developing countries with significant participation of the people, provisions on social and gender justice, and economic, social, and cultural rights almost inevitably feature prominently.

Where to Find Socio-Economic Rights

The UDHR remains an important source for socio-economic rights. Apart from the ICESCR, we have already noted that most of the human rights treaties applicable to specific sections of society contain quite elaborate socio-economic rights. Some of regional human rights instruments also include socio-economic rights. The European Convention has the fewest specifically socio-economic rights, though some other rights, such as privacy, have been used to support essentially socio-economic rights as has Article 3 which says 'everyone has the right to respect for his private and family life...' (see p. 131). Socio-economic rights are provided in the European Social Charter. The member states of the Organization of American states, in the American Convention on Human Rights committed themselves to the progressive realization of socio-economic rights listed

in the Organization's Charter, including rights to education, removal of illiteracy, and fair conditions of work. The African Charter is the fullest; it includes Article 17 on the right to education, Article 16 on the right to enjoy the best attainable state of physical and mental health, Article 15 on the right to work under equitable and satisfactory conditions, and Article 22 on peoples' right to economic, social, and cultural development, with due regard to their freedom and identity. It says, 'States have the duty, individually or collectively, to ensure the exercise of the right to development' (Article 22), and Article 24 guarantees a right to general satisfactory environment favourable to their development. It has been pointed out that the African Charter does not separate civil and political rights, and socio-economic rights, but has a truly indivisible and interdependent normative framework, addressing all rights equally in the same coherent text.²³

In Part II, we look at national constitutions with socio-economic rights.

Supporting and Monitoring Socio-Economic Rights

Apart from the formal mechanisms for supporting the implementation of the rights discussed earlier (see pp. 16–17), there are a number of specialized UN agencies which have produced very concrete suggestions for bringing countries' laws and practices in line with these human rights obligations. The most active have been the ILO on matters related to workers, the Food and Agriculture Organization (FAO) on the right to food,²⁴ and the WHO on the right to health. We shall take some ideas from these bodies when talking about specific rights in constitutions.

Other organizations have also produced guides to implementing socio-economic rights at the national level or on monitoring implementation, such as the Habitat International Coalition/Housing and Lands Rights Network, and Toolkit on Monitoring the Right to Housing.²⁵ An important aspect of some of these monitoring tools is the use of indicators. One such toolkit describes indicators as signals that make it possible to determine the extent to which a particular obligation or standard has been, or is being, attained. They are tools that can be used to indicate the present situation. They can show trends, serve as signs, reveal symptoms, and mark progress towards targets.²⁶

Several of the international agreements also have a mechanism under which people can take individual complaints, rather like a complaint one might take to a national court. In 2008, a procedure for complaints about violations of the ICESCR was adopted. This means that individuals and

groups of people can complain to the relevant UN committee, provided that they have made use of any procedures in their own country first and received no remedy. However, some of the other documents that include socio-economic rights also have procedures for individual complaints, such as CEDAW.

All Rights Must be Considered Together

In this book no hard line is drawn between various types of rights, for the following reasons.

- It is not possible to draw any clear line between different sorts of rights. Is a right to property a civil, or an economic, or even a cultural right, cultural because for many peoples their land and their cultures are intimately connected?
- The underlying basis for all rights is respect for human dignity. Why should we draw any distinction between a person whose dignity is attacked because he or she is a prisoner under an unjust law, or is subject to torture, and one whose dignity is violated by terrible working conditions or starvation?
- Any drawing of distinctions between rights tends to create a hierarchy of rights—some are more important than others. In fact, in the nature of things, that is likely to lead to greater emphasis on rights that are more important to the already advantaged sectors of society.
- This book is particularly focussed on the connection between poverty and rights, and the MDGs as a way of attacking poverty. Poverty, it has been said, is the greatest violation of rights, it undermines all rights, and dealing with it needs all the rights.
- It is a serious over-simplification to suggest that civil and political rights are cost-free and socio-economic rights are expensive. Or, that civil and political rights just require the governments to restrain themselves, while socio-economic rights require them to take positive actions. Common violations of civil rights involve denying freedom of speech and association, failing to give fair trials to people accused of political crimes, including using torture to get confessions. Governments that are under pressure will not simply stop committing these violations. To allow free comment and criticism will need new policies and practices. Having a justice system that treats people fairly requires retraining, new facilities, and expense. Governments that are in systematic violation of these rights are actually being asked to make radical changes, towards

democracy and towards fundamentally different ways of governing.
Not easy or cost-free

- Over the years, careful analysis of socio-economic rights has clarified the obligations of states, and others, and shown that respecting those rights involves governmental restraint just as respecting civil and political rights is said to involve (see p. 48).
- In most countries it will indeed be political action that brings about change and protects socio-economic rights. Political action is not possible without freedom of speech, association, and assembly, or where rights to vote cannot be exercised. In other words, the most civil and political of rights are fundamental to socio-economic rights. However, on the other hand, people who are hungry, or otherwise demoralized and suppressed by economic conditions, are not going to be able to exercise their political rights freely, and still less to benefit from their cultural rights. Education and literacy (which are classified as social rights) are necessary for the freedom of expression (which is classified as a civil right) in order to read and communicate. Similarly, a clean environment is necessary for health and the right to life, more generally, bringing together all categories of rights. Freedom of expression and association are essential to protect campaigners on the environment from government harassment.
- Although there are two covenants, one apparently dealing with civil and political rights, and the other with economic, social, and cultural rights, they are identical in their provisions on two fundamentals of rights. These are the right to self-determination. 'By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development' (Article 1 of each covenant), and the need for equality and non-discrimination (Article 2). The right to self-determination here means that everyone, including all groups within society, must be able to be involved in deciding issues that affect them. In fact, most of the violations of economic and social rights, as well as cultural rights, can be analysed as involving inequality—either general inequality, within a particular society, or inequality in government policies, particularly relevant to the economy and society, or inequalities on the international scale.

Obligations under Socio-Economic Rights

The Covenant on Economic Social and Cultural Rights (ESCR) obliges a government to 'take steps,... to the maximum of its available resources,

with a view to achieving progressively the full realization of the rights ... by all appropriate means' (Article 2), not to achieve miracles. The nature of the obligation has been analysed in some detail by the Committee on the Covenant and by various Special Rapporteurs. Firstly, the state must achieve, at the very least, minimum levels of each of the rights' and to give priority to achieving this minimum level. Beyond that, the duty is to 'respect, protect, promote and fulfil' the rights. In fact, this way of analysing the duty of the state fits perfectly well with its duty with respect to civil and political rights, too, and our examples here involve both. The Constitution of South Africa says 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights', not just the socio-economic rights. The state, therefore, has an obligation to ensure that other people respect the rights as well as doing so itself. What is possible in a particular country at a particular time? A right of access to a lawyer may be vital to a person in danger of being condemned to death or life imprisonment. In many countries, it will not be possible to provide a lawyer at public expense to any person accused of less serious crimes as there are simply not enough lawyers in some countries.

'Respect' would mean that the state must not confiscate printing machines, or television cameras, or detain journalists, as this would deny the freedom of information as well as the freedom of expression. It must not prevent trade unionists from carrying on industrial action like staging a strike or negotiating for better conditions of work. It must not prevent members of minorities from voting or forming political parties. A government that seized farmers' land without providing for compensation or resettlement, so that the farmers lose their livelihood, would probably be failing to respect the right to an adequate standard of living of the farmers, the right to work, and also, perhaps, the right to food of other people who depend on the farmers.

'Protect' means that the state must take concrete steps to ensure, by appropriate measures that non-state actors do not prevent an individual or group from exercising their rights. The state must end discriminatory hiring or admissions policies, or prohibition of the use of one's mother tongue in private or in educational institutions, or attacks on the institutions, or practices of a community's religion by racial or religious bigots. It must try to stop international fishing boats destroying the livelihood of local fishermen, or require private schools to observe standards so that they meet the right to education.

'Promote' and 'fulfil' are often treated together. They both involve positive actions by the state. These may involve education and

encouragement, taxation systems that stimulate fulfilment, for example. They may involve the state taking positive steps to create the conditions, for, or provide concrete measures to facilitate the enjoyment of, a right; for example, it must ensure the right to housing by making available sufficient land for building or the supply of water, and ensure health by ensuring the supply of affordable medicines. Sometimes, the state must go further, for example, by providing feeding programmes in case of droughts. However, it does not mean that the state must use a particular approach to achieve the rights. That is a matter of policy for the particular government.

A good deal of thought has also been given to the question: A right to what? People have a right to food, but this does not mean a right to caviar, or a right to rice when yams would be enough. International mechanisms would suggest that the food must be adequate in quantity and in nutritional value, accessible and available, and also culturally acceptable. For example, it would not be right to damage the sheep meat, producing industry, leaving Muslims with no meat option except pig meat, or Hindus with no meat option other than beef. The idea of 'education', to which there is a right, has been refined and developed: the right is to accessible education, that is appropriate in content and quality. The right to health does not mean a right to be healthy, but it would include a right to health care that is reasonably accessible, geographically and financially, and of reasonable quality, as well as culturally and, in other ways, acceptable.²⁷

The international covenants do not require the impossible: states are required to achieve fulfilment of rights progressively. However, they are supposed to do so to the maximum of their available resources. The committee on ESCR has emphasized that lack of resources does not mean that a state may postpone beginning the process of realization of rights. The obligation is immediate, though the progress may be dictated partly by resources. It is well known that countries with comparable resources often have widely differing levels of achievement in terms of human development. This realization inspired the development of the Human Development Index, used in the UNDP's regular *Human Development Reports*. Countries that do poorly are violating their human rights obligations, probably because they have their priorities oriented away from human rights and towards other concerns such as national defence, national prestige, or even personal benefit of the rulers.

4. HUMAN RIGHTS FRAMEWORK AND APPROACH TO DEVELOPMENT

The framers of the UDHR aimed to establish a new world order dominated by the framework of rights. In current debates, there is considerable advocacy of the rights-based approach to development. What do these concepts mean and how far have the UDHR and subsequent treaties established the conditions for their realization? (See Box 1.6.)

BOX NO. 1.6 DECLARATION ON THE RIGHT TO DEVELOPMENT²⁸

ARTICLE 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

The fundamental principle of the UDHR, as mentioned above, is that of a social and international order in which the rights and freedoms are fully realized. This means that, at both the national and international levels, every attempt should be made to promote and secure the protection of all the human rights and freedoms, of individuals and communities, and that no laws or policies should be adopted which violate or undermine rights and freedoms. Relations between states (including trade and other economic agreements) must also respect this imperative. All policies, laws, and administrative acts must pass the test of human rights. This emphasis on rights is based on two assumptions. First, that the protection and promotion of rights will advance the welfare of the people and increase their capacity for self-fulfilment and contribute to the general prosperity of all and prevent discriminations and oppression. As we have seen, poverty is now increasingly defined in terms of the

violations of rights—for example, the rights to food, health, education, self-expression and participation, and other means for physical, social, and cultural existence.

The second assumption is that there is wide global agreement on human rights norms, and their implications. To take the second first, human rights give citizens certain entitlements, particularly against the state, which all states must respect. They constitute the parameters within which state laws and policies must be made. Human rights thus define, fundamentally, the relations between citizens and the state, and in this way restrict the powers of the state. State powers are also restricted vis-à-vis other states and the international community. Through the UDHR and other treaties, a state undertakes international obligations to respect the human rights of its own citizens and other residents. It has the obligation to protect. The international human rights system, discussed earlier, is designed to ensure that these undertakings are honoured—sometimes, when necessary, through armed intervention in the affairs of the defaulting state. This is one instance of rights as empowering the people vis-à-vis the state. International obligations are also of a more positive nature, to co-operate with other states to assist them to achieve their human rights obligations in respect of their own citizens. The co-operation takes the form of technical and financial assistance, and sometimes in more dramatic ways by providing the security framework for a peaceful and orderly life.

On the norms themselves, the UDHR now regarded as part of international law has been followed by a number of international human rights treaties enunciating new or clarifying old rights and freedoms. However, human rights have also become a contested terrain, of the understanding of a good and meaningful life and welfare, of the importance of identity and its different bases, as fresh claims are advanced in the language of rights. So, with the expansion of rights have also come conflicts, partly based on cultural differences as well as material gain, which are reflected in the notions of rights. Increasingly, human rights-based policies must deal with the balancing of individual and group rights, market or welfare oriented rights (that is, private property versus commons, patents versus accessibility to science and knowledge, human security versus human freedom), and the scope of the public sphere free from cultural constraints or prescriptions. Realistically, trade-offs may be inevitable, although some advocates of the rights-based approach rule out trade-offs. The question is whether there is enough guidance in human

rights norms that can help states and other policy makers to negotiate appropriate balances. There can be no mechanistic way to do this. That, indeed, is the challenge for rights-based approaches.

The difficulties posed above may be resolved or mitigated by another critical dimension of rights-based approach—the procedural approach (in addition to the results or outcome approach). Certain values of participation and procedure must be respected in arriving at decisions and their implementation. The first of these is inclusion, so that all persons are treated equally. Inclusion is secured through participation, on which there is considerable emphasis in human rights norms, in the political life of the country, and also in access to economic and social opportunities. The processes of decision-making must be transparent and there must be accountability of the holders of powers as to the exercise of their powers—to be judged in the considerable part by the substance and procedures of human rights norms. This element of procedure entails the empowerment, particularly of the marginalized communities and the poor, in general. The expectation is that through these processes a consensus of some sort will be reached and decisions made in this way will enjoy legitimacy. As we discuss in Part II, these processes are particularly important when fundamental decisions are made about the values, structures, and procedures of the State—often, in the form of the constitution.

BOX NO. 1.7 WHAT IS A HUMAN RIGHTS-BASED APPROACH?

A human rights-based approach constitutes for UNDP a holistic framework methodology with the potential to enrich operational strategies in key focus areas. It adds a missing element to present activities by enhancing the enabling environment for equitable development, and by empowering people to take their own decisions. It brings in legal tools and institutions—laws, the judiciary, and the rule of law principle—as a means to secure freedoms and human development. It is further based on the recognition that real success in tackling poverty and vulnerability requires giving the poor and vulnerable both a stake, a voice and real protection in the societies where they live. A human rights-based approach is not only about expanding people’s choices and capabilities but above all about the empowerment of people to decide what this process of expansion should look like.

UNDP ‘A Human Rights-based Approach to Development Programming in UNDP: Adding the Missing Link’²⁹

4.1 RIGHTS, CLAIMS, DUTIES, AND RESPONSIBILITIES

Two critical components of the framework of rights are: firstly the relationship between the holder of the right and the responsibility of the state and others bound by the right; and secondly the precise obligations of the duty holder.

On the first, the important point is that a right gives its holder an entitlement to certain benefits, or treatment, or freedoms, which the duty holder has to ensure. The UDHR envisaged that rights and freedoms would be binding on non-state as well as state institutions and although some states rejected this broad reach of rights, increasingly, and globally, non-state institutions are being held responsible for violations of human rights. The rights-duty based relationship has several implications. There must be mechanisms to resolve disputes about the existence of the right in the person claiming it and to enforce rights when they are unlawfully denied. Ultimately, these matters are for the courts to resolve, but there can be other methods like administrative bodies, human rights commissions, ombudsperson, police complaints authority, and so on. In regional human rights systems, the final word may be with an international court. The duty holder must be accountable for the proper discharge of his/her obligations, perhaps through parliament, or internationally by treaty bodies, or judicial tribunals (see the next section). When the duties do not fall directly on the state, it has the obligation to ensure that a non-state body which does have the duty actually performs it.

The second component focuses on the obligations of the State (or other duty holder) and how they must be discharged. This will be clear from the text of the document that imposes the duty, or from clarification by courts or other appropriate authorities, for it may be that the rights and freedoms are granted subject to permissible qualifications or restrictions. The State has the obligations to ensure law and order in which the rule of law functions, and civil and political rights are protected against its own officials and members of the public. It has to provide independent courts to protect citizens against discrimination or other acts of oppression by duty holders, which in many cases would include state officials. Many obligations also arise under social and economic rights. Although many of these are to be implemented progressively and in view of available resources some require immediate action, such as the provision of primary education or emergency medical treatment (this topic is explored later in detail see specific rights on p. 118 onwards).

5. MDGs AND RIGHTS: THE RELATIONSHIP

The MDGs offer an opportunity to realize basic human rights more broadly

UNFPA

Human Rights are and should be instruments for the empowerment of the MDG agenda

Jeffrey Sachs

Human rights and MDGs are ... two interdependent and mutually reinforcing frameworks

UNDP

At the level of academic debate and of individual organizations these differences will continue, and the issues reflected are of considerable importance. However, this particular publication is not the place to explore them in detail, or the considerable literature that argues that the two concepts are incompatible, or need not be incompatible, or points out that most people writing about human rights ignore MDGs, and those writing about MDGs ignore human rights.³⁰

5.1 MUTUAL BENEFIT

Already, many national and international organizations are working to support fulfilment of both the MDGs and of rights, especially socio-economic rights. They use similar tools to assess progress towards the fulfilment of both. Nevertheless, some organizations see themselves as working only towards MDGs, or see themselves as human rights organizations. That is, of course, entirely their right. Here we intend simply to suggest ways in which taking account of both, with their common agenda of the elimination of poverty, may be valuable.

5.1.1 MDG Analysis May Benefit Rights Work

A great deal of work has gone into the development of targets and indicators for the achievement of the MDGs. This information and these approaches can be used by governments and organizations approaching development from a human rights perspective.

Organizations may find that some financial and other support is more forthcoming if they emphasize MDGs rather than rights. The right to development is unacceptable in some quarters, even though it is endorsed by the Millennium Declaration.

It is also suggested that sometimes a human rights approach encourages a short-term focus on violations, rather than on the long term. 'Human rights analysts find it difficult to factor in progress that

is deferred, or uneven but positive, or to balance benefits of reform (for some) in relation to risks and threats (for others) over time' says Robert Archer.³¹ This is less true of those who focus on socio-economic rights and progressive realization.

5.1.2 Rights: Support Achievement of MDGs

In the context of constitution-making and implementation, this is the more obvious linkage. We can summarize the possible benefits in the following ways:

- a rights analysis can counter a possible tendency of MDG analysis to focus on figures and overlook the basic truths that motivate both sets of goals, particularly the emphasis on human dignity and the worth of every person
- a rights analysis will draw attention especially to the needs of the most vulnerable sections of society, even if not identified (as children are) in the MDGs
- a rights analysis will, or should, encourage a rounded approach—rather than isolating particular markers of disadvantage

5.1.3 Drawing Connections

A number of recent studies have been making the connections between MDGs and rights. Rather than repeat this work, we use in Table 1.3 (see p. 58) MDG/ESCR connections made by others (for the further link to a constitution see sections on specific rights, pp. 116–43). Here we omit MDG 8, on the international partnership, because it is less relevant to the drafting of a national constitution (see pp. 115–16). It is interesting to see that not everyone will link the same rights to a particular Millennium Goal.

6. CONSTITUTIONS AND CONSTITUTIONALISM

The constitution, as fundamental law, provides the framework for the structures and powers of the State. As the constitution is the supreme law of the country, laws, policies, and administrative acts must be compatible with it. Most constitutions now provide for the invalidity of law and administrative acts which are so incompatible. Normally, a constitution determines the structure of the state according to fundamental principles of the purposes of state power. These are dependent on the history, ideology, and circumstances of the country in question. At one level these purposes are very general; and at another quite specific.

TABLE 1.4: LINKING MDGs AND ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

<i>Goals</i>	<i>Targets</i>	<i>Indicators</i>	<i>Rights (Paul Hunt)</i> ³²	<i>Rights UNDP Rwanda</i> ³³
1	Eradicate extreme poverty and hunger	Halve the proportion of people with income of <\$1 a day Halve the proportion living with hunger	1. Proportion of population below \$1 per day 2. Poverty gap ratio (incidence x depth of poverty) 3. Share of poorest quintile in national consumption 4. Prevalence of underweight children under five years of age 5. Proportion of population with below minimum dietary energy consumption	ICESCR (Art. 11 & GC 12—on the Right to Food); CRC (Arts 24(2) (state measures on child health) and 27(3) (assistance with child's right to standard of living)
2	Achieve universal primary education	Ensure that boys and girls everywhere will be able to complete full course of Primary education	6. Net enrolment ratio in primary education 7. Proportion of pupils starting grade 1 14; CRC Art. 28(1) (a); CEDAW Art. 10; and 7 8. Literacy rate of 15–24-year-olds	ICESCR (Arts 13, 14 and GC 11); CRC (Art. 28(a) and GC 1); CERD (Arts 5 and 7)
3	Promote gender equality and empower women	Eliminate gender disparity (in primary by 2005, in other levels of education by 2015)	9. Ratio of girls to boys in primary, secondary, and tertiary education 10. Ratio of literate women to men, 15–24 years old	CEDAW; ICESCR (Arts 3 and 4(a)(i)); ICCPR (Arts 3, 6(5) and 23(2)); CRC (Art. 22); CERD (GC 25)

(Cont'd)

Table 1.4 *contd*

Goals	Targets	Indicators	Rights (Paul Hunt) ³²	Rights UNDP Rwanda ³³
4	Reduce child mortality	Reduce under-five mortality rate by two-thirds	13. Under-five mortality rate	UDHR Art. 25; CRC
		14. Infant mortality rate	14. Infant mortality rate	CRC (Arts 6 and 24(2)(a)); 24(2)(a); ICESCR (Art.
		15. Proportion of one-year-old children immunized against measles	15. Proportion of one-year-old children immunized against measles	ICESCR Art. 12(2)(a)12(2)(a), GC 14)
		11. Share of women in wage employment in the non-agricultural sector	11. Share of women in wage employment in the non-agricultural sector	
		12. Proportion of seats held by women in national parliament	12. Proportion of seats held by women in national parliament	
5	Improve maternal health	Reduce maternal mortality rate by three-quarters	16. Maternal mortality ratio	UDHR Art. 25;
		17. Proportion of births attended by skilled health personnel	17. Proportion of births attended by skilled health personnel	CEDAW Arts 10(h), 12(1), 14(b) and GC 11(f), 12, and 14(b); 24); CERD (Art. 5 e iv); ICESCR Art. 12; CRC ICESCR (GC 14); ICCPR Art. 24(2)(d); CERD (Arts 3, 6(5) and 23(2)); Art. 5(e)(iv) CRC (Art. 24(d))
6	Combat HIV/AIDS, malaria and other diseases	Have begun to reverse spread of these diseases	18. HIV prevalence among pregnant women aged 15–24 years	UDHR Art. 25;
		19. Condom use rate	19. Condom use rate	Guidelines on HIV/AIDS
		19a. Condom use at last high-risk sex	19a. Condom use at last high-risk sex	ICESCR Art. 12, CRC and HR; ICESCR (GC 14); art. 24; CEDAW Art. CRC
		19b. Percentage of population aged 15–24 years with comprehensive correct knowledge of	19b. Percentage of population aged 15–24 years with comprehensive correct knowledge of	12; CERD Art. 5(e) (iv)
		19c. Contraceptive prevalence rate	19c. Contraceptive prevalence rate	(Arts 24(c) and GC 3)

(Contd)

Table 1.4 *contd*

Goals	Targets	Indicators	Rights (Paul Hunt) ³² Rights UNDP Rwanda ³³	
7	Ensure environmental sustainability	Integrate sustainable development into countries' policies and programmes	20. Ratio of school attendance of orphans to school attendance of non-orphans aged 10–14 years	
		Halve the proportion of people without sustainable access to water and drainage	21. Prevalence and death rates associated with malaria	
		26. Ratio of area protected to maintain biological diversity to surface area	22. Proportion of population in malaria-risk areas using effective malaria prevention and treatment measures	
		27. Energy use (kg oil equivalent) per \$1 GDP	23. Prevalence and death rates associated with tuberculosis	
		28. Carbon dioxide emissions per capita and consumption of ozone-depleting CFCs	24. Proportion of tuberculosis cases detected and cured under DOTS (internationally recommended TB control strategy)	
			25. Proportion of land area covered by forest	25. Proportion of land area covered by forest
				26. Ratio of area protected to maintain biological diversity to surface area
				27. Energy use (kg oil equivalent) per \$1 GDP
		28. Carbon dioxide emissions per capita and consumption of ozone-depleting CFCs	24; CERD Art. 5(e) (iii)	

(Contd)

Table 1.4 cont'd

Goals	Targets	Indicators	Rights (Paul Hunt) ³² Rights UNDP Rwanda ³³
Significant	improvement in lives at 1,000 million slum-dwellers (by 2020)	29. Proportion of population using solid fuels	
		30. Proportion of population with sustainable access to an improved water source, urban and rural	
		31. Proportion of population with access to improved sanitation, urban and rural	
		32. Proportion of households with access to secure tenure	

The most general purpose is to provide security for its citizens and other residents and to enable them to lead a life that is meaningful to them. The role of constitutions is to ensure the smooth operation of the political system by channelling the expression of politics through prescribed institutions in accordance with clearly understood and valued procedures, as well as facilitating the resolution of differences and disputes that inevitably arise in a society. For this purpose, the state must be vested with considerable powers of government, to protect the rights of citizens, maintain law and order with the assistance of police, if necessary, and defend the country against foreign invasion. It must provide the machinery for justice, including a body of laws and courts to enforce them. For these purposes, it must have the power to tax the people and to incur expenditure on their behalf, in order to run the machinery of government. As society and economy have become increasingly complex and as relations with foreign powers and international agencies have become critical for any country, the state must have significant powers of regulation and the ability to operate at the international level. The state has incurred numerous international obligations under treaties and conventions, and there must be authority to discharge them. At home, it must provide the framework and the infrastructure for the economy and ensure for its citizens access to education, health, shelter, and employment opportunities. Consequently, the powers of the state are constantly increasing.

There is a real danger that these powers could be abused and instead of serving the people, they can be used to suppress them. A good constitution tries to strike a balance between giving the state sufficient powers to discharge these critical functions while limiting those powers to protect the rights of the people. A state needs considerable powers to protect rights. For some rights, such as the freedom of expression and association, non-interference by the state is critical. The main possible threat is seen as state interference through laws and practices. In reality, full protection of even these rights may involve positive state action. A country in which physical threats, even emanating from fellow citizens, or risk of dismissal, inhibited free speech or association would not be a country that respected human rights. However, for the protection of certain other rights, such as education and health, some positive state engagement is essential. The balance is often struck by the principle or doctrine of constitutionalism—which is based not purely, as is often assumed, on the limitation of state powers, but also on the grant of powers and resources to the state.

A key feature of constitutionalism is the division and separation of state powers. Powers can be divided horizontally as well as vertically—for

example, at the national level, executive, legislative, and judicial powers can be vested in separate bodies. Nevertheless even within the executive, there can be division of powers between the president and the prime minister. The public service can be granted considerable operational autonomy and independent institutions can be set for particularly sensitive tasks like elections, control of corruption, or promotion of human rights. For the vertical division of power, the clearest example is federalism, but lesser forms of devolution or decentralization of powers are found in many constitutions and political systems. The vertical division of powers, when well structured, serves many important functions, including administrative responsiveness and efficiency, the enhancement of democracy, and greater accountability. The whole scheme of the constitution depends on the acceptance of the principles and procedures of the rule of law, a value recognized in the Millennium Declaration. The rule of law springs from, and is critical for sustaining constitutionalism in general, and, more specifically for governance, in which the rulers too have to follow the law and be accountable to the people for proper custody of legality. The extent to which this proposition takes root is a measure of the success of constitutionalism—and the discipline on, and accountability of, governments.

Turning to the functions of constitutions, the sharpest distinction that could be drawn, until recently, was between market-oriented democracies and communist states. The former regarded the constitution as a relatively neutral framework for access to institutions of the state and the exercise of state power, with elections as the crucial element in this. Communists regarded the state as the vehicle for the centralization of power and its exercise by the communist party. The former tended to exaggerate the neutrality of the state in their system, and the latter, the democratic element in theirs. However, the division of powers and the political and legal institutions for their exercise, reflecting the ruling ideologies, were quite different.

It is possible to draw another type of contrast between well-settled societies and developing societies. With some simplification, we may say that the growth of the state in the former societies has been gradual and organic, responding to changes in society and economy, and, consequently, there is a fit between state and society. This is achieved largely through the dominance of particular social classes or forces in society and the gradual homogenization of culture. Stability as well as the modes of change are based on civil society rather than the state. Therefore, the role

of the constitution is limited and secondary, and largely of a procedural kind (to do with access to and structuring of state power, as in market-oriented democracies).

In the second category, developing societies, the state is much more distanced from society, having had, in most cases, its origins in colonial rule. Furthermore, the constitution often does not have effective links to either society or even the state. There is often no dominant social class or force in society that can impose its rule over others, or bring coherence to the society or state. People may be divided by caste, tribes, religion, or language, and may have come together as a result of coercion by an outside power, now departed. Thus, there may be no organic unity in society—generally regarded as the prerequisite of a functioning and stable state. The absence of national sentiment creates considerable difficulties in creating a state to which is owed the primary allegiance. Instead, the primary loyalty is to a smaller group, marked by ethnic identity. This problem is compounded by scarcity of resources and intense competition for them, putting state neutrality under great pressure.

In this situation, the role of the constitution is significantly different from that in more established societies. The constitution can come to be seen as a major symbol of the state, and the creator of a sense of nationalism and national belonging. Many recent constitutions are designed to create stability through unity, even if that unity is generated by the recognition of ethnic and other differences. The value of diversity is recognized in the Millennium Declaration.

Tolerance: Human beings must respect one other, in all their diversity of belief, culture, and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.

The constitution then becomes the means to hold various social forces in balance—and, thus, is also subject to the vagaries of changing social forces. In the more enlightened constitution for this purpose, considerable emphasis may be placed on social justice and inclusion as the only guarantee of peace and stability in a multi-ethnic society. The constitution may try to acknowledge or incorporate values that are inherently just and moral, or have the potential to unite the people, and project for the people a vision of the purpose and identity of the state. To some extent, therefore, the function of the constitution becomes the narrowing of differences

between state and society—and between them and itself. We discuss later some difficulties in achieving this objective. It will be clear from the above discussion that constitutions can play—or aspire to play—very different roles and functions in different contexts. For the purpose of this book, we look upon the constitution as an instrument to eradicate poverty, as a charter of social justice, and a basis of national unity, without which it may be hard to develop social solidarity which is so essential for MDGs. In the next part, we discuss the implications of incorporating human rights and MDGs in a constitution, broadly of this type. We shall argue in the concluding Part (see pp. 171–2) that it is not sufficient to have a good bill of rights; rather the entire constitution should reflect human rights values and procedures—be human rights friendly. We know that a common problem in many countries is poor governance. When governments are corrupt, incompetent, or unaccountable to their citizens, national economies falter. When income inequality is very high, rich people often control the political system and simply neglect poor people, forestalling broad-based development. The prevalence of corruption erodes public ethics, illegally, diverts, resources away from material development and welfare of the people, produces inefficiency and lack of commitment—and, generally, obstructs human rights. The rights-based approach to society and development, thus, requires an audit of the whole constitution from the perspectives of the protection and promotion of rights.

Such an approach does not endear itself to everyone. An earlier section in this part touched on the arguments against the justiciability (or even recognition) of economic and social rights. Similar arguments are made more broadly against a constitution which defines for the state (and society) a wide social agenda based on human rights and justice. In the next part, we discuss and try to refute these arguments and show how a constitution can promote MDGs and human rights.

