



Social and Economic Rights

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About this series

These constitution-building primers are intended to assist in-country constitution-building or constitutional-reform processes by: (i) helping citizens, political parties, civil society organisations, public officials, and members of constituent assemblies, to make wise constitutional choices; and (ii) helping staff of intergovernmental organizations and other external actors to give good, well-informed, context-relevant support to local decision-makers. The primers are designed as an introduction for non-specialist readers, and as a convenient aide-memoire for those with prior knowledge or experience of constitution-building. Arranged thematically around the practical choices faced by constitution-builders, the primers aim to explain complex issues in a quick and easy way.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

'But it's hard to stand on your own two feet when your bones are softened with rickets and you're wheezing with asthma from the black blots of dampness on the spongy bedroom wall.'
(Julie McDowall, Scottish author and social activist)

Overview

What?

- Socio-economic rights provide protection for the dignity, freedom and well-being of individuals by guaranteeing state-supported entitlements to education, public health care, housing, a living wage, decent working conditions and other social goods.

Why?

- Constitutionalizing socio-economic rights reflects the need to protect the most fundamental interests of individuals in having resources that are necessary for the exercise of their well-being.

Why not?

- Objections to the constitutionalization of socio-economic rights include: the risk of overloading the state's capacity to deliver promised goods leading to a lack of legitimacy, the fear of judges becoming too involved in policymaking and ideological objections.

Where?

- Most recent constitutions, especially in Europe, Africa and Latin America, include some socio-economic rights. North America and the Caribbean are notable for the absence of such provisions.

What Is the Issue?

The connection between political freedom and more equitable access to socio-economic resources has been a recurring feature of human history. In ancient Rome, for example, the campaign of the plebeians (lower class citizens) for equal political rights was motivated by a desire for the remission of debts and a more equal distribution of land. Similarly, the English Magna Carta of 1215, which could be seen as an early declaration of civil and political rights, was accompanied by the Charter of the Forest, which secured peasants' rights to grazing, foraging and gathering wood—the means of peasant livelihood.

The revolutionary experiences of the 17th to 19th centuries, which gave birth to modern forms of democracy, also frequently highlighted the connection between civil-political and socio-economic rights, at least in theoretical and polemic writings, and most early written constitutions did not contain specific socio-economic rights. This situation began to change during the 20th century, with a global trend, over the last hundred years, toward the inclusion of more expansive rights provisions in constitutions, including rights to socio-economic goods, such as education and health care, in addition to civil liberties and due-process rights. The constitutions of developing nations, in particular, increasingly include subsistence rights—rights to the essential criteria of a healthy life, i.e. water, food, sanitation, etc.

The majority of the world's democratic constitutions now either include some legally enforceable socio-economic rights or promote the political pursuit of progressive socio-economic objectives through constitutionally recognized directive principles of policy. Some older constitutions, however, continue to omit socio-economic rights, leaving them to be established, if at all, on a statutory, rather than constitutional, basis.

This primer discusses the origin and spread of socio-economic rights, articulates reasons for and against including them in a constitution and considers the design options and contextual factors that constitution-makers must address when dealing with this issue. It seeks to guide constitution-makers through a range of constitutional choices, including:

- (1) Whether socio-economic rights should be incorporated into a constitution.
- (2) What form their incorporation should take, i.e. as justiciable rights or directive provisions?
- (3) What other design features of a constitution would complement the promotion of these rights?

What Are Socio-Economic Rights?

Generations of Rights

The first modern constitutions defined rights primarily in terms of procedural or substantive limits on the exercise of state power, intended to protect individuals from arbitrary interference — the rule of law, the right to a fair trial, personal liberty and the freedoms of speech, assembly, association and religion. These rights are now variously known as 'first generation', 'negative', or 'civil and political rights'.

Socio-Economic Rights as Outlined in US President Franklin D. Roosevelt's 1944 State of the Union Address.

'The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

'The right to earn enough to provide adequate food and clothing and recreation;

'The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

'The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

'The right of every family to a decent home;

'The right to adequate medical care and the opportunity to achieve and enjoy good health;

'The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

'The right to a good education.'

(Note: These rights were put forward as a political programme, but not established in the US Constitution.)

Because only civil-political rights were protected, these early constitutions were seen as embodying a narrowly individualist version of freedom, blind to social and economic disparities: this narrow view of equality before the law, in the words of the 19th-century French writer Anatole France, 'prohibited rich and poor alike from sleeping under bridges, begging in the streets, and stealing loaves of bread'.

Many reformers from the middle of the 19th century onwards believed that civil and political rights, without improvements in social and economic conditions, offered little hope to ordinary people whose lives may be blunted by long working hours, low pay, harassment of union organizers, dangerous working conditions, vulnerability to arbitrary dismissal and cyclical or chronic unemployment, slum housing and a lack of access to education and health care.

In the United States, in particular, the Constitution was widely regarded as a guarantor of a highly individualist form of freedom. As such, it was an obstacle to progressive legislation that was often annulled by the courts on constitutional grounds. Infamous cases include *Lochner v. New York* in 1905 (which struck down a state law regulating maximum working hours) and *Adkins v. Children's Hospital* in 1923 (which struck down minimum-wage legislation). If constitutional government was to respond to so-called 'social question', and to demands for a more active state and a more positive concept of liberty, then constitutions would have to change.

From the late 19th century onwards, and in particular in the new democratic constitutions that followed the World Wars I and II, more emphasis was placed on rights that protected workers against their bosses and on rights that were defined in terms of positive entitlements, such as the right to education and health care. These rights are variously known as 'socio-economic rights' (sometimes 'social, economic and cultural rights') or 'second-generation rights'. In older literature, they were sometimes called 'positive rights', since they promoted a positive view of liberty as 'opportunities for flourishing or well-being', as contrasted against a negative view of liberty simply as non-interference.

Socio-Economic Rights as an Emerging Global and International Norm

International recognition of socio-economic rights dates from the early 20th century, when the International Labour Organization, then an agency of the League of Nations, adopted a series of conventions intended to improve labour standards around the world.

