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THE MDGS THROUGH SOCIO-ECONOMIC RIGHTS

Constitution Making and Implementation Handbook (Excerpt)



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PREFACE

Many countries are writing new constitutions. This provides an important opportunity to enshrine the basic human rights of all citizens. Despite the rhetoric on the indivisibility of human rights, while most constitutions recognise civil and political rights as fundamental, they place economic and social rights under 'directive principles' of state policy, making them less 'justiciable'. However, some countries have constitutions that guarantee specific socio-economic rights, and the challenge is to make sure that citizens are able to exercise these constitutional rights.

Drafting and amending constitutions has traditionally been the prerogative of constitutional lawyers and jurists. However, experience has shown that active citizen engagement in constitution making is an imperative in our times, essential to confer legitimacy to constitutions.

This handbook, jointly produced by the United Nations Development Programme and the UN Millennium Campaign, aims to bridge the gap between citizens and constitutions in developing countries, using the Millennium Development Goals (MDGs) as an entry point to ensure the basic rights of the poor and excluded are recognized and met. It also identifies concrete legal options and action points to protect and enforce the constitution and rights of marginalized and vulnerable populations. This handbook is an abridged version of the forthcoming publication *The MDGs through Socio-economic Rights: Constitution Making and Implementation*, which is envisaged as an advocacy tool for parliamentarians, legislators and citizens groups to promote the MDGs as human rights in constitution making and constitutional reform processes in national contexts.

The principal authors of the book are Professor Yash Pal Ghai and Jill Ghai. The abridged version of the book was developed by Ryce Chanchai under their overall guidance and that of R. Sudarshan, Policy Advisor, UNDP Regional Centre, Bangkok (UNDP RCB). Substantive contributions on structure and content were provided by Pauline Tamesis, Democratic Governance Practice Leader, UNDP RCB; Minar Pimple, Deputy Director for Asia, UN Millennium Campaign; the Regional Office for South East Asia, Office of the High Commissioner for Human Rights; and Emilia Mugnai, Programme Specialist, Justice and Human Rights, UNDP RCB.

We hope this publication can aid advocacy efforts to realize the fundamental human rights of the world's poorest people, particularly marginalized and socially excluded groups, by focusing on the constitutional provisions needed for the achievement of the MDGs by 2015.



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I. THE MILLENNIUM DECLARATION AND THE MILLENNIUM DEVELOPMENT GOALS

The Millennium Declaration was adopted by leaders of 189 member countries (including heads of State or government of 147 countries) in 2000. The vision of the Declaration 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.

The document was adopted without a vote. This meant that the Declaration won the full endorsement of the international community.

The Millennium Development Goals – and the 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 are meant by the 'MDGs'. They were trimmed and slightly reshaped and take 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.

Under these goals, there is a set of specific targets and indicators – so that it is possible to know whether objectives have been achieved, or by how much the world has fallen short. The targets have been both what has kept the MDGs alive, and what have caused the greatest criticism. For many targets the year 2015 was taken – so that, taking 1990 as a baseline, 25 years was given for the achievement of the targets.

Global or national targets?

These goals and targets are set in terms of the improvement of the condition of the world's population. That is an appropriate target for the United Nations and for 'donor countries'. But for the countries where most of the world's 'deprived' peoples live, 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".² Some developing countries have already achieved some of the goals set – for example, many countries have already achieved universal primary education. Some countries have revised targets because of their special needs, such as countries with particularly serious HIV epidemics, which have given even more emphasis to targets under Goal 6. Cambodia added a new goal, related to mine clearance – because wars have left the country littered with mines that continue to maim people, especially children.

Support for the MDGs

Achieving even the limited targets set out for the MDGs requires a huge investment – from the countries closely concerned, from the other countries in the 'global partnership' under Goal 8 and from the various international organizations that are also involved. This is 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?', but to coordinate and target support, and to watch constantly whether countries, and the world as a whole, was heading for achievement of the Goals.



1 Jan Vandemoortele, 'MDGs: Misunderstood Targets?', UNDP International Poverty Centre, One-pager Number 28, January 2007, <http://www.ipc-undp.org/pub/IPCOnePager28.pdf>.

2 Ibid

II. ACHIEVING THE MDGS THROUGH SOCIO-ECONOMIC RIGHTS

The MDGs are essentially about people who are trapped in poverty and have few means to extricate themselves from its grip. 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 publication.

Rights

'I have a right' or 'we have a right' is a very special claim. It implies that something else is less important (or no more important) – whether that something else is another person's property, or even a nation's interest. But 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, regional and national levels. They have become increasingly intertwined. But the primary focus here is on the national system.

Universal Declaration of Human Rights

One of the most remarkable developments of the last century was the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, following the end of the Second World War and the establishment of the United Nations. The United Nations Charter had already committed its member States to respect 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. But 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 United Nations intended to bring about a new world order in which the framework of rights would constitute the dominant element. The UDHR 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 United Nations and its member States, which have greatly influenced the international system of human rights.

The UDHR provides a holistic conception of rights, of the diversity of entitlements which speak to 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 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 facilitator but also as provider. Social, economic and cultural rights, imposing positive obligations on the State, necessitate an active role, to ensure the 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.