NOTES

1. Jan Vandemoortele, 2007, 'MDGs: Misunderstood Targets?' UNDP International Poverty Centre One-pager, Number 28 January 2007, <http://www.ipc-undp.org/pub/IPCOnePager28.pdf>
2. See http://devdata.worldbank.org/gmis/mdg/UNDG%20document_final.pdf
3. See <http://devdata.worldbank.org/atlas-mdg/>
4. Including the OECD (see http://www.oecd.org/about/0,2337,en_2649_3458_5_1_1_1_1_1,00.html), and the World Bank (see as well the UN itself which had a specific project on the MDGs (see <http://www.unmillenniumproject.org/>),

- last visited 22 August 2010) and a campaigning section to raise support for the Goals (see <http://www.endpoverty2015.org/> last visited 22 August 2010).
5. See http://www.unmillenniumproject.org/reports/tf_education.htm
 6. See <http://www.undp.org/poverty/mdgsupport.htm>, last visited 22 August 2010.
 7. See <http://www.fao.org/mdg/>, last visited 22 August 2010.
 8. http://www.unicef.org/publications/files/Progress_for_Children-No._7_Lo-Res_082008.pdf
 9. Housing and Land Rights Network/ Habitat International Coalition, *Closing the Human Rights Gap in MDG 7: Ensure Environmental Stability*, at: http://www.hic-mena.org/MDG/MDG_EN.zip
 10. A detailed analysis of the way in which international and national tribunals have interpreted and used the concept is provided in Christopher McCrudden, 2008, 'Human Dignity and Justiciability of Human Rights', vol. 19, *European Journal of International Law*, p. 655.
 11. See Part III of this book.
 12. For suggestions on points for a possible constitutional provision on this go to page 111.
 13. Opened for signature in 2009.
 14. See, for example on individual complaints to the Special Rapporteur on the Right to Health <http://www2.ohchr.org/english/issues/health/right/complaints.htm>
 15. For information in regional systems see, for example, <http://www.right-to-education.org/node/98>, last visited 22 August 2010. Electronic Information System for International Law on African system (see http://www.eisil.org/index.php?sid=210302681&t=sub_pages&cat=210, last visited 22 August 2010); for the European System (see http://www.eisil.org/index.php?sid=210302681&t=sub_pages&cat=211); and for the Inter-American (see http://www.eisil.org/index.php?sid=210302681&t=sub_pages&cat=212).
- There is a useful description of the regional processes and the procedures for invoking them in Malcolm Langford and Aoife Nolan, 2006, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, Geneva: Centre on Housing Rights & Evictions (COHRE), pp. 144 (at <http://www.cohre.org/store/attachments/COHRE%20Legal%20Practitioners%20Dossier.pdf>).
16. Unofficially there is the Asian Human Rights Charter (<http://material.ahrchk.net/charter/> last visited 22 August 2010). In a letter to the Joint Standing Committee on Foreign Affairs, Defence and Trade Department of the House of Representatives in Australia, staff of the (University of) Sydney Centre for International Law, in November 2008, reviewed the history and the arguments for a regional system (see www.law.usyd.edu.au/scil/word/2009/AsiaPacificHumanRightsSubmission_Nov08.doc). In 2008 the ASEAN (Association of South East Asian Nations) Charter was adopted, including

the principle of 'respect for fundamental freedoms, the protection and promotion of human rights and the promotion of social justice'—Art. 2.2 (i), and a commitment to establishing an ASEAN human rights body (Art. 14) (see <http://www.aseansec.org/Ac.htm>, last visited 22 August 2010). Terms of reference for this body were adopted in July 2009 and the body was to be set up in October 2009.

17. Plus Protocol on Rights of Women; African Charter on Rights and Welfare of the Child.
18. Plus Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, plus protocols on human organ and tissue transplantation and human cloning; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Framework Convention for the Protection of National Minorities; Convention on Action against Trafficking in Human Beings.
19. Also the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which visits institutions in member countries to from torture and from inhuman or degrading treatment or punishment.
20. Also Protocol on Economic, Social, and Cultural Rights; Protocol to Abolish the Death Penalty; American Declaration of the Rights and Duties of Man; Inter-American Convention on the Elimination of all Forms of Discrimination against People with Disabilities; Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on Forced Disappearance of Persons; and the Proposed American Declaration on the Rights of Indigenous Peoples.
21. *RWDSU v. Dolphin Delivery Ltd.*, (1986) 2 S.C.R. 573.
22. See http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html, last visited 22 August 2010.
23. Pierre De Vos, 2004, 'A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples Rights', *Law Democracy and Development*, 1, 8.
24. For example, (see 'Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security' (2003) (see, <http://www.fao.org/DOCREP/MEETING/007/J0492E.HTM> and <http://www.fao.org/Legal/rtf/rtf-e.htm>). *The Right to Food in Practice: Implementation at the National Level* (2006) (see http://www.fao.org/docs/eims/upload/214719/AH189_en.pdf, last visited 22 August 2010).
25. See http://www.hlm.org/old_hlm/toolkit/index.html. See also Allan McChesney, *Promoting and Defending Economic, Social, & Cultural Rights: A Handbook* (Huridocs). (Available on <http://www.huridocs.org/tools/monitoring/handbook/>)

26. Judith Asher, *The Right to Health: A Resource Manual for NGOs*, London: Commonwealth Medical Trust, 2004. (Available on <http://www.huridocs.org/tools/monitoring/tools/rthealth.pdf>, last visited 22 August 2010, para. 8.2.1.)
27. General Comment No. 12 on 'The right to the highest attainable standard of health', E/C.12/2000/4.
28. Non-binding UN agreement (General Assembly resolution 41/128 of 4 December 1986).
29. UNDP 2000 (now available at <http://www.un.org.kg/en/publications/document-database/article/document-database/un-system-in-kyrgyzstan/human-rights-and-human-rights-based-approach/22-development/2078-a-human-rights-based-approach-to-development-programming-in-undp-adding-the-missing-link-eng-last-visited-22-August-2010>).
30. See, for example, the UK Overseas Development Institute 'Human rights and the Millennium Development Goals: contradictory frameworks?' (see http://www.odi.org.uk/events/rights2005/meeting_10jan/meeting_report.html, last visited 22 August 2010). Nelson Paul 'Goals, 'Norms and Pledges: The Millennium Development Goals and Human Rights', paper presented at the annual meeting of the International Studies Association 48th Annual Convention, Hilton Chicago, Chicago, IL, USA, 28 February 2007 arguing that 'Although it is widely argued that human rights and the MDGs are compatible and mutually reinforcing, the case of water-related goals and rights shows that they are embraced by different social and economic actors in debates over water rights and property rights, and differ sharply in their policy implications for states and corporations, as well as in their capacity to mobilize organized citizen and consumer action'. But see especially, the valuable article by Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', 2005, *Human Rights Quarterly*, 27, pp. 755–829.
31. At the ODI meeting (see http://www.odi.org.uk/events/rights2005/meeting_10jan/archer.pdf).
32. CERD: Convention on the Elimination of All Forms of Racial Discrimination; CEDAW: Convention on the Elimination of All Form of Discrimination Against Women; CRC: Convention on the Rights of the Child; ICESCR: International Covenant on Economic, Social, and Cultural Rights; GC: General Comment (of the relevant UN committee).
33. See http://www.undp.org/oslocentre/docs07/EdiscussionFinalSummary_MDGsHR.pdf, last visited 22 August 2010.



PART II

Constitutional Strategy

We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on government control. Our constitution aims at establishing freedom and equality in a grossly disparate society

Justice Kriegler of the Constitutional Court of South Africa
in *Du Plessis v. De Klerk* (1996)¹

How does a constitution work? Can a constitution really be a vehicle for development, including the achievement of the MDGs? Moreover, what is the place of socio-economic rights in this?

These are the questions that this Part of the book deals with—frankly and without glossing over possible difficulties, but based on the genuine conviction that a constitution is an important part of the national life, at least in many countries, and that it can make a positive contribution to achieving a better life for the people of a country.

This part does not deal only with economic, social, and cultural rights, even though these may appear at first sight to be most relevant to achieving human development. The argument is that the constitution may either be supportive of rights or be an obstacle to rights. A constitution might have a superb bill of rights, but be a failure when it comes to achieving the goals of human development and respect for rights. A good bill of rights, working with other aspects of the constitution, can offer real hope for the people.

Another important message of this Part is that a constitution may be technically well drafted, with appropriate and skilfully expressed provisions about rights and supportive institutions provided for in the document, and even reach out in emotional terms to the people, but remain no more than something just on paper. It may be, in constitutional terms, a beautiful creation, but it may be dead in terms of its actual impact on reality. For a constitution to come to life—to leap off

the paper on which it is printed into the minds and hearts of the people and into the everyday reality of their lives—it needs to be observed, to be used, and to be enforced. On the one hand, it means that there must be institutions and procedures to ensure that it is usable and that these institutions and procedures can be provided by the constitution itself. On the other hand, people, the citizens, affected by denial of their rights and for whom the constitution is designed, must be motivated and able to make use of it.

1. CONSTITUTIONALIZING MDGS

We believe that there is considerable value in incorporating the MDGs in a nation's constitution. This is not to say that they can be reproduced in a national constitution in the form in which they were extracted from the Millennium Declaration, while the specific targets are not suitable for enshrining in a constitution. However, if we take a broader view looking at the Declaration, the principles which it embodies are suitable for a constitution, and indeed are found in many.

The MDGs were prepared by the staff of international organizations and endorsed by heads of states or governments after inter-state negotiations. People across the globe, in whose name the goals were proclaimed, had little role in their preparation or adoption. While the goals speak of the concerns of millions of people, an act of incorporation of the goals into the national constitution (at least if done in the participatory way that we discuss at pp. 73–7) would be an act of national endorsement of, and commitment to the goals and their achievement. If the process of entrenching the MDGs is appropriate, as we discuss ahead, it would establish national ownership of the goals and strengthen the resolve of the people and the government to pursue them until all the objectives are achieved. The process will provide further opportunity to determine suitable institutional and procedural reforms in view of local circumstances.

The constitutionalization of MDGs should facilitate greater awareness of the MDGs among parliamentarians, and enable them and other state and non-state actors to play their proper role in promoting and supervising their implementation. National methods of accountability may well result from this. The MDGs would need to be integrated and harmonized with socio-economic and political rights and will, in turn, have an impact on the interpretation of other provisions of the constitution. In this way, they and the constitution, generally, will be strengthened.

The MDGs are not a time limited thing; they will need to be pursued over a long period of time, well beyond 2015. To establish a proper legal, social, and political status for them, it is advisable that they be incorporated into a law, preferably the constitution. There will be objections to this. An important part of the appeal of the MDGs has been the idea that we can make poverty history, and in our lifetime. The hope was that all that was needed was one big push. Some would object that putting the MDGs into a national constitution is to constitutionalize poverty and to assume that 'the poor ye have always with you' (Gospel according to St. Matthew Chap. 26) when the whole thrust of the MDGs was to deny this inevitability. Some people will object that a constitution is something that ought to last 200 years or more (like the US Constitution) and should, therefore, be timeless. Nevertheless, here it is important to make various distinctions. Firstly, it is not the targets but the goals, we argue, that can and should be constitutionalized and it is not the precise words, but the underlying spirit of the goals and even more so of the Millennium Declaration, that may most appropriately have constitutional embodiment. Even if the goals were realized in a particular society, continued vigilance would be needed to maintain that progress. Many countries have experienced increased inequality with, at least, increased relative poverty. Disease will not disappear from the earth.

Constitutions should not be changed at whim, but the supposed perpetuity of the constitution should not be made an article of faith. We argue later (see pp. 72–7) that a constitution should respond to the needs of the particular country and reflect what the citizens believe is important. There are prices to be paid for this, one of which is length and some unwieldiness, and another of which is the likelihood that a constitution will be changed, or even replaced.

Another objection with some validity is that a constitution is a national document—the national document—but the MDGs were a commitment not of individual nations in regard to their own citizens, but of the whole community of nations. Would not enshrining the MDGs in the constitutions of poor nations let the rich nations off the hook? There is some truth in this because a constitution is a sort of modern social contract, between citizens and between citizens and the state, about how the people of that state will live together. However, a country might decide to reflect in its national constitution an obligation on the part of government to work with the whole community of nations for the achievement of the spirit of the MDGs or the Declaration, or at least as

an obligation under the UDHR in the constructive spirit of globalization. Some countries might find this objectionable of course. Secondly, rich countries also make and amend their constitutions. Is there any reason why an MDG spirit should not be reflected in the constitutions of all countries? We explore this constitutionalization of Goal 8 a little further at pp. 114–16.

Most importantly, we would argue that what happens within poor nations will ultimately be at least as important as what the rich nations do. The importance of the constitutionalization of MDGs and socio-economic rights arises from the fact that the primary responsibility for their promotion lies with national governments and societies—despite the considerable development of international norms and institutions. The international community can do relatively little to stop violations of rights which take place within national jurisdiction—unless they are of genocidal proportions and, even then not often, as Darfur well illustrates. Even in well established regional systems, where the regional courts make the final determination of violations and remedies, implementation depends on national institutions. The future of human rights, therefore, depends substantially, even fundamentally, on protection and promotion at the national level.

A constitution which seeks to incorporate these and other social rights or national policies, is likely to be opposed by various groups. Not all of the opposition comes from persons or groups who are opposed to social justice or the eradication of poverty. Others, without being necessarily attached to conservative values, may find professional or ideological reasons why a constitution should not contain state obligations to look after the material interests of citizens in general, or a special category.

A principal argument against constitutionalization of MDGs is that the constitution should be value neutral, and that its sole function is to provide rules for the formation of government and the mode of decision-making in the legislature and other state organs. The fact is that no constitution is neutral, even if it does not explicitly contain any values. A constitution which is restricted to rules on formation of, and decision-making within, the government is not neutral, but is directed towards the maintenance of the economic and social status quo.

It is also often argued that the sole purpose of the constitution is to limit and restrain the exercise of political power. This is also often an ideological position which is directed towards conservatism, so that those who are already dominant in society enjoy maximum freedom, with the state responsible only for maintaining law and order.

Some say that only provisions which are both clear and legally binding should be included in the constitution. Values cannot normally be stated with clarity and it is difficult for the courts to interpret the implications of values for state action, which weakens the constitution. The underlying assumption here is that a constitution is primarily, even solely, a legal document but in this book we show that a constitution is also a political and social document. In truth, most constitutional provisions have a degree of ambiguity and the courts are asked all the time to interpret values or abstract terms, even if they are not labelled 'principles' or 'values'.

A further objection would be that constitutions with values and aspirations are hard, if not impossible, to implement. This failure diminishes the legitimacy of the constitution and can give rise to the dangerous idea that the constitution need not be taken seriously or that some of its provisions can be ignored. It is bound to disappoint those who have high expectations of the constitution. The first assumption of this position is that achievement of social goals is impossible. As we argue here, it is often impossible for the simple reason that little attempt is made to implement them. The criticism should be levelled at the government for want of effort, not at the constitution. The second assumption is that constitutions without values are, or can be fully implemented, but, as we have suggested, no constitution is really without values and in truth no constitution is fully implemented.

These criticisms are based on the preference for a particular kind of constitution, with minimalist scope. To expand on the question of different functions of constitutions in different societies, a point made in Part I: in many developing, formerly colonial, states there are major problems of nation-building. Primary identities are attached to religious or ethnic communities, or certain pre-colonial historical traditions. Many find it hard to envisage citizenship as the basic unit of society and, so, there is little solidarity as a nation. Consequently, there is little sympathy for the poor and oppressed of other communities. Nation-building based on common citizenship is essential for many purposes, particularly a commitment to a wider sense of social justice.

The modern state itself is a relatively new concept in many of these societies, where there is little familiarity with the modalities and morals of State power, or the true significance of democracy for the organization of the State and society. Consequently, it is necessary to spell these out in a constitution, to guide the exercise of power and establish new institutions of accountability, since society is unable on its own to do this effectively.

The full range of human rights, as a primary component of meaningful democracy, must be fully reflected in the constitution and the design of political organizations.

Implementing the policies and interventions required to meet the Millennium Development Goals requires the commitment of political leaders. However it also requires sustained political pressure, broad popular support and mechanisms for delivering services effectively. An open democratic state that guarantees civil and political freedoms is essential for such popular mobilization and participatory civic engagement, so that poor people can pressure their leaders to deliver on their commitments to the Goals.

The 2003 Human Development Report, p. 133

Furthermore, in most developing countries, there are large pockets of extreme poverty. To say that only a state with limited power is compatible with the constitution is to condemn the poor to perpetual poverty. The notion of the limited state is usually to imply that the state should have a restricted role in relation to the market. It is patent that the market, which is often the cause of poverty, cannot pull the poorest out of their condition. An activist state, with sufficient power to extract and distribute resources, is necessary to assist them to help themselves. Without this role, the very future of the state and society is imperilled. As we have argued, MDGs and socio-economic rights are the principal instruments for this purpose.

Later, we suggest how a constitution can give effect to human rights, both through a bill of rights and the structure and orientation of the state—in other words, how to make the entire constitution rights-friendly.

There are several ways of doing this, as we suggest below. Many of them are probably already in some way or another reflected in the constitution, but some specific way of acknowledging the philosophy, goals, and procedures of the Millennium Declaration would strengthen the general approach and provisions for human rights-based development.

2. REVIEWING OR MAKING A CONSTITUTION

This section discusses how the process of making or reviewing a constitution can promote public contribution to its agenda, gain legitimacy among the people, respond to imperatives of justice, and ensure greater knowledge of the constitution and prospects of its implementation.

Constitution-making or review is a marvellous opportunity to engage the people in discourses on constitutions, human rights, democracy, and social justice. The people can be quite focussed on the process, as much

publicity is given in the media to issues of reform. The process can be used to promote knowledge as well as the practice of democracy.

The process of drafting and adopting a constitution is the centrepiece of constitution-building. This is so, of course, because of the nature and orientation of the document that the process produces. The design of the process, that is the institutions for the making of decisions and the method of making decisions, has an impact on a number of factors such as what interests are articulated and what are excluded, how the views of participants are aggregated, and the match between the text of the constitution and social realities. However, the process is important in other respects as well, which have a bearing on how the constitution is actually rooted in the society.

Participation, an important human rights value, is now regarded as central to the constitution-making processes. The UN Human Rights Committee has emphasized that self-determination is a fundamental right on which depend other rights; its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights (in General Comment 12/1984). It is closely connected to constitutional and political processes which in practice allow the exercise of this right. In keeping with this approach, the Committee has linked self-determination to particularly two articles of the International Covenant on Civil and Political Rights, Articles 25—a general right—and 27—for the protection of minorities (see Box 2.1).

BOX NO. 2.1 ICCPR ARTICLES 25 AND 27

Article 25

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

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

Article 27

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 practise their own religion, or to use their own language.

The Human Rights Committee has explained that Article 25 lies at the core of democratic government based on the consent of the people and

in conformity with the principles of the Covenant.² The conduct of public affairs is a broad concept which relates to the exercise of state power, in particular the exercise of legislative, executive, and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at the international, national, regional, and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the constitution and other laws. Participation in public affairs includes lobbying, and for this and other reasons the freedom of expression and of the media must be secured. Equal access to public service must be ensured, if necessary through affirmative action.

The comment sets out at length the institutional and procedural aspects of free and fair elections. It sketches a broad framework, dependent on the exercise of many rights and freedoms, for the right to participate in public affairs. The committee has emphasized rights of full participation of all communities in the constitution-making process. The general comment said that citizens also participate directly in the conduct of public affairs when they choose or change their constitution. For example, in a complaint from an indigenous community in Canada (the Mi'kmaq) that they had been excluded in a series of constitutional conferences, the Human Rights Committee held that constitution-making is indeed the conduct of public affairs.³

It is now believed that participation is essential to the legitimacy of the constitution and the ability of the people to understand and mobilize its provisions. The process may promote a sense of common belonging and destiny critical for national unity. A well designed process can in itself be an education in and preparation for the deliberative and participatory politics that the constitution may call for. People have the opportunity, and the incentive, to lobby for their rights and other provisions which would promote their welfare. They can bring to the knowledge of constitution-makers the circumstances in which they live and hardships they suffer. Elites involved in constitution-making seldom realize the misery of the majority of their country people. By participation in the process, they can become aware of the contents of the constitution, the ways in which it protects their interests, and how they can use its provisions to safeguard their rights.

Although participation is undoubtedly important, there are problems with it which have not been properly explored—possible manipulation of the people by interest groups, ethnicization of opinion, spontaneity (failure in thinking of complex issues through, properly), populism,

diminishing the role of experts, misrepresentation by decision-makers of people's views, and making consensus-building harder. Importantly, there may be resistance from the establishment to the radical agenda that can often emerge from a genuinely participatory process (see Box 2.2). There is an idealist version of constitution-making, which places great importance on public participation (for reasons mentioned above). There is another strand of literature on constitution-making, within the tradition of writing on deliberative democracy, a process of thoughtful, constructive discourse on public affairs. Some writers on the latter would see a conflict between deliberative democracy and true popular participation.

Box No. 2.2 WHAT THE PEOPLE OF KENYA WANTED FROM A NEW CONSTITUTION⁴

- Give us the chance to live a decent life: with the fundamental needs of food, water, clothing, shelter, security, and basic education met by our own efforts and the assistance of government
- We want a fair system of access to land for the future and justice for the wrongs of the past
- Let us have more control over the decisions which affect our lives, bring government closer to us—and let us understand better the decisions we can't make ourselves but affect us deeply
- We don't want power concentrated in the hands of one person
- We want our MPs to work hard, respect us and our views—and the power to kick them out if they don't
- We want to be able to choose leaders who have the qualities of intelligence, integrity, and sensitivity which make them worthy of leading
- We want an end to corruption
- We want police who respect the citizens—and who can be respected by them
- We want women to have equal rights and gender equity
- We want children to have a future worth looking forward to—including orphans and street children
- We want respect and decent treatment for the disabled
- We want all communities to be respected and free to observe their cultures and beliefs
- We assert our rights to hold all sections of our government accountable—and we want honest and accessible institutions to ensure this accountability.

It is important to avoid idealizing participation. At the same time it is widely agreed that a good participatory process can promote important values of democracy and sustainability of the constitution. There are some good practices of participation that can be drawn upon. In designing

a participatory process (Box 2.3) there are many issues that must be confronted, including:

- Who has the major responsibility for consulting the people? How will this be done in a way that does not make the people's views the subject of political manipulation?
- How will the people be informed about why the process is being undertaken, and what the issues and options are?
- How will the views of the people be collected and analysed?
- When will the people be consulted?
- How can the people's views be really fed into the process—and not just collected as a sort of window-dressing exercise?

BOX NO. 2.3 A PARTICIPATORY PROCESS: KENYA

The process was laid down by an Act of Parliament prepared after round table discussions involving many parties and civil society. The law's dominant objective was a 'people driven' process', a phrase that inspired many, though prompting ridicule from a few. The Act said that the people must be given opportunities to 'actively, freely and meaningfully participate in generating and debating proposals to alter the constitution' [section 5(c)(i)] and the process was to ensure that the 'final outcome of the review process faithfully reflects the wishes of the people of Kenya' [section 5)(d)]. As far as possible, decisions were to be by consensus.

The process was started by the Constitution of Kenya Review Commission (CKRC), appointed by the president on the nomination of parliament. It provided civic education to the public on constitutional issues (carrying out this task itself and also with the help of civil society organizations already involved in this work). It established constitutional forums (of locally elected leaders) in each of the 210 electoral constituencies to promote discussions on reform and to facilitate consultations with the residents of the constituency. It also appointed a coordinator for, and set up a small library in, each of the 74 districts. The public conducted their own debates and many organizations (some with the assistance of the CKRC) held meetings to prepare their submissions to the CKRC. The CKRC succeeded in generating a nationwide debate on critical issues, and, for several months, constitutional issues dominated the media. The public response was overwhelming. At least one meeting, generally lasting two full days, was held in each constituency to receive views. Over 37,000 submissions were received, both from institutions, groups, and individuals, ranging from lengthy (and sometimes learned) presentations to a few sentences. All oral submissions were recorded, in writing and on audio and video tape. Interpreters, of spoken and sign language, were available and summaries of the views were sent back

(Contd)

Box 2.3 *contd*

to the locality to check for accuracy. The views were carefully reviewed and analysed, qualitatively and statistically.

The draft prepared by the CKRC on the basis of the submissions was submitted for public consultation and then to the National Constitutional Conference (NCC) which comprised all members of Parliament, three delegates elected from each district, forty-two representatives of political parties, and 125 representatives of religious, women's and youth groups, the disabled, trade unions, and NGOs, 629 people in all. It was the most representative body ever assembled in Kenya. Its function was to debate, if necessary, to amend, and adopt the draft constitution presented by the CKRC. Finally, there was the National Assembly (NA) which was to enact changes to the constitution by formal amendments. The NA was to be assisted in the discharge of its functions in relation to the review by a Parliamentary Select Committee on the Constitution. The NCC was to adopt the provisions of the draft constitution by the votes of two-thirds of all its members, failing consensus. If on any point such a vote was not forthcoming, the provision in question had to be referred to the people in a referendum, and the results of the referendum were to be incorporated in the draft adopted by the NCC, before sending it to the NA. The NA could either approve or reject the draft, but could not modify it.

The 2004 draft still has a considerable hold over the popular imagination, arguably partly because of the strongly participatory process by which it was prepared.

3. A CONSTITUTION TO WHICH THE PEOPLE CAN RELATE

A constitution is a technical, legal document but it depends as much for its success on the people as on the lawyers, the courts, and the institutions of government. To be a success in this sense, a law is not necessarily drafted in a way that is accessible to the people—one that they will understand and respond to. A constitution, more than most other laws, can reach out and engage the people. Perhaps, the constitution is the law that ordinary people are most aware of. While they may be conscious of laws about marriage and crimes, they will rarely think of such laws as being for them, rather than things to be avoided.

If people think of the constitution as being for the people, it is perhaps more likely to receive the support of the people and to be looked at by them as a tool for justice and a shield against injustice. The assertion that something is unconstitutional can be powerful, even in countries that do not have written constitutions.

A consciousness of the constitution, and what it may mean for the people, is likely to be enhanced by how it is used, by how it came into being,

and by the language in which it is written. How it is used is something that can only develop over time. A new constitution has no track record. How it comes into being is likely to depend on the circumstances that led to its being drafted, and the process by which it was prepared.

Here, we are concerned with how it is written. There may be some provisions which are really designed as the outreach provisions—to appeal to the heart as much as to the mind and the legal technician. Even the hard technical law of the constitution can be written in a way that is not as impenetrable as laws usually are, though, often unnecessarily so.

The outreach provisions are the poetry of the constitution. We may find this in the Preamble. In some countries most laws do not have preambles, but most constitutions do. A preamble, the introduction to the constitution, is not something to be interpreted, unpacked, and dissected like the other provisions. It sets a scene, it may explain the need for the constitution and its objectives. It may be used by courts to help understand the constitution, in a general way, but its main purpose is to engage the commitment of the people. For this reason, it may invoke past memories and struggles or glories. It may reflect a commitment to a belief in a deity, even in a country that is largely secular in its public life. It may be drafted in a style that is quite remote from the rest of the document, or any other legal document. The drafter of two constitutions for the first nations of Canada listened to the way the people talked about their

BOX NO. 2.4 FROM THE CONSTITUTION OF THE NISGA'A PEOPLE OF NORTHERN CANADA

Preamble....

We are Nisga'a, we declare to all the world—

We are a unique aboriginal nation of Canada, proud of our history, and assured in our future.

We claim and take our rightful place as equal participants in Canadian society.

Our destiny is living peacefully together with the other nations in Canada.

We commit ourselves to the values of our Ayuuk [traditional laws and practices] which have always sustained us and by which we govern ourselves, and we each acknowledge our accountability to those values, and to the Nisga'a Nation.

Rights

9. The principle of rights in the Nisga'a Nation

The rights set out in this chapter are an expression of the fundamental values of the Nisga'a Nation, which cherishes the unique spirit, respects the dignity, and supports the independence of each individual living together in a community of shared resources and responsibilities.

histories and their hopes, and drafted preambles that are unlike any other legal document (see Box 2.4).⁵ They are written for their peoples—not for lawyers or foreigners, and do not shy away from using words that have profound meaning for those peoples, though they may be mysterious for others. The Preamble of the much older constitution of Papua New Guinea, 1975, also came from the heart of the people (see Box 2.5). It was written by a then young PNG lawyer (Bernard Narakobi, later Attorney-General and Minister of Justice).

BOX NO. 2.5 PREAMBLE TO CONSTITUTION OF PAPUA NEW GUINEA

WE, THE PEOPLE OF PAPUA NEW GUINEA—

united in one nation

pay homage to the memory of our ancestors—the source of our strength and origin of our combined heritage

acknowledge the worthy customs and traditional wisdoms of our people—which have come down to us from generation to generation

pledge ourselves to guard and pass on to those who come after us our noble traditions and the Christian principles that are ours now.

By authority of our inherent right as ancient, free and independent peoples

WE, THE PEOPLE, do now establish this sovereign nation and declare ourselves, under the guiding hand of God, to be the Independent State of Papua New Guinea.

AND WE ASSERT, by virtue of that authority

that all power belongs to the people—acting through their duly elected representatives

that respect for the dignity of the individual and community interdependence are basic principles of our society

that we guard with our lives our national identity, integrity, and self-respect

that we reject violence and seek consensus as a means of solving our common problems

that our national wealth, won by honest, hard work be equitably shared by all.

In fact, for a document like a constitution other drafting innovations may help the people to understand the purposes of the document. We find that in the Nisga'a constitution there are provisions that set out the general principles of the community as they are relevant to the constitution. This is something that appears also, though in a less pronounced form, in the constitution of South Africa. An effort was made to do something similar in the draft constitution adopted by the

National Constitutional Conference in Kenya in 2004. The Papua New Guinea constitution was drafted in a way that went beyond the traditions of lawyers' drafting. It has been described as a manual for government. It essentially explains how the government works, especially valuable for a country that had very little experience of modern government when it became independent.

A deliberate decision was made by the constitution making bodies that the final constitution of South Africa should be drafted using plain language. That language is also gender neutral, it never speaks of he or she; every time there is mention of the possibility of a person holding an office or performing a role under the constitution, it is made clear that this may be done by a woman or a man. As far as possible, unnecessary words are avoided and obscurities removed. The result is not poetry, but clarity.

The National Assembly must elect a woman or a man from among its members to be the President.

Constitution of South Africa

4. EFFECTIVE CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS

4.1 DRAFTING THE BILL OF RIGHTS

No constitution can be adopted today which does not have a Bill of Rights. However, there are many issues in the drafting of the Bill which often do not receive adequate attention. Some kinds of rights may be excluded for ideological reasons. This section highlights critical decisions that need to be made in the drafting of the Bill of Rights, indicating options that are likely to extend the scope of rights and to make them effective in practice. Where special considerations apply to socio-economic rights, these are highlighted.

4.1.1 What Legal Effect Should Rights Have

Rights can be recognized in the constitution in at least four ways, although not mutually exclusive.

Preamble

Most preambles now refer in some form to human rights: either to recognize past violations of rights or to emphasize the commitment of the state to protect rights. The Indian preamble proclaims that the state has been constituted

...to secure to all its citizens:

JUSTICE, social, economic, and political;

LIBERTY of thought, expression, belief, faith, and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual.⁶

There is here no mention of rights, though they must underlie Justice, Liberty, and Equality. Other constitutions may be more explicit on rights, like South Africa: 'Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.' The Constitution of Eritrea has a paragraph that links rights and development in a way that is in tune with the theme of this book:

Convinced that the recognition, protection and securing of the rights and freedoms of citizens, human dignity, equality will guarantee a balanced development; lay down the groundwork for satisfying the material and spiritual needs of citizens; usher in a democratic order that is responsive to the needs and interests of citizens, guarantees their participation and brings about economic development, social progress and harmony...

In most legal systems, the provisions of the preamble are not directly binding, although they may be referred to for help in interpreting the constitution.

