



A Practical Guide to

Constitution Building:

Building a Culture of Human Rights

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This paper appears as chapter 3 of International IDEA's publication *A Practical Guide to Constitution Building*. The full Guide is available in PDF and as an e-book at <http://www.idea.int> and includes an introductory chapter (chapter 1) and chapters on principles and cross-cutting themes in constitution building (chapter 2), constitution building and the design of the executive branch, the legislature and the judiciary (chapters 4, 5 and 6), and decentralized forms of government in relation to constitution building (chapter 7).



International IDEA resources on Constitution Building

A Practical Guide to Constitution Building: Building a Culture of Human Rights

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Foreword

The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989 have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term ‘constitutionalism’ sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimizing constitutions that are inclusive and democratic. The term ‘new constitutionalism’ has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still belies constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today after the legacy of the 1990s is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

*Cassam Uteem,
former President of Mauritius*

Preface

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

Vidar Helgesen
Secretary-General, International IDEA

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Acronyms and abbreviations

CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECOSOC	economic and social
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEA	International Institute for Democracy and Electoral Assistance
UN	United Nations

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Building a Culture of Human Rights

1. Overview

There are several reasons for building *human rights* into a constitution; they indicate restrictions on government power, are a building block for democracy, establish a foundation for building a *human rights culture*, and are integral to the legitimacy of the constitution. A human rights culture gives space to individuals and groups to organize and aggregate their interests. It permits ordinary people to challenge public officials and state institutions. It is about how human rights ‘work’ and therefore goes beyond the constitution and touches on other complex dimensions of society.

In terms of international law, human rights are universal, inalienable and indivisible. Yet the reason for including and protecting some rights in the constitution has become as contested as the nature and purpose of the constitution itself. For many constitution builders in societies affected by conflict, knowledge of the menu of options concerning substantive rights is often derived from treaties already ratified by a state. Yet a key challenge is not only to draft a modern bill of rights but to use human rights protections to contribute to the peaceful coexistence of socially diverse and conflict-affected groups.

The process adopted for constitution building as well as the type of constitution to be framed will be among the first factors that will shape the scope of a human rights culture. The goal of a human rights culture is not tension-free, as can be seen in the sometimes intractable debates on human rights issues between different segments of society during constitution building. Minority groups’ rights to benefit from special measures, economic rights that touch on claims on national resources, and the rights

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of women to equality in family relations are among these issues. Some tensions arise from the need to strike a balance between protecting human rights and redressing past violations, compatibility with the system of power distribution, and applicable international human rights obligations, as well as competing domestic sources of law.

Another challenge is implementing rights; this clearly requires institutional guarantees to be in place. Less clear, however, is how implementation will work when rights are used by different groups to mobilize their own interests in what the groups themselves often perceive as winner/loser equations. Hence the architecture of power and the distribution of responsibility to make decisions concerning human rights need more practical scrutiny. While the legal enforcement of fundamental rights is comparatively pervasive across legal traditions, constitution builders have sought out dynamic frameworks for implementation that give room for politics to evolve and produce a broader consensus on human rights. What implications should constitution builders consider in order to achieve a viable balance between legally based approaches to human rights and those based on political consensus?

2. Defining the human rights culture

The **Universal Declaration of Human Rights** of 1948 states in paragraph 1 of its Preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Human rights are legal and moral entitlements that have evolved as a basis for constructing how state power is used, and particularly to limit its use against the rights of citizens. From a religious perspective, human rights are derived from the divine endowment of man as a moral and rational creation. From a secular or moral perspective, they have evolved as entitlements surrounding the human dignity of all individuals from natural law. In both cases, human rights have been viewed as notions of entitlements that individuals or groups can claim in spite of, rather than because of, the prevailing framework of man-made law. They could not therefore be alienated through the latter. At the same time, rights that are enforced through the constitution are creations of the law. Quite often, they perpetuate the interests and beliefs that a society holds as fundamental for its identity and the building of its political community.

In the concept of popular sovereignty, the people delegate authority and power to a state's institutions of governance and do not derive their rights from the state. Constitutions are the legal and political devices through which this delegation of power and reservation of rights are accomplished. A human rights culture is therefore premised on what constitutions provide, but can also be seen as extending beyond the actual provisions. Human rights can be expressly or implicitly recognized in constitutions. Nor is the inclusion of rights in a constitution itself an end-state; rather it triggers new ways of articulating and contesting individual and group interests.

Human rights are legal and moral entitlements that have evolved as a basis for constructing how state power is used, and particularly to limit its use against citizens. In the absence of a culture of respect for human rights, constitutional guarantees become worthless.

A *human rights culture* is one in which society values human rights to the extent that most, if not all, official decisions aim to maximize these rights. A strong or vibrant human rights culture evolves when the actions of public officials and institutions, and those of other dominant actors in society, habitually honour rights, prevent violations and assist victims. In the absence of a culture of respecting rights, constitutional guarantees become worthless.

Box 1. Human rights principles

- Rights are premised on universal humanity.
- They are recognized under the law but should not be abused or denied by virtue of the law.
- They treat all human beings as equal in human dignity.
- Rights are interrelated and interdependent, and therefore indivisible.