Although the UDHR is, in a sense, binding on all member States, that binding quality has no real teeth. This is why the United Nations decided to develop binding treaties on rights, including the two Covenants in 1966. And as time has passed, a range of new treaties has been developed, dealing with the rights of specific sections of society. Many of these include socio-economic rights. By no means all States have accepted all the various human rights treaties. Table 1 shows how many States are parties to various treaties.

Table 1: Human rights treaties and numbers of ratifying countries

TREATY NAME	NUMBER OF RATIFYING COUNTRIES
Convention on the Elimination of All Forms of Racial Discrimination (1965)(CERD)	173
International Covenant on Civil and Political Rights (1966)(ICCPR)	156
International Covenant on Economic, Social and Cultural Rights (1966)(ICESCR)	159
Convention for the Elimination of All Forms of Discrimination Against Women (1979)(CEDAW)	185
Convention on the Rights of the Child (1984)(CRC)	193
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 treaties, 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 indigenous peoples (two International Labour Organization (ILO) conventions, the Declaration of the Rights of Indigenous Peoples, and the Declaration of the Rights of Minorities (which recognize rights both of individuals belonging to these communities as well as collective rights of the communities)). The covenants and conventions (unlike declarations) are legally binding on member States that have ratified them. In this way, States have assumed responsibility for a large number of rights of different kinds.

But States sometimes limit their commitment to these instruments. For example, the CRC, the most ratified of human rights treaties, has been accepted only with certain reservations by some 70 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 with indigenous people's child-care practices. India undertook to implement the provision on minimum age for employment only 'progressively'. The Pacific island nation of 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 provide free primary education only to citizen children. The reservations by some countries were so extensive that

other countries have suggested their commitment to the Convention was not real. Similarly, many reservations have been made by Islamic States to the Covenant on the Elimination of All Forms of Discrimination Against Women.³

What are the rights we are talking about?

The UDHR viewed all rights as similar; freedom from want is not different in kind from freedom from fear. It is regrettable that, because of international tensions and ideological differences, when it was intended to give the rights in the UDHR concrete, legally enforceable reality, it was impossible to agree on one treaty, and the result was both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both signed in 1966.

The ICCPR includes:

- the right to life;
- rights against torture and inhuman and degrading treatment;
- rights against slavery and forced labour;
- rights to 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 (the Covenant mentions “grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”);
- the right of children to be protected;
- the right to take part in public affairs and to vote and to serve the public;
- the rights of minorities “to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

³ See, UN Security Council Resolution 1325 on women, peace and security; and UN Security Council Resolution 1820 on sexual violence against civilians in conflict.

And the ICESCR includes:

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

Because the focus of this publication 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). So we shall use the expression 'socio-economic rights'. Nevertheless, it is important to appreciate that the recognition of a culture, community or people may be very important for self-confidence, and for people's ability to play a full part in society, and thus to achieve development.

What must the State do to achieve socio-economic rights?

The nature of the obligations has been analysed in some detail by the Committee on the Covenant and by various special rapporteurs. First, the State must achieve "at the very least, minimum levels of each of the rights"⁴ and to give priority to achieving this minimum level. Beyond that, the duty is to "respect, protect, promote and fulfil"⁵ the rights. 'Respecting' means that the State itself refrains from acts that violate the rights (for example, wrongful eviction from homes). 'Protecting' 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.

4 UNDP Nepal, Support to Constitution Building, <http://www.undp.org.np/constitutionbuilding/constitutiondesign/humanrights/different.php>, see also 'The International Covenant on Economic, Social and Cultural Rights', http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

5 Ibid.

'Promoting' and 'fulfilling' the rights are often treated together. They both involve positive actions by the State. This may include education and incentives – taxation systems that stimulate fulfilment, for example. They may involve the State taking positive steps to create the conditions, 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, ensure the supply of water, and ensure health by guaranteeing the supply of affordable medicines). And sometimes the State must go further, for example by providing feeding programmes in case of droughts. But it does not mean that the State must use a particular approach to achieve the rights – that is a matter of policies 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 interpretations 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 mutton industry, leaving Muslims with no meat option except pork, 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 and of appropriate quality. And 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.⁶

The international covenants do not require the impossible: States are required to achieve fulfilment of rights 'progressively'. But they are supposed to do so "to the maximum of their available resources".⁷ The Committee on Economic, Social and Cultural Rights has emphasized that lack of resources does not mean that a State may postpone beginning the process of realizing 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 creation of the Human Development Index, used in the United Nations Development Programme (UNDP) 'Human Development Reports'). Countries that do poorly are violating their human rights obligations, probably because they have their priorities oriented away from human rights towards other concerns such as national defence, national prestige or even personal benefit of rulers.

How do the MDGs and rights relate to each other?

Some writing has suggested that the MDGs are a way to achieve human rights. Some writing has suggested that human rights are a way to achieve the MDGs. At the level of academic debate, and of individual organizations, these differences will continue, and

6 General Comment No. 14: The right to the highest attainable standard of health, Committee on Economic, Social, and Cultural Rights, Twenty-second session, 25 April-12 May 2000, Geneva, <http://www.aspire-irl.org/General%20Comment%2014.pdf>.