After World War II, international treaties and conventions increasingly began to incorporate socio-economic rights, including, most importantly, the Universal Declaration of Human Rights (UDHR, 1948) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). The International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW, 1965) and the Convention on the Rights of the Child (1989) also contain provisions relating to socio-economic rights.

Regional human rights instruments have also codified socio-economic rights, e.g. the African Charter on Human and Peoples' Rights protects, *inter alia*, the right to work, the right to health and the right to education.

These international instruments are highly important within the human rights discourse generally and also exert significant influence on national constitutions. Due to their normative influence, constitution-makers may be bound by the content of these international treaties, which set a minimum baseline of general global acceptability:

- A number of constitutions (e.g. Afghanistan, Gabon) specifically refer to the UDHR.
- There is a correlation between the rights found in the UDHR and those found in national constitutions, demonstrating that the UDHR has served as a template for constitution-makers (Elkins, Ginsburg and Simmons 2013).
- Post-1966 constitutions from states that have ratified the ICESCR are more likely to contain socio-economic rights than the constitutions of states that have not ratified the ICESCR.

Today, a majority of constitutions include a wide range of socio-economic rights, either as directly enforceable provisions or as aspirational statements or directive principles. A relatively small number of constitutions — mostly those that have survived from before the 20th century — do not directly mention any socio-economic rights.

Think Point: What international treaties, covenants and agreements is the country party to? What human rights obligations has it already taken upon itself? Should these obligations be recognized in the constitution?

Which Socio-economic Rights?

The list of recognized socio-economic rights varies between countries. They can be considered under various headings:

Rights to universal public services: The right to education, health care and other public services that everyone is entitled to and that it is primarily the responsibility of public authorities to fund, provide or otherwise support.

Rights supportive of decent living conditions: In less developed economies, these may take the form of specific rights to food, water etc. (subsistence rights). In industrial and post-industrial economies, decent living conditions are more frequently delivered through redistributive transfer payments in the form of welfare benefits, unemployment assistance, disabled and veterans benefits, old-age pensions etc. These differ from universal public services in that they tend to take the form of cash payments and are usually targeted at specific in-need groups.

Rights of workers: Labour rights defend workers against exploitative working conditions. They may include entitlements to days of rest and holidays, maximum working hours, a minimum wage, the right to form and join trade unions, workplace 'co-determination' rights (i.e. giving workers a

voice in the management of enterprises), protections against arbitrary dismissal and prohibition of workplace harassment and rules for the protection of workers' health and safety.

Rights of particular social groups: Socio-economic rights may often be specifically applied to particular social groups. For example, a constitution may specifically refer to the position of women, people with disabilities, young people, the elderly or members of ethnic or linguistic minorities who are differentially affected by (and, perhaps, especially dependent upon) socio-economic rights. For example, a constitution may specifically seek to protect the reproductive rights of women or the rights of disabled people in access to education and work.

Rights to natural resources: The right of access to clean water, to the natural environment and to the land. In addition, special provision may be made to protect the traditional land rights, hunting and fishing rights or grazing rights of indigenous communities.

Property rights: The right to private property is usually regarded as a first-generation right rather than a socio-economic right. However, the framing of property rights—particularly, the recognition that the right to property is not absolute, that it may be limited by social needs and may carry with it responsibilities—can have important socio-economic consequences. Article 43 of the Irish Constitution, for example, recognizes that property rights 'ought, in civil society, to be regulated by the principles of social justice', and allows the state, by law, to 'delimit the exercise of [property rights] with a view to reconciling their exercise with the common good'.

Reasons for Constitutionalizing Socio-economic Rights

Socio-economic Rights Are Essential to Human Well-being

Some argue that the distinction between first- and second-generation rights is false and artificial, that both generations of rights are indivisible and interdependent. Both are necessary for a 'good life' and for human flourishing: to live well, we need both freedom from tyranny and freedom from want or toil. To include civil and political rights in a constitution without including socio-economic rights is to leave the job half done and to provide the framework only for a hollow, superficial 'bourgeois' freedom.

Crucially, the effective enjoyment of first-generation rights depends on the realization of second-generation rights: one needs certain resources in order to effectively exercise freedom in the civil and political sense. What use, for example, is freedom of the press if someone is illiterate because their parents could not afford to send them to school? What use is freedom of association if someone cannot get to a meeting because they are working 14 hours a day in a call centre or garment factory?

According to this view: (a) human beings are to be treated with equal worth/importance; (b) there are necessary preconditions to ensure protection for that worth: these involve protections for freedom and the well-being of individuals; (c) socio-economic rights protect these important elements of human freedom and well-being and therefore require recognition and enforcement; (d) the most effective way to recognize and enforce these rights is to include them in the constitution (and make them justiciable).

Moreover, it has been argued that both generations of rights place both positive and negative burdens and obligations on the state, whether those are to provide a court system to realize the right to a fair trial, to provide hospitals to realize the right to health care or to prohibit arbitrary evictions in order to protect the right to housing. This means that there is no difference *in kind* between the two sets of rights, only a difference *in degree*.

Responding to Popular Demands

When citizens engage in constitution-building processes, the desire to improve their economic condition and social circumstances is often at the forefront of their minds. Many people wish to see a firm (and preferably enforceable) promise, in the constitution, that their needs and priorities will be addressed by the state. When the overwhelming majority of public submissions to a constitutional consultation process is about the need for adequate food, health care, etc, it is hard not to address the issues directly. To say that a strong and responsive government is the answer is unlikely to satisfy people, especially those who are fed up with corrupt politicians. This popular demand may, in itself, be a compelling reason for the inclusion of socio-economic rights. Not to do so could alienate support and cause the constitution as a whole to forfeit its legitimacy.

Entrenching a Progressive Socio-economic Vision

In certain countries, there may be a consensus to pursue a particular socio-economic vision of society—for example, a Keynesian social-market economy with a welfare state. This consensus may arise from a previous economic shock, such as an economic depression, that fundamentally tilts the social consensus in favour of a more active and interventionist state with a more extensive role in promoting the material well-being of citizens. In such cases, a constitutional statement of what the community stands for, in terms of decency and the humane treatment of citizens (and what it will *not* stand for, in terms of poverty, exclusion and exploitation), may form part of the nation's social contract in a way that transcends ordinary politics. Such recognition may provide political legitimacy for policies supportive of this vision and delegitimize political reaction, thereby helping to protect people's hard-won social rights.