4.1.2 Fundamental Principles and Objectives of the State:

National Values and Goals

The Declaration of Fundamental Principles has been a feature of constitutions in the civil law tradition, but is now becoming common practice in other countries. Portugal's constitution (1974) defines Portugal as 'based upon the dignity of the human person and the will of the people and is committed to building a free and just society united in its common purposes.' Its values are stated as democracy 'that is based upon the rule of law, the sovereignty of the people, the pluralism of democratic expression and democratic political organisations.' Some constitutions have more development-oriented principles and goals. A striking example is Papua New Guinea (a constitution adopted in 1975) which calls, among other things for:

...improvement in the level of nutrition and the standard of public health to enable our people to attain self fulfilment and wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations.

Such statements of goals and principles help establish a national identity and a vision of the country, as a general guide to legislation and policies by the state and society. Nevertheless, they are not directly binding and it is unlikely that a policy which runs counter to them could be decided unlawful by a court.

4.1.3 Directive Principles of State Policy

In some constitutions (for example, Ireland, India, Namibia, Uganda, Ghana, Nigeria, Bangladesh, and Papua New Guinea), certain rights, mostly socio-economic rights, are given a lower status than other rights. They are drafted in the form of 'Directive Principles of State Policy' or Directive Principles of Social Policy, as they are known in the Irish Constitution (1937), which pioneered this concept. India is best known for its Directive Principles and the examples are drawn from its constitution. They include, at a high level of generality:

the promotion of the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all institutions of the national life and more specifically:

- minimization of inequalities in income
- that the citizens, men and women equally, have the right to an adequate means of livelihood
- equal pay for both men and women
- that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood and youth are protected against exploitation and against moral and material abandonment', and
- effective provisions for securing the right to work, to education, and to public assistance in case of unemployment, old age, sickness, and disablement and in other cases of undeserved want.

The Indian constitution says that directive principles are not enforceable by any court (often described as being non-justiciable) but they are nevertheless fundamental in the governance of the country, and the state is under a duty to apply these principles in making laws. The Ghanaian constitution goes further when it says that directive principles shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties, and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and

implementing any policy decisions, for the establishment of a just and free society.

There are a number of reasons why countries make this choice. Sometimes the decision to cast these rights in the form of Directive Principles is based on the consideration that the resources to implement them may be limited and that their allocation is best left to the political process, reflected in the decisions of the legislature. This reason may have nothing to do with the ability or the legitimacy of the courts to decide these issues. Equally, the tasks in the interpretation or implementation of socio-economic rights may be considered beyond the skills and competence of the judiciary. Or, there may be no confidence in the class or ideological impartiality of the judiciary. Or, this status may be a compromise between those who want a strong, and others, who want a weak, protection of socio-economic rights.⁷

The intention to keep the courts out has not always been successful. The Irish courts found a way to take account of Directive Principles by adopting the position that the constitution had not intended to provide an exhaustive list of enforceable rights and using the Directive Principles as the basis for new rights. In other countries, Directive Principles have been used in interpreting the constitution (as expressly authorized in Ghana). Increasingly, courts are giving effect to them in different ways, as justifying qualifications on rights, such as the right to equality, which has been read to justify affirmative action when a directive principle requires the state to redress the historic or contemporary injustices inflicted on a section of the community. In another instance, the courts used the directive principle on living wages and decent conditions of work to uphold the reasonableness of minimum legislation. The right to life has been interpreted with the help of directive principles to include the right to basic needs and a clean environment.⁸ Courts have used the directive principles as the basis for giving directions to governments, legislatures, and administrators to promote social justice.

Somewhere between the directive principles and national policies is an example from Canada's Charter of Rights and Freedoms, relating to the federal structure and relations between the national and provincial governments, by using the language 'being committed to' certain values.

Article 36

- (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their

- legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
- (a) promoting equal opportunities for the well-being of Canadians;
 - (b) furthering economic development to reduce disparity in opportunities; and
 - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

For those who wish to see the strongest possible protection of human rights in a national constitution, we would advise against an optimistic assumption that a broad portmanteau right, like the right to life, or preambles, or directive principles will actually protect socio-economic rights, at least in any predictable and comprehensive manner. These expansions of other rights do not comprehensively cover the socio-economic rights. Moreover, there is no guarantee at all that a court will take such a creative approach. In many countries the right to life is used to refer only to issues like the death penalty and abortion, and the clause that says Directive Principles cannot be used as the basis of a claim in court, is taken very literally.

4.2 GETTING SOCIO-ECONOMIC RIGHTS INTO CONSTITUTIONS

Even some people who are sympathetic to socio-economic rights find it hard to see how these rights can be drafted so as to have legal effect. For some countries the solution, as they see it, has been to include socio-economic rights as directive principles. However, this distinction between rights and directive principles is not really as clear as one might think and the distinction, as we are using it here, only emerged with the Irish Constitution of 1937. Subsequently, the range of socio-economic rights recognized has expanded.

The Mexican Constitution of 1917 recognized some rights to education and some in connection with work. Primary education was to be compulsory and state education to be free, and there was a vision for the purposes of education. Though every person 'shall enjoy the guarantees' it is not clear that a person could rely on provisions as the basis of a legal claim. Most of the very detailed provisions about work were in the form of guidelines for legislation and there is a commitment to land reform. The attitude towards socio-economic rights, generally in Mexico, is said to be that they are not formally binding, but are more in the nature of political goals. In other words more like directive principles.

The constitution of the Weimar Republic of Germany of 1919 was a remarkably wide-ranging document. Prepared in the context of the German defeat in the World War I, the Russian revolution of 1917, and the existence of far right parties foreshadowing the country's future under Hitler, the constitution includes not only civil rights but also social rights. One strand of the intense political and philosophical debate about the constitution wanted it to reflect the entire German worldview, especially distinctive from either Bolshevism (in the East) or capitalism (in the West). The National Assembly committee that drafted the social rights was headed by a Roman Catholic. A close reading of the Constitution shows that many of these rights are framed in terms of state responsibility rather than of citizens' rights (The education of the youth has to be provided by public institutions) or even citizens' duties (Schooling is obligatory). Some are essentially directive principles (The interests of the self-employed in agriculture, industry, and trade are to be promoted in legislation and administration). At least, some commentators on the constitution took the view that only more traditional rights were binding on the state at the instance of the citizen.

The Spanish Constitution of 1931 was another constitution sometimes described as including socio-economic rights. Nevertheless, again it tends to lack a real rights-quality. For example, under Work: 'The Republic will legislate in the direction of providing to all economically needy Spaniards access to all levels of education so that they do not find themselves restricted other than by aptitude or calling.'

Socialist constitutions, including that of the USSR in 1936, also tended to be aspirational rather than rights-providing. So, for example, a statement that 'Citizens of the USSR have the right to education' is immediately expanded by a list of the ways in which the right is ensured, which is essentially a manifesto for educational development.

The drafters of the Irish Constitution of 1937 were apparently inspired by the Spanish Constitution of 1931, marrying Roman Catholic concerns for social justice with some legal conservatism. It was the first to specify clearly the implications of directive principles and, indeed, the first to identify a class of provisions clearly distinct from rights. Ireland defined the status of Social Principles in the following way:

The principles of social policy set forth in this Article are intended for the general guidance of the *Oireachtas* [the legislature]. The application of those principles in the making of laws shall be the care of the *Oireachtas* exclusively, and shall not be cognisable by any Court under any provisions of this Constitution.

Ireland was followed by India in 1950. In the Indian Constituent Assembly, some thought that only rights that the courts could enforce should be in the constitution, and even that non-justiciable rights would create an unwarranted impression of progress and freedom. Other views were either that such rights, if included, should be enforceable, while others thought they should be excluded from the constitution or included as Directive Principles only, the position finally adopted. However, because of concerns that these principles would not be taken seriously, it was decided to include a strong statement about the duty of the State to observe them (Article 37). Many other constitutions have adopted the Directive Principles approach especially for socio-economic policies.

The adoption of the ICESCR and the passing of the South African constitution have changed the debate somewhat. In fact, even in South Africa it was not clear that socio-economic rights would be included. The ANC Freedom Charter, 1955, emphasized civil and political rights, but its later draft Bill of Rights did include socio-economic rights. However, some commentators, even ANC sympathisers, felt that constitutionalizing socio-economic rights would raise false hopes. It would give the judges a role in deciding public expenditure that they felt was inappropriate, would involve them in policy decisions, and in prescribing courses of action. But others were convinced that these rights were essential to deal with the economic and social impacts of the apartheid regime as well as the political ones.⁹ The Constitutional Assembly in which the ANC had a large majority, decided to adopt a series of rights closely modelled on the ICESCR. The process for adopting the 1996 constitution required that the Constitutional Court endorse it as complying with thirty-four principles in the interim constitution. The court did endorse the inclusion of these rights, rejecting any rigid distinction between them and civil and political rights. The inclusion of socio-economic rights had been challenged on the ground that they violated the separation of powers, since they would effectively involve judges in law making and allocation of resources.¹⁰

BOX NO. 2.6 THE SOUTH AFRICAN CONSTITUTIONAL COURT IN THE
CERTIFICATION JUDGMENT

...many of the civil and political rights entrenched in the [Bill of Rights] will give rise to similar budgetary implications without compromising their justifiability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justifiability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

The Northern Ireland Human Rights Commission, in a society with a history of deep divisions and reliance on identity politics as well as of discrimination against one section of the community on religious grounds, referred to the relevant peace agreement which mentions rights 'to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem.' It proposed an obligation, not just a permission, to take 'affirmative action measures to improve the lives of discriminated against groups.' Of particular interest are proposed rights such as education, language rights in education, a right to access services essential to health, life, or security, as well as the right to the highest attainable standard of physical and mental health. There would be a provision that 'No-one shall be allowed to fall into destitution.' and to 'adequate accommodation appropriate to their needs.' Not only persons actually affected would be able to go to court, but anyone with sufficient interest, to be defined as having regard to the need to ensure access to justice.¹¹

A UK parliamentary committee, considering a Bill of Rights, commented that opinion on including economic and social rights is currently polarized, and that the division of opinion often follows party political lines. It proposed an approach for the UK based on the South African progressive realization approach, but without any right of individuals to go to court to enforce their own rights. This is mainly because of the reluctance to give the courts any role in deciding government expenditure. They proposed that initially the rights mentioned should be restricted to health, education, housing, and an adequate standard of living, and to a healthy and sustainable environment.¹²

The tradition of including socio-economic rights in the constitutions of various Latin American countries goes back to early in the twentieth century. In some recent constituent assemblies, such as Ecuador and Bolivia, these have been pushed successfully, especially by the indigenous groups, sometimes assisted by foreign NGOs. In Ecuador, in 1997–8 the indigenous people's movement was successful in getting socio-economic rights into the constitution as well as various collective rights by strategies that involved both participation in the official Constituent Assembly and various other methods of campaigning, and putting pressure on the assembly and government.¹³ However, the Directive Principles have not been entirely superseded by justiciable rights. The various recent Latin American constitutions such as Ecuador 1998 and 2009, and Bolivia 2009 have provisions that it seems could only operate in this way. Similarly, the Constituent Assembly of Nepal

(elected in 2008) has established various committees including one on Fundamental Rights and Directive Principles.

With these preliminaries, we turn to the discussion of how to incorporate the MDGs, especially through socio-economic rights, in the constitution.

4.2.1 Enforceable Human Rights and Fundamental Freedoms

Not every commitment to rights found in a constitution's Bill of Rights is fully enforceable, either because of some vagueness of language or because of provisions that make enforceability depend on new laws. However, a deliberate decision to put a provision into the Bill of Rights usually indicates, at least in modern constitutions, a notion of some sort of legal force. So there is a special quality to rights in a Bill of Rights. We have already explained what it means to have a right. In a state, the scope of rights is as defined in the constitution or another law. Human rights are binding on the state and sometimes also the private sector (see below) and enforceable in the courts.

Ideally, rights should be binding and enforceable without need for further legislation. Nonetheless, many times rights are formulated 'as provided for in law', which transfers the authority to the state which can make the rights more or less binding depending on the laws it passes, or even negate them altogether by passing no legislation, and deprives them of the character of rights inherent in the human being. There is a particular tendency to use such phrases in the case of socio-economic rights, partly because of the tendency to assume that such rights necessarily involve positive action and expenditure of money (but see pp. 46–7). There is a great deal of this in the Nepal Interim Constitution, which says: 'Every citizen shall have the right to basic health services free of cost from the State as provided for in the law' (Article 16). There is a similar provision in the Charter of Human Rights and Freedoms in Quebec in Canada: 'Every person has a right, to the extent and according to the standards provided for by law, to free public education.' This will probably have the effect that if there is no law there is no right. In most countries the courts will not order the passing of a law. There is a dilemma. How can the court order Parliament to pass a law? What happens if they do not do it?

There may be a genuine need for new laws and standards before a right can be effective. Is there any way to deal with these provisions in the constitution in a way that ensures that even if this is so, it is not used as an excuse for total inaction, deliberately or by oversight? We discuss this in section 4.2.7 (at p. 131).

Some constitutions have other provisions that undermine rights. For example, they may say that existing laws are not affected by rights, or that parliament can freely make a law to undermine the rights. We consider the latter a little later.

Philip Alston, former chair of the UN Committee on ESCR, has described a Bill of Rights as 'a combination of law, symbolism and aspiration.'¹⁴ Not every right need be expressed in the same terms. Just as some element may be immediate (such as free primary education) and others need progressive realization, so it might be unrealistic and unworkable to include every element as giving rise to an enforceable right. That is a matter for individual countries, taking into account of styles of drafting.

Of these different ways of recognizing rights, the most legally effective is as human rights. With the agenda of MDGs in mind, socio-economic rights should, as far as possible, be expressed in the form of justiciable rights, as has been done in South Africa. In this way, they will not be seen as inferior to civil and political rights and state agencies, including courts, will have to harmonize all kinds of rights in an integrated scheme of entitlements. A basic commitment to a regime of rights through the preamble or statements of national values and principles is a useful supplement, by highlighting the importance of human rights and enabling interpretations of other legal concepts and provisions in the context of human rights. These preamble statements or state principles are also a good place to indicate the objectives of human rights, such as human dignity and democracy. However, some desirable objectives may be hard to turn into rights and so the directive principles or values would be the best place for them. Something like elimination of poverty or conservation of resources is not something that can be made a right of any person or even a group.

4.2.2 Identifying the Types of Rights to Include in the Constitution

In Part I, we have indicated the different types of rights. Traditionally, most rights have been rights of individuals, on the basis of equality and non-discrimination. This is the approach of the UDHR. The restriction of rights to individuals is based on liberalism where the freedom of the individual (as a citizen) is paramount. Liberalism itself perhaps assumes that the citizens of a state belong to the same nation, that is, they speak the same language and profess the same religion, and are, thus, strongly bonded. Today, due to conflicts and other reasons, we have become aware of social, ethnic, and cultural diversities across, as well as within

states, and the need to accommodate them (a point which is stressed in the Millennium Declaration). In addition, the power of corporations over the lives and destinies of the people has increased enormously, ever since 1948, and the imposition of human rights obligations on them is a means to accountability in the exercise of this power. There is increasing awareness of gender discrimination and the vulnerabilities of different groups—children, indigenous peoples, elderly, disabled, migrants, and ethnic minorities.

Since the UDHR, efforts have been made to redress discrimination against and the vulnerabilities of these groups by conferring on them special rights through several international conventions and declarations, especially in recent years. There is still a strong bias in favour of individual rights in national constitutions. However, there is the beginning of inclusion of special rights, particularly based on international instruments.

A good starting point for identification of rights is the obligations accepted by the country when becoming a party to human rights treaties. Some countries have chosen to give special status to only a few rights. For example, Nepal, in its Interim Constitution, gives more protection to the right to education than to most other rights which still appear in the directive principles. However, if a country is bound in international law to observe a full range of rights and the issues that they reflect are important, is there any reason for being selective in this way? It may be that a particular country has endorsed certain rights only with reservations (see pp. 15–16).

Existing obligations can be a starting point, but should not be the ending point. After the constitution is drafted, the country may enter into new human rights treaties; the right to environment is a relatively new right, for example. International thinking may expand existing rights; the ICESCR mentions food, but that is now widely accepted to include a right to water, on which the Committee on ESC Rights has produced a General Comment.

There are various ways in which a constitution can deal with the emerging rights issue. In some countries, in theory, any treaty that is adopted becomes part of national law. In other countries that does not happen until a national law is passed to implement them. This is a matter of national legal tradition, but it would be possible for the constitution in any country to say explicitly that new rights accepted by the state would automatically become a binding part of national law. There are some problems about this idea: the language of a treaty may not necessarily be

the most suitable for a national constitution or law. There is also a risk that this will not be understood when human rights treaties are made, especially as in many countries parliament understands little about new human rights treaties and there may be little public debate. So, there is no real understanding of the implications of becoming a party to treaties. The problem to some extent could be taken care of in the part of the constitution dealing with adoption of treaties, for example, by a provision requiring ratification (final adoption) of treaties to be made by the legislature after a debate. At least there could be a constitutional requirement, once a treaty has been ratified, of a parliamentary debate on what will be required to implement it.

International law is not the only source of rights, and the needs of the particular country may necessitate recognition of rights that are not significant in other countries. The South African Constitution says that the Bill of Rights does not deny the existence of any other rights, whether from law or custom, provided they do not conflict with the constitution.

4.2.3 Defining the Scope of Rights

Although certain rights are usually drafted in similar language, often using the words of the UDHR or other international treaties, there is no fixed and required way to formulate any rights. Comparison between different national constitutions would reveal widely differing wording for some rights. This is particularly so in the case of socio-economic rights, and also in the rights of certain, especially vulnerable, groups. Nevertheless, different words can have significantly different implications. Drafters and civil society groups, who hope to see their particular concerns incorporated in a constitution, should pay careful attention to the words used. In the following paragraphs we consider the components of a right. Among the issues that must be looked at are whether a right is actually created for the public, generally, or the group, particularly, in need, rather than an aspiration or a duty on someone else and if so, what is the extent of the right. Simply because something appears in a chapter of a constitution called Bill of Rights, it is not conclusive.

What is it that people have a right to? Many rights are traditionally framed in terms only of results. People have a right to life, a right to equality, a right to freedom of speech. There has been an assumption that all this is required to achieve the right is for the State not to interfere. Some long recognized rights are sometimes spelled out in detail and sometimes expressed in broad terms. For example, a right to a fair trial might be simply expressed in those words. Sometimes it might be spelled out in

detail: including rights to a lawyer, to an interpreter, to notice of charges, even a right to a transcript of the trial. Even if this approach is adopted, it is wise to include the phrase 'fair trial' to ensure that other possible unfairness is covered. It also invites reference to international standards, whereas a technique of listing details of the obligations may suggest that the constitution is a complete programme for implementation.¹⁵ Such an impression could be avoided by making it clear that the detailed obligations are only examples, and the duties *include* those that are specified.

Modern understanding of rights, even of some of the longer recognized ones, like right to life, now emphasizes not just the negative obligations of the state, its duty of restraint, but also its more positive duties. The UN's elaboration of the duty to protect implies that states must take positive measures. The constitution of South Africa reflects this when it says, 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights,' using language developed in connection with economic, social, and cultural rights. It is not necessarily appropriate to spell out in detail what those positive obligations are. The same cautions apply as in the previous paragraph.

4.2.4 Specifying What Constitutes Violations of Rights

It might seem easy to recognize violation of rights, but this is not always so. Particularly important is the question of indirect discrimination: whether a law or a practice that on the face of it is not discriminatory, but is discriminatory in effect, is a violation. A commonly cited example is a height requirement, perhaps for employment. It may be set at a level that excludes far more women than men. It does not *say* women are not to be recruited, but that is the result. If there is a real need for tall people this may not be unfair, but otherwise such discrimination should not be allowed. Similarly, educational qualifications for particular positions may have been crafted with certain sorts of applicants in mind. They may exclude non-traditional applicants and, thus, prevent them from gaining employment. The requirements are discriminatory; if the qualifications are really necessary for the work, then that is not unfair. However, very often no thought goes into whether qualifications should be revised to bring in new types of applicants and do away with discrimination. Rights are usually rights to results: people should not be unfairly excluded or discriminated against at all; there is no need to inquire whether there was an intention to discriminate. A well drafted Bill of Rights will make this clear. The South African Constitution uses the words 'directly or indirectly'.

The situation is often different for socio-economic rights, where the obligation of the state is often to achieve a right progressively. The obligation is not necessarily to produce certain results, though it is to work towards those results (sometimes described as an obligation of conduct). Nonetheless, in an individual case a person may be able to show that though there were efforts, they were not enough (see section on specific rights, especially the *Grootboom* case on the right to housing¹⁶). If individuals or groups are able to bring legal actions for violations of these rights, they must show not only inadequate efforts but also that they themselves have not achieved or been granted something to which they were entitled (in other words an absence of result). A constitution will not spell out these things in detail, but a court wrestling with whether there is a violation of a socio-economic right may find guidance in the decisions of foreign courts and international bodies.

The Importance of Equality

A good deal can often be achieved in terms of socio-economic rights by using more established constitutional provisions. Many of the grievances in society stem from resentment at unequal treatment. Equality is a key feature of virtually any modern Bill of Rights, whether or not it mentions rights to education, housing, and the like. In Belarus, the constitution guarantees a right to housing. However, when a complaint was made to the Constitutional Court about the law on the privatization of housing, the response of the court was not to attack the law on the basis of the right to housing (indeed, it seemed to accept the claim that the law was a way of fulfilling the right to housing in the constitution). It also said that the law violated the equality clause of the constitution because it made unjustified distinctions between the rights it gave in certain different housing situations.¹⁷ A consequence of declaring this clause unconstitutional was hopefully to enhance the housing rights of the groups previously discriminated against; but the particular decision did not depend on the constitutional right to housing. Staying in the area of housing, the UN Committee on Racial Discrimination (the treaty monitoring body for the Convention on the Elimination of Racial Discrimination) said that the cancellation of a programme for housing for members of the Roma community in a town in Slovakia should be reversed because it was racially discriminatory, and responded to racist complaints from minorities in the town.¹⁸

4.2.5 Specifying Who Should be the Beneficiaries of Human Rights

Some constitutions make a distinction between the rights of citizens and non-citizens. Such a distinction is unfortunate, for all persons have human rights—regardless of whether they are citizens or not—which the law must recognize. No distinction is made in international human rights treaties between citizens and others resident in a country—except for political rights. Article 25 of the ICCPR restricts political rights of citizens, that is, the right to vote and stand for elections, access to the public service, and to take part in the conduct of public affairs. This, of course, does not prevent a state from giving political rights to non-citizens; in Britain, traditionally, citizens of other Commonwealth countries have the right to vote as well as to stand for elections and several countries in Europe have given full franchise to non-citizens in local elections. In 1985, the UN General Assembly adopted a Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, which seeks to give them most of the civil rights, including rights of workers—though, not political rights as defined in Article 25 of the ICCPR, or socio-economic rights.

A particularly difficult situation is faced by those persons who do not have any citizenship—numerous communities in the world fall in this category. Not only can they not exercise political rights anywhere, but even other rights may be denied to them. Stateless communities are usually also marginalized communities because of the discrimination against them. Normally, a state would intervene on behalf of its citizen whose rights have been violated—a stateless person cannot count on this type of assistance. This is why Article 7 of the CRC gives every child the right to a nationality and the Convention on the Reduction of Statelessness was passed in 1961, requiring states in certain circumstances, like the birth of a child in their country who would otherwise be stateless, to confer nationality on the child.

Possibly, this principle that rights are for all might be modified to some extent for socio-economic rights. Casual visitors would not be entitled to housing. However, they ought perhaps not to be denied emergency healthcare, as the result might be death. Refugees would have more entitlements than holiday makers as would long-term residents, regardless of whether they are citizens. In South Africa, citizens have the right to choose their work freely, but most of the other rights apply to everyone.

We have already noted in Part I that a number of treaties confer rights on particular communities which are distinct from and additional to those given to all persons. Of particular significance are rights of minorities and

indigenous peoples,¹⁹ to aspects of their culture, like personal laws or land rights. Some constitutions do recognize special rights. Sometimes, these are to recognize cultural differences, differences which are of particular significance to the community in question. In principle, there is no objection to this, so long as the differences do not operate to disadvantage others (except in cases of affirmative action, referred to above) and there is valid justification for them, as often there is. There is sometimes a problem of defining the community and membership in it, if a person has only one parent belonging to the community, or if the community insists on self-identification. This problem is seldom dealt with in the constitution and it is left to administrators or judges to decide on difficult problems of membership.

Other special rights could best be described as targeted rights, which essentially guarantee and underline, for specific groups with particular difficulties, the rights generally recognized as those of members of society. The Kenyan 2004 draft had provisions about persons with disability and the elderly. For example, on persons with disability, it said there was a right to access to education, to institutions, and facilities for persons with disabilities that are as integrated into society as a whole as is compatible with the interests of those persons. The constitution of Portugal also has an article on the rights of persons with disability. Women and children are groups for whom rights are now often specified; the South African constitution has an article devoted to the rights of children, for example.

Such rights are usually modelled on human rights treaties. Other sections of society have a claim to be thought of as having special needs. These include the elderly, though there is not yet a global treaty devoted to their rights; however, they are mentioned in a Protocol to the American Convention on Human Rights, in the European Social Charter, and the African Charter on Human and People's Rights. Another group is prisoners. Again there is no treaty on the rights of prisoners. However, there are international standards on the treatment of prisoners and in many countries there have been court cases about the rights of prisoners to adequate food and to decent conditions and the right to vote. The fact that there is no international treaty (though there may soon be one on the elderly) or that the group cannot be described as a community, should not preclude special mention if this would be helpful.

Resistance to such inclusion may be based on a conviction that the protection of individual rights is sufficient for all groups. Or, there may be the fear that having special rights for different groups may undermine the notion of universal human rights. There may be fear that this form

of recognition, especially of ethnic minorities, may threaten national unity. Others may complain that the recognition of these separate rights increases the length of the constitution and makes it confusing for the ordinary citizen.

We consider that there is considerable merit in including special provisions for the above mentioned groups which aim at overcoming past injustices or present disadvantages, or recognizing their particular identity and, thus, dignity. Attempts to impose uniformity on diverse communities pose a greater threat to national unity than recognizing the special circumstances of groups. Inclusion and social justice are better achieved by such recognition than by assuming a homogeneity that in practice discriminates against minorities. In multi-ethnic states, there are many competing interests (economic, political, or cultural), which must be reconciled—the framework of human rights must be and can be used to balance them.

The inclusion of such special rights in a constitution would encourage the members of the community in question to insist on their rights and also help them feel accepted in society. The rights would also guide unimaginative or inexperienced lawyers, and courts, especially those unaccustomed to applying international norms.

There is one possible risk about greater detail and special rights, that some provision will reflect a particular philosophy at a particular time. If constitutions had had provisions on indigenous peoples when the ILO Convention of 1957 was the leading instrument, they might have emphasized integration into society. Now the philosophy of international instruments reflects choice and the preservation of culture—if that is what the people concerned wish. A provision on choice of language in education might be at odds with research that shows that children learn best in the early stages in their mother tongue, perhaps a right to education in one's mother tongue might be appropriate. Constitution makers need to consider the appropriate balance between a right to choose the language of instruction, a choice that would be exercised by parents or guardians, and educational effectiveness, which will affect the child.

So far, we have discussed human beings as beneficiaries of human rights. Many rights can, of course, be exercised only by individuals, such as rights about the family, and most socio-economic rights. Today, a great many economic and social activities are carried out by corporations or associations, and they could perhaps benefit from rights like the freedom of expression, and the right to property, or rights of association, or rights to engage in economic activity. Should they be allowed to do so? Sometimes

this seems justified. In the case of a newspaper/media company, if it could not rely on freedom of expression, it would be at the mercy of the government, and easily closed down, or strangled by unreasonable conditions being placed on its operation.

With the rapid growth of globalization in recent decades, corporations are wielding increasing power and to give them the benefit of all human rights may make it more difficult to hold them accountable or to control their activities (as when companies have demanded the benefit of the right against self-incrimination).²⁰ A question here is to what extent should the freedom of expression exist: should it apply to what is called commercial speech (including advertising)? It is not surprising that different countries have taken different positions on this issue. If the Bill of Rights is silent on the question (as most are) then it would be for judges to decide—and judges can differ on the answer, not only as between countries but also within the same country.²¹

It is, therefore, advisable for the constitution to address this point. The answer to whether non-human bodies have rights need not be ‘yes’ or ‘no’, but qualified. The type of speech or other protected right may be, as in the European Convention system, relevant to deciding whether laws limiting it are justified. There laws restricting commercial speech are more readily accepted as valid, for example, than political speech.

Here, again, the South African solution is instructive. Referring to corporations and other associations recognized under the law as juristic persons, ‘thus: the constitution says that “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person [Article 8(4)]”’. This essentially leaves it ultimately to the judiciary to strike the right balance between the legitimate interests of juristic persons and protection of rights of others.

4.2.6 Identifying the Duty Holders

The most obvious duty bearers are the state and its institutions. Human rights developed to define the relationship between the state and citizens, and to restrict the powers of the state in relation to citizens. The state as the primary duty holder is expressed in several constitutions. The Indian Constitution says, ‘The State shall not make any law which takes away or abridges the rights conferred by this Part [Fundamental Rights] and any law made in contravention of this clause shall, to the extent of contravention, be void’—Article 13 (2). Elsewhere in that constitution, it is clear that the State may not discriminate in the application of law, so executive action or policies are also subject to obligations that flow from human rights. ‘State’

is broadly defined to include the executive and legislative authorities of the Union and States, especially as defined by the Supreme Court, and includes state corporations and statutory authorities, or even bodies receiving state support. The test is whether the body is an instrumentality or agency of government. However, this concept has not been without controversy or difficulty for the courts.²² In Hong Kong, the courts held that a public university was not a public authority and, therefore, was not subject to human rights obligations—a very questionable decision. Nonetheless, drafters of a constitution might feel that the courts are the best bodies to decide how far the obligations to respect human rights extend. In other words, they would be prepared to leave some vagueness. Nevertheless, such an approach also creates problems for bodies like human rights commissions, when interpreting a mandate to investigate violations of human rights.

The South African constitution is more comprehensive: ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state’—section 8(1). One effect of this is that rights apply in relation not only to state enacted law but also common law. Constitutions with similar provisions include that of Fiji Islands Constitution.

How far are clearly non-state persons and bodies bound by the human rights of others. Are they duty holders? Until recently, most Bills of Right explicitly provided, or it was assumed, that only the state had duties. Bills of Rights applied only vertically (between the State and citizen) not horizontally (between citizens). Some courts have taken a different view, even where the Bill of Rights is silent.

Where the constitution is silent, there is no legal difference between companies and individuals. Nonetheless, there is more concern about corporations, because they have the greater capacity to abuse rights. Sometimes the State owns various corporations, often known as parastatals, including nationalized industries. As wholly owned arms of the state, it is not so difficult to hold that they must observe human rights, though careful drafting could make this crystal clear. Indian courts have often held that bodies performing functions on behalf of the State are in fact State for purposes of the constitution, including human rights. As one Indian judge said, otherwise the State would be able to ‘play truant with human rights’ by using corporations.²³

What about legal private corporations? The UN has been devoting a good deal of attention to the question of the responsibility of business for human rights.²⁴ Whether corporations can be said to have legal obligations

to respect and protect human rights has been the subject of much academic debate. There is a particular focus on the role of transnational companies (generally first world companies operating in third world countries). In 2008, the Human Rights Council said that they have a responsibility to respect human rights, using the language of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.²⁵

In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion—comprising employees, communities, consumers, civil society, as well as investors—and occasionally to charges in actual courts.