7 'The International Covenant on Economic, Social and Cultural Rights', http://www.unhcr.ch/html/menu3/b/a_ceschr.htm.

the issues reflected are important.⁸ Nevertheless, the MDGs and human rights have common objectives to protect and uphold human dignity. The realization of human rights is critical particularly for the poor and marginalized. Hence, direct linkages between the MDGs and human rights provisions must be established.

The MDGs, although not cast in the language of rights, have pointed to the importance of life and dignity with adequate material resources. The Goals often correspond with human rights obligations, standards or norms. The Millennium Declaration has drawn attention to social and economic rights by encouraging heads of State and government to commit themselves to “respect fully and uphold the Universal Declaration of Human Rights” (paragraph 25).

Mutual benefit

Already, many national and international organizations are working to support fulfilment of both the MDGs and of rights. They use similar tools to assess progress towards the fulfilment of both. But some organizations see themselves as working only towards the MDGs, or see themselves only as human rights organizations. That is, of course, entirely their prerogative. 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.

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 pursuing a human rights perspective.

Organizations may find that some financial and other support is more forthcoming if they emphasize the 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 human rights 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.⁹ This is less true of socio-economic rights and ‘progressive realization’.

⁸ See for example: Overseas Development Institute, ‘Human rights and the Millennium Development Goals: Contradictory Frameworks?’, http://www.odi.org.uk/events/rights2005/meeting_10jan/meeting_report.html; 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, USA, February 28, 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: Alston, Philip, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals’, *Human Rights Quarterly*, 2005, 27, 755–829.

⁹ Robert Archer, Overseas Development Institute Meeting Series, ‘Human Rights and Poverty Reduction: Realities, Controversies and Strategies’, Meeting 1: Human Rights and the MDGs: Contradictory Framework?, ODI London, 10 January 2005, http://www.odi.org.uk/events/rights2005/meeting_10jan/archer.pdf.

Rights may support the achievement of the MDGs – and longer-term development

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.

Drawing the connections

A number of recent studies have made connections between the MDGs and rights. Rather than repeat this work, in Table 2 we present the MDG/rights connections made by others. Here we omit MDG 8, on the international partnership, because it is less relevant to the drafting of a national constitution. It is interesting to see that not everyone will link a particular MDG to the same right(s).

Table 2: Links between MDGs and human rights

	GOALS	TARGETS	INDICATORS	LINK TO RIGHTS BY PAUL HUNT ¹⁰	LINK TO RIGHTS BY UNDP RWANDA ¹¹
1	Eradicate extreme poverty and hunger	Halve the proportion of people with an income of below \$1 a day Halve the proportion living with hunger	<ol style="list-style-type: none"> 1. Proportion of population below \$1 per day 2. Poverty gap ratio (incidence x depth of poverty) 3. Share of the 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 	UDHR, Article 25(1) (the right to a standard of living); ICESCR Article 11 (on the right to a decent standard of living)	ICESCR Article 11 & GC 12 (on the right to food); CRC articles 24(2) (state measures on child health) & 27(3) (assistance with the child's right to a standard of living)
2	Achieve universal primary education	Ensure that boys and girls everywhere will be able to complete a full course of primary education	<ol style="list-style-type: none"> 6. Net enrolment ratio in primary education 7. Proportion of pupils starting grade 1 who reach grade 5 8. Literacy rate of 15–24 year-olds 	UDHR Article 25(1); ICESCR articles 13 & 14; CRC Article 28(1)(a); CEDAW Article 10; CERD Article 5(e)(v)	ICESCR articles 13, 14 & GC 11; CRC Article 28(a) & GC 1; CERD articles 5 & 7
3	Promote gender equality and empower women	Eliminate gender disparity (in primary education by 2005, and in other levels of education by 2015)	<ol style="list-style-type: none"> 9. Ratio of girls to boys in primary, secondary and tertiary education 10. Ratio of literate women to men, 15–24 years old 11. Share of women in wage employment in the non-agricultural sector 12. Proportion of seats held by women in the national parliament 	UDHR Article 2; CEDAW; ICESCR Article 3; CRC Article 2	CEDAW; ICESCR articles 3 & 4(a)(i); ICCPR articles 3, 6(5) & 23(2); CRC Article 22; CERD GC 25
4	Reduce child mortality	Reduce the under-five mortality rate by two thirds	<ol style="list-style-type: none"> 13. Under-five mortality rate 14. Infant mortality rate 15. Proportion of one-year-old children immunized against measles 	UDHR Article 25; CRC articles 6 & 24(2)(a); ICESCR Article 12(2)(a)	CRC articles 6 & 24(2)(a); ICESCR Article 12(2)(a), GC 14

Continues...