Overcoming Historical Legacies

Some countries may adopt a new constitution as a transformative document that is intended to overcome a past in which particular groups were excluded or discriminated against, and to provide a blueprint for an equitable future. As such, there may be a general appetite for incorporating constitutional provisions that seek to legally transform society by widening access to power and economic resources.

South Africa is a paradigm case: it was argued that the apartheid system could not be separated from the problem of persistent social and economic deprivation. In the end, the 'argument for socio-economic rights was irresistible, in large part because such guarantees seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid – the overriding goal of the new Constitution' (Sunstein 2001: 4).

Similarly, in India, with its history of caste-based discrimination, there remains a group of marginalized, lower-caste people regarded as 'untouchables'. To remedy historical discrimination against these groups, the Indian Constitution specifically provides that 'the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation' (Constitution of India, Part IV).

'The reasons why economic and social rights took center stage in the Arab Spring are not...limited to historical factors. Economic justice and social justice are concerns of the political man, the stuff of concrete collective action, as well as debate and discussion.'

Jamshidi, M. (2013) 42. *The Future of the Arab Spring*. Oxford: Butterworth-Heinemann

Constitutional designers may need to consider whether similar circumstances and strong emotions exist around rectifying past oppression. Parties representing marginalized communities may insist

upon the robust protection of socio-economic rights, which may be seen as: (i) a commitment by the state never to revert to the prejudicial practices of the past and; (ii) a strategic legal tool through which to engage in achieving socio-economic equity for deprived communities.

Post-conflict Situations

‘Constitutional entrenchment of socio-economic rights can be a key aspect for post-conflict or post-trauma countries, in part because exclusion from socio-economic power is often widespread prior to transition’ (Wickeri 2010: 476). Poverty resulting from inadequate protection of housing, land and property rights could be part of the reason why conflict occurs in the first place. The incorporation of socio-economic rights could signal a serious commitment to peace and to remedying the root causes of conflict, and constitutional designers might find that peace agreements require the provision of socio-economic benefits. For example, Article 3.9 of the 2003 Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal requires the government ‘to adopt policy to establish rights of all citizens in education, health, housing, employment and food reserve’.¹

Preventing Regressive Judicial Activism

If socio-economic rights are not specified or recognized in the constitution, then courts may take a very narrow view of the state’s responsibility, preferring civil and property rights over social, economic and cultural concerns. This may cause the courts to strike down progressive or redistributive legislation.

The presence of socio-economic rights in the constitution—even if the rights themselves are directive and not judicially enforceable—may incline the courts toward a more expansive interpretation of the state’s responsibilities and a more communitarian understanding of rights. India takes this further: the 25th Amendment to the Constitution of India (Article 31-C) provides that legislation intended to further certain socio-economic principles stated in the Constitution cannot be annulled solely on the grounds that they infringe other fundamental rights.

Gender Equality and Protection for Marginalized and Minority Groups

Many socio-economic rights have a disproportionate effect on the lives of women and of marginalized and minority groups, who may—depending on the social mores, economic situation, and political culture and institutions—be both: (i) more reliant on state support or assistance to realize their social and economic needs; and (ii) less well equipped to ensure their needs are met through political channels.

A strong culture of socio-economic rights, embedded in justiciable (or otherwise effective and binding) constitutional provisions, can help to ensure that these groups are entitled to a fair share of national resources and are able to enjoy the material conditions necessary for their dignity and well-being.

Think Point: What is the historical legacy of the country? Has it reached a turning point at which a bold, transformational constitution represents a broad political consensus? Are socio-economic rights necessary as an expression of a desire to overcome past divisions? How broad is the consensus that socio-economic provisions can be based on?

¹ Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Accra (18 August 2003).

Arguments against Recognizing Socio-economic Rights

Costs, State Capacity and Excessive Expectations

In some countries, the financial cost of achieving socio-economic rights will be a major issue. Delivering socio-economic rights requires public resources (in terms of available funds) and state capacity (in terms of technical knowledge and effective administrative structures). If the state cannot muster these, then the rights will exist only as unfulfilled promises. It is widely argued that this may have a harmful effect on other rights and on the constitutional system as a whole, since it could lead to a political culture where promised rights exist only on paper, and are not treated as credible or binding by the public or the government.

In such circumstances, the response would be that a constitution should be realistic. It may commit the state first to the achievement of a certain minimum core of socio-economic rights for everyone. As resources allow, it may also commit the state to implementing additional measures in accordance with the principle of ‘progressive realization’, as contained in the International Covenant on Economic, Social and Cultural Rights. Even if undelivered, the incorporation of such realistic promises can nevertheless create a legitimate expectation of enforcement that groups and parties seeking social and economic justice can use to strengthen their case. If nothing else, the gap between constitutional promise and reality may embarrass the authorities into action. Certain rights might also be delivered by restraints on government action, which may mean that these rights can be enforced without placing a heavy demand on public resources: for example, a right to housing may, at least, protect people from being evicted from their home if no alternative housing is available.

Besides, the fact that socio-economic rights cost money is, of course, true of civil and political rights as well: private property cannot exist without some system that upholds rights and punishes violators, and guaranteeing the right to a fair trial or the right to vote may also require the state to spend significant amounts of money.

Pakistan Court Widens Role, Stirring Fears for Stability

‘Pakistan’s Supreme Court is waging a campaign of judicial activism that has pitted it against an elected civilian government, in a legal fight that many Pakistanis fear could damage their fragile democracy and open the door to a fresh military intervention...the court has dictated the price of sugar and fuel, championed the rights of transsexuals, and, quite literally, directed the traffic in the coastal megalopolis of Karachi.’