John Ruggie, Special Representative of the Secretary General

The liability of companies is particularly important when previously public functions are transferred to private corporations, that is, privatization. Supply of gas, electricity, or water, running schools, and running prisons are examples. Privatization of water has been the cause of problems in many countries where, suddenly, people who have been used to virtually free water, though rarely of high standard, now find they have to pay for it. Reading a right to access to water as meaning that the state must protect such access may enable the courts to decide that the state is in violation. Nevertheless, if the fault is with the company rather than with the state, it may be necessary or desirable to hold the company liable.

If the constitution is silent on whether companies are bound by rights, the courts may still be able to develop the law in a way that is shaped by human rights, at least if the judiciary itself is bound by the Bill of Rights (which is not expressly provided in many constitutions). For example, a court could decline to enforce any transaction between private parties that involves the infringement of rights.²⁶ However, the Canadian courts have held that they are not bound by the human rights in this way and in some countries the courts have less scope for law making.

How about companies conducting purely private operations? The constitution of Papua New Guinea, drafted in 1975, has an interesting provision:

- Section 41: ...any act that is done under a valid law but in the particular case—
- (a) is harsh or oppressive; or
 - (b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case; or

(c) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,
is an unlawful act.

This appears in the human rights chapter. It is not clear what the implications of its being an unlawful act are. The provision has been applied, including between an employer and employee in 2008.²⁷ But, the constitution goes further and says that human rights generally apply 'as between individuals as well as between governmental bodies and individuals', unless the constitution indicates otherwise. This is not the only example in the Pacific island states of horizontally applicable human rights provisions.²⁸

The South African constitution is explicit: 'A provision of the Bill of Rights binds 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'. Nevertheless, it is not always clear what this might mean. Most often it would be used as a guide for deciding whether a body was acting lawfully in some other area of the law (for example, whether a contract was reasonable), and the South African courts are specifically directed to develop the common law, that is, judge made law, in accordance with the human rights provisions. So, in deciding the reasonableness of the behaviour of a company, rights could be taken into account.

Individuals carrying out specific public functions may be covered, as in The Fiji Islands: 'This Chapter binds ... (b) all persons performing the functions of any public office.' The position of purely private individuals is not fundamentally different from that of private business (though courts may be more inclined to try to find companies liable, either because of their greater capacity to cause harm or because of they are, in some cases, carrying out functions on behalf of the state). Again, the Papua New Guinea and South African constitutions are explicit that they are liable. In fact, courts that accept an obligation to take human rights principles into account, as they apply and develop the law, may also be able to apply them to the obligations of individuals.

Some constitutions make only a few very specific rights applicable horizontally. For example, in The Fiji Islands, 'Every person has the right of access, without discrimination on a prohibited ground, to shops, hotels, lodging houses, public restaurants, places of public entertainment, public transport services, taxis, and public places.' Most of these are under private control, so clearly exclusion would normally be an act of a private person.

Many constitutions recognize the responsibility of individuals among others, but tend to say that this is an area where the state must make laws, thus, making the rights contingent on that law. We can see this in the recent constitutions of Nepal. The Interim Constitution says of untouchability, ‘Such a discriminatory act shall be liable to punishment and the victim shall be entitled to compensation as provided by the law.’ Until there is such a law there is no punishment or compensation, and no obligation. We, next, discuss this issue further.

4.2.7 Rights That Require Law

One might describe this as ‘giving with one hand and taking away with the other’: the rights law or constitution says that there is a right, but immediately adds ‘according to law’ or as provided by law. A determined citizen and courts can maintain that this does not totally negate the right. Nonetheless, it often proves very hard to make any real use of the right if no law is passed. In Nepal a right to information was included in the 1990 constitution but no law, which was required, was passed for seventeen years.

Such a provision should be used only if strictly necessary. Where there is some detail in the constitution itself or in international jurisprudence, it may not be necessary. A new constitution could have a transitional provision giving the legislature a period of, say, two years to make any new law. After that, the courts could be free to apply the right, with it still being open to the legislature to pass laws to define the right more clearly.

4.2.8 Drafting Styles and Drafting Precision

In preparing a constitution, it is important to take into account national traditions of drafting and interpretation. Broad sweeping statements of principle are more common—at least for provisions intended to have legally enforceable effect—in the laws of countries in the civil law tradition (which include Eastern Europe and Latin America). While countries of the common law tradition may permit some vagueness and even some emotion in preambles, and now in directive principles in some countries, legally enforceable provisions are usually drafted with careful attention to the words used and thinking in advance about how judges (raised in the same tradition) will interpret the words. Advocacy for provisions should take these factors into account without, however, being too constrained by tradition or hampered by legal conservatism.

In fact, even in countries with more detailed drafting traditions there is room, and need, for choices about how much detail should be put in

human rights provisions. A discussion of a new Bill of Rights for South Africa suggested that rights should be expressed in broad terms rather than in great detail, for the following reasons:

- to be more accessible to the ordinary citizen
- to discourage detailed litigation about the real meaning of the words used, and encourage cases concerned with whether government action is justifiable
- to minimize the risk of inadvertently cutting down rights (which can happen with more detail)
- to allow for evolutionary interpretation and constitutional growth.²⁹

In the event the Bill of Rights adopted by the Constitutional Assembly is framed in rather more detailed terms than these scholars had suggested. To some extent this may be attributable to legal caution, and to some extent to the participatory process through which the final constitution was prepared. Experience shows that ordinary people want to see their own concerns reflected and are not likely to be convinced by lawyers' assertions that these are embraced by broad formulations.

Drafting a Bill of Rights is not like drafting a tax law yet there is a need to consider every word, just as in a tax law. To take a simple example: women and men should receive equal pay. In the past this idea was expressed sometimes as same pay for the same work. Then it was realized that very often socially prescribed or supported roles meant that women and men did rather different work, so it was not enough to say all engineers must be paid the same if very few women were engineers, while very few men were nurses. The phrase equal pay for equal work became more popular, but many laws and some constitutions now say that there must be equal pay for work of equal value. Even this requires elaboration—equal value does not mean whether someone will pay the same, but the value in terms of the qualification and required experience, the demands of the work, and the conditions in which it is carried out. The concept is sometimes described as comparable work, or pay equity.³⁰

4.2.9 Socio-Economic Rights: How Should They Be Framed

Some constitutions talk rather generally, such as saying, 'Everyone has the right to health'. Others go into considerable detail. The details may be more important for some rights than others. It is common to be quite detailed about rights to work and in work. In South Africa they thought it useful to be a bit more detailed about the right to health and the right to housing

than about some other rights. In fact, they refined and, perhaps, limited the full scope of these rights by referring to *access* to housing and health care. Indeed, they do not provide a right to health as such, although the International Covenant mentions the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

No constitution can spell out all the details. There is far more guidance to be obtained from foreign courts, and from treaty bodies and special rapporteurs' reports than could ever be encapsulated in a single Bill of Rights. There are two aspects of detail:

- i. When one says a right to something, what is it a right to?
- ii. What must be done to achieve that right?

There has been a good deal of elaboration of the former aspect, often referring to issues like availability of a right, accessibility—meaning physical, financial, and in other ways—appropriate, and acceptable, which includes cultural or religious acceptability. Reference to such ideas as applied to socio-economic rights, generally, or a group of rights could be made in a constitution, provided they are not used to limit the extent of a right.

Some constitutions, especially in Latin America, go into great detail about what the government must do to achieve the rights. Sometimes, these go so far as to incorporate a particular political philosophy. Many people would think that this is anti-democratic because it would prevent the electorate's choice in future being fully carried out. The balance is not easy. A commitment to rights is itself a philosophy but it is one that now has universal acceptance, at least in theory. The drafting challenge is to include the core of the rights without crippling legitimate political choice in future. The challenge is as much for the courts as the drafters. For example, courts have been able to say to governments, 'you may privatize nationalized industries, but you must not do so in a way that leads to violation of rights'.

The drafters of the South African Constitution decided against detailed prescriptions of how to achieve rights, though they did prescribe affirmative action for the removal of historic injustices. They turned to the ICESCR for language using the following expressions:

- progressive realization
- reasonable legislative and other measures
- within its available resources and to the developments of the rights by the international mechanisms for this point:
- respect, protect, and fulfil rights.

Not only does this give some guidance to what the responsibilities are, but not how to achieve them. It also automatically brings in international interpretations. However, the drafters were careful. They did not permit progressive realization for every right—as rights to free primary education, emergency health care, and from arbitrary evictions are not something to be worked towards, but are an immediate need.

Would it be appropriate to use the very language of international instruments in the constitution? Some countries have done this (Hong Kong, with the entire ICCPR, the UK with the ECHR). Some of those instruments are drafted concisely in a way that might be useful in a national constitution but others are too detailed. Treaties are always a result of a process of bargaining and, as a result, may be rambling and sometimes over-inclusive, sometimes under-inclusive. Rephrasing rights in a way that fits into the particular country's legislative style, brings out the important points clearly, and is concise and likely to make for a Bill of Rights that is workable in the particular context. The Hong Kong Court of Final Appeal has held that when drafting ordinary laws giving effect to the Bill of Rights, which is itself drafted in the language of the ICCPR, the language used in the law must be comprehensible to those with primary responsibility for ensuring respect for the right. Rather unusually, a statute copied the ICCPR phrase public order (*ordre public*) when setting out the grounds on which the police might lawfully restrict peaceful assembly. The Court held that this was so vague that it did not satisfy the requirement of the Bill of Rights and ICCPR that any restriction must be provided by law. A vague law is no law.³¹

Belts and Braces Drafting

Popular participation in constitution-making tends to increase the wordiness of drafting. Non-lawyers, especially, tend to want to see their concerns expressed in a language that they understand, and are not familiar with international documents and other sources that expand what may seem very simple language. Among the recent constitutions that have probably been affected by this factor are those of Nepal (Interim Constitution 2007), Bolivia, and Ecuador. The last makes not only the statement of a right to water quoted below, but also:

- makes it a primary duty of the State to guarantee the various rights including the right to water
- guarantees the right to a life with dignity, specifically mentioning that this is assured by potable water

- mentions water when elaborating the notion of food sovereignty, and has various provisions prohibiting privatization of water.

Repetition may be harmless, but it may also create problems. If the words used are different, various groups or persons, who stand to benefit or suffer, may try to rely on the formulations that suit them. Having both a statement of rights and a statement that the state must act to satisfy the need, may give rise to some doubt as to whether what is created is a right or a mere directive principle.

4.2.10 Qualifications on Human Rights

It is generally accepted that human rights can be abused (that is, by using the freedom of expression to defame another person) and that there may be circumstances where, in the public interest, restrictions need to be placed on human rights. Rights may also need to be qualified or even suspended in cases of serious emergencies which put at risk the life of the nation or of its communities (an issue which is discussed later at pp. 114–15). At the same time there is always the risk that the government would put unnecessary restrictions on rights in order to enforce unpopular policies or to control the people, for example, by severe restrictions on the media. It is, therefore, necessary to strike a balance between the abuse of rights by the rights holder and the limitation of rights by the government.

There are three ways in which rights have been limited. The first is seen in the US, where the constitution does not impose limitations so that the responsibility for defining permissible limitations has fallen on the judiciary.³² Unless the judiciary is both competent and independent, there is the danger that it would tend to favour the government, particularly in cases with a political flavour. It is also unfair to throw this heavy burden on the judiciary without some guidelines. Though, we tend to expect the judiciary to be the voice of reason and stability when popular passions, including those of politicians, may lead to overriding of rights, they are not always so. In various countries the judges have gone too far in permitting restrictions of rights, especially in times of national stress such as wartime.³³ There is also insufficient guidance to the legislature as to the permissible restrictions on rights when it makes laws. And there is not sufficient predictability for citizens. Today, it would be rare for a constitution not to seek to give guidance on permissible restrictions.

The second way to limit rights has been to specify the permissible grounds for limiting each right, which was the common approach until recently. This has the advantage that the restrictions could be tied to the

particular right. For example, it may be more acceptable to have more or different limits on the freedom of expression than on the right to life. One problem is that in this way the Bill of Rights may have more words dealing with restrictions than with rights! This is something you find in the Constitution of Nepal; for example, both the 1990 and the Interim Constitutions have long exceptions provisions in relation to major civil rights. This gives the impression that rights are of little importance or limited relevance and it may detract from the primacy of rights. It can also make it hard for a non-lawyer to read and understand the Bill of Rights. There is the danger that a judge, who wants to rule in favour of the government and the restriction, may find it easy to latch on one of the qualifying factors. A second problem is that it may be difficult to anticipate all the possible reasons for legitimately limiting rights. Either one has a long list, or one says 'other legitimate reasons', in which case having the specific list of reasons for limiting a right seems to make less sense.³⁴

The third approach to restricting rights was used in the Canadian Charter of Rights and Freedoms. This involves having a general provision on restrictions, ideally as the first Article in the Bill of Rights, so that the reader is immediately aware of the possible qualifications on rights. Article 1 of the Canadian Charter reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Canadian Supreme Court requires that when a party argues that a limitation in question is unlawful, that party has to prove that there has indeed been a limitation. Then it is up to the government to prove that the limitation is within the terms of Article 1. It will be clear from that Article that the restrictions must have been made by law and not merely by an administrative act. Then it is necessary to prove that the limitation is for a purpose which can be demonstrably justified in a free and democratic society, which presumably places value on human rights and political freedoms. However, the rule established by the courts is that even if the purpose is justified, the limitation must be proportional to the objective, so that a person's right is not unduly limited. The Israel Basic Law on Human Dignity and Liberty of 1992 says, 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.'

South Africa followed this strategy, incorporating elements of the approach of the Canadian courts and emphasizing more clearly the importance of human rights. The South African provision (Article 36) reads:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
 - (a) the nature of the right;
 - (b) the importance of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
2. Except as provided in sub-sec. (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Papua New Guinea constitution has an interesting provision designed to keep conceptions of what is justifiable in a democratic society up to date. This is to be 'determined in the light of the circumstances obtaining at the time when the decision on the question is made'. In the Namibian constitution, the scope of limitation is specified together with each right, but there is also a general clause controlling all limitations. It says that the limitation shall be of general application, that is applying to all persons in a similar situation, and adds that it 'shall not negate the essential content' of the right (Article 22). This is perhaps not an easy expression but is intended, no doubt, to suggest that though a right may be limited it may not be destroyed.

Some constitutions combine the listed exceptions approach with the reasonable limitations approach, in other words, as well as listing an exception, they say that any law must impose reasonable restrictions (as in the Indian and Nepalese constitutions, or they say that the laws must also be 'reasonable and justifiable in a free and democratic society', to take the example of the recently abrogated Fiji Islands constitution).

On balance, the Canadian/South African approach seems to be better. It emphasizes the overriding importance of human rights, gives judges the task of balancing the importance of a person's right with the public interest, and requires proportionality in the limitation. The last point is particularly valuable for there are judgments of courts in numerous countries where a court, having found a possible ground for limitation, has gone on to uphold the limitation without focusing on the relationship between the extent of limitation and the necessity of the limitation.

It is possible, within the approach of a general limitation clause, to specify that some rights cannot be limited at all (for example, the right to be free from torture) or, equally, to specify that a particular right may be limited to a greater extent than under the general formula.

Some limitations are too wide. For example, some constitutions say that only future laws are to meet the constitutional standards, while existing laws are protected. This can make serious inroads into the human rights, especially in a country that is making a new constitution, precisely because of conflicts that have arisen from past human rights abuses.

Who can limit human rights? Some constitutions say that only legislation may limit human rights. This means that the common law, judge made law relevant only in some countries, cannot impose any limit, however reasonable. In Papua New Guinea only a law satisfying certain conditions can impose limits on human rights. It must say expressly that it is made for the purpose of limiting rights, specify what right or freedom that it regulates or restricts, and be passed by a majority of all members of the legislature (Article 38 of the Constitution).

A final point: limitations that may be possible in ordinary circumstances are different from what are often called possible derogations that may take place in case of an emergency or other special situations (see pp. 144–5).

Application of These Ideas to Socio-Economic Rights

Achievement of certain socio-economic rights may be put forward as a justification for limiting civil and political rights. Governments may justify interference with property rights in the interests of providing public facilities for education or health. They may argue that dealing with economic problems of a country requires clamping down on freedom of expression or association. On the whole, this type of argument is unconvincing—it is the attitude that was partly responsible for the division of rights into civil and political rights (CPR) and economic, social, and cultural rights in 1966. So far as the issue of property rights is concerned, it is usual for a constitution to indicate that property can be acquired for public purposes. Usually it will also be said that compensation must be paid. However, the South African Constitution says that compensation can take into account not just market factors but even the purpose of the expropriation.

How about limiting socio-economic rights? This has been an issue when programmes of structural adjustment or other programmes involving cuts in public spending or privatization are undertaken or even

forced on states. Certainly, there is a risk that these programmes can lead to a violation of the progressive realization provisions of the Covenant. It has been suggested by the Committee on ESCR that a state could use its obligations under the ICESCR to resist some such pressures.

4.2.11 Protecting the Rights

How can the rights be protected from being undermined by government and others?

Linking the National to the International Mechanisms

As described in Part I, a state which is a party to an international human rights treaty is required to make periodic reports to the treaty body on the implementation of rights under the treaty. It also has, at the least, a moral obligation to follow the recommendations of the treaty body. Unfortunately, many countries do not submit their reports on time, do not publish the reports locally, and often disregard the recommendations of the treaty body. There is very little publicity at the national level about the requirement of reporting or on the recommendations. One way to strengthen the international system and at the same time strengthen rights domestically is to link the constitution to the international system.

The Bill of Rights could require that:

- the government must submit the report to treaty bodies on time
- in preparing the report, it must hold consultations with civil society and other relevant organizations
- it must publish a draft of the report in the country for a reasonable time, before it is to be submitted to the treaty body, for public discussion
- it must take account of comments on the draft
- civil society organizations should be facilitated to attend hearings by the treaty body or at least to submit their comments, or an alternative report to it
- the government must publicize the comments and recommendations of the treaty bodies and must report to the legislature how it intends to respond to the recommendations.³⁵

There could similarly be a brief provision requiring that any other UN report, such as of Special Rapporteurs, should be laid before the legislature and debated.

Another way in which the Bill of Rights could be linked to the international system is by requiring the government and the courts, when

considering a human rights issues, to pay regard to the interpretations and decisions of the international courts and treaty bodies relevant to that issue (on courts see following paragraphs).

What Role, If Any, should Courts have in Protecting the Rights?

This takes us to a crucial issue: what is to be the role of the courts? To some extent this must be left to the courts themselves though reluctant courts might need encouragement and over-enthusiastic courts some restraining. A decision to put socio-economic rights in the Bill of Rights already suggests a role for the courts. This may involve the courts deciding that the acts of, or even the laws made by, the government are unconstitutional. In some countries, it is unacceptable or, at least highly unusual, to allow the courts to declare laws made by parliament unconstitutional on any ground. Most countries have moved more towards giving the courts a role in this.

The UK still finds this a problem, and the Human Rights Act, 2000, only allows the courts to *declare* that a law is contrary to the Act, not to give any directions. The government (a Minister) may amend the law in question by an order, which must be laid before parliament and needs its positive approval. A recent parliamentary Select Committee proposed that the courts be allowed to use the socio-economic rights to interpret laws and they should also be able to decide that measures taken by the government to fulfil these rights are unreasonable. This matches many of the decisions in India and South Africa where the courts have decided that measures are unreasonable.³⁶ However, the Indian courts have sometimes gone a good deal further and directed governments to do certain things. Often, when courts are given the power to decide whether something is reasonable or not, it is left to the courts to decide how to approach this question. However, the Select Committee suggests criteria for the courts to take into account, including the availability of resources and whether the measures adopted by the government are capable of facilitating the realization of the relevant rights. They say that the courts would have no jurisdiction to enquire into whether public money could be better spent. This is not a draft law; a proper law or constitution would almost certainly allow the courts to use other criteria also.

In some countries, guidance is given to the courts about their task of interpreting the human rights provisions and the law, generally, from a human rights perspective. In Canada, the Charter of Rights and Freedoms 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians' (Article 27).

This relates to a very specific issue. The South African Constitution says, more generally: the courts must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom when interpreting the Bill of Rights.

It may be helpful to urge the courts to refer to international law and to cases in other countries to understand the rights more fully. The Constitution of South Africa does this when it adds, 'the court must consider international law; and may consider foreign law'³⁷ as does the Constitution of the Fiji Islands: '...must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter'. In many countries reference to international law is common in courts and it is becoming more common, but in some countries this sort of constitutional encouragement could be very useful.

Looking back at the UK Select Committee proposals, it is clear what remedies would be available, if any, to persons affected by a breach. No individual would be able to enforce the rights. In South Africa the courts have not rejected the idea of claims by individuals; one of the earlier right to health cases involved a single person. In fact, the court declined to make any order because this would involve the courts in deciding priorities on individuals, which the Select Committee in the UK also feels would be inappropriate for a court.

Should the courts be able to order any sort of compensation for those whose rights have been violated? In some countries courts have given compensation, notably in India. In a sense this is creating a new civil wrong of violation of a socio-economic right and involves a complex range of issues that cannot be explored here. Just as a note: the Quebec Charter of Human Rights and Freedoms does include a right to compensation for breach of rights, and some of these are socio-economic rights.

In a country where it is acceptable to give the courts the power to declare a law unconstitutional, this power may be given to different courts and may apply at different phases of the law's life-span. In some countries, it is normal to give such dramatic power only to the highest court, or a special constitutional court. In some eyes this may have disadvantages: firstly, it means that any claim that a law is unconstitutional must be taken to the highest, more remote, and most expensive court in the land. Secondly, it means that there can be no appeal from the decision of the court, whereas, in most systems there will be at least one appeal from any court decision. The second objection may be partly answered if the one court in question is really high-powered having several judges, and those being the most experienced and independent.

In some countries, it is possible for a court, usually a special constitutional court, to be invited, in a case brought for the purpose, to declare that a law not yet passed or not yet in force is unconstitutional. In Cambodia there is a body called the Constitutional Council comprising 'dignitaries with a higher-education degree in law, administration, diplomacy, or economics'. The Constitution says that 'The King, the Prime Minister, the President of the Assembly, or one-tenth of the assembly members' may forward a Bill to the Council which must decide within 30 days if it is constitutional.

After a law is promulgated, the King, the Prime Minister, the President of the Assembly, one-tenth of the assembly members or the courts, may ask the Constitutional Council to examine the constitutionality of that law.

Ordinary citizens, however, would have to appeal against the laws through their representatives or the President of the Assembly, not directly to the Council which has made access to it difficult. There are some problems with these provisions. Firstly, to send a Bill to the Council, before the national assembly has even debated it, is to detract from the democratic role of the legislature. In some countries, even the second procedure would be thought inappropriate as the courts would not be permitted to decide on an issue like unconstitutionality in the absence of a concrete problem. The very existence of a special body outside the court structure, such as the Cambodian Constitutional Council, would not be acceptable in some systems. It must also be said that the Cambodian body has proved weak and ineffective—showing that even powerful sounding provisions may be useless.

The Supreme Court of India has developed a whole series of modifications of traditional court procedural rules designed to enable Public Interest Litigation for the genuinely disadvantaged (see Box on p. 27). It is usually under these procedures that the courts, especially the Supreme Court, have decided many of the cases referred to in this book.

A few other countries have followed this lead, especially in South Asia, though not perhaps with the same exuberance as in India. A few constitutions have articles that refer to constitutional remedies in a way that brings in some of the Indian innovations or their spirit. Thus, the 1990 Constitution of Nepal said '*Any Nepali citizen* may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground. There is no

requirement that the citizen be personally affected.’ The Constitution of South Africa provides that the persons who may approach a court for the enforcement of rights 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.

Specifying Other Bodies to Protect Human Rights

The main responsibility for fulfilling these rights, even more so than in the case of civil and political rights, must rest on politicians and administrations, and the sanctions are primarily political. However, it is possible to give legal responsibilities to others. For example, a few constitutions say that the government must report on its performance on socio-economic rights. An example is Ghana where,

The President shall report to Parliament at least once a year all the steps taken to ensure the realization of the policy objectives contained in this Chapter and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.

In Ghana most of these rights are in Directive Principles and the President’s duty is no doubt partly there because of the absence of any responsibility enforceable through the courts. Nevertheless, this need not be the case because this sort of responsibility could co-exist with enforceable duties.

In South Africa, the Human Rights Commission is given a particular responsibility to report on economic, social, and cultural rights, and government departments must report annually to the Commission on their own performance. The Commission issues a voluminous report (no longer annual) and it has devised various means to investigate and interrogate government departments. It is an onerous duty for the Commission and undoubtedly involves a good deal of overlap with other government departments’ responsibilities. The committee sees its role as enhancing the understanding of the rights and encouraging better performance. It makes recommendations, which are often necessarily rather general. The value of the reports, perhaps, lies in the information and analysis and not in the recommendations.

Should the constitution give any indication of how rights should be monitored, as opposed to saying who should monitor them? The 2004 Kenyan draft proposed:

Parliament and the Commission on Human Rights and Administrative Justice shall establish standards for the achievement of the rights.

It would not be appropriate to have too much detail in a constitution on how to monitor, but the principle of careful monitoring could be required. This coupled with a provision requiring perhaps that the Statistical or Census Office be independent (to try to avoid political tampering), and a right to information,³⁸ could provide useful tools for civil society and others concerned to see the realization of rights.

Education may play an important part in protecting rights. This is a function that the constitution could give to a body like the human rights commission.

Finally, it is the experience of all countries that organized civil society is important in protecting rights. A constitution may give special recognition to civil society. The rights of association, assembly, and free speech are extremely important in protecting civil society from government efforts to suppress criticism. Without these civil and political rights, economic, social, and cultural rights cannot be protected. We say a little more about civil society in Part III.

Protection against Amendment or Suspension

A constitution may be made; it may also be changed. It is always quite hard to change the constitution (often, it requires two-thirds of all members of the national parliament to do so). One important decision to be made is whether it has to be specially hard, or even impossible, to change to the constitution to remove or reduce human rights protection. In the Constitution of Portugal, 'The rights, freedoms, and safeguards of the citizens' cannot be amended.' The Constitution of South Africa does not have any special protection of human rights, but there are elaborate provisions for publicity and for ensuring public input and reasoned debate on any constitutional amendment.

It is common for constitutions to allow some suspension of human rights provisions in a situation of grave emergency. In such situations, government may have to move very quickly and there may be threats to the nation that justify steps that in ordinary situations would not be permitted. However, the drafters of the constitution must be careful to ensure that these special powers are only available when really justified,

and that, specially, any reduction of human rights protection is strictly necessary. Attention must be paid to:

- When can a state of emergency be declared?
- Who can declare it and by whom does it have to be approved (particularly is this subject to democratic control)?
- How long can it last?
- What special powers are or may be granted, and to whom?
- Which of the human rights provisions may be affected during an emergency?

The Constitution of South Africa is specially careful on the last point. It says that:

- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that
- (a) the derogation is strictly required by the emergency; and
 - (b) the legislation—
 - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
 - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

There is a Table in the constitution indicating that some rights may be affected only to a certain extent during an emergency and some may not be affected at all, including the right to human dignity and the right to life.

4.3 MDG 8 AND CONSTITUTIONS

Goal 8 is: Develop a global partnership for development. Does this have any relevance for constitutions? A partnership is at the heart of the Millennium Declaration, but constitutions are usually concerned with institutions, powers, rights, and duties within an individual state. It cannot give, for example, a citizen of a state a right against another state.

The state has a duty, as we have already discussed, not just to protect, but also to protect and promote the rights of its citizens. Arguably, even without any special mention of the possibilities of international aid or involvement, a state that fails to tap those possibilities could be held to be in breach of its obligations. So a citizen, with a right to sue the government for failure to protect or promote, might be able to include as evidence of such failure that fact that the state rejected the possibilities of the partnership.

Many constitutions include Directive Principles of State Policy (see p. 82). While we argue here against relying to heavily on these to protect

rights, they might perhaps have a place as guiding the government's foreign policy in relation to the MDGs. While we would argue that a constitution should not pre-empt the political process, a Directive Principle on the following lines might be worth considering:

The State must use the opportunities offered by foreign assistance and investment for the benefit of the people, especially to fulfil basic needs, so far as compatible with national sovereignty and control of resources.

This would not be legally binding, though courts might feel they are able to use it in interpreting the duty to fulfil rights to food and other aspects of livelihood. This suggestion is intended only to stimulate debate, as we are fully aware of the arguments about the irrelevance, or even damaging nature, of foreign aid, and the dependence it can create.

What about the developed countries? It would not be appropriate for citizens to be given a right that their governments should play their part in the Millennium enterprise. Nevertheless, there is no reason why aspirational statements of such countries' constitutions should not refer to international responsibilities. The constitution of Ireland says: 'Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.' A constitution might equally say that '[the country] affirms its commitment to fulfilling its obligations under international law, and officially endorsed programmes of the United Nations, including in relation to the contribution of the country to the achievement of a fairer world through aid and international cooperation.' This would not create a legally binding obligation under national law but it could have political value, specially at any time when the government was tempted to cut back on foreign assistance.

5. SPECIFIC RIGHTS

5.1 EDUCATION

MDG 2: Achieve universal primary education

MDG 3: Promote gender equality and empower women

A right to education has been included in many constitutions going back to the French Declaration of the Rights of Man and Citizens (which the Constitution of 1793 said was to be upheld by the State).

Education is needed by all. Society ought to favour with all its power the advancement of the public reason and to put education at the door of every citizen.

The French Constitution of 1791 had also said:

Public instruction for all citizens, free of charge in those branches of education which are indispensable to all men, shall be constituted and organized, ...

We find here the main ideas that have been included in more recent constitutions:

- a general right to education,
- a particular right to free education at the most basic level, and
- the purposes of education.

More modern constitutions often say something about setting standards for education which is important, especially when the constitution provides, as many do, for the freedom to set up educational institutions: something that is important to many religious and minority groups.

Constitutions with a vision of the purposes of education have included Mexico in 1917:

Article 3. The education imparted by the Federal State shall be designed to develop harmoniously all the faculties of the human being and shall foster in him at the same time a love of country and a consciousness of international solidarity, in independence and justice.

That constitution (as changed up to 1946) included provisions about the education being democratic, national, and contributing to human relationships.

Especially since the UDHR and the various international human rights treaties, national constitutions have tended to reflect the main features of those documents:

- free and compulsory primary education
- progressive introduction of education for all at higher levels, secondary, vocational, and tertiary
- fundamental education for those who have missed out on the formal system
- gradual introduction of free education at various levels
- freedom of establishment of schools
- compliance with national standards if these are set
- education supporting human rights, the United Nations, Internationalism and Peace, and the development of the human personality
- the need for discipline in schools to respect the child's dignity (CRC)

Not all countries have been equally happy with all these ideas!

Need for Clear Drafting

As emphasized earlier, it is important to have constitutional provisions that are clear and can be used. To be clear in wording, it is important to be clear in what you want to achieve. The Right to Education project interestingly compares the constitutions of Albania and Bangladesh, showing how much vaguer the former is:

ALBANIA

‘Everyone has the right to education. Mandatory school education is determined by law.’ It is unclear from this extract whether the constitution makes education mandatory or if further legislation is required. ‘Mandatory education and general high school education in public schools are free.’ The only thing that is certain is that everyone should attend high school and it should be free. However, it is not clear who should provide the education. It is certainly arguable that the State should provide it, but the law does not say anything to obligate them to do so. This is a real weakness as it suggests that no one could easily be held accountable for the failure to provide education.