The reason for having rights in the constitution, and specifically the purpose of stipulating specific rights, has tended to be contested. This is because rights are tied to core societal beliefs. In some instances, the contestation has increased feelings of deep grievance and irreconcilability, and risked more societal violence. Increasingly, constitution builders also intend rights in the constitution to have a broader purpose than the classic limitation of governmental power. They have aimed to use human rights to connect the institutions and powers established in the constitution to the pursuit of prescriptions for justice, peace, reconciliation, welfare and the public good.

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Many constitutions today embody the language of human rights, their substantive content and the means of their implementation that are stipulated as obligations which states have assumed under international human rights law. The United Nations (UN) has contributed to this internationalization, particularly through the seven ‘core’ international human rights

instruments (see box 2).

Box 2. The seven core international human rights instruments adopted by the United Nations

- The Universal Declaration of Human Rights (UDHR), 1948 (not a legally enforceable treaty)
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965
- The International Covenant on Civil and Political Rights (ICCPR), 1966
- The International Covenant on Economic, Social and Cultural Rights

(ICESCR), 1966

- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979
- The Convention on the Rights of the Child (CRC), 1989
- The Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT), 1984

3. Constitution-building processes and human rights options

During constitution building the inclusion of human rights options, and therefore the scope of a human rights culture, will be shaped by:

- (a) the type of process used to frame the constitution; and
- (b) the nature or type of the constitution.

The process adopted for constitution building and the type of constitution are among the first factors that shape the scope of a human rights culture.

3.1. Type of process

Different kinds of processes have been used in different countries and periods to agree on the substantive options to be included in constitutions. Processes that were managed as a series of incremental reforms could allow different groups to gain or win human rights recognition in the mainstream of society, still under continuing constitutional principles. Processes where a dominant group set all or the key terms of constitutional design essentially stipulated in their own terms the scope of human rights for other groups and segments of society. In some cases, constitution building was a process negotiated between groups in a conflict where there was no clear victor or political leadership. In many of these cases, the paramount consideration was conflict resolution and peace building, which set the scope for human rights. Each process in its unique context had practical implications for who emerged as the perceived ‘winners’ and ‘losers’ in relation to groups whose rights were included and those whose rights were omitted.

In some cases, constitution building has been a process negotiated between groups in a conflict where there was no clear victor or political leadership. Some groups will be perceived as ‘winners’ or ‘losers’ depending on whose rights have been included in or omitted from the constitution.

A demand for greater public participation in constitution building has emerged with force. In some cases, public participation has successfully supported a broader consensus on the importance of rights and even given the constitution greater legitimacy. In other cases, participation has narrowed the rights in the vision of dominant groups and contributed to more public disagreement on the scope of constitutional guarantees. In El Salvador, for instance, national leaders made a concerted effort to write a legitimate constitution reflecting the national culture and political aspirations and based on actual input from citizens, nearly all of whom were Catholic. A majority of citizens demanded a right-to-life provision in the Constitution that would have criminalized abortion. In fact, the provision in the 1999 Constitution was changed to define human life from the

In some cases public participation in constitution building has given the constitution greater legitimacy. In others, its effect has been ambivalent or has narrowed the rights in the view of some groups and contributed to more disagreement on the scope of constitutional guarantees.

moment of conception. Few leaders could have opposed this provision if they intended to run for office under the new Constitution. Hence the effect of popular participation was ambivalent, owing to factors such as the influence of religion on society, the economic situation, the prevalence of illiteracy, the experience of conflict and the country's constitutional history.

3.2. Type of constitution

The character and nature of the constitutions and the society to which it is responding crucially underlie the shape, extent and realization of a human rights culture. It is not possible to understand these key variables by reading the language of human rights in different constitutions, which shares formulations across legal traditions and divergent constitutional systems.

There are different kinds of constitutions and constitutions have different meanings for different groups. Some practitioners view constitutions as 'organic' because they are rooted in and have evolved over a long time from long-established conventions and traditions, for example, that of the United Kingdom. Other constitutions are viewed as basic frames for institutions of government and the way in which they relate with each other in the system of government. These mainly use human rights as a safeguard against abuse of official power. The famous example is the more than 200-years old Constitution of the United States (1789), which was drafted by delegates representing a confederation of 13 pre-existing states. Constitutions may be described as 'revolutionary' because they aim at particular societal outcomes, and are used to authorize the re-engineering of both society and the state. The new Constitution of Bolivia (2009), the drafting of which was driven by the country's first elected indigenous President aims to 're-establish' the legitimacy of the state based not only on a recognition that it is composed of plural nations, but also on its re-engineering for greater participation of indigenous nations in the political and economic mainstream. A Constituent Assembly designed the Constitution of South Africa (1996) to root out the old order and to completely reorder the state as a democracy founded on 'non-racialism and non sexism' (Article 1(b)).

Following its six-year civil war, in 2007 Nepal promulgated an Interim Constitution that has established a federal republic in place of a 240-year old monarchy. This Interim Constitution authorized the framing of a new Constitution to ‘restructure’ a new Nepal.