Table 2 continued

	GOALS	TARGETS	INDICATORS	LINK TO RIGHTS BY PAUL HUNT ¹⁰	LINK TO RIGHTS BY UNDP RWANDA ¹¹
5	Improve maternal health	Reduce the maternal mortality rate by three quarters	<p>16. Maternal mortality ratio</p> <p>17. Proportion of births attended by skilled health personnel</p>	UDHR Article 25; CEDAW articles 10(h), 11(f), 12 & 14(b); ICESCR Article 12; CRC Article 24(2)(d); CERD Article 5(e)(iv)	CEDAW articles 10(h), 11(f), 12(1), 14(b) & GC 24; CERD Article 5(e) (iv); ICESCR GC 14; ICCPR articles 3, 6(5) & 23(2); CRC Article 24(d)
6	Combat HIV/AIDS, malaria and other diseases	Have begun to reverse the spread of these diseases	<p>18. HIV prevalence among pregnant women aged 15–24 years</p> <p>19. Condom use rate</p> <p>19a. Condom use at last high-risk sex</p> <p>19b. Percentage of population aged 15–24 years with comprehensive correct knowledge of HIV</p> <p>19c. Contraceptive prevalence rate</p> <p>20. Ratio of school attendance of orphans to school attendance of non-orphans aged 10–14 years</p> <p>21. Prevalence and death rates associated with malaria</p> <p>22. Proportion of population in malaria-risk areas using effective malaria prevention and treatment measures</p> <p>23. Prevalence and death rates associated with tuberculosis</p> <p>24. Proportion of tuberculosis cases detected and cured under DOTS (internationally recommended TB control strategy)</p>	UDHR Article 25; ICESCR Article 12; CRC Article 24; CEDAW Article 12; CERD Article 5(e)(iv)	Guidelines on HIV/AIDS and HR; ICESCR GC 14; CRC Article 24(C) & GC 3

Continues...

Table 2 continued

GOALS	TARGETS	INDICATORS	LINK TO RIGHTS BY PAUL HUNT ¹⁰	LINK TO RIGHTS BY UNDP RWANDA ¹¹
7 Ensure environmental sustainability	Integrate sustainable development into countries' policies and programmes Halve the proportion of people without sustainable access to water and drainage Significant improvement in the lives of 100 million slum dwellers (by 2020)	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 29. Proportion of the population using solid fuels 30. Proportion of the population with sustainable access to an improved water source, both urban and rural 31. Proportion of the population with access to improved sanitation, both urban and rural 32. Proportion of households with access to secure tenure	UDHR Article 25(1); ICESCR articles 11(1) & 12; CEDAW Article 14(2)(h); CRC Article 24; CERD Article 5(e)(iii)	ICESCR GC 4, 7, 14 & 15; CRC Article 24(C) & GC 3

10 Report of Paul Hunt, Special Rapporteur of the Commission on Human Rights, on the "Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health," submitted to the General Assembly of the United Nations, 59th Session, 2004; Paper A/59/422 Annex; (2004).

11 http://www.undp.org/loslocentre/docs07/EdiscussionFinalSummary_MDGsHR.pdf.

Dealing with myths and prejudices about socio-economic rights

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 sorts of attitudes may come from ignorance about human rights (because few lawyers are really well educated about them), from some hostility to international law, or from legal or political conservatism (the legal profession does not tend in general to be socially or politically radical). Perhaps because of this hostility to socio-economic rights, some people are resistant to public participation in the process of constitution making. Why? Because 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 a living for themselves and their families. In other words, what many people really want to see in a constitution are precisely the things that 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 the MDGs or similar objectives.



How do we respond 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 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; saying, "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 President Franklin Roosevelt of the United States of America were insisting on the need to protect the rights of people from want, as well as their right to express their views and their beliefs. But 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: “Everyone, as a member of society ... is entitled to realization, through national effort and international cooperation 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”.

But in 1948 an ‘Iron Curtain’ was descending over Europe, and the rest of the world was held captive by Europe’s ideological divides, 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 United Nations and by earlier constitution makers. But 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 publication, but is outlined briefly in Box 1.

Box 1: Discussion of objections to ‘constitutionalizing’ 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.

‘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, and it is the main purpose of this publication to show how they can be made legally binding within an individual country’s legal system.

‘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. And in the fourth section of this handbook, on constitutions and enforcement of constitutional rights, we shall show how these rights can be a matter for law, though they are also, of course, very much a matter of politics and policies.

‘You can’t have rights unless someone has a duty, and it is not clear who has the duties’. This may well be made clear – as it is in the ICESCR and in many constitutions. (But rights can also have political as well as narrowly legal force).

‘There is no way that courts are suitable to deal with socio-economic rights’. It is true that there are many decisions that will need to be made in order to satisfy rights, but which courts are not competent to make. However, 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.

Continues...

Box 1 continued

'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. But people expect governments to have policies to support 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'. This sort of supposed distinction between civil and political and socio-economic rights is discussed below (see page 19).

More positively, there are various reasons why socio-economic rights have won increasing acceptance, at least in some quarters. Practical experience, research, intellectual ideas, human determination and global politics have all played their part. Throughout history, ideas about, and the scope of, rights have been modified and adjusted to changing realities and ideologies. Rights 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 that 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 people.

There has been a tremendous amount of research on the nature of poverty, and there is greater realization of its complex and multilayered 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.

All rights must be considered together

In this publication, 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 – suggesting that some are more important than others. And, 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 publication 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 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 governments to restrain themselves, while socio-economic rights require them to take positive action. 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. These are 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 some protection of rights is as much a matter for governmental restraint as respecting civil and political rights is said to be (this is elaborated below under 'What must the State do to achieve socio-economic rights?').
- 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 the right to vote cannot be exercised. In other words, the most 'civil and political' of rights are fundamental to socio-economic rights. And, 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. Freedoms of expression and association are essential, for example, to protect campaigners on the environment from government harassment.
- The ICCPR and the ICESCR 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. And 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 economy and society, or inequalities on the international scale.