BANGLADESH

‘The State shall adopt effective [key word] measures for the purpose of: establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such a stage as may be determined by law.’ This extract clearly identifies the State as the body responsible for providing uniform education for all. The only limitation is the phrase ‘as may be determined by law’. However, this refers only to the extent (years) of free education, but does not give the option as to whether or not to provide free education.

The Bangladeshi extract confers far greater responsibility on the government than the Albanian one. It should be noted that both include the vital aspect that the right to education should be made available for all children.³⁹

Points that might be considered:

- Age for primary education: many constitutions do not say how long primary education should be for
- Language: research shows that children tend to learn better in early years in their own language. This may be a particular issue in countries with ethnic minorities (where it may be hard to provide mother tongue education for all)
- Minorities: apart from language, minorities might wish to have aspects of their culture included
- Punishment and violence in schools: reports in Kenya suggested that some street boys had run away because of violent punishments

in school; girls in Nepal were reluctant to go to school because they feared physical abuse. The Convention on the Rights of the Child says that punishment in school should respect the child's dignity. Possibly a constitution might mention this, and the need for schools like other aspects of society, to be free from abuse, physical or otherwise

- Fees: though primary education is supposed to be free, in many countries all sorts of fees are charged that make it quite expensive.⁴⁰ These are usually clearly in violations of constitutional provisions about free education, but should the constitution say more?
- Education for disadvantaged groups or children, for instance, Dalits in India or Nepal. In some countries members of certain groups are marginalized in society and even in schools. Dalits, or untouchables, can be seated at the back of the class, children living with HIV, or albinos or persons with disabilities may also be segregated formally or in practice, and children of migrant workers or children with disabilities may suffer discrimination. In theory, equality should deal with most of these issues and a lawyer might take the view that special mention is unnecessary, but groups with particular problems in a society may wish to see their concerns specifically accommodated, as all embracing provisions have not worked for them in the past. The draft constitution for Kenya, in 2004, tried to deal with the issues of children with disability:

(2) Persons with disabilities have a right to...

(b) access to education, to institutions and facilities for persons with disabilities that are as integrated into society as a whole as is compatible with the interests of those persons;

- Affirmative action: the 93rd amendment of the Constitution of India included the possibility of:

special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes [means groups formerly known as 'untouchables'] or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State...

- Federal/decentralized systems: in a federal system it will be essential to say which level of government can make laws about education, and administer them, or even to specify different responsibilities for different aspects of education this may be done; in a country

with a guaranteed system of decentralized government falling short of federalism.

Other things countries might want to include but some of which might be doubtful in terms of international law:

The Constitution of Turkey, Article 24 says:

No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education.

This sort of provision, though intended to build a sense of nationhood, is not only unlikely to be good in pedagogical terms, but is in violation of the rights of minorities. It has been a particular issue in Eastern Europe, especially for the Roma. A prohibition on the use of other mother tongues is a clear violation of international human rights law.

The Constitution of Mexico (1917–46) drafted at a time of a major split between the church and State, and said that:

Freedom of religious beliefs being guaranteed by Article 24, the standard which shall guide such education shall be maintained entirely apart from any religious doctrine and, based on the results of scientific progress, shall strive against ignorance and its effects, servitudes, fanaticism, and prejudices.

Such a prohibition on religious elements in education, and even that privately provided, is probably contrary to the ICESCR.

BOX NO. 2.7 SOURCES ON THE RIGHT TO EDUCATION

Circle of Rights Module 16

<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module16.htm>

Paulo David 'A Holistic Vision of the Right to Education' (International training centre for Human Rights and Peace Teaching)

<http://www.cifedhop.org/publications/thematique/thematique11/David.pdf>

Kitty Arambulo 'A Rights approach to education'

<http://www.cifedhop.org/publications/thematique/thematique9/arambulo.html>

Right to Education Project <http://www.right-to-education.org/>

UNESCO on Right to Education http://portal.unesco.org/education/en/ev.php-URL_ID=9019&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNICEF A Human-rights based approach to Education for All (2007) http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf

In some countries single sex education might be required. This would probably not be contrary to human rights law unless the education provided for one sex was inferior, of course.

5.2 HEALTH

MDG 4 Reduce child mortality

MDG 5 Improve maternal health

MDG 6 Combat HIV/AIDS, malaria and other diseases

Some sort of right to health has been included in a number of modern constitutions. A recent study divided them into various types:

1. A statement of aspiration, stating a goal in relation to the health of its citizens.

Many of these are principles of state policy, such as in Namibia (Article 95, '... the government should take care of the health of the people', or the Sudan Interim Constitution, and Article 19, '...shall promote public health and provide basic medical services and facilities).'

2. A statement of entitlement, stating a right to health or health care or public health services.

This refers to actual statements of rights, such as in the Constitution of South Africa which says clearly that everyone has the right of '...access to health care services, including reproductive health care' and cannot be refused emergency health care.

3. A statement of duty, imposing a duty to provide health care or public health services.

This refers to a statement about the duty of the government in connection with health, for example, in the constitution of Cambodia which says that 'The State shall establish infirmaries in rural areas.' Some statements are less in terms of duty and more of fact (in the style of former socialist countries, or the constitution of China today; again Cambodia's constitution says 'The State gives full consideration to disease prevention and medical treatment.'

4. A programmatic statement, specifying approaches for the financing, delivery, or regulation of health care and public health services.

Some South American constitutions go into detail about how health care is to be organized.

5. A referential statement, incorporating, by specific reference, any international or regional human rights treaties recognizing a human right to health or health care.⁴¹

For example, the constitution of Haiti refers to the UDHR in connection with the right to health.

The major divide in these various provisions is whether they appear to provide an actual right for people. Guidelines, exhortations, principles, and even state responsibilities are not, or not necessarily, the same things. Even responsibilities are phrased with varying degrees of commitment. Ethiopia says, 'To the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education,' although it also says, 'The State has the obligation to allocate ever increasing resources to provide to the public health, education, and other social services.'

Other important factors are whether they speak of a right to health, or to health care. Some deal with specific situations like a right to emergency healthcare, but not other types of health care. Some constitutions speak, usually in general terms, about responsibilities in connection with public health. Some speak of a healthy environment, occasionally, as a right, but often as a less precise duty or responsibility of the state. And several constitutions (for example, Ethiopia) speak of issues related very specifically to maternal health, especially the possibility of maternity leave—which is very relevant to both the mother's and child's health.

What is included in the concept of health also varies. A few constitutions refer to reproductive health, notably South Africa, and the Interim Constitution of Nepal and Ethiopia: '...women have the right of access to family planning education, information and capacity.'

It is often said that there is no right to be healthy; even under the ICESCR there is only a right to the best attainable standards of health. Some people can never be really healthy, for genetic reasons. Unusually, the constitution of Cambodia says that 'The health of the people shall be guaranteed' (Article 72).

Some constitutions provide, as they do with other rights, that the right exists 'as provided by law', which, as we have already remarked, can greatly weaken the right. Thailand's 1997 constitution is an example, when it purports to give a right to the poor '...to receive free medical treatment from public health centres of the State,' or Slovenia which says, 'Everyone has the right to health care under conditions provided by law' and 'The rights to health care from public funds shall be provided by law.'

The constitution of Sudan refers to the issues of equality, 'equal access to public health care and basic medical services' (Article 46), which presumably does not mean that access for anyone is actually guaranteed.

This great variety of provisions means that it is unhelpful to say that about one-third of countries protect the right to health. In fact, how those provisions will be interpreted by the courts and other institutions of the State also varies enormously. This depends, in part, upon national traditions of interpretation and, to some extent, on the creativity of particular courts and legal professions.

Among the large number of cases that have gone before national courts on issues relating to the right to health, we can identify three from different countries. The first was in India, in the *Paschim Banga Khet Mazdoor Samity v. State of Bengal*,⁴² when the court did not use an explicit right to health (for there is none). The petitioner had been taken to a succession of eight state medical institutions, ranging from the local health centre to two medical colleges, being refused treatment at each either because of lack of beds or lack of technical capacity. The court not only ordered that the plaintiff be compensated for the violation, but also set out the facilities that the government must provide in the way of hospitals and their facilities at different levels, of the grade of hospitals (including the scope of ambulance services and communication system between hospitals, to take care of overflow in one or more hospitals. The Court relied on Article 21 (right to life), which the court rephrased as imposing an obligation on the state to safeguard the life of every person. The scheme the Court outlined was based partly on the report of a Government committee set up to investigate the incident, on the state Government's own actions following that report, and representations made by counsel for the petitioners, which themselves drew partly on experience and legislation in the United States.

The second case, *Minister of Health v. Treatment Action Campaign*,⁴³ is from South Africa, which turned on the right of access to health care services. The state was providing Nevirapine, which prevented mother to child transmission of HIV very cheaply, only through a few centres designated for research. The court held that the government was constitutionally required to realize a programme providing progressively for the rights of pregnant women and their unborn children. It also held that the existing scheme was inadequate because it restricted Nevirapine to certain sites, and that the programme must include reasonable measures for counselling and testing.

The third case is from Colombia, where the constitutional court has made a number of important decisions. It has drawn on the International

Covenant and on the work of the Special Rapporteur. It has insisted that there is a right to health and the State must progressively realize it, and that there is a core obligation that the State has already adopted and must be granted. The Constitution of Colombia has a number of provisions about health, but none clearly invites such a sweeping response from the courts. It does say, 'The law will determine the limits within which basic care for all the people will be free of charge and mandatory. Every individual has the right to have access to the integral care of his/her health and that of his/her community.'

BOX NO. 2.8 SOURCES ON THE RIGHT TO HEALTH

Circle of Rights Module 14

<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module14.htm>

The Lancet, 10 December 2008 <http://www.thelancet.com>

World Health Organisation <http://www.who.int/hhr/en/>

University of Essex, Human Rights Centre, Right to Health Unit Archives (Professor Paul Hunt former United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) http://www2.essex.ac.uk/human_rights_centre/rth/

Judith Asher, *The Right to Health: A Resource Manual for NGOs* (Commonwealth Medical Trust and AAAS Science and Human Rights Program, 2004) http://shr.aaas.org/pubs/rt_health/rt_health_manual.pdf

5.3 FOOD

MDG 1:1. Eradicate extreme poverty and hunger

This is the most basic of the MDGs. Apart from the general right, which is not spelled out, the ICESCR spells out the right to be free from hunger by saying that states must take the measures needed to improve methods of production, conservation, and distribution of food by making full use of the 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.

The right to food has been elaborated, especially by special rapporteurs, and the Committee on ICESCR. The Committee has suggested that the right means:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

It has neatly been suggested that the food must be adequate, available, accessible (physically and financially, and in other ways), and acceptable (culturally, for example). 'Adequate' will include not just quantity but also issues of safety and nutritional value. 'Available' includes the idea of sustainability (that it is not just there now, but will continue to be). This really is the idea of food security, for both the present and future generations.

Another idea that has come into more recent discussion is that of food sovereignty. This is not a concept of international law; indeed it is to some extent an anti-globalization concept. It has been defined as:

...the right of peoples, communities, and countries to define their own agricultural, labor, fishing, food and land policies which are ecologically, socially, economically and culturally appropriate to their unique circumstances. It includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and culturally appropriate food and to food-producing resources and the ability to sustain themselves and their societies.⁴⁴

The focus is on the producer more than the consumer, and on the group rather than the individual.

We have discussed in another place how the state should respect, protect, and fulfil the right to food. Of course, all sort of things have an impact: natural circumstances, wars, agricultural policies, international developments, and so on.

How can the right to food appear in national constitutions? In 2003, the FAO studied all the constitutions of the world and discovered that many of them had some sort of protection for the right to food, though they said those protections could be described variously as high, medium, medium low, or low. About twenty-one constitutions had a high level of protection. The Constitution of South Africa has a provision clearly based on the ICESCR:

27. (1) Everyone has the right to have access to
 - (b) sufficient food and water; and
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
28. (1) Every child has the right

- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition
25. (2) Everyone who is detained, including every sentenced prisoner, has the right
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

In fact very few other countries have a clear right to food in any legal sense. Far more of the countries, even with high protection have provisions like those of Brazil:

Article 227. Children and Teenagers

(0) It is the duty of the family, of society, and of the State to ensure children and adolescents, with absolute priority, the right to life, health, food...

or Uganda:

XXII. Food security and nutrition.

The State shall—

- (a) take appropriate steps to encourage people to grow and store adequate food;
- (b) establish national food reserves; and
- (c) encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State.

These are State focussed rather than right focussed provisions.

The new Constitution of Ecuador (approved by referendum in 2008) provides that:

Article 13. Individuals and groups have the right of secure and permanent access to safe, sufficient and nutritious food; preferably produced at the local level and corresponding to the various identities and cultural traditions.

The State of Ecuador will promote food sovereignty.

The Constitution goes on to define the last:

Article 281. Food Sovereignty

Food Sovereignty constitutes an objective and strategic obligation of the State to guarantee its individuals, communities, peoples and nationalities self sufficiency in healthy food, culturally appropriate in a permanent form.

You will see that the focus is on the State and its obligations. The Interim Constitution of Nepal, at the instance, it is understood, of the Maoists, provides:

Every citizen has the right to food sovereignty as provided for in the law

and

The State shall have the following responsibilities...to pursue a policy of establishing the rights of all citizens to education, health, housing, employment and food sovereignty

The first is odd, as food sovereignty is not really a right of individuals. The second is not a right at all but a non-enforceable, in the legal sense, state responsibility. When drafting provisions like this, it is important that new, and ill-defined, ideas should not squeeze out those with clearer definition and for which guidance in interpretation is available at the international and, often, foreign level, such as the right to food. A starving Nepali might have to fall back, like his Indian counterpart, on the right to life (see below).

There are other countries which have provisions that can be used, by creative lawyers and courts, to support the right to food. The Constitution of Switzerland says that:

12: Everyone who is in a situation of distress and who does not have adequate means for their support, has the right to be aided and assisted and to receive the indispensable means to lead an existence consistent with human dignity.

The Swiss Federal Court held in a case, in 1996, that there is a right to basic necessities, and that though it could not say how the government should meet the need, it could set aside a law that would result in a failure to meet necessities for really needy people. The case involved refugees who could neither leave the country without papers nor work without a work permit.

There are some important Indian cases, building on the right to life. Particularly, there is a case that has been before the Supreme Court since 2001. The Court held that there was the right to food and it has over the years issued a large number of orders on all sorts of food related topics, and to various state bodies.⁴⁵ They relate to food distribution in emergencies, school meals for children and the position of pregnant women, for example. It also appointed Commissioners on the Right to Food, who presented their 8th report, in 2008, on the right to food for various marginalized groups such as single women (including widows), the poorest Dalits, Primitive Tribal Groups, urban homeless, and slum dwellers.

BOX NO. 2.9 SOURCES ON THE RIGHT TO FOOD

UN Food and Agriculture Organisation <http://www.fao.org/righttofood/>
<http://www.righttofood.org/> (set up by Jean Ziegler former UN Special Rapporteur on the Right to Food)
 Right to Food Campaign (India) <http://www.righttofoodindia.org/>
 FIAN (FoodFirst Information and Action Network) <http://www.fian.org/>

5.4 HOUSING

MDG 7 Ensure
 environmental
 sustainability

By 2020, to have achieved a significant improvement in the lives of at least 100 million slum-dwellers.

Though, housing is mentioned only in this connection, it is clear that homelessness and living in squatter settlements is a common feature of poverty. Moreover, without a home, people cannot work, cannot feed themselves, will have unhealthy living conditions. The target here is limited: it does not deal with the homeless, for example. Indeed, improving the lives of slum-dwellers might have little to do with their actual housing.

Many international instruments mention housing, though some use the expression shelter, which may sound very basic. The ICESCR gives little detail, but both the Committee in its General Comments and the Special Rapporteur on the Right to Housing have spelled out the right. The Committee suggests it means the right to live somewhere in security, peace, and dignity. In addition, it includes:

- Legal security of tenure
- Availability of services, materials, facilities and infrastructure—including safe drinking water, energy, sanitation, means of food storage, refuse disposal, site drainage, and emergency services
- Affordability
- Habitability—adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors
- Accessibility—even for the disabled, the ill, the elderly, and victims of disasters
- Location—so that there is access to employment, health care, schools and so on
- Cultural adequacy.

Another international instrument that deals with the right to housing is the European Social Charter, revised, Article 31 of which says:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- i. to promote access to housing of an adequate standard;
- ii. to prevent and reduce homelessness with a view to its gradual elimination;
- iii. to make the price of housing accessible to those without adequate resources.

In a case against France, the European Committee on Social Rights⁴⁶ said that though a State cannot be obliged to produce particular results, the rights must take practical and effective, rather than purely theoretical, form. This means that a State must:

- (a) adopt the necessary legal, financial, and operational means of ensuring steady progress towards achieving the goals laid down by the Charter
- (b) maintain meaningful statistics on needs, resources, and results
- (c) undertake regular reviews of the impact of the strategies adopted
- (d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage
- (e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

The Committee commented that the implementation of the Charter requires state parties not merely to take legal action, but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein. These statements apply not just to the right to housing, of course.

National Constitutions

In 2000, the Centre on Housing Rights and Evictions⁴⁷ said that over 40 per cent of the world's constitutions had some sort of right to housing, from Argentina's 1853 Constitution to Poland's of 1997, though many of these have weak or vague rights, and some do not mention housing or shelter specifically. A large number of constitutions include some sort of right to housing. They include Tajikistan:

Article 36: Each person has the right to housing. This right is ensured through the provision of governmental, social, cooperative, and individual housing construction.

Portugal

Article 65. 1. Everyone has the right, both personally and for his or her family, to a dwelling of adequate size that meets satisfactory standards of hygiene and preserves personal and family privacy.

2. In order to ensure the right to housing, it is the duty of the State to:
 - a. Draw up and implement a policy for housing as a part of general national planning and to support plans for urban areas that guarantee an adequate network of transport and social facilities;
 - b. Promote, in conjunction with local authorities, the construction of economic and social housing;
 - c. Promote private building, when in the public interest, and access to privately owned or rented dwellings;
 - d. Encourage and support the initiatives of local communities for the resolution of their housing problems and for promoting the establishment of housing co-operatives and their own building projects;
3. The State shall adopt a policy for the institution of a system of rents that are compatible with family incomes and for individual ownership of housing.

Ecuador

Article 30. Persons have the right to a secure a healthful habitat, and to proper and dignified housing, independent of their social and economic situation.

Article 375. The State, at all its level of government, guarantees the right to habitat and to decent [or worthy] housing for which:

1. It will generate the necessary information for the design of strategies and programmes which include the relations between housing services, public space and transport, equipment and management of the urban soil.
2. Will maintain a integrated geo-referenced national [property register], of habitat and housing.
3. Will elaborate, implement and monitor policies, plans and programmes on habitat and of universal access to housing, derived from the principles of universality, equity, and interculturality, with focus on the management of risk.
4. Will improve dangerous housing, will donate shelters, public spaces, and green areas, and promote special lease arrangements.
5. Will develop plans and programmes of finance for social housing, through the public bank and popular finance institutions, with emphasis on persons with scarce resources and female heads of household.

The new Constitution of Bolivia says:

Article 19

- I. Every person has the right to a proper habitat and housing, which dignifies the family and community life.

- II. The State, at all levels of government, will promote social housing plans, by means of proper financing systems, based on the principles of solidarity and equity.
- III. Those plans will be preferentially directed at families with scarce resources, at less favoured groups, and at the rural area.

Article 20

- I. Every person has the right to universal and equitable access to the basic services of drinkable water, drainage, electricity, domestic gas, post, and telecommunications.

Best known is, again, the Constitution of South Africa:

Housing

26. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

This provision uses the expression access to adequate housing. There have been many cases that have invoked this Article. The courts have said that respecting the right includes not evicting people so that they have no place to go, while the duty to protect could be used to justify laws that might otherwise be an unconstitutional interference with the right to property. The most famous case concerns the duty to fulfil. About 900 adults and children had lived in appalling conditions. They decided to move out and occupied vacant private land across the road. The owner, supported by the local council, obtained a magistrate's court order for their eviction. Their homes were demolished. They were now truly homeless. They could not go back to where they had come from because other people had occupied that land. They had literally nowhere they could live.⁴⁸ The Constitutional Court said:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. ... To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right...

The court held that the measures taken by the state Government had not been enough.⁴⁹

Sometimes, the courts can protect the right to housing even if it is not specifically mentioned. For example, under the European Convention on Human Rights, burning of Kurdish houses was a violation of the right to family life.⁵⁰ The UN Committee on Torture had included certain demolitions of houses as a violation of the Convention Against Torture's prohibition on 'cruel and degrading treatment', thus, protecting the right to housing. The Indian courts have held that the right to life includes a right to housing.⁵¹ The Supreme Court said,

Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as human beings. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right.

In 1990, the court directed a State Government to constitute a committee to monitor its scheme for allotment of the houses to the weaker sections.⁵² However, how effective this right has been generally, is a matter of some uncertainty. In fact, it is unwise to assume that a court will take an expanded view of a right that is silent on a particular point. The Constitutional Court in Hungary declined to hold that the right to social security included a general right to housing, though it might include a right to shelter in emergency.⁵³

BOX No. 2.10 SOURCES ON THE RIGHT TO HOUSING

Centre on Housing Rights and Evictions <http://www.cohre.org/>
 ESCR-Net http://www.escr-net.org/resources/resources_show.htm?doc_id=401410
 UN-HABITAT's *Strategy for the Implementation of the MDG 7, Target 11* (2004)
 link from <http://www.unhabitat.org/pmss/getPage.asp?page=downloads>

5.5 WATER AND SANITATION

MDG 7 Ensure environmental sustainability	Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation.
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'Water is life; sanitation is dignity' UN Habitat

The ICESCR does not mention water or sanitation, but the ESCR Committee has made it clear that it considers that water is part of the

right to a decent standard of living. The committee has expanded on this by suggesting that adequate water means that water must be:

Available—that is sufficient for ordinary use including drinking, personal sanitation, washing of clothes, food preparation, personal, and household hygiene, suggesting that World Health Organization (WHO) guidelines on quantity of water can be used.

Of satisfactory quality—safe and of acceptable colour, odour, and taste.

Accessible—to everyone without discrimination, physically, including in terms of gender, life-cycle and privacy requirements, economically, and that water information should also be accessible.⁵⁴

It has been suggested that water for agricultural use ought to have been mentioned as it is very important.⁵⁵

The Convention on the Rights of the Child mentions water and sanitation under the right to health of the child:

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia...the provision of adequate nutritious foods and clean drinking-water
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of ... hygiene and environmental sanitation

The Convention on the Elimination of Discrimination Against Women (CEDAW) says:

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
 - (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply,...

Water and Constitutions:

A number of countries have specifically mentioned water in their constitutions, including South Africa, 'everyone has the right to have access to sufficient water' and Ecuador, 'the human right to water is fundamental and irrenounceable.' The former is more precise and could more clearly found a legal claim. The latter goes on to say that:

Water constitutes a strategic national patrimony [in ordinary English, national inheritance or treasure] of public use, inalienable, imprescriptible [no other person

can acquire the right as the result of long usage], non-embargable [cannot be the subject of a ban on trade] and essential for life.

This makes the article seem more a declaratory rather than a right-creating provision.

The Constitution of Bougainville (a province of Papua New Guinea with a good deal of autonomy) says:

22. General Social and Economic Objectives.

The Autonomous Bougainville Government shall endeavour to fulfil the fundamental rights of all people in Bougainville to social justice and economic development and shall, in particular, ensure that—

(b) all people in Bougainville enjoy... clean and safe water...

33. Medical Services and Health Care.

The Autonomous Bougainville Government shall take all practical measures...

(d) to promote water and sanitation management systems at all levels

The Bougainville example, however, is not one that gives a clear right to the people, but sets out objectives and aspirations for the province to work towards.

How would having a right to water affect the way in which government approaches water issues? Of course, there is no guarantee that the government will respond to such a right. In the case of South Africa, it is suggested that the National Water Act does try to do so. It has as objectives: meeting the basic human needs of present and future generations, promoting equitable access to water, promoting the efficient, sustainable, and beneficial use of water in the public interest, facilitating social and economic development, and protecting aquatic and associated ecosystems and their biological diversity. The Constitution is also reflected in the idea of the public trust, where the government is the trustee of the national water resources for the benefit of the people, and in the creation of a basic human needs reserve, which 'provides for the essential needs of individuals ... and includes water for drinking, for food preparation and for personal hygiene and second of an ecological reserve.'⁵⁶ In 2001, the government developed a Free Basic Water policy so that people were entitled to a minimum amount of free water, based on an assumption of 25 litres per person per day. In fact, this is not really enough for many poor and large households.

A number of special issues have arisen in connection with water. One is the question of privatization of water supplies. Whereas, in many developing countries provision of water, at least in urban areas, used to be a matter for public enterprise, private business has often taken over the

supply of water. In some countries, this has meant that water has become more expensive, so poor people actually find it harder to get access to drinking water. Even in South Africa, despite the constitutional right, there has been a move towards payment above the basic water minimum, including in some places pre-payment, which means there is automatically no more water if there is no payment, and in various places water supply has been privatized. Various court cases have dealt with this issue. In one case, a court decided that water could not be disconnected unless a fair procedure had been used.⁵⁷ In another case, the court stated that giving no effective alternative to a pre-paid system, under which households did not in fact receive the minimum of water required, was unconstitutional and also ordered that the free allowance be 50 litres a day.⁵⁸

BOX NO. 2.11 SOURCES ON WATER AND SANITATION

Right to Water website (Water Aid and Rights and Humanity) <http://www.righttowater.info/code/homepage.asp>

Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation (Catarina de Albuquerque) appointed 2008 see UN Human Rights website on the mandate etc. http://www2.ohchr.org/english/issues/water/Iexpert/Ind_expert_DeAlbuquerque.htm

World Health Organisation on Water Sanitation and Health http://www.who.int/water_sanitation_health/rightowater/en/

5.6 ENVIRONMENTAL RIGHTS AND SUSTAINABLE DEVELOPMENT

MDG 7 Ensure environmental sustainability

Integrate the principles of sustainable development into country policies and programmes; reverse the loss of environmental resources.

Reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss.

Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation.

Environmental rights are a more recent idea than rights to work, education, and so on. Some people refer to them as a sort of third generation right, but this is not very helpful. It is also sometimes said that environmental rights are rights of the community rather than of individuals, but in fact they can be both, as individuals may claim that their health is affected by the state of the environment, even if that environment also generally affects the community.

There is no specific environmental rights international treaty, but in a number of recent international human rights instruments a right to

a clean or healthy environment is mentioned. For example, the CRC includes, under the right to health, clean water, and also mentions the dangers of pollution and the need for public knowledge about environmental sanitation, and that one of the objects of education should be development of respect for the natural environment. There is an international Framework Convention on Biological Diversity which does not create rights for people but imposes obligations on states to protect the biodiversity within their own territories, for the benefit of mankind as a whole.

MDG 7, and target 1 under it, focuses not just on the environment but on the concept of sustainable development. This is not the place to discuss this in detail. One influential definition is that it 'meets the needs of the present without compromising the ability of future generations to meet their own needs'. The concept was spelled out in the Rio Declaration on Environment and Development of 1993, which speaks of the need to have environmental protection as an integral part of development processes, eradication of poverty as a prerequisite for sustainable development, the necessity to eliminate unsustainable production methods, the need for public participation, and the precautionary principle, which means not waiting for scientific certainty before acting if there is the possibility of serious irreversible damage to the environment.

There are a few modern constitutions that refer to sustainable development, for example, South Africa, the autonomous province of Bougainville in Papua New Guinea, and Eritrea. The new Constitution of Ecuador has a number of provisions including one on biodiversity:

The State will exercise sovereignty over biodiversity, the administration and management of which will be realized with intergenerational responsibility.

Most of these provisions are not rights creating but set out aspirations or principles for state action that may not be able to be used in a court context, though they would be important standards by which to measure the state's laws and policies in a political context.

Turning recognition of environmental rights, we find a variety of provisions. Since everyone has an environment, a constitution will not give a right to environment but to a clean, or healthy, or decent environment. The Philippines Constitution includes a State Policy:

Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

The Ecuador Constitution says:

Article 14. The right of the population to live in a healthy and ecologically balanced environment is recognised, which guarantees sustainability and good life [well being], *sumak kawsay* [an expression of the indigenous Kichwa people meaning good life, which is used at several points in the constitution].

It is not entirely clear what the significance of the phrase is; the right is recognized as opposed to ‘everyone has a right’ to be found in some other contexts in that Constitution.

A number of countries provide more direct rights. Spain says:

Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.

(This linking of right and duty appears in several constitutions.)

The Turkish Constitution provides

Everyone has the right to live in a healthy, balanced environment.

As so often, the Constitution of South Africa is clearer and more precisely drafted:

24. Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

In a number of other countries, less clear provisions have been used to develop environmental rights out of the right to life or other provisions. India is the best known example but there have been cases in Sri Lanka, Nepal, and Bangladesh as well.

BOX NO. 2.12 SOURCES ON ENVIRONMENTAL RIGHTS

Right to Environment website: <http://www.righttoenvironment.org/default.asp?pid=1>

Alan E. Boyle, Michael R. Anderson, *Human Rights Approach to Environmental Protection* (Oxford University Press, 1998)

Center for Human Rights and Environment (based in Latin America) <http://www.cedha.org.ar/en/>

5.7 WORK AND SOCIAL SECURITY

MDG 1: Eradicate extreme poverty and hunger	Halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day.
	Achieve full and productive employment and decent work for all, including women and young people.

The Millennium Declaration also speaks of a commitment:

To take measures to ensure respect for and protection of the human rights of ... migrant workers and their families

These rights have a key place in the CESC: this Covenant is not a charter for handouts, but an undertaking that people will be able to feed and clothe themselves, and that there will be full and productive employment. Its underlying vision is one of human self-reliance with the support of the State and the community for those things which people cannot do themselves. We can summarize what the Covenant says about these rights:

- The ... right of everyone to the opportunity to gain his living by work which he freely chooses or accepts
- The right to fair wages and equal remuneration for work of equal value without distinction of any kind; a decent living for themselves and their families' safe and healthy working conditions; equal opportunity for everyone to be promoted, rest, leisure, and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays
- There are also rights to form trades unions (and employers' organizations), and to strike.
- Finally: the right to social security, including social insurance.