Bolivia, Nepal and South Africa are among the countries that exemplify the fundamental need to build constitutions that acknowledge that the character of the state and its citizenship are problematic and therefore require explicit social contracting. These constitutions use human rights as an agent of social empowerment; sometimes human rights are used to represent an ideal picture of the state. Finally, continental European constitutions have been described as ‘codes’ intended to ensure that state authorities are mandated and confined by sovereign law.

Each type of constitution supports and is in turn supported by specific moral choices and values. Constitution builders may have to be aware of the need not to focus only on cataloguing rights in constitutions, overlooking the fact that this letter of the law is applied in the context of a given reality. The moral underpinnings of some constitutions may be encapsulated in code words such as ‘non-racial democracy’ in South Africa, ‘pluri-nationality’ in Bolivia and Ecuador, and ‘restructuring’ in Nepal. This moral dimension, which shapes political behaviour within constitutional systems, expresses the political culture of the people it serves, and allows constitution builders to refer to a constitution as a ‘living document’. It is not possible to separate the actual human rights culture from it.

In the sections below, the focus is on building a human rights culture in constitution building in fractured and conflict-affected states. These constitutions have required explicit, negotiated consent often in a context of stalemate. They have been designed to cope with pre-existing social orders, with territorial groups with rooted power systems and with competing sources of legal norms and values.

The character and nature of the constitution and the society crucially underlie the shape, extent and realization of a human rights culture. Each type of constitution supports and is in turn supported by specific moral choices and values, and the letter of the law is applied in the context of a given reality.

Constitutions may grow ‘organically’ because they have evolved over a long time from long-established conventions and traditions, or they may aim to authorize the re-engineering of both society and the state. They may use human rights as an agent of popular empowerment.

4. A human rights culture in conflict-affected constitution building

Many tensions accompany and are caused by a demand for human rights language in constitutions. Common sources of tensions and disagreement include:

- (a) the need to deal with past gross violations;
- (b) the general system of power distribution;
- (c) legal versus political visions of the constitution; and
- (d) domestic legal norms versus international human rights law.

4.1. Dealing with past gross violations

There may be valid reason to acknowledge not only that gross violations have occurred during past conflicts, but that they will need to be specially dealt with in ways other than through ordinary court processes. In some cases, it has not been viable to contemplate constitution building without first, or at the same time, resolving historical injustice. There is a risk that failure or inability to resolve past gross violations may hinder or derail efforts at constitution building and laying the foundations for a new human rights culture. At the same time, attempts to resolve historical injustice can endanger a new peace and resuscitate deep divisions.

In many cases, the paramount considerations in constitution building have been conflict resolution and peace building and it has not been viable to build the constitution without first, or at the same time, resolving historical injustice. Victims have emerged as important actors in processes of constitution building.

Systematic, identity-based discrimination coupled with state repression, long periods under emergency rule, or state violence against citizens may have created a culture of gross violations of human rights. In Central and Latin America, where truth and reconciliation procedures were pioneered, questions of state violence and state-enforced ‘disappearances’ were central to the constitutional dialogue. In Rwanda, the experience

of the 1994 genocide framed the way in which rights were addressed in the Constitution of 2003, as was also the case with Cambodia. In Iraq, framers of the 2005 Constitution were pressured by the demands of groups that had hitherto been brutally repressed. In addition, the victims of gross human rights violations by state and non-state actors, and their supporters, have emerged as important actors in processes of constitution building.

Given such histories, some states in the initial stages of constitution building have required different special mechanisms to deal with reconciliation and transitional justice questions. A wide range of formal mechanisms have been used such as truth and reconciliation commissions, forensic inquiries into past crimes, ‘memory-making’ measures, conditional or qualified immunities or amnesties, criminal trials, and interim measures and transitional ‘sunset’ or ‘sunrise’ laws to mediate the expiry of the status quo ante and the commencement of new measures.

4.2. The general system of power distribution

Constitutions assign power and authority, which is why they are greatly fought over, particularly where outcomes are still couched in partisan terms of winners and losers. Constitution building is fundamentally political. The system of power is indelibly shaped by pre-existing conflicts and lines of division. Ecuador’s recent process of constitution building illustrates this perspective. Given widespread disillusionment with a political system that had generated eight presidents in the 11 years between 1995 and 2006, 82 per cent of Ecuadoreans voted to convene a Constituent Assembly in April 2007 to frame a new Constitution. The new Constitution introduced significant changes to end stalemates between the executive branch and the legislature by increasing the power of the executive, which could now dissolve Congress once per term provided the President also resigns and calls general elections. Also under the new Constitution, the President can serve unlimited consecutive four-year terms and gains authority over the Central Bank, which can exercise increased powers of expropriation, including the authority to raise taxes and to redistribute unproductive lands. To channel popular democracy and localize politics, citizen assemblies were authorized at the local level. In addition, the state was reordered as composed of plural nations and the central government was required to consult—though not necessarily to obtain the approval of—indigenous groups prior to developing mines on their traditional lands. Of the Ecuadoreans who voted on 28 September 2008, 63.9 per cent approved the new Constitution.