The New York Times, 22 January 2012

Ideological Objections

The inclusion of socio-economic rights in the constitution recognizes, at the level of fundamental law, an active role for the state in the achievement of common goods, in the promotion of the material well-being of the people and in the redistribution of wealth. Some people are ideologically opposed to this view: they may have an individualistic and market-oriented concept of freedom, and prefer the state to be restricted to a minimal role in protecting life, contracts and property. According to this view, socio-economic rights are not rights at all: they are entitlements created only by infringements of the property rights of others. However, there are many philosophical responses to this view that aim to show that the state cannot be justifiably restricted to this minimal role.

Flexibility and Democratic Responsiveness

Others may accept that the state *can* legitimately have an active and redistributive role in socio-economic matters but argue that the nature and extent of the state's role should not be prescribed in the constitution; rather, it should be determined by ordinary laws, by day-to-day politics and by various political parties offering competing manifestos at election time.

Keeping socio-economic rights out of the constitution, it has been argued, enables those who do not support such rights to pursue their preferred policies by ordinary legislation, without having to make (difficult and time-consuming) constitutional amendments. It also allows greater political flexibility in the delivery of socio-economic rights, according to need and to public demand. However, the strength of this argument is largely dependent on the effectiveness of political institutions at channelling public demands: if people do not trust politicians to deliver, it is unlikely to be acceptable.

Excessive Reliance on the Judiciary

It has been argued that the constitutional recognition of socio-economic rights can politicize the judiciary and judicialize politics. In other words, the constitutionalization of socio-economic rights may give judges the power to determine socio-economic policy.

This could be perceived as undemocratic. It could undermine the capacity of citizens to choose, through elected representatives, socio-economic policies that they wish to pursue, fatally undermining popular sovereignty.

Further, this could implicate courts in making decisions that could have budgetary/cost implications, which judges are poorly equipped, by virtue of their training and working practices, to resolve.

Such interference could also bring the courts into conflict with the elected branches of government, which would be a particular problem in states where the judiciary is struggling to establish its independence.

Several counter-arguments can be made against these claims:

- As discussed below, socio-economic rights can be framed in non-justiciable ways that rely primarily on the legislature, and not on the courts, for enforcement. Even where the courts do review the constitutionality of legislation and of government decisions for compliance with socio-economic rights, they may also allow the legislature considerable latitude in their application.
- Judges are already and necessarily involved in political or policymaking decisions. This need not be seen as a violation of the separation of powers: legislative, executive and judicial powers need not be in conflict with one another; they can work collaboratively, as separate but equally necessary parts of a democratic constitutional order, to realize rights and public goods.
- The difference between ruling on civil and political rights and ruling on socio-economic rights is less real than apparent. If judges have a role to play in defending civil and political rights through the judicial review of legislation—which could affect, for example, policing or sentencing policy—why should they not have a role to play in defending socio-economic rights affecting housing or education policy?
- Moreover, if judges have a role in enforcing *statutory provisions* on socio-economic matters (e.g. administrative law regarding allocation of public housing), why not also entrust them with a duty of enforcing *constitutional provisions* (e.g. a duty of the government to adopt a comprehensive public housing plan)?

- The judiciary need not necessarily be out of touch. Judicial appointment mechanisms can, for example, be structured in ways that promote a more inclusive and responsive judiciary. The judiciary may even enhance democracy, providing a corrective to the deficiencies of elected institutions, particularly where the latter are structured in ways that exclude representation of minority and marginalized groups.
- Failing to protect socio-economic rights is not a neutral position. As noted above, the absence of constitutional socio-economic rights provisions may incline the courts to adopt a type of reactionary activism, and thereby to shape the constitution through an anti-progressive bias.
- The argument that the constitutionalization of socio-economic rights denies people the right to determine such issues for themselves through the political process is weakened by the fact that the people can express their views through constitutional amendment processes that are frequently more inclusive and participatory than ordinary legislation (e.g. by referendum).
- Although judges are not experts in policymaking, courts can call in the expertise they need to help guide their decisions as they apply processes of legal reasoning.

Incorporation Does Not Guarantee a Positive Outcome

Constitutionalized socio-economic rights are neither necessary nor sufficient: Many of the arguments for the inclusion of socio-economic rights rest on the assumption that inclusion has a significant positive impact on the ground. There is, however, no necessary correlation between the inclusion of socio-economic rights in a given country and the level of socio-economic rights enjoyed, in practice, by its citizens.

It is often noted, for example, that many national constitutions have made generous—but empty—promises, with little or no attempt to fulfil them. This, however, is more a problem of constitutional implementation than design: the fact that some countries have ignored their constitutions is not an argument against the inclusion of socio-economic rights in the constitutions of countries that intend to sincerely honour their commitments.

Other constitutions make no mention, or only minimal mention, of socio-economic rights and yet support very robust social welfare policies through ordinary legislation: Australia, Denmark, Finland and Sweden being notable examples. The problem with this approach, however, is that in the absence of constitutional recognition, rights that may currently be enjoyed depend entirely upon the vagaries of majoritarian politics. Often, there may be minorities or politically marginalized groups (especially the poor) whose rights are not well protected through the political system and who have no remedy.

This is not to suggest that the constitutional entrenchment of socio-economic rights is without any effect but simply emphasizes that constitutional incorporation is only one tool for achieving socio-economic progress. The fact that the constitutional recognition of socio-economic rights is neither a necessary nor a sufficient condition for beneficial outcomes is not, in itself, an argument against their constitutionalization: constitutional recognition may be a partial help, without claiming to be a panacea.

Beneficiaries may not be the very poorest: There is some evidence to suggest that the beneficiaries of certain rights (e.g. the right to higher education) may be middle- and upper-class groups rather than the poor. The Latin American experience in places where social rights have been actively enforced (Brazil and Colombia) suggests that these rights are often sought by people and groups who are more middle-class than poor. This could be cited as an argument against including socio-economic rights, especially if one regards the purpose of socio-economic rights simply as a means of ensuring a minimum baseline for the poorest.

However, this is not the only purpose of socio-economic rights. The inclusion of socio-economic rights in the constitution can also reflect a desire to promote the well-being of everyone in society through a system of universal provision that everyone pays into according to their ability and everyone receives support from according to their need. If this is the case, then the middle class, as well as the poor, are entitled to social services such as education and health care. Thus, socio-economic rights, while not necessarily targeting the very poorest, can help to promote a more inclusive and economically egalitarian society as a whole. Nevertheless, to ensure that those most in need are prioritized, constitutional provisions could require the state to focus on delivering at least a minimum core to the poorest before additional services are provided to others.