III. THE CONSTITUTION: CREATING AN ENABLING ENVIRONMENT TO ACCELERATE THE ACHIEVEMENT OF THE MDGS

Constitutions and constitutionalism

The constitution, as fundamental law, provides the framework for the structures and powers of the State. All laws, policies and administrative acts must be compatible with it. Normally, a constitution determines the structure of the State according to fundamental principles of the purpose of state power. At one level these purposes are very general; and at another quite specific.

The most general purpose of state power is to provide security for citizens and other residents and to enable them to lead a life that is meaningful to them. The role of the constitution 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 any 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.

Nevertheless, there is a real danger that these powers could be abused, and, instead of serving the people, used to suppress them. A good constitution tries to strike a balance between giving the State sufficient powers to discharge its critical functions, and limiting those powers to protect the rights of the people.

The balance is often struck by the principle or doctrine of constitutionalism. 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, and 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 up for particularly sensitive tasks like conducting elections, controlling corruption or promoting human rights.

Of 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 power, 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, governance in which even the rulers 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 and accountability of government.

In developing countries, the State is often much more distanced from society than in developed countries; and often the constitution does not have effective links to either society or even the State. There is frequently no dominant social class or force in society that can impose its rule over others or bring coherence to society or State. People may be divided by caste, tribe, 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 – which has been regarded as the prerequisite of a functioning and stable State. The absence of national sentiments creates considerable difficulties in establishing a State to which primary allegiance is owed. 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.

In this situation, the role of the constitution is significantly different from that in developed countries. The constitution can come to be seen as the symbol of the State, and the source of a sense of nationalism and national belonging. Many recent constitutions have been 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.) 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. Some constitutions in this context place considerable emphasis on social justice and inclusion, as the only guarantees 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.

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 publication, 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 achieving the MDGs. In the next section, we discuss the implications of incorporating human rights and the MDGs in a constitution broadly of this type. We shall argue that it is not sufficient to have a good bill of rights; rather the entire constitution should reflect human rights values and procedures – that it should 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 great, the rich often control the political system and simply neglect the poor, forestalling broad-based development. The prevalence of corruption erodes public ethics, illegally diverts resources away from the 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.

Nevertheless, a constitution may be technically well drafted – with appropriate and skilfully expressed provisions about rights, supportive institutions provided for in the document, and even reach out in emotional terms to the people – but remain no more than something 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, this means that there must be institutions and procedures to ensure that it is usable – and these institutions and procedures can be provided by the constitution itself. On the other hand, people – the citizens, the people affected by denial of their rights, the people for whom the constitution is designed – must be motivated and able to make use of it.

Integrating the MDGs into the constitution – a vehicle for development

Taking the MDGs into account in the constitution making and reform process can facilitate greater awareness among parliamentarians. It can enable both State and non-State actors to play a proper role in promoting and monitoring the implementation of the MDGs, enhancing accountability in the delivery mechanisms. The MDGs need to be integrated and harmonized with socio-economic and political rights, and can in turn have an impact on the interpretation of other provisions of the constitution. In this way, the MDGs and the constitution can reinforce each other.

The MDGs are not time-limited; they need to be pursued over a long period of time, well beyond 2015. It is important to establish a proper legal, social and political context for achieving these goals, particularly within the constitutional framework. However, there will be objections to this. Some will object that including the MDGs in the national constitution is to constitutionalize poverty and to assume that ‘the poor will always be with us’ when the whole thrust of the MDGs is to deny this inevitability. Some people will object on the grounds that a constitution is something that should last for 200 years or more (like the US Constitution) and should therefore be timeless. But here it is important to make various distinctions. Firstly, it is not the targets but the Goals that we argue can and should be integrated into the constitutional framework. And it is not the precise words, but the underlying spirit of the Goals, and even more so of the Millennium Declaration, that may be most appropriately embodied in a constitution. Even if the Goals were realized in a particular society, continued vigilance is needed to maintain that progress. For example, many countries have experienced increased inequality – with at least increased relative poverty. At the same time, disease will not disappear from the earth.

Constitutions should not be changed at whim, but the supposed perpetuity of a constitution should not be made an article of faith. 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 that the MDGs are 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 developing countries let developed countries ‘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. But, 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 to achieve the spirit of the MDGs or the Declaration. Of course, some countries might find this objectionable. Secondly, developed 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?

The importance of the integration of the 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 taking place within national jurisdictions – unless they are of genocidal proportions, and even then with great difficulty, as the situation in Darfur, Sudan well illustrates. Even in well established regional systems, where the regional courts make 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.

Reviewing or making the constitution

The constitution making process is a marvellous opportunity to engage people in discourses on constitutions, human rights, democracy and social justice. 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. But the process is important in other respects as well, which have a bearing on how the constitution is actually rooted. The design of the process, that is the decision-making institutions and methods, has a bearing 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 the social realities established. Participation, an important human rights value, is now regarded as central to constitution making processes.