Human rights issues may be shaped by questions of broader power dynamics, for example, will the country function with or require a strong centre and a nationalized human rights culture in order to keep deep divisions and societal fractures in check? Or will diverse groups practice loyalty only towards their representative organizations, reinforcing the decentralization of power to sub-national levels, which will equally decide on the human rights culture?

Constitution building is fundamentally political. The system of power is indelibly shaped by pre-existing conflicts and divisions. Human rights issues may be shaped by questions of broader power dynamics.

4.3. 'Legal' or 'political' visions of the constitution

Constitutions rarely settle with finality the substantive content of a human rights culture. Instead, they are general instruments that may be constructed to allow room for interpretation, particularly in the face of deep division over their contents. Constitution builders have had to deal with the question of who will shape the human rights culture through the power of interpreting human rights provisions.

On the face of it, *bills of rights* are considered legally enforceable and therefore the best locations for all human rights provisions. Most democracies today generally refer to the constitution as the supreme law and reveal a trend for citizens increasingly to seek to use litigation in courts of law to secure their rights against official actions, including through activist-driven '*public interest litigation*'. This trend reflects a legalization of the human rights culture. The drivers of change behind it may be groups that are concerned that future political changes will jeopardize their claims. Bills of rights are increasingly expansive and lengthy, and also buttressed by the fact that they are increasingly difficult to amend compared with other provisions in the same constitution. More states have ratified international human rights instruments, which have also increased in number, and ratification has had an impact on legalization of the human rights culture. In practice, the impact of legalization of the human rights culture has its own limitations: it extends only insofar as the judiciary is independent, autonomous and competent, and its true beneficiaries may remain only those with the resources to file and win individual cases.

Constitutions rarely settle with finality the substantive content of a human rights culture; they are instead general instruments that may be constructed to allow room for interpretation. But who will shape the human rights culture through the power of interpreting human rights provisions?

Practitioners have also recognized that the ability of a constitution to confront pre-existing social and political norms in situations of deep division may actually depend on winning a broad consensus on these issues among diverse groups and actors. This is a political rather than a legal process. Popular participation drawing in different segments of the society to frame the constitution has also meant that constitution building is no longer the exclusive domain of elite lawyers. In fact, popular participation means that human rights are seen beyond a legal prism. In deeply divided states, constitution builders have also recognized the limitations of legal processes in dealing substantively with the pressing causes and outcomes of deep divisions, such as severe social inequality, for instance because of a shortage of qualified lawyers and judges. Politicians and their supporters may also take the view that decision making over substantive controversies should remain a democratic process that allows consensus on values in divided societies to evolve organically, with elected and therefore removable officials remaining responsible for key decisions.

There is a trend towards legalization of the human rights culture through litigation; but the ability of a constitution to confront deep divisions in society may depend on winning a broad consensus among diverse groups and actors, and this is a political rather than a legal process.

4.4. Domestic legal norms versus international human rights law

Most of the constitutions in force today have been framed since the International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. Countries with Muslim majorities have based constitutional provisions on the Cairo Declaration on Human Rights in Islam (1990). Constitution builders have aimed to embody international human rights norms in national constitutions. At the same time, in deeply divided states they have also tried to use the constitution to formally recognize and integrate other domestic sources of legal norms, such as custom and religion, into the formal constitutional system. The result is that constitutions incorporate international human rights and also promote domestic values by giving formal recognition to locally valid sources of legal norms. In practice, international human rights norms and local legal norms are different entities. Underlying the international instruments mentioned above is the principle that human rights are equal, universal and inalienable from the individual. Customary law, on the other hand, is based on traditional values that often reify social hierarchies. The constitution is thus a vehicle for two competing notions.

Constitution builders have aimed to embody international human rights norms in national constitutions, but there may be competing domestic sources of legal norms, such as custom and religion. If customary law is to be formally recognized in and integrated into the constitution, it will become a vehicle for competing notions.

Constitution builders can give guidance on the relative weight to be given to the constitution and to competing sources of legal norms generally. Many constitutions do this by expressly stating that the constitution is the supreme law. In addition, they contain clauses that allow the invalidation of competing legal norms that are found to be inconsistent with the constitution. On the other hand, it is less straightforward if other provisions in the constitution include competing sources of legal norms in the form of exceptions.

5. Democracy and human rights

Democracy is a system or form of government in which citizens are able to hold public officials to account. Constitution building can embody democratization through the design of institutions and processes that entrench the protection of political pluralism. These include varied measures such as limitations on terms of office in the executive, guarantees related to freedom of political party activity, independent electoral management and electoral dispute resolution bodies, civilian control over the armed forces and law enforcement officials, balanced relations between the executive and the legislature, constraints on the use of emergency powers and martial law, guarantees for a free and independent media, and measures to boost accountable, transparent government.

Participation in the ‘marketplace of political ideas’ may be impossible without effective rights to vote, to freely form and join political associations, to freedom of expression and information, to freedom of movement (in order to campaign and propagate political messages), and to institutional guarantees for a free and independent media. The demand for these ‘political rights’ was in fact a common feature of constitution building in many countries that made the transition to democratic rule after 1989.