Design Alternative I: Justiciable Socio-economic Rights

Judicially Enforced Rights

The strongest form of constitutional recognition is to list socio-economic rights as judicially enforceable rights in a manner similar to that in which civil and political rights are usually enforced. About a third of the world's constitutions take this approach.

The United Nations promotes constitutional incorporation as 'one of the strongest national statements' regarding such rights, claiming they provide 'valuable tools for those wishing to enforce' them (United Nations Human Settlements Programme 2002: 36). Likewise, International IDEA's *A Practical Guide to Constitution Building* recognizes that, given the widespread commitment to social and economic rights in international law, their inclusion in a constitution is now the norm rather than the exception.

Extent of Provision and Mode of Enforcement

If a constitution guarantees rights to well-being, food, housing and other social and economic goods, how extensive should this provision be? If people have a right to food, do they have a right to at least one meal a day or three? If people have a right to fresh water, do they have a right to 24-hour running water in their home or a right to access a water pipe a kilometre from their home for two hours a day? If people have a right to health care, do they have a right to a basic clinic or to expensive specialist care?

Recognizing that resources are limited, various approaches to these questions have been formulated and recognized. The principle of *progressive realization*, embodied in the ICESCR, is one such approach (see Chenwi 2013). Progressive realization places a duty on the state to act within its capacity to meet social and economic needs—as capacity increases, so the level of provision must increase. This does not mean that states can postpone the implementation of social and economic rights until they have reached a certain level of development: all states, even the poorest, have an immediate duty under ICESCR to 'move as expeditiously and effectively as possible' to realize socio-economic rights to the maximum extent possible. Another principle derived from ICESCR is that of a *minimum core*: states have a duty to secure a basic minimum of provision with respect to each right that must be given immediate priority. Progressive realization then proceeds from this minimum as state capacity increases (Chenwi 2013). A third principle is that of *non-regression*: states may not go backwards by reducing their social and economic rights provisions except in cases where they are forced to do so by a demonstrable lack of resources.

The Constitution of South Africa requires the state to take 'reasonable measures' to secure the progressive realization of guaranteed rights. The Constitutional Court of South Africa has not endorsed the 'minimum core' principle (Chenwi 2013), although elements of prioritization for urgent need have been incorporated into considerations of 'reasonableness' (Bilchitz 2007: 149).

Kenya's 2010 Constitution takes a slightly different (and, in principle, more robust) approach. It places a burden of proof on the state to demonstrate, if it cannot deliver a guaranteed right, that the necessary resources are unavailable.

Enforcement of Socio-Economic Rights in South Africa

In the *Grootboom* case, concerning the right to housing under Article 26 of the South African Constitution, the Constitutional Court rejected the argument that the Constitution gave the plaintiffs a right to a minimum core entitlement to shelter. It declared instead that 'the Constitution requires the state to devise and implement within its "available resources" a comprehensive and coordinated program progressively to realize the right of access to adequate housing'.

This is an example of how socio-economic guarantees in a constitution, while not necessarily realizable in each instance as *individual entitlements*, can nevertheless be judicially enforced as *public entitlements* for which the government has to make adequate provision.

Judicial Culture and Processes

Latin American experience suggests the importance of judicial culture in securing the implementation of socio-economic rights. For example, an important difference between Brazil, where social rights have been commonly enforced but have not had a transformational role, and Colombia, where social rights have been commonly forced and perhaps moved towards a transformational role, is that the Colombian judiciary is much more creative and willing to try structural or dialogical remedies. The Brazilian judiciary tends to prefer individual methods of enforcement and is hostile to structural cases.

Given the cost and time taken to bring a case to successful conclusion through the court system in many countries, streamlined processes may also help promote access to social and economic justice. The Constitution of Colombia, for example, makes provision for a so-called '*acción de tutela*', which is a form of direct constitutional complaint that enables ordinary citizens to gain rapid (and cheap) access to the justice system for the protection of their rights.

Think Point: What is the judiciary's record? What values are prevalent in the judiciary? Is the judiciary likely to take a broad or narrow interpretation of human rights? Is it wise to make long-term decisions based on the current state of the judiciary? Is the judiciary also to be reformed as part of the constitution-building process?

Against Whom Can Rights Be Claimed?

Another question to consider is whether rights are enforceable solely against the state or whether they are also enforceable against private entities. For example, landlords may have to refrain from evicting people arbitrarily from their homes, and factories may be prevented from indirectly damaging people's health by doing harm to the environment. In states where discrimination has been rampant even on the part of private parties, such horizontal enforcement could be desirable.

Moreover, given that most countries use a variety of mechanisms to deliver services, including private as well as public entities, there might be a strong case for making socio-economic rights enforceable against private entities—or, at least those private entities that perform important public functions.

Ambiguous or Mixed Provisions

Some constitutions include socio-economic rights without clearly specifying whether these rights are intended to be directly justiciable or not. This solution may facilitate constitution-making, enabling agreement to be reached between diverse groups who agree to postpone the final resolution of these issues to subsequent legislative and judicial interpretation. In Italy, for example, the Constitution-makers of 1946 could not agree on whether socio-economic rights should be enforceable (as the left desired) or merely aspirational (as the right desired). The resulting text is ambiguous, separating 'fundamental principles', 'ethical and social relations' and 'economic relations' from civil rights and political rights from, without specifying whether these different provisions are intended to be directly justiciable or not (Adams and Barile 1972).

Such ambiguity, however, can weaken the rights thereby conferred (especially if set alongside other rights that are more clearly justiciable). It has also been argued that such ambiguity can lead to an erosion of respect for the authority of the constitution as a whole, and, potentially, weaker enforcement of civil and political rights than might otherwise have been achievable.