Much of the elaboration of rights in connection with work has been carried out by the International Labour Organization, far older than the UN itself. The phrase 'decent and productive work' in the Millennium Declaration comes from the ILO and it has been described briefly as: Decent work is about opportunities for women and men to obtain decent and productive employment in conditions of freedom, equity, security, and human dignity.⁵⁹

Of course, a very wide range of factors determine whether a particular country has or can generate productive employment, and many of those factors are outside the control of individual countries. In its country programme for Nepal the ILO says:

It is the ILO's view that the generation of productive employment needs to be the primary focus of macro policy, extending from the triumvirate of monetary, fiscal, and exchange rate policies, to a range of other policy spheres that impact on employment—sectoral policies, product market policies and commercial regulation, trade policy—labour policy and social protection, among other spheres.⁶⁰

Constitutions and work: The Constitution of Brazil is an interesting example because of the range of rights it gives in connection with work. Here is the main article, with an asterisk against those items that can be thought of as social security rights:

Article 7. The Rights

- (0) The following are rights of city and rural workers, notwithstanding any others that seek to improve their social condition:
- I. employment protected against arbitrary dismissal or against dismissal without cause, according to a supplemental law which shall establish *severance payment, among other rights;
 - II. *unemployment insurance, in the event of involuntary unemployment;
 - III. *unemployment compensation fund;
 - IV. *a minimum wage nationwide, established by law, capable of satisfying their basic living needs and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation, and social security, with periodical adjustments to maintain its purchasing power, it being forbidden to bind it for any purpose;
 - V. a salary floor in proportion to the extent and complexity of the work;
 - VI. irreducibility of salary or wage, except when provided for in collective agreements or covenants;
 - VII. guarantee of salary or wage never below the minimum wage, for those receiving variable compensation;
 - VIII. *a thirteenth salary based on the full compensation or on the pension payment;
 - IX. compensation for night work above that for daytime work;
 - X. salary protection, as established by law, malicious withholding of a salary being considered a crime;
 - XI. participation in the profits or results, independent of compensation, and, exceptionally, participation in the management of the company, as defined by law;
 - XII. *family allowance for their dependants;
 - XIII. normal work hours not exceeding eight hours per day and forty-four hours per week, with the option to set off work hours and reduce the work day through an agreement or a collective bargaining covenant;
 - XIV. a work day of six hours for work carried out in uninterrupted shifts, unless otherwise established by collective bargaining;

- XV. paid weekly leave, preferably on Sundays;
- XVI. compensation for overtime work at least fifty per cent above the compensation for normal work;
- XVII. annual vacation with compensation at least one third above the normal salary;
- XVIII. *maternity leave without loss of job and of salary, for a period of one hundred and twenty days;
- XIX. paternity leave, under the terms established by law;
- XX. protection of the work market for women through specific incentives according to the law;
- XXI. prior notice of dismissal in proportion to period of service, but at least thirty days, under the terms of the law;
- XXII. reduction of work risks by means of health, hygiene, and safety rules;
- XXIII. additional compensation for unhealthy or dangerous work, as established by law;
- XXIV. *retirement pension;
- XXV. *gratuitous assistance for the children and dependents from birth to six years of age, in day care centres and kindergartens;
- XXVI. recognition of covenants and of collective bargaining agreements;
- XXVII. protection by virtue of automation, as established by law;
- XXVIII. *work accident insurance, under the responsibility of the employer, without excluding the indemnity for which the employer is liable, in the event of malice or fault;
- XXIX. legal action for credits arising out of employment, with a statute of limitations:
 - a) of five years for city workers, up to the limit of two years after ending the employment contract;
 - b) of up to two years after ending the contract, for rural workers;
- XXX. prohibition of any difference in salary, in performance of duties, and in hiring criteria by reason of sex, age, colour, or marital status;
- XXXI. prohibition of any discrimination with respect to salary and hiring criteria for handicapped workers;
- XXXII. prohibition of any distinction between manual, technical, and intellectual labour or between the respective professionals;
- XXXIII. prohibition of night, dangerous, or unhealthy work for minors under eighteen years of age, and of any work for minors under fourteen years of age, except as an apprentice;
- XXXIV. equal rights for workers with a permanent employment bond and sporadic workers.

(1) The category of domestic workers is assured of the rights set forth in Items IV, VI, VIII, XV, XVII, XVIII, XIX, XXI and XXIV, as well as integration into the social security system.

There are also full provisions on rights in connection with labour organization and the right to strike.

It would be difficult, and perhaps undesirable, to achieve agreement on such a detailed range of rights in many countries. Other countries have considerably less in the way of detail. The South African Constitution includes:

Assembly, demonstration, picket, and petition

17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Freedom of trade, occupation, and profession

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Labour relations

23. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right—
- (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right—
- (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right—
- (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Social security: This is a rather broad expression. The Committee on ESCR (see p. 108) has recently produced a General Comment on this right.⁶¹ It says that:

The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family

member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependants.

The relevance of this idea for the elimination of poverty is obvious. It is also clear that for many countries a major programme of social security would be beyond their means. The Committee recognizes the problem, but insists that 'the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy.'

The Covenant does not say that the State must provide social security; for people who have or have had regular employment, private schemes may be as important as state schemes. Nevertheless, for many poor countries with many unemployed people or people working only in the informal sector or in subsistence agriculture, privately organized social security may be difficult to achieve. However, it has been suggested that a country, in order to meet its obligations under the Covenant, should have a plan of action to realize the right, including clear goals, and strategies, benchmarks, time frame, and monitoring systems.⁶² The same publication suggests that the core obligation should be to provide for the most disadvantaged and vulnerable groups. Who these are will depend on the particular country.⁶³

5.8 CONSTITUTIONS AND SOCIAL SECURITY

Many constitutions say little or nothing about social security. We have seen that the Constitution of Brazil says quite a lot but the South African Constitution only says:

27. (1) Everyone has the right to have access to.
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The Constitution of Finland says:

Section 19 The right to social security

- (1) Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.
- (2) Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.

In some countries, especially in Eastern Europe, courts have dealt with cases about the right to social security. The Constitutional Court of Latvia held that laws that did not ensure that employers actually paid social insurance premiums for their employees violated the constitution (and the Covenant).⁶⁴ The Supreme Court of Venezuela ordered the National Assembly to pass a law filling a gap in the social security law, which had left no protection for workers suspended or dismissed (and pending the new law, the court declared that an existing scheme remained in force).⁶⁵ The Hungarian Constitutional Court has decided several cases,⁶⁶ and has said that, in general, it is for parliament to decide how to fulfil its obligations, but it must not reduce social support below the minimum indicated by the constitution which says:

Article 70/E Citizens... are entitled to the support required to live in old age, in case of sickness, disability, or being widowed or orphaned, and in case of unemployment through no fault of their own.

BOX NO. 2.13 SOURCES ON WORK, AND SOCIAL SECURITY

International Labour Organization <http://www.ilo.org/global/lang-en/index.htm>

ESCR-Net http://www.escr-net.org/resources/resources_show.htm?doc_id=401411 (social security)

National Economic and Social Rights Initiative (USA) 'Human Right to Social Security Info Sheet no. 1' http://www.nesri.org/fact_sheets_pubs/Right%20to%20Social%20Security.pdf

5.9 DUTIES AND RESPONSIBILITIES

A number of constitutions have, in recent years, provided for the duties and responsibilities of individuals, on the basis that we must all respect the rights of others and to contribute to the state and society, and our own development. Some human rights activists have attacked this, fearing that the state will abuse the provision for duties and even criminalize non-fulfilment of duties. They say that duties are hard to specify in a way they could be made enforceable.

We consider that there is merit in specifying duties. They are implicit in our understanding of good citizens and responsible members of a community. In many countries for which the MDGs are most relevant, there is so much discrimination and oppression in civil society, much more than through the mechanisms of the state, that they cannot be eliminated except through a sense of responsibility and solidarity. We

know that poverty and the misery of millions are the result of the greed of some others, particularly capitalists and politicians. Greed is the negation of the responsibility that we owe to each other. As we have argued, all human rights, particularly socio-economic rights, facilitate

BOX NO. 2.14 BASIC SOCIAL RESPONSIBILITIES IN THE CONSTITUTION OF
PAPUA NEW GUINEA

BASIC SOCIAL OBLIGATIONS

WE HEREBY DECLARE that all persons in our country have the following basic obligations to themselves and their descendants, to each other, and to the Nation:

- (a) to respect, and to act in the spirit of, this Constitution; and
- (b) to recognize that they can fully develop their capabilities and advance their true interests only by active participation in the development of the national community as a whole; and
- (c) to exercise the rights guaranteed or conferred by this Constitution, and to use the opportunities made available to them under it to participate fully in the government of the Nation; and
- (d) to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations; and
- (e) to work according to their talents in socially useful employment, and if necessary to create for themselves legitimate opportunities for such employment; and
- (f) to respect the rights and freedoms of others, and to co-operate fully with others in the interests of interdependence and solidarity; and
- (g) to contribute, as required by law, according to their means to the revenues required for the advancement of the Nation and the purposes of Papua New Guinea; and
- (g) in the case of parents, to support, assist and educate their children (whether born in our out of wedlock), and in particular to give them a true understanding of their basic rights and obligations and of the National Goals and Directive Principles; and
- (i) in the case of the children, to respect their parents.

IN ADDITION, WE HEREBY DECLARE that all citizens have an obligation to themselves and their descendants, to each other and to the Nation to use profits from economic activities in the advancement of our country and our people, and that the law may impose a similar obligation on non-citizens carrying on economic activities in or from our country.

and indeed necessitate solidarity and require the activity of individuals and communities, including participation and a measure of vigilance. We believe that it is desirable to remind people of and educate children with a sense of responsibility and solidarity.

We propose that corporations and other associations, since they are beneficiaries of rights and their activities have a major impact on the lives of most people, should also be charged with duties and responsibilities, as applicable.

The 2003 Rwanda constitution incorporates duties, among which is:

Every citizen has the duty to relate to other persons without discrimination and to maintain relations conducive to safeguarding, promoting and reinforcing mutual respect, solidarity and tolerance (Art. 47).

One of the best formulations of responsibilities that we know comes from the 1975 (independence) constitution of Papua New Guinea (see Box 2.14).

6. THE INVISIBLE, MDGS, RIGHTS, AND CONSTITUTIONS

The MDGs and their targets deal, on the whole, with total populations (except to the extent that they speak of women, or children, or young persons). Experience shows that poverty does not affect all groups within countries to the same extent or in the same way. In fact, the measures needed to bring people out of poverty will not necessarily be the same for all groups in a country. Statistical targets can obscure this and work to the disadvantage of smaller marginalized groups. Bringing the most deprived groups out of poverty is often more difficult, for the same reasons that they are the most deprived—physical remoteness, cultural reasons, as well as poor relationships with majority communities, attitude of majority communities, and so on. These are the groups for which equality provisions are not enough. Positive efforts may be needed to achieve real equality. The experience of minority communities has often been that, in the eyes of the majority, equality means being the same. In other words, the distinctiveness of minorities is not recognized, even when the minorities wish to retain that distinctiveness, but, “To be the same is not to be equal. To be equal is to be treated as equal based on relevant differences.”⁶⁷

Women, though not a minority, are among the groups for whom rights, equality, and development may not be achieved simply by putting them in the constitution and even in government policies. For them, the issue

is not recognition of cultural distinctiveness. In fact, it may be recognition of different needs or meeting similar needs in appropriate ways.

Indigenous peoples in many countries find that they are either ignored or treated as being in need of assimilation into the majority community, a process that they feel will rob them of their identity, their traditional knowledge, and even of their existence.

Other minorities face problems that may resemble those of indigenous peoples. Indeed in many countries there is resistance to the whole language of 'indigenous peoples' because it seems to introduce a hierarchy of worth into countries where most or many groups are deprived. Migrants into a country may find that their needs are not understood and they do not understand governmental processes even if these are intended to benefit them. Ethnic minorities face similar problems of identity and inclusion as those of indigenous groups. In some countries, deprivation has nothing to do with indigeneity but to do with other traditions such as caste. South Asia is particularly affected by this, and the Dalits or Harijans (once known as untouchables) still suffer deprivation and exclusion, associated with attitudes on the part of the dominant groups that are, if anything, even more demeaning than the attitudes often displayed by majority groups towards indigenous communities.

Because we recognize that global standards may not be enough to meet the needs of such groups within society, and precisely because we are aware of the invisibility which groups, even women who are often a technical majority, often experience when government policies are being developed. In this short section we suggest some ways in which constitutions may try to redress this imbalance.

6.1 WHAT SOCIETIES LOSE BY TURNING A BLIND EYE

It is too easy to assume that the benefits of paying attention to the invisible are in one direction only in other words that this is for the benefit of the excluded groups only. Nonetheless, a society that excludes substantial sections of its population is actually depriving itself of valuable resources. If most women cannot play a full part in society, if there is a substantial section of society which is kept in ignorance and passivity, or perhaps even in resentment and rebellion, because of its ethnicity, or origin, or remoteness, if the 10 per cent of the population, on an average, who suffer from some sort of disability are viewed as burdens rather than burden sharers, society as a whole as much as the excluded, suffers from this. We can see this in Nepal where 35 per cent of the population has monopolized senior public positions, educational opportunity, and

status on the basis of caste and ethnicity, and even within that 35 per cent most women have been equally excluded, depriving the nation as a whole of valuable human resources.

Society deprives itself not only of human resources, but also of knowledge. This is particularly so in the case of indigenous communities: because of their close relationship with land and its resources, they often know more than scientists about appropriate farming techniques and the medicinal potential of plants.

6.2 WOMEN

Some of the goals, and the targets for the achievement of the MDGs, specifically relate to women. However, our concern here is the particular position of women, generally, in the achievement of the MDGs.

6.2.1 Is the Situation of Women Different?

It is universally the case that women's experience of poverty is rather different from men's and that the strategies needed to tackle poverty are also probably different. It is also true that development projects very often fail to involve women despite talk of mainstreaming gender.

We can take, as an example, a study of the MDGs in Cambodia and what would be needed to achieve them for women.⁶⁸ That study found, for example:

- Girls are more likely to work than boys and, thus, be deprived of education
- Women hold 22 per cent of public sector jobs
- Traditional attitudes, which still prevail to a considerable extent, put women in an inferior position; even primary school curriculums still teach that women should be quiet, shy, and submissive
- More women than men worked in the informal sectors and inadequate support to small and medium size enterprise development affected them badly
- Though women have a major role in agricultural production, agricultural extension services targeted men far more than women
- Despite laws protecting women's land rights, cultural and other factors often meant that these rights are not really enforced
- Completion rates in educational institutions are higher for boys and the disparity increases with higher levels of education
- Women were increasingly at risk from HIV, yet only 1 per cent of married women used condoms

- Only 7 per cent of judges were women
- More women are involved in decision making at village rather than higher levels.

To take one more specific example: women experience water (and associated sanitation) issues very differently from men. In many societies, girls rather than boys are expected to collect water, for family use. The consequences can be lack of schooling for girls, poor health (from carrying heavy loads), lives dominated by water collection. Sanitation also raises a whole lot of other issues. Where there are no latrines women may have to defecate where they are exposed to physical harassment. They may have to delay bodily functions until after dark. Yet, programmes for water and sanitation (like many other programmes) may fail to involve women in decision-making, so these aspects are neglected in development projects.⁶⁹

None of these observations will surprise people with experience in development issues. Many countries have similar experiences, though the details will vary. The percentage of literacy among women will vary, traditions of working outside the home vary, water problems are not identical everywhere, and so on.

6.2.2 Constitutions and Women

Many constitutions say nothing about the specific experience of women, but just emphasize that all are equal, and that discrimination on the basis of sex is impermissible (some older constitutions do not even say this). Are there other useful provisions that can be included in a constitution that could be used to enhance the chances of anti-poverty programmes addressing the specific concerns of women?

First to come to mind will no doubt be the Bill of Rights. Secondly, provisions about participation will also be important. Indeed, rights to participation can also be in the Bill of Rights. In the context of water, it has been suggested, 'Strategies setting out to make water managers and planners gender aware is a necessary but not sufficient measure. More important is to ensure that the water reform process takes women's rights to participate and own property on an equal basis with men on board.'⁷⁰ The provisions about the working of government, about participation, and about accountability are also relevant, and 'accountability to whom?' is an important issue for women as for other members of society. Provisions to empower women, emphasized in the MDGs, are important for the achievement of all rights. Research has shown that sometimes gender mainstreaming, touted as being the way to ensure that women's issues are

not marginalized, can actually lead to the disempowering of women and lessening their active involvement.⁷¹

Here are some provisions that might increase the effectiveness of constitutional protection and rights for women:

- permitting affirmative action for women, as well as other disadvantaged groups (so that programmes, especially for women, cannot be attacked as being against the equality provisions)
- make it a duty of the state to have special programmes for the advancement of women (such a provision was included in the draft constitution for Kenya in 2004: the State must 'provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realise their full potential and advancement'; and the Constitution of the Fiji Islands provides for affirmative action for 'all groups or categories of persons who are disadvantaged' but not identifying women specifically)
- provisions to ensure that women hold a certain minimum number of seats in the national or lower legislatures; such provisions exist in India (applying to local government bodies only), Rwanda, and Uganda (special seats in the national legislature)
- rights for women that draw particular attention to issues that affect women rather than the general 'equality and non-discrimination' provisions only; the 2004 Kenyan draft Constitution says Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural, and social activities; women's rights to property have been mentioned in some constitutions, for example the Interim Constitution of Nepal 2007'
- provisions for equal rights within the family, because it is within the family that obstacles to women's full participation in society often lie⁷²
- carefully drafted rights, including ensuring that indirect discrimination is included (see p. 92)
- provisions designed to ensure that women's issues (and those of other groups) are understood by decision makers. The 2004 draft for Kenya said, 'All public officers and State organs, and their employees have the responsibility to equip themselves to understand and deal with the needs of special groups within society including women, ...'
- provisions designed to ensure that the public, including women, participate in decision making that affects them, and not just

in the voting process at general elections. The South African Constitution says:

- 59 (1) The National Assembly must—
- (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees.

The Constitutional Court has held that certain legislation was passed unconstitutionally by virtue of failure of other legislative bodies (to which a similar provisions applies) to satisfy those provisions.⁷³ Some inspiration for drafting might be derived from the Protocol to the African Charter on Human and People's Rights: 'States Parties shall integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and all spheres of life.'⁷⁴

- provisions designed to enhance democracy within political parties, and to specifically encourage the adoption of women candidates (for winnable seats); public funding of parties, which is becoming increasingly common, can be used with incentives of this sort
- other provisions that enhance democratic control, accountability of government, and public participation, generally
- provisions that make it clear that public policies must be prepared with wide consultation, including with affected groups, and women could be specifically mentioned
- statements of policy that raise the visibility of women's issues, including in the preamble and in the Directive Principles (but always bearing in mind that there is a risk that putting women's issues into such provisions, which have fewer legal teeth than rights, may lead to those issues being viewed as less important).

Ensuring that women have an effective voice in decision-making is a very complex business, and the issues will be different in different societies, even in different contexts within one country.

6.3 INDIGENOUS PEOPLES AND OTHER MINORITIES

Much research shows that indigenous minorities tend to be excluded from many activities of society and also tend to be poorer, less well-educated, less healthy, and have shorter life expectancies. These groups, and others concerned with their welfare, have complained that they are invisible in the MDGs. The human rights emphasis of the Millennium Declaration would not exclude them, but the goals and the specific targets, with the stress on dates and statistics, can leave smaller and more marginalized

groups behind. As has been said, 'Arguably, the Millennium Development Goals as they stand today could be achieved even while whole populations of indigenous peoples disappear.'⁷⁵ Countries, in reporting on their MDG performance, often give inadequate attention to indigenous peoples and other minorities.⁷⁶ The ILO has found that so-called Participatory Poverty Assessments often exclude indigenous peoples. In fact, development projects can be positively disadvantageous to indigenous groups; they may live in hilly regions, the sort of terrain where dams are built, to supply water and power to cities far away; they may live in scenic areas, where tourism projects emphasize natural beauty and even wildlife, but not the lives of the human beings who live there. There are recurring patterns in the violations of the human rights of indigenous peoples everywhere.⁷⁷ Even where policies are intended to benefit indigenous peoples, those making the decisions often do not understand the issues.

The ILO comments: 'Although indigenous and tribal peoples' special situations and needs are sometimes reflected in the analysis and assessment of the poverty and development challenges in a given country, these are rarely reflected in policy prescriptions, programmes, and budgets.'⁷⁸

From various initiatives⁷⁹ we can draw the following ingredients of inclusion of indigenous peoples in MDG processes:

- Non-discrimination against and inclusion of indigenous peoples
- Full and effective participation of indigenous peoples in decisions that affect their lives
- Defining development policies to include a vision of equity for indigenous peoples that respects their cultural and linguistic diversity
- Policies, programmes, and budgets targeted specifically at indigenous peoples
- Appropriate monitoring and evaluation mechanisms, with relevant targets and benchmarks, including disaggregation of national statistics so that the situation of indigenous groups can be properly understood
- Involving indigenous groups in preparation of reports
- Undertaking research on key issues in relation to the achievement of the MDGs by indigenous peoples.⁸⁰

The recently adopted Declaration on the Rights of Indigenous Peoples⁸¹ has a number of articles about the right of indigenous peoples to self-determination, especially participation in decisions that affect them, and also their right to retain their distinctiveness. The rights include:

To freely pursue their economic, social, and cultural development (Article 3)

To autonomy or self-government in matters relating to their internal and local affairs, including means of financing that autonomy (Article 4)

To maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the State (Article 5)

To participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (Article 18)

To be consulted about laws and administrative measures that may affect them, and that their free, prior, and informed consent should be required before such laws and measures are adopted (Article 19)

To be actively involved in developing and deciding on economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (Article 23).

6.3.1 Constitutions and Indigenous Peoples

How might a constitution be relevant to the achievement of these rights and objectives, and to the achievement of the rights of indigenous peoples to health, housing, education, and so on, and the Millennium Goals?

- Bills of Rights that specifically recognize that the circumstances of indigenous peoples might differ from those of other groups in society
- Specific recognition of the rights of indigenous peoples to participation, consultation, inclusion, and non-discrimination
- Specific mention of intersectional issues, such as the particular problems of women in indigenous society
- Electoral systems that promote wide participation. In New Zealand, proportional representation has led to Maori MPs (Members of Parliament) being about the same proportion as their presence in the population; though it may be unwise for a constitution to specify an electoral system in detail, the Constitution of South Africa does require some element of proportionality in the system; or, where elections are based on geographical constituencies, boundaries could still be required by the constitution to be drawn in a way that maximizes the representation of various groups, including indigenous peoples
- Provisions about participation and consultation could also mention the specific needs of various groups including indigenous peoples.

A number of South American constitutions make specific mention of indigenous peoples. For example:

Venezuela:

Article 119. The State recognizes the existence of indigenous peoples and communities, their social, political and economic organization, their cultures, practices and customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy, and which are necessary to develop and guarantee their way of life. ...

Article 120 provides that state exploitation of the natural resources in indigenous habitats must not harm the cultural, social, and economic integrity of the habitats, and that there must be prior information and consultation⁸² with the indigenous communities concerned.

Article 122. Indigenous peoples have the right to a full health system that takes into consideration their practices and cultures...

Article 124. Collective intellectual property rights in the knowledge, technologies and innovations of indigenous peoples are guaranteed and protected. ...

Article 125. Indigenous peoples have the right to participate in politics. The State shall guarantee indigenous representation in the National Assembly and the deliberating organs of federal and local entities with an indigenous population, in accordance with law.⁸³

Bolivia (2008):

Article 26

II The right to participation includes:

....

4 Election, designation and direct nomination of the representatives of the nations and farming peoples of indigenous origin, in keeping with their own norms and procedures.

Article 30

- I. The whole group of people who share cultural identity, language, historical tradition, institutions, territoriality and worldview, whose existence predates the Spanish colonial invasion constitute the nation and peasant people of indigenous origin.
- II. Within the framework of the unity of the State and in accordance with this Constitution, nations and farming peoples of indigenous origin enjoy the following rights:
 1. To exist freely
 2. To their cultural identity, religious beliefs, spirituality, practices and customs, and to their own world vision.

...

9. To have their wisdom and traditional knowledge, their traditional medicine, their languages, their rituals and their symbols and clothing valued, respected and promoted.
10. To live in a healthy environment, with proper utilization and management of the ecosystems.
11. In the intellectual property of their collective wisdom, science and knowledge, as well as their valuation [meaning being valued], use, promotion and development.
12. To an intracultural, intercultural and pluri-lingual education in the whole of the education system.
13. To a universal and free health system which respects their world vision and traditional practices.
14. To the exercise of political, judicial and economic systems in according with their world vision.
15. To be consulted through appropriate procedures and in particular through their institutions, whenever consideration is being given to legislative or administrative measures which may affect them. In this context, the right to mandatory prior consultation by the state, in good faith and in concert, with respect to the exploitation of non-renewable natural resources in the territory they inhabit is respected and guaranteed.
16. To participation in the benefits of the exploitation of the natural resources in their territories.
17. To the indigenous, autonomous management of territory, and to the use and exclusive utilization of the renewable natural resources in their territory.
18. To participation in the organs and institutions of the State.

Article 149

- I. The proportional participation of the nations and peasant peoples of indigenous origin in the election of members of parliament is guaranteed.
- II. Law will determine special constituencies for indigenous peasants where population density, district boundaries and geographical continuity will not be considered essential criteria.

6.3.2 Other Minorities

Other minorities may suffer similar disadvantages to those of indigenous peoples, such as general discrimination, being ignored in planning and policy-making, not being consulted, lack of comprehension of their language, culture, or needs. Nevertheless, it is likely that the precise nature of disadvantage will differ between groups and between countries. Minorities may differ in their way of life (pastoral or hunter/gatherer, as opposed to mainly settled communities, for example), in their language, in their religion, or in their caste, or in their ethnicity. So it is not possible

to anticipate all the issues that might merit mention in a constitution. From the perspective of socio-economic rights and achievement of development goals, however, a number of issues are likely to be relevant, and they overlap to some extent with the comments made earlier on indigenous peoples, and also with the comments in relation to women.

Relevant points would include:

- Clear anti-discrimination provisions (if necessary spelling out types of discrimination known to occur in the particular society—as the Constitution of Nepal mentions ‘caste’)
- Linguistic rights—including giving particular status, locally or nationally, to languages spoken by minorities (in South Africa there are 11 official languages, though each government in the country uses only a few)
- Rights to practise culture and religion
- Strong participation rights
- Electoral systems (see the comments under Indigenous Peoples above)
- Effective local government, or decentralized government that brings decision-making closer to the people)
- Accountability provisions

6.3.3 Persons with Disability

In most countries persons with disabilities tend to be among the poorest. They may be invisible in the most literal sense, as in some societies disabled people are hidden away. Certainly, persons with disability seem to have been invisible to the drafters of the MDGs.⁸⁴ Since raising their standard of living may be more expensive and difficult, there is a serious risk that they will be last in the queue when it comes to achieving statistical targets. However, the former Chairman of the World Bank, James Wolfensohn, said, ‘Unless disabled people are brought into the development mainstream, it will be impossible to cut poverty in half by 2015 or to give every girl and boy the chance to achieve a primary education by the same date.’⁸⁵

Some estimates suggest that in many societies about 10 per cent of the population may suffer from some disability (though official statistics rarely acknowledge this), and that taking into account the families and carers of persons with disability, as many as 25 per cent of the population may be affected by disability.⁸⁶ Various studies have pointed out the connections between disability and poverty and, therefore, how ignoring disability can make the achievement of the MDGs harder. For example:⁸⁷

MDG 1: Eradicate extreme poverty and hunger

- Hunger and malnutrition and disability and poverty are inextricably intertwined.

MDG 2: Achieve universal primary education

- Cannot be achieved without including disabled children, but the majority of disabled children are out of school
- In Malawi, 35% of disabled children had never been to school compared to 18% for other children.

MDG 3: Promote gender equality and empower women

- Disabled women are recognized to be multiply disadvantaged, experiencing exclusion on account of their gender and their disability
- Disabled women and disabled girls are particularly vulnerable to abuse
- Research in India suggests that women are more likely to carry on working than men with similar impairments, less likely to seek medical help and less likely to receive treatment and services than disabled men

MDG 4: Reduce child mortality

- Mortality for disabled children can be as high as 80% even in countries where under-five mortality is below 20%

MDG 5: Improve maternal health

- As 20 million women per year suffer disability and long-term complications as a result of pregnancy and childbirth
- Abnormal prenatal or perinatal events are a major cause of disability in children.

MDG 6: Combat HIV/AIDS, malaria and other diseases

- One in 10 children suffers neurological impairment after cerebral malaria, including epilepsy, learning disabilities and loss of coordination
- HIV/AIDS in many countries is considered a disability because of the discrimination faced by people living with HIV and AIDS.

MDG 7: Ensure environmental sustainability

- Poor environmental quality is a significant cause of ill health and disability.
There is now a Convention on the Rights of Persons with Disabilities, which includes:

Article 4(3). In ... decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Article 5(4). Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination...

Article 8. 1. States Parties undertake to adopt immediate, effective and appropriate measures:

- (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- (c) To promote awareness of the capabilities and contributions of persons with disabilities.

Article 19. States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community....

Article 25. States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health-related rehabilitation.

Article 29. States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected. ...

These rights are spelled out in some detail, as are other rights, in order to make it clear that persons with disability are as entitled as anyone else to full participation in society and to the enjoyment of all the same rights. As the Preamble says:

Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty.

6.3.4 Constitutions and Persons with Disability

A constitution cannot go into this level of detail, but to give full rights to persons with disability it could:

- define 'disability' in a way that covers all circumstances that may impair some people's participation in society, including, for example, being HIV positive (which may lead to discrimination, even when the person in question is not suffering any related ill-health) or a condition like albinism (which in East Africa can lead to discrimination or even to murder so that body parts can be used)
- give visibility to the issues and to the rights by being explicit that persons with disability do have all the rights as that of others in society
- highlight some of the more important steps that government might take, including the use of Braille or sign language (the Constitution of South Africa says that a Language Board must promote and create conditions for the development and use of ...sign language)
- provide for affirmative action for persons with disability (at least as being non-discriminatory)

Other ways in which a constitution might strengthen the role and protection of persons with disability include:

- recognize the role of civil society organizations, especially in consultation and participation in policy-making
- protect the statistical service from political interference (and a temptation to minimize figures of person with disability).

Examples:⁸⁸ The South African constitution includes disability as one of the grounds on which laws and policies may not discriminate, as does that of Eritrea. The Kenyan draft constitution of 2004 included, as a national goal, that the State must ensure full participation of women, persons with disabilities, marginalized communities, and all other citizens in the political, social, and economic life of the country and progressively implement the principle that at least 5 per cent of the members of elective and appointive bodies shall be persons with disabilities (which would not create any enforceable legal rights), but it also said:

42. (1) Persons with disabilities are entitled to enjoy all the rights and freedoms set out in the Bill of Rights, and to be full participants in society.
- (2) Persons with disabilities have a right to—
 - (a) respect and human dignity including to be treated, addressed and referred to, in official or private contexts, in a manner and in words that are not demeaning or derogatory;

- (b) access to education, to institutions and facilities for persons with disabilities that are as integrated into society as a whole as is compatible with the interests of those persons;
 - (c) access to all places, to public transport, and to information and communications;
 - (d) use of sign language, Braille, and other appropriate means of communication;
 - (e) participate in decision-making at all levels;
 - (f) equal rights to inherit, have access to and to manage property;
 - (g) access to materials and devices to overcome constraints arising from those disabilities; and
 - (h) treatment and opportunities in all spheres of life that are both fair and equal to those of other members of society.
- (3) The State shall take legislative and other measures to ensure that persons with disabilities enjoy all the rights referred to in clause (2).
- (4) Legislation and policy measures provided for in clause (3) shall make special provision for women with disabilities.

The Constitution of Brazil (Article 7) prohibits any discrimination with respect to salary and hiring criteria for handicapped workers. The Constitution of Finland says: 'The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.' The Constitution of Estonia says: '...persons with disabilities shall be under the special care of the state and local governments.' Arguably this provision does not confer rights. It is on the face of it a rather paternalistic provision which denies persons with disability their autonomy.

NOTES

1. 1996 (5) BCLR 658 at Para 147.
2. General Comment 25/1996 available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument). See also Vivien Hart, *Democratic Constitution Making* (Washington: US Institute of Peace, July 2003 Special Report No. 107) at <http://www.usip.org/specialreports/sr107.html>, last visited 22 August 2010.
3. *Marshall v. Canada* (Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991).
4. From *The People's Choice: The Report of the Constitution of Kenya Review Commission Short Version* (Nairobi: The Commission, 2002).
5. The drafter was the Canadian lawyer Phil Knight; he has written about constitution drafting in a forthcoming article 'Drafting (Actually)'.