Democracy thrives when citizens are politically active and informed, which in turn requires an open civil society. Constitution building can be used to enhance the protection of civil rights—freedom from discrimination, equal treatment before the law, the right to freedom of the person and personal integrity, the right to a privacy, the right to property, the right to a fair trial and the administration of justice, protection from servitude and forced labour, freedom from torture, the presumption of innocence, and entitlement to due process in all situations where one’s rights may be affected.

Constitution building can embody democratization through the design of institutions and processes that entrench the protection of political pluralism. Constitution building can be used to enhance the protection of political and civil rights.

In recent decades, the importance of citizen participation in plural political institutions has gained in recognition. This is seen in the growing popularity of *direct democracy* and *participatory democracy*. Both these concepts are about citizens engaging directly in key decision making rather than relying solely on elected representatives. Constitution builders may respond to these ideas by extending or increasing the number of instances when referendums can be used. In addition, constitutional designs for participatory

democracy include innovations such as citizen assemblies and participatory resource management, usually at the level of local government. Even areas traditionally reserved for specialists, in particular the judiciary, can allow for greater popular participation through the expansion of rights to trial by jury as well the recognition of people's courts and traditional, communal or customary courts.

It is quite common to include in constitutions the rights that are included in the international human rights instruments. This has the advantage that it connects the enjoyment of rights to a 'neutral' source, so that no group can claim that the rights are derived from its own culture, religion or custom.

6. Human rights options in the constitution

One straightforward option is to include the rights that are included in the international instruments. If we compare the rights that are specified in countries' constitutions with those in the international instruments, it can be seen that the transfer is quite common. Ratification of an international instrument has a practical implication for the language of rights in a constitution. In terms of this approach, civil and political rights are individual rights against the state. They are partly seen as negative rights since their purpose is to constrain the state from doing certain things which are viewed as only harmful, for instance, limiting the freedom of expression or association. These rights are also seen as first-generation rights, signalling their historical development. Economic, social and cultural rights also refer to rights that require the state positively to do certain things. For this reason they are described as positive rights, for instance, the rights to education for all citizens or to welfare for citizens in need. A third classification clusters rights that are considered vital for society, for community, and these are also termed solidarity rights; they include the rights of indigenous people, ethnic nations and religious groupings, minorities, women, children, people with disabilities, and so on.

In deeply divided and conflict-affected states, this option has two practical attractions. First, the language is already framed and only needs slight adjustment if any. Second, and perhaps more significantly, it connects the enjoyment of rights to a 'neutral' source, so that no group is able to claim that the rights are derived from its own culture, religion or custom. While constitutions generally affirm, either expressly or tacitly, their status as supreme legislation in the national legal system, it is necessary to take into account international human rights and humanitarian law, which have progressed in creating obligations that constitution builders should recognize. International practice does not accept constitutional shields for violations of rights that are now considered to be part of what is described as *customary international law*. This fundamental law rests on widespread consensus between states that certain acts are always impermissible, such as torture, slavery, genocide, war crimes and crimes against humanity. Some

Civil and political rights are individual rights against the state. Economic, social and cultural rights on the other hand require the state positively to do certain things, such as provide education for all or welfare for citizens in need. A third group of rights are those that are considered vital for society, for community, and these are termed solidarity rights: they include the rights of indigenous people, ethnic nations and religious groupings, minorities, women, children and so on.

a right to be protected against untouchability is specifically included in the constitution. Similarly, other countries may have no choice but to protect the right to education in the mother tongue. In Ecuador, environmentalists successfully demanded the inclusion of the inalienable ‘rights of nature’ in the new (2008) Constitution, while Bolivian activists have contemplated the rights of Mother Earth. Rights embodied in constitutions as a legacy of conflict are likely to be enduring if people have struggled for them and are still prepared to fight to secure them. Finally, some constitution builders have recognized the importance of considering the inclusion of other individual or collective rights, such as those related to the elderly, children, people living with disability, young people or even prisoners, when this can also act as a pathway to building consensus.

Some rights must be included in a constitution based on historical antecedence, such as those that have emerged from political struggles in a country, sometimes over a long period.

new constitutions in fact expressly subject themselves to international or supranational legal instruments, for example, those of Bolivia (Article 257), Ecuador (Article 11) and Guatemala (Article 46).

Constitution builders may also consider what rights must be included based on historical antecedence. These will tend to be the rights that have emerged from political struggles in a country, sometimes lasting years and with constituencies of ardent supporters. In India and Nepal, for instance, some constitution builders have recognized the importance of considering the inclusion of other individual or collective rights, such as those related to the elderly, children, people living with disability, young people or even prisoners, when this can also act as a pathway to building consensus.

Two issues tend to come up in constitution building across diverse contexts. These are:

- (a) the distinction between citizens’ rights and human rights; and
- (b) the distinction between basic or fundamental rights and rights in general.