It is important to avoid idealizing participation. Nevertheless, it is widely agreed that a good participatory process can promote important values of democracy and sustainability of the constitution. In designing a participatory process, 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 really be fed into the process – and not just collected as a sort of ‘window-dressing’ exercise?
- Are the people to be consulted only, or do they have an input into the actual decision making process?

An effective bill of rights

No constitution can be adopted today that does not have a bill of rights. Having a bill of rights is no longer an issue, no lobbying is required. Nevertheless, critical decisions need to be made in the drafting of the bill of rights to make them effective in practice, including special considerations applying to socio-economic rights. Some key considerations include:

- Rights that are included in the bill of rights should be fully enforceable. It is essential that rights should be binding and enforceable without need for further legislation.¹²
- With the agenda of the MDGs in mind, socio-economic rights should be included in the bill of rights and 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 (see *Directive principle of state policy* and *The struggle to get socio-economic rights into constitutions*).
- 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 account of styles of drafting. Or it might be appropriate to have at the beginning of the part on socio-economic rights, some statements putting them in the context of broad national aims such as the elimination of poverty.

How can the bill of rights be protected from being undermined by governments and others?

Linking the national to the international mechanisms, 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 public discussion, for a reasonable time before it is to be submitted to the treaty body;
- 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 on how it intends to implement the recommendations.

In addition, there could be a requirement that the government and courts pay regard to the interpretations and decision of the relevant international courts and treaty bodies when considering issues related to human rights.

¹² But often, rights are formulated in this way – “as provided in law” or “subject to laws” – which, by transferring the authority to make them more or less binding, or negating them by passing no legislation, deprives them of the character of rights. For example, there is a great deal of this in the Nepal Interim Constitution: “Every citizen shall have the right to basic health services free of cost from the State, as provided for in the law” (Article 16). This will probably have the effect that if there is no law, there is no right.

Directive principles of state policy

In some constitutions (e.g. Bangladesh, Ghana, India, Ireland, Namibia, Nigeria, Papua New Guinea and Uganda) 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’s Directive Principles are the best known, and our examples are drawn from its constitution. At a high level of generality, they include 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”.

More specifically, the Indian Directive Principles include:

- minimization of “inequalities in income”;
- “the citizens, men and women equally, have the right to an adequate means to 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”;
- “effective provisions for securing the right to work, to education, to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want”.

Directive principles are not ‘justiciable’, which means that they cannot be used as the basis of a claim in a court of law. However, the Indian courts have been able to make creative use of the Directive Principles to flesh out human rights.

Box 2: Case studies: The struggle to get 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’. The Irish Constitution of 1937 was the first to adopt the directive principles approach – marrying Roman Catholic concerns for social justice with some legal conservatism. This approach was followed by India in 1950. In the Indian Constituent Assembly there was debate between those who thought that only those 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”) and others. However, because of concerns that these directive 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.

The adoption of the ICESCR and the signing of the South African Constitution has changed the debate somewhat. But even in South Africa, it was not clear that

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Box 2 continued

socio-economic rights would be included. The African Nation Congress (ANC) Freedom Charter, adopted in 1955, emphasized civil and political rights, but its later draft, the Bill of Rights, did not include them. Some commentators, even ANC sympathizers, felt that constitutionalizing socio-economic rights would raise false hopes. It would give the judges a role in deciding public expenditure (which they felt was inappropriate) and involve them in policy decisions and in prescribing courses of action. Others were convinced that these rights were essential to deal with the economic and social, as well as the political, impacts of the apartheid regime.¹³ Strong submissions, backed up by public demonstrations, were made to the Constitutional Assembly in support of inclusion of these rights. The Assembly, in which the ANC had a large majority, decided to adopt a series of rights that were closely modelled on the ICESCR. The Constitutional Court endorsed the Constitution with the inclusion of these rights, rejecting any rigid distinction between them and civil and political rights.

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, has proposed a new bill of rights with an obligation, not just a permission, to take “affirmative action measures to improve the lives of discriminated against groups”. Proposed rights include 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 for “adequate accommodation appropriate to their needs”. Anyone with “sufficient interest” – to be defined as “having regard to the need to ensure access to justice” – could go to court.¹⁴

A UK parliamentary committee, considering a bill of rights, commented, “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 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. It proposed that, initially, the rights mentioned should be restricted to health, education, housing, an adequate standard of living, and to a “healthy and sustainable environment”.¹⁵

The constitutions of various Latin American countries include wide socio-economic rights. In some recent constituent assemblies, such as Bolivia and Ecuador, these have been pushed especially by the indigenous groups, sometimes assisted by foreign non-governmental organizations (NGOs).

Directive principles have not been entirely superseded by ‘justiciable rights’. The Constituent Assembly of Nepal (elected in 2008) has established various committees including a Committee on Fundamental Rights and Directive Principles.

13 Corder et al., ‘A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate’, Cape Town, University of Cape Town, 1992, p21.

14 ‘A Bill of Rights for Northern Ireland – Advice to the Secretary of State for Northern Ireland’ –Northern Ireland Human Rights Commission, 10th December 2008.

15 ‘A Bill of Rights for the UK?’, Twenty-ninth Report of Session 2007–2008, House of Commons Joint Committee on Human Rights.