Design Alternative II: Recognition on a Non-justiciable Basis

Directive Principles of State Policy

Socio-economic rights can be incorporated into a constitution in the form of directive principles that are not binding on the state in a legal-judicial sense but are binding in a political and moral sense. The legislative and executive branches are expected to take steps to realize these directive principles, and to give effect to the socio-economic rights derived therefrom, in the enactment and implementation of laws. The rights are thus recognized in a way that directs, inspires and legitimates legislative decisions.

Directive principles typically make elected politicians, rather than judges, responsible for dealing with socio-economic issues, thereby avoiding some of the potential problems of legitimacy and competence associated (as discussed above) with judicial rulings in this area.

Inclusion of socio-economic rights in the form of directive principles is relatively common in countries whose constitutional tradition derives from English common law, including Ghana, India, Ireland, Malta, Nigeria and Papua New Guinea. Typical provisions defining directive principles include the following:

- *Constitution of Ireland*: 'The principles of social policy set forth in this Article are intended for the general guidance of the Parliament. The application of those principles in the making of laws shall be the care of the Parliament exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.'
- *Constitution of Malta*: 'The provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws.'
- *Constitution of India*: 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

The lack of judicial enforcement does not mean that directive principles are necessarily irrelevant. In helping to define the context in which politics takes place, they could have political significance that at least partially compensates for their lack of judicial enforceability. For example, direct principles may make it easier for civil society to mobilize support in the name of social and economic justice by invoking the populist rhetoric of a constitutional violation. Further, legislators can invoke directive principles to promote or ease the passage of legislation that may promote socio-economic rights, invoking the directive principles in parliamentary debates and public forums in support of their legislative initiatives.

'...merely because the Directive Principles are not enforceable in a court of law, it does not mean that they cannot create obligations or duties binding on the State...In fact, non-compliance with the Directive Principles would be unconstitutional.'

Minerva Mills Ltd. v. Union of India (1980)

While including socio-economic rights in the form of directive principles is designed to exempt them from judicial enforcement, some courts have used directive principles to inform their decisions. In Ghana, for example, the Supreme Court has ruled that the courts are mandated to apply the directive principles in interpreting the law.² The Supreme Court of India has also recognized the constitutional significance of directive principles. It has, in several cases, asserted that directive principles are as important as the enforceable rights contained in the Constitution,³ and some socio-economic principles have even been rendered justiciable under the protection of the right to life. Even in Ireland, where the courts have been reluctant to intrude on the prerogatives of the legislative and executive branches, and where a strong constitutional presumption in favour of political, rather than judicial, enforcement of socio-economic rights exists, the courts have relied on the directive principles as 'supplementary to the interpretation of other constitutional provisions' (Trispiotis 2010).

However, a criticism of pursuing rights through directive principles is that they would only be most effective where civil society stands ready to punish legislators who depart from the constitution's requirements. Marginalized groups that lack access to political power may not be able to gather the political support necessary to pursue directive principles.

Recognition in the Preamble

Another way of recognizing and expressing a commitment to socio-economic rights, without relying on judicial enforcement and without negating the responsibility of the legislature and executive for policy and budgetary decisions, is to place socio-economic rights in the preamble rather than in the body of the constitutional text. The French Constitutions of 1946 and 1958 adopted this approach as the result of a political compromise between the parties of the right, who did not wish to include socio-economic rights in the Constitution at all, and the parties of the left, who wished to include them in more binding and definitive terms. The French Constitutional Council subsequently decided that the preamble was justiciable and that legislation could be reviewed in advance of promulgation for conformity with the socio-economic rights contained in it. The French decision to regard the preamble as binding, however, is a relatively unusual development; in most countries rights asserted only in the preamble are unlikely to be enforced.

Recognition of Legislative Competence

Some constitutions, particularly federal ones, assign specific powers or spheres of competence to legislatures. These can have socio-economic implications. For example, the Constitutions of Australia, Canada and Germany make no explicit reference to socio-economic *rights*, but they

² New Patriotic Party v. Attorney General [1996-7] SC Ghana LR 728 at 745.

³ See, for example, Olga Tellis v. Bombay Municipal corporation AIR 1986 SC 194; Pathumma v. State of Kerala AIR 1978 SC 771.

each confer *powers* over socio-economic matters to legislative bodies. For example, the Australian Constitution confers power over ‘invalid and old-age pensions’ and ‘the provision of maternity allowances, widows’ pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services...benefits to students and family allowances’. While this creates no rights, it does signal to the courts and the public that the authorities have a right (and thus, arguably, a duty) to take positive legislative or administrative action in these areas.

Similarly, the Canadian Constitution gives the federal parliament competence over unemployment insurance and gives provincial legislatures competence over ‘the establishment, maintenance, and management of hospitals, asylums, charities and eleemosynary [charitable] institutions’, as well as over education, thereby indicating that the authorities have a legitimate role in these aspects of life.

Design Alternative III: Non-recognition of Socio-economic Rights

Judicial Derivation from Civil-Political Rights

Even if not explicitly recognized in the Constitution, some socio-economic rights may be derived from civil-political rights that are recognized. The courts may determine that the effective enjoyment of civil-political rights requires at least a minimal level of socio-economic well-being and may interpret principles of procedural fairness and equality in a broad way that is supportive of such well-being. The European Convention on for the Protection of Human Rights and Fundamental Freedoms and the Canadian Charter of Rights and Freedoms, for example, both omit socio-economic rights, but the European Court of Human Rights and the Supreme Court of Canada have applied these instruments in matters such as education, social security and housing, and have sometimes protected people’s socio-economic rights, where appropriate, on grounds such as non-discrimination and due process.

Achieving a Minimum Core of Socio-economic Rights through Broad Interpretation of Civil-Political Rights.

‘The study of Canada, for example, shows that socio-economic rights can also be given teeth when they are protected as corollaries of civil and political rights. Interpreting rights to “life and security of the person” and “equality” in a broad manner allows for dealing with issues concerning social security, health care and housing policy. An overly deferential attitude of courts might obstruct achieving the full socio-economic potential of these rights, but at least the possibility for bringing claims and concretising protection is there.’