6. In an amendment in 1977, the words 'unity and integrity of the Nation' were added.
7. On many of these issues see Yash Ghai and Jill Cottrell, 2004, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, London: Interights.
8. See for example, The Indian Supreme Court in various environmental cases such as *Rural Litigation & Entitlement Kendra v. State of U.P.*, AIR 1985 SC 652, *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446, and the various cases brought by MC Mehta mostly named *MC Mehta v. Union of India*, including 1996 (4) SCALE (SP) 29 (pollution affecting the Taj Mahal), AIR 1988 SC 1037 (*Ganges Tannery case*), and very recently the Supreme Court's order on mining in the Aravalli Hills in the case Writ Petition (C) No. 4677 of 1985 on May 8 2009 see <http://www.indiankanoon.org/doc/1188746/> last visited 22 August 2010 (see a list of those cases at <http://www.elaw.org/resource/topic/1721>).
9. Corder *et al.*, 1992, *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate*, Capetown: University of Capetown, p. 21.
10. *Certification of The Constitution of The Republic of South Africa*, 1996 Case CCT 23/96.
11. *A Bill of Rights for Northern Ireland Advice to the Secretary of State for Northern Ireland* (10 December 2008).
12. House of Lords House of Commons Joint Committee on Human Rights *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007-8*.
13. Robert Andolina, 'The Sovereign and its Shadow: Constituent Assembly and Indigenous Movement in Ecuador', *Journal of Latin American Studies*; November 2003; 35, p. 271.
14. The UK Parliament Joint Committee on Human Rights, see Twenty-ninth Report of Session 2007-8 'A Bill of Rights for the UK?' at p. 46.
15. In the specific context of fair trial, we find a wide range of international standards such as Lawyers' Committee for Human Rights, *What is a Fair Trial? A Basic Guide to Legal Standards and Practice* http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf, last visited 22 August 2010. Amnesty International Fair Trials Manual (1998) <http://www.amnesty.org/en/library/info/POL30/002/1998>, last visited 22 August 2010.
16. *Government of the Republic of South Africa v. Grootboom* 2001 (4) SA 46.
17. On the conformity between the Constitution of the Republic of Belarus and part two of Article 5 of the Law 'On privatization of housing resources in the Republic of Belarus' 2 June 1999, Minsk No. J-80/99 <http://ncpi.gov.by/constud/eng/judg19.htm>
18. *L.R. et al. v. Slovak Republic*, Communication No. 31/2003, UN Doc. CERD/C/66/31/2003 (10 March 2005). The case is among those discussed in James A. Goldston and Mirna Adjami, 'The Opportunities and Challenges of Using

- Public Interest Litigation to Secure Access to Justice for Roma in Central and Eastern Europe', in Ghai and Cottrell (eds), *Marginalized Communities and Access to Justice*, London: Routledge, p. 205.
19. Yash Ghai, (2000), 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims', *21 Cardozo Law Review*, pp. 1095–1140.
 20. The courts of Australia have held that this does not apply to companies: *Environmental Protection Authority v. Caltex Refining Company PTY Ltd*, (1993) 118 ALR 392.
 21. The European Court of Human Rights has held that all sorts of 'speech' are protected by the Convention, but the type of speech involved is relevant to deciding whether laws limiting it is justified in a democratic society; the leading case is *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* (1989) 12 EHRR 161. In India commercial speech has been held protected; the Supreme Court said in *Tata Press Ltd. v. MTNL and Others* (1995) 5 SCC 139, 'In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech".'
 22. In 2005 the Supreme Court held by 3:2 that the Board of Control for Cricket in India was not 'State' for the purposes of human rights responsibility: *Zee Telefilms Ltd. v. Union of India* Writ Petition (civil) 541 of 2004 (02/02/2005).
 23. *Ajay Hasia v. Khalid Majib* (1988) 1 SCR 722, at 733.
 24. See e.g. <http://www2.ohchr.org/english/issues/globalisation/business/index.htm> and <http://www.unglobalcompact.org/both> last visited 22 August 2010.
 25. John Ruggie, 2008, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' A/HRC/8/5 April 2008, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>. Among the various endeavours to guide and persuade companies to respect human rights is Castan Centre for Human Rights Law, Monash University, *Human Rights Translated: A Business Reference Guide* (Office of the High Commissioner for Human Rights, 2008) available at http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf, last visited 22 August 2010.
 26. For example a famous US case in which the courts invalidated clauses (restrictive covenants) in private land documents that prevented particular groups from owning/occupying land (*Shelley v. Kraemer* 334 US 1 (1948)).
 27. *Toa v. Ly Cung-Long* (2008) PGNC 137; N3471 (15 September 2008).
 28. See Jennifer Corrin, 2008, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific', The University of Queensland, TC Beirne School of Law Legal Studies

- Research Paper Series (2008) <http://ssrn.com/1287450>, which reviews literature on horizontal effect from other jurisdictions also.
29. Corder *et al.*, *A Charter for Social Justice*, pp. 17–18.
 30. See the section on the Right to Education under Specific Rights below for a comparison of two constitutional provisions in terms of their clarity and precision.
 31. *Leung Kwok Hung v. Hong Kong Special Administrative Region*, (2005) 3 HKLRD 164; (2005) 8 HKCFAR 229.
 32. It is not necessary to look in detail at how the courts have responded to this, especially because most modern constitutions have express limitations. Among the concepts developed by the US courts is that of ‘Clear and Present Danger’ to a valid public interest, especially in the context of the First Amendment—freedom of speech.
 33. The US Supreme Court developed the concept of Clear and Present Danger, but its application to the facts in the case where the phrase originated, *Schenck v. United States* 249 U.S. 47 (1919) hardly seems justified.
 34. In the common law system, a judge faced with a list of specific items and then something that says ‘other reasons’ will interpret the last items as meaning that other reasons must be similar to the items in the list. This may limit the nature of the reasons the judges will accept—a good thing for rights protection. It only works if the items in the list seem to have common characteristics so they fall into a class.
 35. This is based on the provision in the Draft Constitution of Kenya (2004).
 36. For example, *Olga Tellis and others v. Bombay Municipal Corporation*, AIR1986 SC 180, (1985)3 SCC545, (1985) Supp 2 SCR51 in India and *Government of the Republic of South Africa v. Grootboom*, 2001 (4) SA 46 in South Africa.
 37. It also says: Application of international law 233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.
 38. On the importance of access to information (especially primary data) for the achievement of the MDGs see Rafael Guerreiro Osorio, ‘Free Access to Primary Data Should Be a Right’ International Poverty Centre One, November 2008, p. 72, <http://www.ipc-undp.org/pub/IPCOnePager72.pdf>
 39. <http://www.right-to-education.org/node/258>.
 40. Katarina Tomasevski, ‘The State of the Right to Education Worldwide: Free or Fee’, 2006 *Global Report*, http://www.katarinatomasevski.com/images/Global_Report.pdf, last visited 22 August 2010.
 41. Eleanor D. Kinney and Brian Alexander Clark, 2004, ‘Provisions for Health and Health Care in the Constitutions of the Countries of the World’, 37 *Cornell International LJ*, 285, 290.
 42. AIR 1996 SC 2426.

43. 2002(5) SA 721, 2002 (10) BCLR 1033.
44. From 'Political Statement of the NGO/CSO Forum for Food Sovereignty' on the Food First website at <http://www.foodfirst.org/progs/global/food/finaldeclaration.html>, last visited 22 August 2010. See also La Via Campesina (an 'international movement of peasants, small- and medium-sized producers, landless, rural women, indigenous people, rural youth and agricultural workers') at <http://viacampesina.org/>, last visited 22 August 2010.
45. <http://www.righttofoodindia.org/orders/interimorders.html>, last visited 22 August 2010.
46. *European Federation of National Organisations working with the Homeless (FEANTSA) v. France* Complaint No. 39/2006 (2008) http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC39Merits_en.pdf, last visited 23 August 2010
47. Legal Resources for Housing Rights: International and National Standards <http://www.cohre.org/store/attachments/COHRE%20Sources%204.pdf>, visited mid-2009.
48. This summary is from Budlender, 2004, 'Justiciability of Socio-economic Rights: Some South African experiences' in Ghai and Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, London: Interights.
49. *Government of the Republic of South Africa v. Grootboom* 2001 (4) SA 46.
50. *Akdivar and others v. Turkey*, European Court of Human Rights (Reports 1996 IV (16 September 1996)).
51. For example, *Chameli Singh & Others v. State of U.P. & Another*. [(1996) 2 SCC 549].
52. *Shantistar Builders v. Narayan Khimalal Gotame & Others*, [(1990) 1 SCC 520].
53. Decision No. 42/2000. (XI. 8.) AB; see the website of the Court at http://www.mkab.hu/content/en/en3/42_2000.pdf, last visited 22 August 2009.
54. General Comment 15 E/C.12/2002/11, 26 November 2002.
55. A comment made at a day of Discussion on the Draft General Comment (E/C.12/2002/SR.46, 27 November 2002 by Mr Langford of the Centre on Housing Rights and Evictions (COHRE).
56. Alix Gowlland-Gualtieri, 'South Africa's Water Law and Policy Framework Implications for the Right to Water' International Environmental Law Research Centre Working Paper 2006-7, <http://www.ielrc.org/content/w0703.pdf>
57. *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* [2002] (6) BCLR 625 (W).
58. *Mazibuko v. City of Johannesburg* Case 06/13865, Witwatersrand High Court decided on 30 April 2008.
59. ILO, *Decent Work Country Programmes Guidebook*, <http://www.ilo.org/public/english/bureau/program/dwcp/download/guide.pdf>, last visited 23 August 2010.

60. <http://www.ilo.org/public/english/bureau/program/dwcp/download/nepal.pdf>
61. General Comment 19 February 2008.
62. 'Introduction to the Right to Social Security in the South African Constitution' in Mashava (ed.) *A Compilation of Essential Documents on the Right to Social Security*, (Centre for Human Rights, University of Pretoria, 2000) at p. 21.
63. *Ibid.*, at pp. 22.
64. See the summary on the ESCR-Net website at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=400782, last visited 23 August 2010.
65. http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=412549&focus=14014.
66. See the discussion in the 2000 case above endnote 55.
67. Rosalie Abella, 1993, *From Civil Liberties to Human Rights: Acknowledging the Differences*, in K and P Mahoney (eds) *Human Rights in the Twenty-first Century: A Global Challenge*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, pp. 66.
68. UNIFEM, the World Bank, ADB, UNDP, and DFID/UK, 2004, *A Fair Share for Women: Cambodia Gender Assessment*, Phnom Penh: April 2004, published with a set of Policy Briefs.
69. UN Habitat, *In pursuit of the Millennium Development Goals: UN Habitat's Contribution to Water and Sanitation*, especially films: *Reaching the Unreached* and *Voices from the Margins* (included in CD format).
70. A. Hellum, 'Towards a Human Rights Development Approach: The Case of Women in the Water Reform Process in Zimbabwe', *Law, Social Justice & Global Development Journal (LGD)*, 2001 (1). <<http://elj.warwick.ac.uk/global/issue/2001-1/hellum.html>> last visited 23 August 2010.
71. See Hellum, 'Towards a Human Rights Development Approach'.
72. 'By seeing water reform and family law reform as separate issues the legal structures underlying gender inequities concerning land and water availability are left out.' *Ibid.*
73. *Doctors for Life International v. Speaker of the National Assembly* (2006). There was a powerful dissent by J. Yacoob. Available on www.Saflii.org.
74. In terms of drafting styles, and the processes of negotiation of international instruments, it is interesting to note that a Draft of this provision referred to states 'taking all necessary measures' [a common provision in international instruments that could be viewed as less demanding—being arguably an obligation of conduct rather than of result—see for example, 'Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights', Maastricht, 22–6 January 1997, available on www.fao.org, last visited 23 August 2010]. It also said a 'women's [rather than 'gender'] perspective'; this is not the place to go into the women/gender terminological debate. 'Gender' has become the orthodox usage (to the distaste of grammarians who insist the word

has a specific meaning), with the sense of referring to social roles rather than biological sex. There is no equivalent of the sex/gender distinction in some languages, and insistence on such usages may not be valuable in all contexts.

75. Carolyn Stephens, John Porter, Clive Nettleton, and Ruth Willis, 2006, *Disappearing, Displaced, and Undervalued: A Call to Action for Indigenous Health Worldwide*, *Lancet*, 367: 2019–28, p. 2026.
76. The UN Permanent Forum on Indigenous Issues has a programme of analysing national MDG reports from the indigenous perspective – see <http://www.un.org/esa/socdev/unpfii/en/mdgs.html>, last visited 23 August 2010.
77. Rodolfo Stavenhagen, ‘Indigenous Peoples and their Access to Human Rights’, The International Council on Human Rights Policy Sixth Annual Assembly, Access to Human Rights: Improving Access for Groups at High Risk Guadalajara, 17–18 January 2003.
78. ILO Submission to International Expert Group Meeting on MDGs indigenous peoples and good governance http://www.un.org/esa/socdev/unpfii/documents/workshop_MDG_ilo.doc, last visited 23 August 2010.
79. OHCHR Factsheet ‘Indigenous People, Poverty and the MDGs’ <http://www2.ohchr.org/english/issues/indigenous/docs/IntDay/IndigenousPoverty&MDGseng.pdf>, Victoria Tauli-Corpuz, ‘Indigenous Peoples and the Millennium Development Goals’ in *Civil Society Perspectives on the Millennium Development Goals*, UNDP. Available at <http://www.eldis.org/assets/Docs/18959.html>, last visited 23 August 2010. Joji Cariño, 2005, *Indigenous Peoples, Human Rights and Poverty (Indigenous Perspectives*, volume 7, no. 1, April 2005, Published by Tebtebba Foundation), and UN Permanent Forum on Indigenous Issues, <http://www.un.org/esa/socdev/unpfii/en/mdgs.html>, last visited 23 August 2010.
80. See for example, the OHCHR Factsheet, and the ‘main objectives’ of the 2nd International Decade of the World’s Indigenous Peoples, 2005–15 <http://www.un.org/esa/socdev/unpfii/en/second.html>, last visited 23 August 2010.
81. A/RES/61/295 (2007).
82. Indigenous groups would no doubt complain that this does not require prior informed consent—which is required by the recently adopted Declaration on the Rights of Indigenous Peoples (2007) see requirement for ‘free, prior and informed consent’ in Article 19; the Declaration is available, for example, at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. For discussion on what this consent means see *Report of the International Workshop on Methodologies Regarding Free, Prior, and Informed Consent and Indigenous Peoples*, E/C.19/2005/3.
83. Another example of the weakening ‘according to law’; however, a court could use this to hold that law that did not guarantee indigenous representation was unconstitutional.

84. The point has been made by, for example, 'the Dutch Coalition on Disability and Development' <http://www.dctdd.nl/?2812>, last visited 23 August 2010. Disability India Network (see Petition to UNSG for inclusion of person with disability—<http://www.disabilityindia.org/mdg.cfm>) and
85. Quoted <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:21162907~menuPK:3265756~pagePK:210058~piPK:210062~theSitePK:282699,00.html>, last visited 23 August 2010.
86. For example, Asian Development Bank (2002), *Regional Workshop on Disability and Development: Draft Recommendations*, Manila, October 2002, cited by Philippa Thomas, 'Disability, Poverty, and the Millennium Development Goals: Relevance, Challenges and Opportunities for DFID', http://www.disabilitykar.net/research/pol_final.html, last visited 23 August 2010; see also the World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:21162907~menuPK:3265756~pagePK:210058~piPK:210062~theSitePK:282699,00.html>
87. This is an abridged version of a table in the paper by Thomas, where sources are also found.
88. See also Syracuse University College of Law, *International and Comparative Disability Law*, Web Resources: <http://www.law.syr.edu/lawlibrary/electronic/humanrights.aspx>, last visited mid-2009, and 'International Norms and Standards Relating to Disability', <http://www.un.org/esa/socdev/enable/comp300.htm>, last visited 23 August 2010.

PART III

Implementing and Consolidating the Constitution

In practice, it may not be too hard to secure a constitution with many of the characteristics that we have described above. Constitutions are increasingly made with the participation of the people and, to an extent, reflect their preference for a welfare-oriented state. Constitutions also reflect the growing corpus of international human rights and, thus, include valuable principles of freedom and social justice. In fact, many constitutions are made to end internal conflict and include elements of inclusion. Thus, the constitution, gets long, ambitious, and aspirational, which finds favour with many groups but also meets with resistance from others. The real challenge is to implement it.

From the point of view of MDGs, the achievement of MDGs becomes more challenging in an unequal society. The 2003 *Human Development Report* says,

The more unequal a society, the less likely it is to generate sustained political support for the Goals, because political power is usually concentrated and overlaps with economic wealth and social dominance. In unequal societies, elite-dominated progress towards the Goals is also less likely to benefit the poorest people. Moreover, overall national progress may still mean that large sections of the population are being left behind, as in Brazil, China, India, and elsewhere.¹

Can a constitution which elevates social justice and egalitarianism to a high principle overcome this challenge?

The constitution is not a self-operating or self-executing instrument. It is one thing to make a constitution. It is quite another to breathe life into it, making it a living, vibrant document which affects, and hopefully improves the reality of people's life. A living constitution is one which people use in their daily existence, which governs and controls the exercise of state power, and which promotes the values and aspirations

expressed in it. Even more importantly, a living constitution is also one which political leaders and senior and junior state officials understand, respect, and observe—and to the values and procedures of which they are willing to submit their exercise of state power. It is not the objective of this chapter to provide a blueprint for the implementation of a constitution—the blueprint in any case would vary from constitution to constitution and country to country. It is to alert the reader to some aspects of implementation.

At a technical level, making a constitution fully effective revolves around three elements: implementing, promoting, and safeguarding. To implement a constitution means to give full expression to its provisions: making new laws and policies to give effect to them, setting up new institutions and vesting them with powers and resources adequate for their responsibilities, and repealing laws inconsistent with them.

To promote the constitution means enforcing these laws, respecting rights, and freedoms of the people, developing constitutional norms, sustaining institutions and the rule of law, holding regular elections, providing access to justice, resolving disputes in accordance to the constitution, and facilitating the participation of the people in public and state affairs.

Safeguarding the constitution means to protect the constitution against hasty amendments that detract from the values of democracy, constitutionalism, and the rule of law. Attacks against which it must be safeguarded also include the distortion of constitutional norms through practice and disregard of the law, and the avoidance of unnecessary resort to emergency powers. Safeguarding also means, in extreme cases, protection against the overthrow of the constitution through illegal measures such as military coups.

There is a distinction between constitution-making and constitution-building—the latter continues well beyond the enactment of the constitution. A new constitution oriented towards social justice often also represents significant changes from previous laws and practices. Its implementation requires the repeal of some old laws and the enactment of new ones as well as changes in administrative practices, sometimes in fundamental ways if the state is radically restructured. This requires not only political will, but also new attitudes and skills. Many progressive parts of the constitution may remain unfulfilled, such as the freedom of information, affirmative action, land redistribution, economic and social rights. Much needed legislation is not prepared and brought to the legislature for want of either political will, or lack of capacity.

The real problem is the neutralization of the values of the constitution, imperfect or incomplete implementation, the occasional or systematic disregard of some of its provisions, selective implementation, abuse of powers given under the constitution, and denying separation of powers or the independence of institutions including the judiciary.

Threats to the constitution are inherent in the circumstances which require the strengthening of the powers and capacity of the state. People have high expectations of the State as the agency for social and economic development, and solver of society's problems. This sense of dependence is accompanied by a deep suspicion of those who manage the affairs of the State, politicians and civil servants, widely regarded as self-serving and corrupt. Thus, there are attempts to restrict the purposes and modes for the exercise of state power and to impose high standards for the conduct and accountability of those who wield state power. At the same time, the state is the terrain of internal struggle and conflict. Externally, there are economic and political forces against which the constitution can provide limited resistance.

The weight and resilience of social traditions, ideologies, and institutions is a major obstacle to the achievement of progressive social reforms and changes. Among other consequences, it leads to fear, on the part of the disadvantaged, of using constitutional remedies in order not to provoke political, economic, or social retribution from the powerful.

The wide ranging ambitions expressed in the constitutions—particularly, as they affect class or ethnic interests, such as affirmative action, social and economic rights, and identity—make the constitution controversial and divisive and prevent it from becoming an unquestioned point of loyalty and focus.

Corruption is a major threat to the integrity of the constitution. Powerful interests in or external to country, who are not sympathetic to the objectives of the constitution or wish to buy illegitimate influence, use corrupt means to sabotage it. This leads to the subversion of both the values and the institutions of the constitution—one of the surest ways to weaken them is the financial or political corruption of the judiciary.

We have pointed to the particular problems of implementing socio-economic rights. In part, they are political. The wealthy have little interest in greater social justice, which they consider is at their own expense (for example, higher taxation). The ideologically conservative oppose socio-economic rights because they think that they distort the logic and mechanisms of the market. Both groups are politically powerful. We have suggested that the universal support for MDGs provides a good opportunity

to win support for goals of social justice and to consolidate them as socio-economic rights. In part, the problems are technical—the newness of the concept of socio-economic rights and, therefore, uncertainty among policy-makers and the legal community on how to proceed with their realization by the state, the lack of clear criteria and standards for their achievement, and the difficulty of access to political and legal institutions for those whose rights are ignored or violated. We have suggested that some of these problems can be resolved by ensuring representation of the disadvantaged communities in the legislative and executive bodies. Reference can be made to the jurisprudence of international and regional tribunals, including treaty bodies, special rapporteurs, and public interest litigations, and financial and administrative ways can also be found to assist the disadvantaged to access the courts and other relevant bodies. Linking to international networks of human right activists, around international treaty systems, for information and mutual assistance is another way to strengthen the movement for socio-economic rights.

Additionally, it would also be useful to set up a special, independent commission to ensure the implementation of socio-economic rights by offering both assistance in preparing laws and regulations, and on relevant standards and monitoring. In the case of a new constitution, such a commission would have the broader function of assisting with the implementation of the entire document, perhaps in accordance with a schedule in the constitution, setting out a programme of phased implementation (see p. 188).

However, even with these measures, there is no guarantee that socio-economic rights will be protected and promoted. The viability and success of a constitution is premised on the ideology of constitutionalism, a belief in the value of restrictions on power, expressed as substantive and institutional limitations, and the practice of the rule of law, with emphasis on rules and the modes of their enforcement. These reflect and spring from political and cultural traditions. Paradoxically, countries which try to use the constitution for social transformation, often lack these traditions. Constitutionalism provides a framework for the organization and functioning of the society and State which may run counter to the logic and practice of other social orders, based on the dominance of religious, feudal, social, and economic elites and where the repository and exercise of power is based on dogma or individuals and their personalities. These social orders may command greater allegiance from, or inspire fear among, the people than the constitution, whose values, institutions, and procedures may not be fully understood by them.

The problems inherent in the conflict between these social and political orders go beyond issues of socio-economic rights and pervade the entire corpus of values and institutions of the constitution. One way to understand the potential of a constitution to impose its imprint on state and society is to examine two key factors. One is internal to the constitution: the way in which it distributes power, the institutions it sets up for different tasks, modes of accountability, and methods for the enforcement of the constitution, including respect for and protection of human rights. The balances within the constitution can do something to guide state institutions and empower the people. The other, external to the constitution, is societal—the way society and economy are organized, the understanding and commitment of the leaders and the people to constitutionalism, including democracy, human rights, social justice, the relations between different communities, social hierarchies, and the organization of the economy.

We begin with a discussion of what the constitution can do.

1. CONSTITUTION: A FRAMEWORK FOR RIGHTS

In the context of human rights and social justice, the ultimate goal of a constitution must be to fulfil Article 28 of the UDHR:

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

Since the national constitution can do little about the international order,² the focus of this section is on the national aspects of the constitution. Article 28 requires that every provision of the constitution be rights-friendly. The Indian Constitution has a similar orientation. The first Directive Principle says, 'The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all institutions of the national life,' Article 38(1).

Getting the Bill of Rights right is undoubtedly important. However, it is equally or perhaps even more important that the whole of the constitution is rights-friendly. A perfectly good Bill of Rights can be ghettoized (by which we mean isolated from the rest of legal activity and public life) and subverted if the political and judicial institutions are not correctly designed. Rights and social justice are unlikely to be respected or promoted if enormous powers are concentrated in the executive, if the government is not sufficiently accountable, if elections are not free

and fair, and if the judges can be easily bought over, or are willing to take instructions from the executive. We must examine electoral systems to assess what kind of persons and from communities are likely to be elected.³ Similarly, we must consider whether an emphasis on culture may jeopardize the right of women, children, disabled, or low-caste persons. We must ask whether there is too much emphasis on some rights (for example, property, market, or contract) that restrict affirmative action or other measures necessary for equity and social justice.

1.1 THE NEO-COLONIAL STATE

In planning a constitution which is rights- and justice-friendly, we must begin with an analysis of what is wrong with contemporary political systems. In many poorer countries, often with a colonial background, the modern state is artificial and alien. It is artificial because it did not grow organically over a period of time but was created by a colonial power, drawing boundaries, sometimes in negotiations with other colonial powers, in which peoples with considerable racial, religious, linguistic diversity, and often with very different lifestyles were brought together. It is alien because it was imposed by the colonial power, in the image of its own state—but without the humanizing and democratic dimensions existing or emerging in the latter. Towards the end of colonialism, attempts were made through new constitutions to incorporate human rights and democracy, but by now the colonial structures were well entrenched and the local leaders who succeeded to power were only too anxious, for their own benefit, to preserve the coercive and extractive features of the old state.

Consequently many features of the colonial state have persisted, including the following:

- the state remains highly bureaucratic with little scope for participation or consultation by the public in decision-making
- relatively few ministers devote significant time to policy issues
- democracy seldom goes beyond periodic elections, which are often dominated by ethnic politics and manipulation
- political parties are either ethnic enclaves or personal fiefdoms with little understanding of, or commitment to democracy
- the elites (political, bureaucratic, and business) see the state primarily as the source of enrichment for themselves; and so a key characteristic of the state is rampant corruption within it, and under its auspices

- there is little accountability of the state and wide impunity for those who abuse power, as most elites conspire to plunder the state
- there is little respect for the rule of law; the whims of the president/head of government are more important than, and override, the law; and it does not help that many judges are themselves corrupt and subservient to the executive
- for these reasons, the State is highly centralized, which marginalizes many communities and regions
- the state is weak in its capacity to bring about economic and social development but is strong vis à vis society and, thus, little happens without State sanction
- reduced merely to subjects by colonialism, most people remain docile and it is difficult to establish strong organizations in civil society
- most people are not aware of their rights or are afraid to exercise them in fear of reprisals; they have little understanding of this alien state or how to influence it
- lacking legitimacy, the state relies on coercion and often draconian laws bequeathed by colonial regimes; and, pretensions of the nation-state when it does little to cultivate a genuine sense of nationalism and common purpose.

Those in charge of the apparatus of the state have endless opportunities for personal aggrandisement and for amassing fortunes through corruption, and very little interest in, or incentive for limiting these powers. Other groups in society lack the capacity—or think that they lack the capacity—to impose controls, much less accountability, on the government.

Because the State is so important for accumulation and access to power, patronage, and the like that there is considerable conflict over control of the State, sometimes leading to civil war. This type of internal conflict is often ethnic, deeply divisive and the cause of a great deal of suffering. The greatest setback to economic and social development, particularly socio-economic rights, in many countries is civil conflict. Among those who suffer most are women and children, and ethnic minorities (already recognized in the Millennium Declaration as among the most marginalized groups).

1.2 RESTRUCTURING THE NEO-COLONIAL STATE

How far can the constitution restructure the neo-colonial state, eliminating its negative, destructive tendencies, and introduce values and structures to promote fair and balanced development? Traditionally, the constitution

is concerned with the state and its institutions. It takes for granted certain presuppositions about society supportive of the constitution and if these presuppositions are not applicable in a particular country, the purposes of the constitution will be subverted. Formally and textually, the constitution can determine the structures of the State and their relationship to each other and society, prescribe values and purposes for, and procedures by, which the powers given to them are exercised. It can prescribe the electoral system and methods of the accountability of the government and legislators, designed, for example, to prevent and punish for corruption. Constitutions are increasingly being drafted to eliminate the problems outlined above—and to prescribe values and principles of State policy and, as a consequence, have become very lengthy. However, whether constitutional provisions achieve their purposes is quite another matter.

1.2.1 Framework of Values and Principles

PREAMBLES

South Africa:

The state is committed to

Improve the quality of life of all citizens and free the potential of each person

Bougainville:

WE, THE PEOPLE OF BOUGAINVILLE under the sovereignty of God our Father believing and trusting in HIM do now, with His guidance and blessing, hail the dawn of a new era of government for Bougainville to enable us with His help.

- (h) to strive to eliminate universal problems in Bougainville of poverty, illiteracy, corruption, pollution, unemployment, overpopulation and other ills

Bolivia:

A State based on respect and equality between all, with principles of sovereignty, dignity, complementarity, solidarity, harmony and equity in the distribution and redistribution of the social products [products of society?], of which predominate the search for the good life; with respect for the economic, social, juridical, political and cultural plurality of the inhabitants of this land; in collective co-existence with access to water, work, education, health and housing for all

The constitution should set out the broad framework of values and principles that form the vision of the country and which must be scrupulously observed in the exercise of state powers. In preceding sections, we have highlighted the values and principles necessary to achieve MDGs and social justice, generally, and pointed to the methods of incorporating them, for example, the Preamble, State Principles, Directive Principles, and the Bill of Human Rights. It is within this framework of values that

the constitution should be interpreted. Statements of values would also assist those who have to implement the constitution or who may want to use it for lobbying, litigation, and so on. to promote or safeguard particular values.

1.2.2 Inclusive and Participatory Democracy

Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.

Millennium Declaration 2

A major problem with most states is the lack of genuine democracy going beyond periodic and often rigged elections. Key decisions about state policies, including allocation of resources, are made by small groups. Consequently, the ordinary people and groups like women, the poor, lower castes, and youth have little influence on how the state functions or accountability of state officials. But democracy is not only about the functioning of the State; it is also about the organization of society. In many states, communities or regions are excluded from the benefits of the State. Others are excluded from meaningful participation in public affairs. In this way not only are these communities or groups deprived of their rights, but the State itself suffers from the benefits of a functioning democracy. As a result many groups are alienated from the State and often there are serious and damaging conflicts that we have mentioned above, and discuss later.

Here is a list of constitutional provisions, probably not appearing in the Bill of Rights, but which are to be found in constitutions and which support meaningful democracy.

- an inclusive definition of citizenship so that no individuals or groups are left out and everyone enjoys equal rights
- a fair electoral system which assures minorities and women proportional representation and an independent electoral commission which ensure free elections
- regulation of political parties for integrity and internal democracy
- separation of powers that ensures that the major institutions of the state are independent in the exercise of their powers and are able to hold each other to a measure of accountability
- fair mechanisms under which constituents of a member of the legislature can recall the member for neglect of duties or lack of integrity

- procedures for law-making that give the people adequate opportunities and time for consultation and commenting on legislative bills and regulations including a parliamentary committee, which is obliged to engage the people in law-making
- the decentralization of government which enables the greater participation of people in public affairs and which diminishes the chances of the abuse of unaccountable power (experience shows, as we demonstrate below, that decentralization is good for the delivery of social services)
- a convention, if not law, that the government and not merely parliament would include members of as many communities and regions as feasible
- a role for civil society organizations in public affairs.

When designing a constitution, we have to consider (i) how inclusion can be brought about—for women, youth, low caste people, minorities, and such others—in economy, politics, public service, and army; (ii) how participation in decision-making can be promoted; (iii) establishing mechanisms for consultation; and (iv) establishing social democracy, where objectives of justice are achieved through a democracy with a broad franchise and commitment to equality.