6.1. The distinction between citizens’ rights and human rights

While the terms *citizen rights*, *fundamental rights*, *basic rights* and *human rights* have been used as synonymous outside expert circles, the nomenclature of rights has in fact signified different priorities for constitution builders. In the light of conflict, constitution builders have deliberately used citizen rights to consolidate a nationality while attaining, defending or redefining statehood. Most of the new East European republics used constitution building after 1989 to enhance nationality as a marker of citizenship, in some cases retaining a principle of consanguinity or bloodline affiliation as a transmitter of citizenship. Their situation mirrored Greece’s dilemma at the time of its creation as a new state, summed up in the line ‘having created modern Greece, let us search for the Hellenes’.¹ Some countries such as Bulgaria, Georgia, Hungary and Ukraine remained single states attempting to fashion a national identity through citizenship

rights, which on the one hand recognized the rights of exiled citizens to return while using assimilationist laws to negate the human rights of minorities, in particular the Roma. For instance, Hungary's Constitution (1949, amended 1989); includes the clause that: *'The republic of Hungary shall bear a sense of responsibility for the fate of Hungarians living outside her borders and shall promote the fostering of their links with Hungary'* (Article 6). The clause, which was reiterated as a fundamental principle in respect to a new constitution-building process, echoes the provision in Germany's Basic Law which defines a German to include a person of German ethnic origin returning to the country, in the context of the upheaval of the Second World War (Article 116). Unlike the examples above, the former Yugoslavia and Czechoslovakia split into new nation states.

Citizens' rights, fundamental rights, basic rights and human rights mean different things, and the nomenclature of rights has signified different priorities for constitution builders. In the light of conflict, constitution builders have deliberately used citizen rights to consolidate a nationality while attaining, defending or redefining statehood.

With these countries committing themselves to European norms that they have to respect and abide by as new or potential members of the European Union, clear fractures have emerged between constitutionalized identity supported by official languages and traditional religions on the one hand, and multi-ethnic characteristics on the other. A similar problem plagued Andean nations with sizeable and hitherto neglected indigenous first nations: here constitution builders used the human rights language to strengthen the citizenship rights of previously marginalized communities. In Africa, the problem of who belongs is still plaguing most constitution builders and citizenship continues to be used as the main determinant of belonging in a context where ethnic nations straddle international borders and the state is in reality only existent at the centre. Recent conflicts have complicated citizenship further, first by virtue of the great numbers of migrants leaving some countries, and second because of the equally great numbers of scattered members of the diaspora arriving from others.

Clear fractures have emerged between constitutionalized identity supported by official languages and traditional religions on the one hand, and multi-ethnic characteristics on the other. In Africa, where ethnic nations straddle international borders, the problem of who belongs still plagues most constitution builders, and citizenship continues to be used as the main determinant of belonging.

A constitutional system may prioritize the protection of human rights through common citizenship rather than membership of any particular group. This distinction matters when practitioners intend to withhold certain rights from non-citizens, which can result in acute problems of discrimination. In Colombia aliens have the same civil rights as citizens, but political rights are reserved to citizens (although legislation can extend particular voting rights to aliens). Citizens may be able to exercise and retain the enjoyment of rights outside the state's territory. There are some risks entailed in using the criterion of territorial presence as the basis of recognizing rights in favour

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of some groups but not others during the specific time frame of constitution building. Here one has in mind the distortion in the population that conflict produces in the form of displacement, migration en masse and any major changes in the size and composition of the population.

Sometimes constitution builders have treated human rights as additional or

supplementary to citizens' rights. For instance, constitution builders in Brazil (the 1988 Constitution) specified that in addition to existing citizenship rights, minorities and indigenous peoples or first nations have rights to the use of a particular minority language, the reservation of their lands and the preservation of their customs. In the Interim Constitution of Nepal (2007) the same language was used to elevate the advancement of untouchables from a 'directive principle' in the defunct Constitution of 1990 to a fundamental and enforceable right. In some cases, the language of human rights has also been used to permit de facto non-citizens to earn their livelihood without discrimination, for example, in South Africa where the Constitutional Court rejected the contention that non-citizens could not be permanently employed to teach in state-funded schools. On the other side of the coin, constitution building could also modify the understanding of human rights, resulting in some previously recognized rights being 'omitted' or 'downgraded', for example, the disappearance of a 'right to work' in Hungary's post-communist-rule Constitution, and counting the Parliament's intentions to stipulate it as a 'state goal' in a new Constitution.

Constitution builders who base rights on citizenship may need to carefully consider safeguards for citizens who lack proper documentation and formulate adequate procedures to allow people to attain citizenship. The process of formulating such procedures risks providing some political groups with an opportunity to package xenophobic attitudes as citizenship values, supporting a nationalist view of rights and opposing the extension of rights to non-citizens, foreign nationals and undocumented citizens. If the government cannot easily ascertain citizenship or if various parties contest the citizenship of particular groups, the resulting disputes can ignite fresh conflict. If the constitution ties rights to citizenship, then government officials might prioritize evidence of citizenship at the expense of individuals who lack proper documentation. To avoid such outcomes, the constitution might expand citizenship rights to those with a parent who is or was a citizen of the country, permit dual citizenship, create a presumption of citizenship, and guarantee the resumption of citizenship for returnees and the non-revocability of citizenship.