Ingrid Leijten, Leiden Law blog, 2012

While this approach may give people some procedural protections, and while a progressive court may develop broad interpretations of constitutional rights, the weakness of this approach is that it depends on the willingness of the courts to recognize implicit rights that are not provided for in the text of the constitution. As noted above, the recognition of such rights as directive principles or in the preamble to the constitution may incline the courts to such an approach, but in the absence of such guidance it is difficult for courts to avoid being accused of exceeding their role and of interfering in political choices.

Statutes and ‘Super Statutes’

In the absence of specific constitutional recognition, socio-economic rights may be adopted by ordinary statute law. Scandinavian countries, for example, have established extensive public services

and highly redistributive systems of transfer payments as a matter of public policy, giving people access to a range of socio-economic rights, without entrenching such rights in their constitutions. Even in more individualist societies, such as the United States, legislation has been enacted to establish Social Security, Medicare and Medicaid, 'Food Stamps' programmes and other socio-economic rights on a purely statutory basis. Similarly, in developing countries that lack a specific constitutional commitment to socio-economic rights, the state nevertheless undertakes to provide certain services—such as access to basic health care, sanitation or education—as part of its development goals.

If reformist legislation is passed after a long political struggle and a wide-ranging public debate, it may become so important—so fundamental to the way in which a country sees itself, expresses its values, defines its rights and understands its history—that it becomes 'politically entrenched', in the sense that it would be very difficult to change it without a similarly expansive and extensive process.

Such laws may be recognized as 'super statutes' (Eskridge and Ferejohn 2001). Since super statutes are politically, rather than constitutionally, recognized, no definitive list of them can be produced. In the United States, the Civil Rights Act of 1964 might be regarded as a super statute: by bringing a previously excluded ethnic minority into the political arena, it altered the underlying social contract and changed society's sense of itself in ways that are almost irreversible.

The French Constitutional Council has recognized super statutes in the form of the fundamental laws of the Republic, referred to in the Preamble to the 1946 Constitution. One of these fundamental laws is the 1905 law on the separation of church and state, which was passed as an ordinary statute and has since acquired special constitutional significance. This is very much the exception, however. In most countries, super statutes can easily lose their informally acquired status, and can be swept aside very quickly if there is a sudden change in the political mood. For example, it could also be argued that the great social reforms of the mid-20th century in the United Kingdom, which led to the creation of the welfare state, publicly funded universities and the National Health Service, were similarly profound super statutes, but this has not prevented governing majorities from reversing many of these achievements through austerity and privatization programmes. Ultimately, socio-economic rights conferred by statutes, super or otherwise, depend on the continued goodwill of the incumbent legislative majority; the economically vulnerable, and other marginalized and minority groups, are in a very weak position.

Additional Design Considerations

Incorporation of Socio-economic Rights through International Agreements

The ICESCR has been ratified by 160 countries. Many of these (including Argentina, Colombia, Costa Rica, Cyprus, Ecuador and Luxembourg) have also directly incorporated the ICESCR directly into domestic law. Other international conventions, such as the CEDAW, also bind states to promote socio-economic rights in certain fields, to the benefit of both men and women.

Incorporating such ready-made socio-economic rights into domestic law by accession to treaties and other international agreements may be simpler and less controversial than having to negotiate and establish each right in a new constitution.

However, the disadvantage of this approach is that there can be a lack of national ownership: these rights may be perceived as foreign imports, not something that society has agreed, at a fairly deep and inclusive level, to honour. A further disadvantage is that these international rights covenants are usually framed in very general and generic terms, which might not address the particular needs of any country.

Placement in the Constitution

When incorporating socio-economic rights, constitutional designers should consider the placement of such rights in the constitution. Are they to be placed in the same title or chapter as civil-political rights, or in a title or chapter of their own? If it is intended that the two sets of rights should have different authorities and different means of enforcement (for example, if socio-economic rights are treated only as directive principles), it would be usual to separate them in order to make this distinction clear. If, on the other hand, socio-economic rights are intended to be directly justiciable in the same way as civil-political rights, then there might be good reason to make this apparent by arranging all rights under the same heading.

Amendment Rules

Not all parts of a constitution are necessarily amendable by the same procedure. Some parts may be relatively easy to amend while other parts—typically including those parts related to the protection of fundamental rights—may be very rigidly entrenched. If one sees socio-economic rights as having an equal basis to civil and political rights, then they should logically enjoy the same degree of entrenchment. If, on the other hand, one sees socio-economic rights as more politically contingent—more sensitive to changes in political orientation, more responsive to societies changing economic circumstances and more dependent upon limited budgetary resources—then there might be a case for making socio-economic rights provisions more easily amendable than some other parts of the constitution.

In Malta, for example, the directive principles can be amended by an absolute majority vote in parliament, contrasting with the two-thirds majority required for amendments to civil and political rights. Likewise, in Spain, socio-economic rights can be amended by a procedure that requires a three-fifths majority in both houses of parliament, or a two-thirds majority in the Congress of Deputies and an absolute majority in the Senate, whereas civil and political rights can be amended only by a two-thirds majority in both houses, with an obligatory confirmatory referendum.

The danger of making socio-economic rights too easily amendable, however, is that they might thereby be weakened, with gains achieved on behalf of the poor and marginalized during the constitution-drafting process (perhaps when a more transformative spirit prevails) being too easily eroded by governments.

Forms of Government

Some commentators argue that a state that takes an active role in the promotion of the common good, the delivery of public services and the support of the material well-being of its citizens needs a form of government that is inclusive, in terms of policy formulation, and yet effective, in terms of implementation. It is therefore important that constitution-makers not consider rights issues and forms of government in isolation from one another: one specifies what the state has pledged to do, while the other influences how willing and able the state is likely to be to deliver on these pledges. In the long run, inclusive institutional structures such as proportional representation and parliamentarism, combined with robust civil-political rights that enable free political contestation, may help to promote a more inclusive and egalitarian approach to social and economic policymaking.

Other Institutional Provisions

Other institutional provisions in a constitution can help strengthen the effectiveness of socio-economic rights provisions. For example, the establishment in a constitution of an independent ombudsman with jurisdiction over the delivery of public services may provide a quick and accessible way by which unemployed people—who could not afford to sue—can protect their substantive and procedural rights in dealing with the authorities responsible for assessing and paying their benefits.