1.2.3 Prevention of Conflict

Conflicts, external and internal, are a major threat in many countries to the most basic of human rights. A typical consequence of conflict is the displacement of large numbers of people from their homes, which denies to them basic human security, especially to children and women, access to education for their children, sanitary living conditions, malnutrition, and leads to suppression of culture and arts. Internal conflicts often arise out of competition for access to the State and its resources, the structure of the State, and inclusion—and, thus indirectly about the constitution that governs these matters. Modern conflict is seldom about outright control of the State by a narrow group; it is about a share in government and, thus, about inclusion and participation, and the recognition of religions, languages, culture, and sometimes about forms of self-government. In these circumstances, a constitution acceptable to all groups becomes the precondition of any development. Examples abound, including Sri Lanka, the Sudan, the DRC, Rwanda, Palestine/Israel, Somalia, Kenya, Cambodia, Afghanistan, and Myanmar are all states dominated by conflict in recent times.

There are many ways in which the constitution can prevent or mitigate conflict. Inclusive and participatory democracy as defined above is critical. We have indicated some principles for bringing about this type of democracy. Social justice, including affirmative action, is primary, since conflict is primarily about resources. Special attention should be paid to group identity, languages, and religion. There should be respect for cultural differences. The precise mechanisms would depend on the circumstances and historical context. Some electoral systems are more hospitable to representation of minorities and participation can be secured through forms of consultation, modes of decision-making in government and legislature, power sharing, proportionality, and self-government, particularly through federalism or devolution.

However, the recognition of cultural differences should not lead to further fragmentation of the people. Many of the mechanisms mentioned above are based on ethnic classifications, which have a tendency towards perpetuation, and indeed accentuation, of differences. A deeply divided and fragmented society is unable to deal with critical social and economic problems. A common vision and a common identity, leading to broad social consensus, not incompatible with recognition of differences, form the basis of collective action and are necessary for the fair and effective operation of the state. The success of the development of such consensus depends greatly on the quality of leadership—and avoiding the temptations of mobilizing narrow sectarian interests. Some constitutions try to achieve these positive results by laws on political parties, prohibition of inflammatory racial rhetoric, and the promotion of national symbols. The balancing of a common, national identity with particularities of religions, languages, and culture remains one of the greatest challenges to the making and functioning of constitutions.

1.2.4 Decentralization

We have remarked above on the importance of democracy, participation, recognition of diversity, and power sharing, as well as self-government for a just and stable socio-political system. In many countries, decentralization has been the means through which some or all of these goals have been sought. Decentralization is the method for the reorganization of the State by which power is dispersed throughout the country, with powers that are best exercised nationally—such as currency and monetary policies, defence, foreign affairs, international trade, nuclear power, and national transport infrastructure—left to the central government, while those which are best exercised at sub-national levels—such as those which relate to the

MDGs, health, primary and secondary education, housing, social welfare generally, local transport, marketing, land, agriculture, and irrigation—are transferred to districts and provinces. Proponents of decentralization argue that a state power should be vested at the lowest level at which it can be most effectively exercised. In practice, this principle is difficult to apply, for people and policy-makers may legitimately disagree on what the most effective level is. There are many objectives of decentralization which have to be balanced or given priority, popular democracy, promoting local cultures and languages, accountability, economic and social development, and changing values and technology. The scheme for, and the division of, powers are often determined in a country by factors such as history and tradition, ethnic diversity, geography, natural resources, and commitment to general and equitable welfare, and the bargaining power and skills of negotiators.

Decentralization is not only about the division of powers. It is also about co-operation between governments at different levels in societies which are becoming increasingly complex and interdependent, and where all economic and social sectors are heavily influenced by globalization. It is also about the institutions which enable the exercise of power at various levels as well as coordination and co-operation. It is a means to enhance democracy and accountability and to provide a basis to share power between regions and communities. It seeks to strike a fair balance between national and local values, identities, and planning.

In constitutional and administrative terms, decentralization takes many forms, depending on the balance between national and sub-national levels, the number of sub-national levels, the autonomy of and relationship between institutions at different levels, and the extent and form of the entrenchment of national and, particularly, sub-national powers. It can vary from federations—some which give powers predominantly to regions and provinces, as in Switzerland, or others, to the centre as in India—to local government with minimal basis in law, perhaps dependent on administrative arrangements rather than the constitution or even law, as in early forms of decentralization in Tanzania.

In one form or another, decentralization has been adopted in many countries in recent decades. It seems particularly suited to the achievement of MDGs. Responsibility for many socio-economic rights is vested in government at sub-national levels. Health, education, and water, for example, are very often fully or partly the responsibility of local governments, or regional/provincial governments in a federal system. When responsibility is with the central government, it may be hard for it

to find out the needs of the people and, even when it is informed, there are often few incentives to persuade it to respond. However, placing the responsibility at a local level leads to more participation of beneficiaries and, thus, to greater democracy. Needs are more clearly identified and there is greater accountability. It is usually easier for local groups, including women, the disabled, and the marginalized, to make an impact. India has shown how women can be involved in large numbers at local government levels, though interestingly this only happened because the national constitution required it: one-third of local body members must be women. Decentralization can offer a counterbalance to the power of centre through local democracy. This will be even more so in a federal country, with powers of law-making and resources guaranteed by the constitution.

The outcomes will depend on various factors such as the existence of some traditions of local democracy, of adequate resources, both financial and human (see Box 3.1). According to the 2003 *Human Development Report (Millennium Development Goals: A compact among nations to end human poverty)*, decentralization:

- often reduces absenteeism among government employees in local schools and
- health clinics
- provides bureaucrats with early warnings of potential disasters
- encourages local people to find solutions to their everyday problems
- provides people with a much stronger voice in public policy decisions that affect their lives.
- has increased representation among women.

And

- local authorities tend to act more in line with local preferences and conditions, and no longer have to wait for permission from higher levels before acting
- decentralization of government spending is closely associated with lower corruption among bureaucrats
- reallocating resources ensures a more equitable distribution of national funds to regions previously neglected by dominant groups at the centre.

There is likely to be resistance to decentralization: people, including leaders with vested interests in the centralized administration, will resist losing

their powers and control over resources. The bureaucracy is likely to resist: some fear losing their jobs, while others will be reluctant to move out of the capital, even to their 'home' areas. Implementing a new constitutional system of decentralization is likely to be very hard and time-consuming.

BOX NO. 3.1 DECENTRALIZATION EXAMPLES FROM THE
HUMAN DEVELOPMENT REPORT (2003)

- In Mozambique committed local authorities working in a decentralized system doubled health staff and focussed on outreach—improving vaccination coverage and prenatal consultations by 80 per cent
- The Kerala People's Campaign started in 1996, sparked by the state government's decision to devolve 35–40 per cent of state plan funds to village and municipal bodies. In its first two years the campaign led to the construction of 98,494 houses, 240,307 sanitary latrines, 17,489 public taps, and 50,162 wells—all far more than in previous years.
- In Bogota, Colombia, after the people were able to elect their own mayor, deaths from traffic accidents are down, from a peak of 1,387 in 1995 to 745 in 2001. Homicide rates have fallen even more sharply, from a peak of 4,452 in 1993 to 2,000 in 2001. Perhaps most surprising was a voluntary tax campaign that increased city revenues by \$500,000 during the same period.

Nor are all systems of decentralizations necessarily well designed or successful, as the HDR (Human Development Report) also shows. There is likely to be duplication of effort, using more money and personnel. There will almost certainly be expensive new institutions. Scrutiny of what goes on at the local government level is often more difficult than of what goes on in the national capital. Local unaccountable traditional elites may become the new government. The media is less interested in what happens locally. Decentralized governments may simply lack resources. They may lack human capacity.

There are ways of trying to anticipate and deal with these problems, including rules requiring certain minimum amounts of resources to be spent on poverty-eradicating policies and programmes. UN Habitat has developed a set of guidelines on decentralization and the strengthening of local authorities.⁴ This project makes a specific connection between decentralization and the MDGs.

1.2.5 Independent Bodies

With the loss of confidence in the integrity of politicians and occasionally judges, and often the administration, it is becoming common to set up independent institutions for the exercise of certain responsibilities and

functions. These institutions may have responsibility for accountability of state institutions (for example, auditor-general, human rights commission), dealing with complaints against the state for maladministration or unfair discrimination (for example, ombudsman, courts), the eradication of corruption, the conduct of politically sensitive functions (like elections, drawing of electoral constituencies), exercise of sensitive powers (like prosecution), and the promotion of constitutional values (like human rights or the protection of the environment). The characteristics and structures of these institutions differ, but they do share certain features: impartiality, independence, and expertise. The growth of these institutions represents a new development in the separation of powers, traditionally restricted to the separation of, and checks and balances, between the legislature, executive, and the judiciary.

The South African constitution provides a good example of how to use these institutions. Chapter 9 of the Constitution of South Africa establishes a number of these institutions as can be seen in Box 3.2:

BOX NO. 3.2 SOUTH AFRICAN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Establishment and governing principles

181. (1) The following state institutions strengthen constitutional democracy in the Republic:
- (a) The Public Protector.
 - (b) The Human Rights Commission.
 - (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - (d) The Commission for Gender Equality.
 - (e) The Auditor-General.
 - (f) The Electoral Commission.
- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- (4) No person or organ of state may interfere with the functioning of these institutions.
- (5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

The chapter prescribes their functions and responsibilities, for example, the functions of the Public Protector known in some countries as the ombudsman/person, and the Human Rights Commission, which are as follows:

Functions of Public Protector

182. (1) The Public Protector has the power, as regulated by national legislation—
- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
 - (b) to report on that conduct; and
 - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.
- (3) The Public Protector may not investigate court decisions.
- (4) The Public Protector must be accessible to all persons and communities.
- (5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

Functions of Human Rights Commission

184. (1) The Human Rights Commission must
- (a) promote respect for human rights and a culture of human rights;
 - (b) promote the protection, development and attainment of human rights; and
 - (c) monitor and assess the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power
- (a) to investigate and to report on the observance of human rights;
 - (b) to take steps to secure appropriate redress where human rights have been violated;
 - (c) to carry out research; and
 - (d) to educate.
- (3) Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

- (4) The Human Rights Commission has the additional powers and functions prescribed by national legislation.

There can be great value in a body like the Human Rights Commission having the responsibility to monitor progress on socio-economic rights for the success of the MDGs, as the South African Commission has been given.⁵ That body, in fact, is addressing the connection between ‘The Millennium Development Goals and the realization of economic and social rights in South Africa’.⁶

The competence, integrity, and independence of these institutions are protected by the following sections of the Constitution which deal with the qualifications for appointment of these important officers and the process for appointing them. Where a Commission (comprising several members) is appointed, its membership must take into account racial and gender balance. A Committee of the National Assembly puts forward names after consulting civil society, if this is provided for by law. The committee itself must reflect the party make-up of the Assembly. The names must be approved by the Assembly and if the post is that of Public Protector or Auditor-General, at least 60 per cent of the Assembly members must support the nomination. Then the President formally appoints. These important officers may be removed from office only for misconduct, incapacity, or incompetence after inquiry by a committee of the National Assembly. The report of the committee goes to the National Assembly which may vote in favour of removal. If the issue concerns the Public Protector or Auditor General, at least 60 per cent of the Assembly members must support the removal. If the Assembly votes for removal, the President must remove the person from office.

Two additional institutions to ensure fairness and prevent political intervention are provided: (a) a broadcasting authority ‘to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society’ and (b) a National Directorate of Prosecutions. The former is important for promotion of public debates in which all viewpoints are heard, as a way of strengthening democracy and ensuring participation, and the latter is a critical component of the rule of law. The importance of an independent prosecution service is discussed below in the section on the rule of law.

1.2.6 Participation of Society

A constitution inevitably pays most attention to institutions of the State. The State is the primary business of the constitution, and even democracy is conceived primarily as question of the relationships between State

institutions. When it deals with the citizen, the focus is his or her relationship to the State. Such an approach without consideration of societal structure, market relations, and the like, disregards the crucial role of social and economic forces in society in the functioning of the State. In market-driven societies, the economic power of capitalists and other wealthy groups plays a decisive role in the policies and decisions of the government—largely to serve their interests. Socio-economic rights inevitably play a subsidiary role, that is, when they are recognized at all. As will be obvious, much of this book has been concerned to redress this problem and to compel the State into a greater recognition of the interests of the marginalized and the oppressed. What we concentrate on here is how the constitution can increase the role of civil society in the affairs of the State and, in this way, enhance democracy and accountability. Later we discuss how civil society can use the constitution to achieve social justice. Active citizenry and consciousness of civic virtues are essential for sustaining democracy.

We have already seen that decentralization can increase public participation. In Switzerland the major form of participation, as well as initiatives by the people, is the referendum—but the referendum, for various reasons, is not very suitable in many countries where levels of literacy are low or society is marked by ethnic cleavages. The constitution should provide for representation of groups hitherto marginalized—of women, the disabled, indigenous peoples, and lower caste communities. Voters who think that their representative in state institutions has not fulfilled her or his role, should perhaps be able to initiate the process for their recall. Citizens should have the right to petition lawmakers about legislation, and a parliamentary committee could be given responsibility for ensuring public participation at various stages of lawmaking.

Civil society is made up of various groups and organizations: trade unions, political parties, co-operatives, professional associations, movements of women, the disabled, and so on. Ways must be found to promote their participation. Public participation can be promoted by making official information to the people; hence, the importance of freedom of information legislation. In the area of the MDGs, participation can be linked to the design of strategies and as service providers through community organizations and national NGOs and as watchdogs to ensure government fulfilment of commitments.

Ultimately, participation is important because it transfers influence and power to groups who are often left out of traditional forms of democracy. If we believe that genuine democracy is essential to divert

resources to the needs of the poor, then participation becomes central to the strategy of the MDGs.

1.2.7 Institutionalizing the Rule of Law

The supremacy of the constitution is impossible without the rule of law. The rule of law means that the affairs of the State, and its relations with the people, are conducted strictly in accordance with the law, especially the constitution. All State authority must be founded on the law. Laws or State policies which are inconsistent with the constitution are invalid. The law must be fair and respect fundamental human rights. It is up to the courts, not the government, to determine whether a law is invalid or what is the meaning of a provision of the law. The law must bind all, including the government, and all citizens must receive equal treatment before the law. The law must be administered impartially, without fear or favour. An important function of the rule of law is to limit the powers of the State and to protect citizens and communities against the arbitrary acts of the State or other forces.

The establishment of the rule of law depends on a combination of laws, institutions, and procedures. The laws must be just and enunciated in accordance with constitutional norms, and, therefore, must not derogate from constitutionally protected fundamental rights. Laws must be made in accordance with prescribed rules and procedures. Ultimately, it is up to the courts to decide whether a law is valid. Nevertheless, it is important that a person who considers that a law violates his or her rights, or is in breach of the constitution, should be able to challenge it without being victimized. The public must have access to the laws. The law must be written in clear language, and a person who wants to know the law should be able to find it easily.

Laws must be applied fairly and without discrimination. As no-one is above the law, everyone is accountable for his or her conduct, or wrongdoing. No person can escape the law because that person is well connected with the ruling party or a powerful politician. If a law is not applied to a person because of his or her connections, or status, we say that the person has immunity from the legal process. Equally, no person can be punished or penalized who has not broken the law.

Institutions which are involved in the decisions to prosecute a person or organization, or to decide what the law is, and whether it has been broken, should be separate from the government and independent of it. The government should not be able to tell the prosecutor who to prosecute. The prosecutor must make this decision in accordance with the law. A

judge should not be told or influenced either by the government or a rich or powerful person to find an accused guilty or not guilty. The judges must be independent. This means that their appointment or removal must not depend on the government. Judges must be appointed by an independent body and they must be qualified for the job in terms of their training and experience, as well as moral integrity. A judge should be removable for a crime or abuse of power. Similar principles apply for the appointment or removal of prosecutors, so that the powers of prosecution cannot be used to punish those persons that the government does not like or to protect its friends from the due process of the law. Lawyers who advise the public and provide legal representation to an accused person must also be independent. The police play an important role in the way in which the law is enforced by ensuring security in which the people can enjoy their rights, in the way they make investigations into breaches of the law, and in the way they exercise their powers to arrest or detain persons. Therefore, the police should be free from influence of the government or other well-connected persons in the performance of these tasks.

An extremely important element of the rule of law is that a person whose rights have been violated or who has suffered from the breach of the law is able to get a remedy—even if the violation or breach has been done by or on the order of the highest official in the state. The importance of remedies was emphasized in a recent resolution of the UN General Assembly which requires states to adopt ‘appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice’.⁷ Without access to justice, particularly of the vulnerable and disadvantaged persons and communities, the rule of law will have no meaning for them. Access to justice requires that a person should be able to secure legal assistance and representation (with legal aid if necessary), that courts are within easy geographical reach, that they can present the case in the language that they understands that fees for filing or conducting the case is not prohibitive, people are not intimidated so they refrain from seeking legal advice or the help of the court, that the judges are not biased against members of any community, and that if a judgment is given, it is promptly enforced.

It is perhaps safe to say that constitutions may succeed in setting up institutions and giving them authority, but they often fail in the fulfilment of national values or directive principles—for the paradoxical reason that those who become officers of these institutions may have little commitment to the values. Constitutional values may well require significant changes in the power structure of society, and state officials

who matter may be either unable or unwilling to bring economic and social change.

In these circumstances the role of the judiciary becomes critical to ensure the fulfilment of constitutional values and mandates. When amending the constitution is difficult or there is resistance to necessary legislation, courts can play a constructive role through interpretation of the constitution and directives on its implementation or observance. The role of a constitutional court with special responsibility to interpret and enforce the constitution (as in Poland, Germany, and South Africa) has been critical to the success of the constitution. Even in common law countries, where most courts have the authority to interpret the constitution, there may be value in having a specialist court with all judges well versed in national and comparative constitutions.

Even in the role of the courts, the scales are weighted in favour of the rich. The poor have considerable difficulties in getting access to the courts for reasons already mentioned earlier. In addition, the poor are often victimized if they resort to lawyers and courts. The record of the courts is mixed, but they have on the whole tended to favour the establishment and the well off. Where they have upheld the rights of the poor, the judgments have tended to be ignored by the other branches of the government and there are considerable problems in enforcing them by the disadvantaged.

In a number of countries, the access of the poor is secured through a special form of litigation, public interest litigation (PIL). The concept and practice of PIL have been developed for cases which have a significant element of public interest, often to enforce the rights of a poor, marginalized group. The US pioneered class interest litigation for this purpose, which was adapted in India to the circumstances of a country where there is massive poverty, and social and economic marginalization. The poor have little access to the courts, there are long delays in concluding cases, the rules of procedure disadvantage the disadvantaged, and the remedies are inappropriate. PIL seeks to overcome these deficiencies (see p. 27). Public interest litigation is generally credited with giving prominence to the plight of the disadvantaged, the development and implementation of constitutional values, empowering a marginalized community, and giving redress for the violation of rights of the poor. Several other countries have adopted PIL (including in Latin America, where some courts have used the mandates of the constitution in favour of indigenous peoples to redefine some key legal concepts like property to emphasize responsibility and not only entitlements, and indeed to reconceptualize entitlements

as well).⁸ However, recently these claims on behalf of PIL have been challenged. Despite wonderful court judgments and some continuing court involvement, enforcement remains a problem and the poor are often not empowered as professionals take over the key decisions about litigation.

The previous section discussed various institutions that are important to constitutional implementation, including special commissions and the courts. However, recent constitutions have gone further and created special institutions and processes to try and ensure that in its initial stages the constitution does not remain a paper document only, or special implementation functions are given to other bodies.

It is usually necessary to have transitional provisions in a new constitution to provide for the move from the old to the new system. Nonetheless, how can it be guaranteed that that transition actually takes place? One technique is to include a timetable in the new constitution for when particular things must be done: new institutions created, new laws passed. Nevertheless, alone this cannot guarantee that anything happens!

Specific functions can be given to particular bodies. The human rights commission may be given a broad responsibility for the promotion of human rights including ensuring the introduction of new necessary legislation and institutions. Uganda has a land commission to develop policies within the general principles in the constitution and to implement them. Several constitutions have anti-corruption and environmental bodies with similar responsibilities in their areas of competence.

One can carry this idea to a general commission to implement the entire constitution—as is the case in Afghanistan and in the new Kenya constitution of 2010, working with the specialist commissions and relevant government ministries. The experience of numerous countries is that governments implement only those provisions which they like, and that civil society is too weak or unqualified to do much about it. The failure to implement the constitution fully can also arise from the lack of expertise or resources. To make up for the lack of political will or the scarcity of resources, an independent commission, with considerable resources, could be established for a period of ten years or so to ensure full implementation. The commission would have the responsibility, in conjunction with the government and civil society, to review the old, and prepare the new legislation, and facilitate the establishment of new institutions. It would also promote knowledge of the constitution and facilitate the participation of communities and NGOs in public affairs. It would report periodically to the nation through the legislature on

progress and bring to their attention obstacles preventing full and effective implementation.

In the case of a country adopting devolution/decentralization, particular reluctance to introduce the new system may arise. Yet a phased approach is almost certainly going to be needed. Here, again, a special commission may be set up to prepare new laws, propose the necessary policies, and the like.

A particular problem may arise in connection with human rights. We made the point earlier that rights ought, as far as possible, not to require new laws to be made. However, sometimes this is hard to avoid. If the government simply fails to make such laws, what can be done? The draft constitution that the Government of Kenya put before the people in a referendum in 2005 included an innovative, but unsatisfactory, solution. The Attorney General in consultation with the Commission on the Implementation of the Constitution was to prepare bills required to implement the Constitution, not only on human rights. However, if Parliament failed to pass them within the timetable laid down the bills would have been 'deemed to have been enacted' on the day after the time limit expired. This would have given a very great deal of power to the Attorney General and would be fundamentally undemocratic. It also assumes a degree of independence of the Attorney General from the government that may not always be found. The Constitution actually adopted in 2010 provides that if Parliament fails to pass a required law on time, the courts may order that the necessary steps are taken to pass the law, failing which Parliament must be dissolved.

Other devices that anticipate possible foot dragging by the government include allowing institutions to make their own rules if the authority designated to do so fails to carry out the responsibility. The Constitution of Papua New Guinea said that if no law was made, a constitutional institution could provide for its own procedures. This would have applied to the courts, and constitutional commissions and offices. It would not have helped in Kenya where the Chief Justice failed, for many years, to make rules of procedure for human rights cases—he was the constitutional institution for this purpose. The courts are better placed to implement the spirit of the constitution even if no laws are made. This is truer of courts in the common law systems, where judges are recognized as lawmakers to some extent.

However ingenious the constitutional devices may be, there are many aspects of a constitution that cannot be enforced if the government or authorities simply fail to do their part in making laws, setting up

institutions, providing finance, and so on. Corruption, ineptitude, and lack of political will can obstruct implementation even if the laws and institutions do exist. That takes us to the external aspect of implementation—society.

1.3 SOCIETAL CONTEXT

So far, we have discussed what might be called technical issues in implementation, which experience shows are secondary to other factors. Constitutionalism cannot be willed, it must be established by deep commitment and sustained activity. The constitution cannot achieve anything by itself. Like Marx's commodities, it does not have arms and legs. It must be mobilized, acted upon, and used. This idea is also expressed by Granville Austin,⁹ in his monumental study of the working and impact of the Indian Constitution, who says that a constitution, however living, is inert. A constitution does not work, it is worked. The real task of establishing constitutionalism, therefore, lies in other spheres: politics, the judiciary, the rise of professionalism, civic associations, and enlightened leadership. The fortunes of a constitution are shaped by many factors: personalities and elites, political parties and other organizations, social structures, economic changes, and traditions of constitutionalism.

The constitution operates within society and seeks to influence its development. It may set out guidelines for the exercise of power and the aspirations that the State must fulfil. But society also impacts on the constitution. The distinguished Indian sociologist, Andre Béteille, believes that a constitution can provide directions for the national development, but whether, and the pace at which, the development takes place depends on society.¹⁰ The constitution may set out guidelines for the exercise of power and the aspirations that the State must fulfil. Nevertheless, society also impacts on the constitution, sometime giving it a push in the directions adopted in the constitution, and sometimes negating them. We have placed unjustified reliance on the capacity of the constitution to influence society. Comparative constitutional law restricts itself to legal rules and techniques and says little about the society in which constitutions operate. The political order, intended to be set up by the constitution, competes with other models of power and ideologies, and realities. In most societies, it is society which has determined the extent to which the constitution will be observed, manipulated, or disregarded.

Béteille's brilliant insight needs to be supplemented by a consideration of the obstacles to progress placed by the inherited, pre-constitution bias of the State apparatus. Perhaps, inadequate attention has been paid to

these obstacles, as opposed to societal obstacles, because it is assumed that the constitution has the primary function of designing and structuring the State. However, as we have mentioned above, it may structure institutions, but may fail to infuse them with values and principles. The constitution tends to structure macro institutions but often says little about values and procedures of the administration of the state which may persist from one constitution to another. The constitution may not only fail to mould civic values or the behaviour of key political actors, it also fails to generate a state which is capable of sound social policies, and fair and honest administration.

Two inter-related factors, at least, have characterized the State in many developing polities—the colonial, fashioned to establish the hegemony of a particular class, and what Jean-Francois Bayart has called the ‘politics of the belly’,¹¹ and what others call the politics of eating.¹² Everywhere the colonial state was exclusionary, built on racial and ethnic distinctions, with a stronger bureaucracy for this reason. The bureaucracy was rooted in the imperative of the dominance of the various societies that made up the colony, the close relationship between the colonial administration and the foreign, business community, and consequent economic disparities, and its resistance to democracy. In fact, it is this tradition rather than any adaptation to independence or democracy that marks the present reality. This system was buttressed by a battery of repressive laws and a repressive legal system which survived the colonial era and which constantly undermines new democratic constitutions.

These characteristics ensured that independence would not bring about social transformation but merely the partial replacement of the old ruling group by the local elite, politicians as well bureaucrats, who found the colonial repressive apparatus highly functional. Bayart identifies three factors which have sustained the authoritarian tradition, despite appearance of democratization: control over the security forces which has enabled them to maintain a covert harassment of the opposition forces, control over economic rents with which they have bought off dissident politicians and weakened the opposition, and the support of western powers obsessed about order and stability. More specifically, for many countries, there is an additional factor: the ethnicization of politics, which serves to obscure the underlying process and the reality of inequality and powerlessness, and is closely connected to the politics of eating (which is not, as Bayart clarifies, merely gastronomic, but aspires to a network of relations, patronage, incentives, and sanctions that sustain an individual or group’s hegemony). This is the colonial

predatory state, but crude and criminalized, relying on impunities, without the sophistication of the colonialist.

There are other forces, deeply rooted in society, that undermine the values of the constitution. Many countries have remnants of feudalism (often tied to religious beliefs), under which there is a hierarchy of castes or communities, and in which allegiance and services are owed to traditional leaders. Feudalism is characterized by unequal distribution of resources, authority, and prestige—and rights. It has its own system of rewards and sanctions—sanctions which can be severe, as in honour killings. In many parts of the world, this feudalism, transformed into modern politics and class relations, has negated the values as well as institutions of the constitution.

Economic interests, particularly under the impact of globalization, have not been friendly to constitutions. The state restructuring of the 1960s, which heralded the contemporary phase of globalization, dealt a big blow to the provision of health, educational, and water services to the poor people, whose impact on the growth of poverty is still felt. The spread and intensification of patent and other intellectual property rights, largely under the dominance of the West, and emergence of huge multinational corporations and the increased influence of international trading and finance agencies, have weakened the capacity of states to fulfil their obligations in respect of socio-economic rights—and denied the basic premise underlying the constitution of an autonomous state. The powers that the constitution gives state agencies, thus, elude them.

In so far as the kind of constitutions we are discussing are oriented towards the MDGs and social justice, that is, people-centred, it is especially important to redress the balance between politicians and traditional and new elites on the one hand, and the people on the other. What is required is the genuine empowerment of the people, promoting an awareness of public issues and procedures, the role of public institutions, familiarity with their constitutional rights, the mechanisms to protect and mobilize them, and institutions and opportunities to express their views, and to demand accountability. We have suggested that the constitution should provide effective entry points for civil society initiatives. Civil society institutions could bring legal actions on behalf of the disadvantaged and the voiceless, they could work with state institutions to establish standards and benchmarks for social progress and justice, they could mobilize the people to take advantage of provisions for public participation, they could inform and educate on constitutional issues, they could have played a critical role in the reporting to regional and international bodies on the

fulfilment of the country's international obligations, particularly regarding human rights.

Ultimately, the people have to be guardians of the constitution. To perform this role the people must:

- understand the constitution and know their rights
- know how to use the machinery of the constitution and the law to hold public authorities accountable
- be involved in the conduct of public affairs
- act as agents of accountability, for example, by:
 - providing alternative budgets or analysing draft state budgets
 - publishing annual assessments of the record of government and corporations of human rights, social justice, environment, and natural resource policies, and so on
 - providing alternative reports (often known as shadow reports to regional and international human rights supervising bodies on the national record
 - undertaking constitutional litigation to prevent the state or private interests from breaching the constitution or law.

However, all this may not, and will not, be enough for the transformation of social relations. The agenda of MDGs cannot effectively be achieved through the activities of civil society unless significant portions of it convert themselves into a direct political force, challenging the hegemony of the existing, increasingly corrupt and irresponsible, political classes.

Fundamentally, implementing a constitution is not about this or that provision, or even the totality of the constitution, important as these are. It is about the inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts, and other bodies authorized to interpret the law, giving effect to judicial decisions, acceptance of the limits on the government, respecting and promoting human and collective rights, the participation and empowering of the people. This is a long-term project—which hopefully will be strengthened and sustained by the emergence of socio-economic goals, giving expression to the MDGs and bringing within the domain of the constitution new constituencies, hitherto excluded from its benefits.

NOTES

1. *Millennium Development Goals: A compact among nations to end human poverty*, p. 132.

2. See the brief section on MDG 8 and Constitutions in Part II.
3. In 1997, the Indigenous Peoples of Ecuador, having previously concentrated on getting recognition of their rights moved on to include demands for institutional change in the constitution (see the article by Andolina, above p. 162); many other groups have experienced similar frustration with rights alone.
4. See http://www.unhabitat.org/downloads/docs/4501_40753_K0654571%20GC21-2-Add2.pdf
5. For its ESCR reports see http://www.sahrc.org.za/sahrc_cms/publish/cat_index_28.shtml, last visited mid-2009.
6. But has apparently found the government less than fully cooperative—see http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml. It has prepared a working paper for this project (December 2008) see http://www.sahrc.org.za/sahrc_cms/downloads/MDG%20n%20ESR%20Working%20Doc_Final.pdf. Also see <http://www.sahrc.org.za>, last visited 24 August 2010.
7. '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' Resolution A/RES/60/147, 16 December 2005.
8. See for examples the chapters by Faundez, 'Access to Justice and Indigenous Communities in Latin America', and Santos and Carlet, 'The Movement of Landless Rural Workers in Brazil and their Struggles for Access to Law and Justice', in Ghai and Cottrell, *Marginalized Communities and Access to Justice*, (London: Routledge); more generally see the other chapters in that volume, and those in Ayesha Dias (ed.), 2009, *Justice for the Poor Perspectives on Accelerating Access*, New York: Oxford University Press.
9. Granville Austin, 2000, *Working a Democratic Constitution: The Indian Experience*, Oxford: Oxford University Press.
10. Andre Bèteille, 1991, 'Caste and Politics: Subversion of Public Institutions', in Vinay Chandra Mishra (ed.) *Reservation Crisis in India: Legal and Sociological Study on Mandal Commission Report*, New Delhi: Bar Council of India Trust, Universal Book Traders.
11. Jean-Francois Bayart, 1994, *The State in Africa: The Politics of the Belly*, New York: Longman.
12. Michaela Wrong, 2009, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*, London: Harper-Collins.

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