Drafting the constitutions

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 consideration 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.

Box 3: The argument for less detail in a bill of rights

A discussion of the Bill of Rights for the 1996 South African Constitution 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 to encourage cases concerned with whether government action is justifiable;
- to minimize the risk of inadvertently cutting down rights (which can happen with more detail); and
- to allow for “evolutionary interpretation and constitutional growth”.¹⁶

*Socio-economic rights: How should they be framed?*¹⁷

Some constitutions talk rather generally, with phrases such as ‘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 rights at work. In South Africa, they thought it useful to be 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. And 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?; and (ii) what must be done to achieve that right? There

¹⁶ Corder et al., op. cit., p.17–18.

¹⁷ For some examples of how economic, social and cultural rights are integrated into constitutions; how this results in better protection, making them executable and justiciable; and how this can enhance the achievement of the MDGs, see Human Rights Policy Network (HURITALK), ‘Final Summary of E-Discussion: How to Strengthen Engagement with the International Human Rights Machinery’, May–June 2007.

has been a good deal of elaboration of the former aspect – often referring to issues like availability of a right, accessibility, appropriateness and acceptability (see above). Reference to such ideas as applying to socio-economic rights generally, or to 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 from 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 with 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 a 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 the following expressions:

- "progressive realization";
- "reasonable legislative and other measures";
- "within its available resources";
- "development of the rights by the international mechanisms for respecting, protecting and fulfilling the rights".

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

IV. PROTECTING AND ENFORCING THE CONSTITUTION AND RIGHTS

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 that 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. It is on the actions, or inaction, of national governments that the main criticisms by international or regional bodies will concentrate.

National system of human rights protection

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 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 rights 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 related to public life;
- the media – how they work, who owns them, how they are regulated and what their traditions and cultures are;
- 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, and how far the State controls the economy and regulates the forces that affect such things as 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 in the private or family spheres (such as 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; and
- the ‘international community’ – the United Nations, international NGOs, international aid agencies, and so on.

More specifically, a national system of human rights protection may involve:

- 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 United Kingdom, 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.
- 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; to set up non-judicial bodies; to hold government accountable; and to determine the scope of rights by providing reasons and procedures for limitation.
- It is also a 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, and it should protect citizens against violations by state officials, as well as by non-state actors. It is often said that human rights should form the framework for the development and the carrying out of policy.
- The judiciary has as one of its basic functions the protection of human rights. This is not its only function; it also resolves disputes about commercial matters and many issues that may have no obvious human rights dimension. But in 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 the courts

The roles of the courts are, especially, to:

- 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.
- Interpret the law in a way that is compatible with human rights.
- Make or develop laws with the guidance of the human rights framework. (In some countries, laws are partly the creation of the judges.)

- Perform an educational function (through their decisions, the State and its organs, and citizens, learn about human rights). The courts are thus a forum for discussion about rights.

Key challenges on the role of the courts

- Courts, especially in the common law tradition, are also dependent on the arguments raised by lawyers for the parties. To enforce the criminal law, they depend 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’ – deliberate failure to enforce the law, especially against the rich, powerful and well-connected. Sometimes the courts can assert themselves; for example, in some countries if a criminal case is brought before the courts by a private citizen or group, it is possible for the government’s lawyer (the attorney-general) to take over the case or even stop it. In a few countries the courts have refused to allow this to happen without their scrutinizing the reasons, but if the constitution endorses the attorney general’s behaviour, the courts may be restricted in what they can do to limit impunity.
- The courts can only be effective in protecting the citizen against the State or a powerful person or body if they are independent – not subject to state influence, not prepared to take bribes, 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 profession.
- Going to 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 law’. 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.

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 upon 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 the despair of the poor divide the proletariat and marginalized groups, obscure realities, and weaken resistance to oppression and the will to struggle. And if politics become 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 the 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 who stand up for their own rights or those of others – including the media, activists and lawyers – 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 go unenforced and unrespected, 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 the international, regional and national levels, the importance of civil society is enormous. It offers to the individual and to the community a way to work together that does not depend on the support of the 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 public and often private sectors, and enforcement (e.g. through the use of public-interest litigation) etc. This is not to ignore the fact that civil society has its weaknesses. It can be co-opted, or even created, by the very same 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.

Many NGOs justify their existence by the need to promote rights. It is the regime of rights that 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 the 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 indigenous peoples.

One of the most important functions is that of 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 and protection against torture owe their origin to the efforts of national and international NGOs. Later, these ideas may be picked up and ultimately put into international conventions, resolutions or declarations.

The role of other bodies in protecting rights

The main responsibility for fulfilling these rights, even more than in the case of civil and political rights, must rest on politicians and administrations, as sanctions are often politicized or used as political tools. However, it is possible to give legal responsibilities to others.

Key recommendations on the constitution

- A constitution may require that the government report on its own performance on socio-economic rights. A few constitutions include this requirement; for example, in 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.”
- A human rights commission may be given a particular responsibility to report on economic, social and cultural rights – and government departments may be obliged to report annually to the commission on their own performance, as is the case in South Africa. The role of the commission is to enhance the understanding of the rights and encourage better performance, including providing necessary recommendations.
- The ‘right to information’ could provide useful tools for civil society and others concerned to see the realization of rights.¹⁸
- 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.
- 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.
- All human rights, particularly socio-economic rights, facilitate – and indeed, necessitate – solidarity, and require the activity of individuals and communities, including participation and a measure of vigilance. The authors believe that it is desirable to remind people of, and educate children in, a sense of responsibility and solidarity.