Likewise, a national human rights monitoring institution may be able to strengthen socio-economic rights—whether expressed as judicially enforceable rights or as directive principles—by investigating and reporting on alleged violations of such rights, or on the failure of policy to reflect such principles. The 1996 Constitution of South Africa, motivated by the recognition that socio-economic rights are difficult to enforce, specifically mandated the Human Rights Commission to conduct such reporting. The effectiveness of these institutions will be dependent on the strength of their constitutional mandate and on their institutional independence, both in terms of appointment and funding, from the government.

Other measures that a constitution may take to support the political implementation of socio-economic rights include: (i) designing electoral systems or systems of representation in a way that secures representation for marginalized groups, including the poor, to ensure that they are able to fully participate in political decision-making; (ii) amending campaign-finance legislation so that politicians are not beholden to rich interests; (iii) compulsory voter registration to ensure that the poor can vote; (iv) rules against conflicts of interest so that decision-makers cannot be bought by economically strong interests; and (v) freedom-of-information rules, ensuring that citizens have access to information about policymaking in matters of socio-economic rights.

Additional Contextual Considerations

Political Culture and Social Values

Ultimately, the extent of socio-economic rights in a society will broadly reflect the political culture and social values of that society—its balance between individualism and communalism, its view of the moral limits of wealth, its sense of collective responsibility for the well-being of others. Culture and values will be shaped by a range of factors, including religion, historical experience, economic circumstances and education systems. Even a transformative constitution, if it is to be accepted and successful, needs to reflect an existing, more or less widely held consensus about the direction in which the country should go. In the absence of such a consensus, its claim to speak for citizens will be fragile and illegitimate. However, this does not mean that constitutional provisions are unimportant. If a broadly supportive culture is in place, the constitutionalization of socio-economic rights may reflect and further develop that culture among citizens, and also help legislators and courts apply it in their work. A constitution is an expressive and declaratory instrument that has an educative role: it may help a society that has emerged from turmoil in a transformative moment to return, in later and less united times, to its first principles, and to be reminded, through its constitution, of the values that it has proclaimed for itself.

Constitutional Education and Civil Society

In relatively established democracies with a strong civil society, people may be well versed in using civil and political rights to achieve socio-economic goals. On the other hand, in states without a history of democracy, there may be little understanding of how to make use of the rights that are available under the constitution. In Guatemala, for example, people have rarely made use of their constitutionally recognized right to food owing to a lack of awareness of these rights, lack of legal assistance and interpreters, and ‘a lack of trust in, and respect for, the legal system’ (Brandt 2011). This is not an argument against socio-economic rights, but it does highlight the need for civic education during and after the implementation stage. For example, the transitional provisions of a constitution could prescribe a programme of civic education to inform citizens about the content of the constitution and the rights they enjoy under it.

Examples of Weak Recognition of Socio-economic Rights

India: Directive Principles

Art. 38

'(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

'(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.'

Art. 41

'The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.'

Australia: Legislative Competences

Art. 51

'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

'(xxiii) invalid and old-age pensions;

'(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services... benefits to students and family allowances.'

France: Recognition only in the Preamble

'The law guarantees women equal rights to those of men in all spheres.

'Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs.

'All men may defend their rights and interests through union action and may belong to the union of their choice. The right to strike shall be exercised within the framework of the laws governing it.

'All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place.

'All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.

'The Nation shall provide the individual and the family with the conditions necessary to their development. It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society.

'The Nation proclaims the solidarity and equality of all French people in bearing the burden resulting from national calamities.

'The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State.'

Examples of Strong Recognition of Socio-economic Rights

South Africa: State's Duty to Take Reasonable Measures for Progressive Realization

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

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

'8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

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

'26. (1) Everyone has the right to have access to adequate housing.

'(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

'(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

'27. (1) Everyone has the right to have access to —

(a) health care services, including reproductive health care;

'(b) sufficient food and water; and

'(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

'(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

'(3) No one may be refused emergency medical treatment.'

Kenya: State Justification of Inability to Deliver

'20. (5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

'(a) it is the responsibility of the State to show that the resources are not available;

'(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

'(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.'

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

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

'43. (1) Every person has the right—

'(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

'(b) to accessible and adequate housing, and to reasonable standards of sanitation;

'(c) to be free from hunger, and to have adequate food of acceptable quality;

'(d) to clean and safe water in adequate quantities;

'(e) to social security; and

'(f) to education.

'(2) A person shall not be denied emergency medical treatment.

'(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents.'

Decision-making Questions

- (1) Who will be the real bearers and beneficiaries of socio-economic rights? If it is marginalized groups, would they better served by enforceable rights as compared to directive principles?
- (2) Will rights be enforceable only against the state or even horizontally, between private parties? What about private parties that perform public or quasi-public functions on behalf of public authorities?
- (3) During negotiations, are some parties more ideologically inclined to provide for socio-economic rights and others opposed? Would rendering socio-economic rights politically, rather than judicially, enforceable make some parties more amenable to their inclusion? Can friction be resolved by incorporating socio-economic rights as directive principles or by conceding, for example, non-redistributive rights such as private-property rights in exchange?
- (4) How will conflicts between the courts, legislature and executive be avoided? (This problem is not unique to the enforcement of socio-economic rights; it exists wherever the judiciary is called upon to enforce a constitution. Nevertheless, it is worth considering how a notwithstanding clause—enabling the legislature to overturn judicial decisions—might be applied in the context of socio-economic rights.)

- (5) Will a national human rights institution be recognized as part of the institutional architecture for the realization of socio-economic rights?
- (6) Depending on ideology and affiliation, stakeholders (domestic and foreign) involved in constitution-making may be more receptive to, and even advocate for, the inclusion of particular rights. Thus, it is important to ask who is pressing for socio-economic rights and who is opposing them and why. What interests do they represent?
- (7) How can socio-economic rights be included in a constitution in a way that is sensitive to the resources of the state, on the one hand, and the needs of its citizens, on the other?

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