6.2. The distinction between basic or fundamental rights and other legal rights

‘Fundamental rights’ or ‘basic rights’ are protected from political interference through legal enforcement by an independent judiciary. In addition, constitution builders have increased the hurdles against future political tampering with fundamental rights, usually through entrenching bills of rights for which the amendment procedures are more rigorous. ‘Human rights’ is a generic term; it connotes constitutional content included in but extending beyond a legally enforceable bill of rights. Human rights touch on the substance of preambles, the principles according to which a state is governed, citizenship, institutional arrangements, electoral system design, security sector arrangements and even financial provisions.

Fundamental rights trump legislation since they are not derived from law, and can therefore be used to limit political and official actions within the rule of law. Due process, equality under the law, protection from discrimination and similar fundamental rights set legal standards to be followed by administrators. Determining whether these standards are upheld when a dispute arises between parties is a judicial and not a political question.

Fundamental rights trump legislation since they are not derived from law, and they can therefore be used to limit political and official actions within the rule of law. ‘Fundamental’ or ‘basic’ rights are protected from political interference through legal enforcement by an independent judiciary.

Constitutional derogation or suspension of fundamental rights ought to be expressly stated and authorized in situations of emergency; and even then not all fundamental rights can be derogated. For example, international law does not consider protection from freedom of torture to be derogable. Different countries have different rules on which rights can be derogated during an emergency and the rules that apply. Options to permit judicial review in cases where fundamental rights are directly affected by the exercise of emergency power, that is, when someone can show a direct infringement on their rights, are actually quite common across legal traditions. Derogation is a measure which partially suspends the application of one or more of the provisions of the rights, at least on a temporary basis. This should not be done as a discriminatory measure, which is a problem when a state of emergency is in place in some parts of a country but not the entire country for prolonged periods of time. Constitutional limitations on fundamental rights, for example, to curtail the rights to freedom of expression in order to prevent hate speech, should be stipulated as legal standards. If they are not, the consequence (using hate speech as an example) may risk allowing partisan politicians to make the electoral field uneven by deciding what hate speech is while curtailing freedom of expression, most likely of their opponents.

Not all fundamental rights can be derogated, even in situations of emergency. A constitution should state expressly in what circumstances fundamental rights can be derogated or suspended, for example, by curtailing the rights to freedom of expression in order to prevent hate speech.

Human rights that extend fundamental rights may need political consensus, which places them partly if not wholly in the domain of legislative politics. Constitution builders may be keen to prevent a ‘judicialization of politics’ whereby judges try to square the circle by proffering technical legal solutions to political problems. Not only would this increase institutional conflicts between the judiciary and other branches of government; it may also risk raising the stakes of politics dangerously high while jeopardizing fragile,

conflict-affected democratic institutions that are no longer usable to channel fundamental disagreement. The question of how to deal with rights that are controversial and not necessarily fundamental plagues many practitioners.

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7. Enforcement

Once rights are included in the constitution, what is the practical effect? As noted, nearly all constitutions of the world catalogue rights. But the entrenchment of rights in the constitution does not always result in a culture of respect for these rights, and there is sometimes a huge gap between rights into the constitution and rights in practice. While the incorporation of human rights in constitutional texts itself delivers benefits over time, as empowerment develops, constitution builders do need to consider carefully a second aspect of this entrenchment—the enforcement of these rights.

Under international law, the primary instrument of enforcement is the state which guarantees the rule of law. The obligation to protect rights is addressed to the state which is required to take measures to give effect to rights and ensure access to a legal system from which victims can secure effective remedies.

Constitution builders need to consider carefully the enforcement of the rights specified in the constitution. The state is obliged to protect rights but there are not many means of implementation.

While constitutions can include rights and expand them considerably, there are not as many actual means of implementation. Practitioners have, however, considered multiple devices to catalyse implementation and ensure enforcement.

7.1. Interpretation aids

Constitutions per se may not be able to grapple with the substantive issues of human rights. While some provisions of human rights in constitutions are detailed and specific, many others are formulaic, general and abstract. Generalization may be required by a tradition of drafting rules that will have general application, or as a result of a particular compromise. However, enforcing general formulations is problematic because it calls for interpretation. Constitution builders have aimed to set guidelines for interpretation.

Principles and statements in preambles are one option. Setting out the moral basis of the constitution is an option, but one that is problematic if this morality is not universally shared in the state or itself conflicts with or contradicts other provisions of the constitution. Some constitutions have provisions that call for those interpreting them to do so conjunctively instead of disjunctively, and constructively with the intent to give it purposeful application. Some practitioners

have attempted to facilitate enforcement by instead writing the constitution as a practical legal guide, and to put in a great deal of detail, for example, in relation to what rights a minority group have.

Enforcing general formulations is problematic because it calls for interpretation. Constitution builders have aimed to set guidelines for interpretation.

7.2. Procedures to enforce human rights provisions

Courts are not only called upon to adjudicate in existing and clear-cut human rights disputes; an important part of their enforcement mandate is to adjudicate the grey areas of human rights where uncertainty is high and opinions are widely divided. During the negotiations on the new Constitution in South Africa (1994–6), the leaders of an elected Constituent Assembly agreed that the death penalty violated human rights principles. But the death penalty was hugely popular; a universal referendum would probably have supported it. Negotiators opted to leave the resolution of this question to a newly created Constitutional Court. In due course, this Court indeed pronounced the death penalty unconstitutional and a violation of human rights principles. The Court's legitimacy, although it was a new body and in spite of widespread social distrust of state

institutions, helped it to be an arbiter with a result that was broadly accepted. However, this did not put the issue to rest and in electoral campaigns in 2005 some leaders touted the possibility of a referendum on the same question as a way to build their own credibility as taking a firm line against spiralling crime in the country.