Citizen actions to promote human rights

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.

Citizen actions 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 and donors etc;
- action at the regional level – similar procedures may exist as at the international level for hearings on individual complaints and for shadow reports (but there is no such machinery at the Asian regional level);
- using the international machinery at the national level, publicizing the comments and recommendations of the treaty bodies;

¹⁸ 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-Pager No. 72, <http://www.ipc-undp.org/pub/IPCOnePager72.pdf>, November 2008.

- action purely at the national level – lobbying for laws to be passed, policies to be made, and laws to be respected and implemented (which will require networking, negotiating, political action, perhaps even legal action), and publishing annual reports on the state of human rights.

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 so 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. And many constitutions are made to end internal conflict, and include elements of inclusion. The constitution thus becomes lengthy, ambitious and aspirational, which finds favour with many groups but meets with resistance from others. The real challenge is to implement it.

From the point of view of the MDGs, the challenge is the greater the more unequal the 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.”¹⁹

Implementing the constitution

At a technical level, the enforcement of a constitution revolves around three elements: implementing, promoting and safeguarding:

1. To implement a constitution means to give full expression to its provisions – making new laws and policies, setting up new institutions (and vesting them with powers and resources adequate for their responsibilities), and repealing inconsistent laws.
2. To promote the constitution means enforcing these laws, respecting the 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 with the constitution, and facilitating the participation of the people in public and state affairs.
3. Safeguarding the constitution means to protect it 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 or excessive resort to emergency powers. Safeguarding means, in extreme cases, protection against overthrow of the constitution through illegal measures such as military coups.

19 UNDP, ‘Human Development Report 2003, The Millennium Development Goals: A Compact Among Nations to End Human Poverty’, <http://hdr.undp.org/en/reports/global/hdr2003/>, 2003, p.132.

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 freedom of information, affirmative action, land redistribution and economic and social rights.

Key challenges in the effective implementation of the constitution

- occasional and/or systematic disregard of some of its provisions, including selective implementation;
- abuse of powers given under the constitution (for example, denying the separation of powers or the independence of institutions such as the judiciary);
- the power and capacity of States, including lack of expertise or resources;
- economic and political forces against which the constitution can provide limited resistance, such as powerful interests in, or external to, a country who are not sympathetic to the objectives of the constitution or wish to buy illegitimate influence or use corrupt means to sabotage it;
- subversion of both the values and institutions of the constitution – one of the surest ways to weaken these is the financial or political corruption of the judiciary;
- the weight and resilience of social traditions, ideologies and institutions that prevent the achievement of progressive social reforms and changes.

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 the emphasis on rules and the modes of their enforcement. These reflect and spring from political and cultural traditions. Paradoxically, countries that try to use the constitution for social transformation often lack these traditions. This situation is aggravated by a lack of knowledge of the role and content of the constitution among those who benefit from the provisions of the constitution being respected and enforced.

These factors can only too easily lead to those who are dissatisfied with the constitution, for one reason or another, to seek solutions outside the constitutional framework. We often associate the military or political insurgents with this approach. Nepal has experience of this, even from the monarchy, which abused the country's constitution for its own ends. Sometimes the constitution can be delegitimized by its adherents – as, again, political parties in Nepal are alleged to have done to the 1990 Constitution, thus opening challenges to it from its detractors.

So far we have discussed what might be called technical issues in implementation – which, experience shows, are secondary to other factors. The real task of establishing constitutionalism 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, traditions of constitutionalism, and by the rules and institutions in the constitution itself.

Society and implementation

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 affects the constitution, sometimes giving it a push in the directions adopted in the constitution, and sometimes negating them. Unjustified reliance is sometimes placed upon the capacity of the constitution to influence society. Comparative constitutional law scholarship restricts itself to legal rules and techniques, and says little about the societies 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 the society itself that has determined the extent to which the constitution will be observed, manipulated or disregarded.

In so far as the kinds of constitutions we are discussing are oriented towards the MDGs and social justice – and are people centred – it is important to redress the balance between politicians (and the government) and people. 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 constitutional rights and the mechanisms to protect and mobilize them, and familiarity with the institutions and opportunities through which to express views and to demand accountability. 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 people to take advantage of provisions for public participation; they could inform and educate on constitutional issues; and they could play a critical role in the reporting to regional and international bodies on the fulfilment of the country's international obligations, particularly as regards human rights.

Fundamentally, implementing a constitution is not about this or that provision, or even the totality of the constitution, important as these aspects 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; and the participation and empowerment of the people.

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 in order 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 on human rights, social justice, the environment and natural resource policies, etc;
 - 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.

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The UN Millennium Campaign works with partners in countries around the world to support individuals in their efforts to hold their governments to account for the achievement of the MDGs and for the realization of human rights. We believe that only if citizens are informed of the promises and commitments that their governments have made, and are engaged in calling for their realization, will the MDGs be achieved by 2015.

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