Courts are called upon to adjudicate the grey areas of human rights where uncertainty is high and opinions are widely divided. Political actors view attempts to use courts to pronounce on the rights of minorities and other peripheral groups with suspicion.

Courts engaged in these exercises can be perceived as 'making the law' rather than interpreting it. This is important when the charge is changing or amending the constitution without democratic consent. Political actors view attempts to use courts to pronounce on the rights of minorities and other peripheral groups with suspicion, partly because they wish to monopolize 'law-making' power and partly out of partisan protection of their own constituency. To support Ethiopia's delicate ethnic constitutional balance, which hinges human rights on membership of nations and nationalities, the Constitution expressly authorizes the legislature to be the sole body entitled to interpret any provision of the Constitution, including in relation to disputes in court.

7.3. Complaint procedures in the constitution

Who can initiate complaints and seek the enforcement of rights? Is it only the individual who is directly aggrieved or can a concerned group acting on his/her behalf take up a case? What of any group acting in the public interest? These are important questions where judicial enforcement is concerned. At the same time, the rules of procedures on access to courts for human rights enforcement are dealt with at a highly generalized level in constitutions. This could be out of consideration of the level of detail involved. The trend has been for constitution builders to guide courts to make rules that will be simple and facilitate easier access. Constitutions do expressly guarantee a right of individual complaint in respect of infringements on rights rather than defer the entitlement to future legislation or court rules.

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7.4. Institutional guarantees

Human rights commissions are increasingly common, and many follow the guidelines endorsed by the UN for national human rights institutions. The main issue is the extent to which these bodies can offer 'effective remedies' to individuals and groups complaining of rights violations. The range of options stretches from commissions that have power to award remedies, including compensation, to those that can only offer recommendations intended for other public institutions to act upon.

8. Tensions in relation to specific rights

During constitution building, the mobilization of groups in terms of ‘our’ rights versus others’ means that certain rights more than others raise conflicts and tensions. These include:

- (a) minority rights;
- (b) women’s rights; and
- (c) economic and social (ECOSOC) rights.

Certain rights more than others raise conflicts and tensions. These include minority rights, women’s rights and the ECOSOC rights.

8.1. Minority rights

Contestation for legal and political recognition of different groups and actors in constitutional dialogue has often taken the form of contestation over the human rights of diverse minorities and indigenous peoples. In Brazil (1988), Bolivia (2009) and Ecuador (2008), there was constitutional agitation about the recognition of rights of indigenous people. In Indonesia, deliberation on constitutional reform was intertwined with the *pancasila* concept of plural cultures and the minority rights of natives of Aceh and other territories (see chapter 2 of this Guide on principles and cross-cutting themes). In Nepal’s ongoing constitution building following the ten-year armed conflict that ended in 2006, demands by ethnic minorities have been at centre stage. In Eritrea and Ethiopia, the constitutional processes in 1994 largely resulted from a demand for recognition of distinct ethnic groups as self-determining entities. In South Africa, contention between the rights of the racial majority vis-à-vis the racial minority was central to the 1990–6 negotiation that resulted in a ‘non-racial’ democratic Constitution (1996). In Afghanistan rights of religious affiliation and of women transfused the 2003 talks in the Constitutional Assembly or Loya Jirga. Discrimination in the past and prevailing identity classifications had an important bearing on the demand for constitutional change. Resolving rights claims by minority groups did in many cases become a focal point for constitution building and the biggest source of tensions.

The concept of the human rights of minorities may imply two things: first, that individuals who also happen to belong to defined minority groups are still entitled to the same rights, on an equal basis and without discrimination, as everyone else; and, second, that a minority group can itself legitimately claim particular rights. An alternative way of seeing the second proposition is that individuals are able to acquire or lose certain specified rights through joining or belonging to minority groups.

The concept of the human rights of minorities may imply not only that individuals who happen to belong to defined minority groups are entitled to the same rights as all citizens, but also that a minority group as a group can legitimately claim particular rights.

Minority rights issues are multivalent and complex. It helps for constitution builders to first define the main issues through questions such as: What is the nature of the ‘minority’ problem? Why is the ‘minority’ issue a national problem that needs constitutional measures? What measures are required of the constitution and how will they contribute to alleviating the problem?

8.1.1. Who is a ‘minority’?

Defining who constitutes a minority is itself challenging. Not only do some groups reject the term as demeaning, but constitution builders have found a firm ‘boundary’ of identification to be rather elusive. Moreover, most boundary-drawing classifications of minorities include conceptual criteria and categories developed in the sociological or anthropological sphere, among others, which may give rise to conflicting legal and political impacts in different constitutions. The same may happen with generic or very broad denominations when the question of who is then included in such categories generates areas of conflict.

The legitimacy of a self-defined minority group may be questioned or casually dismissed by non-members, whether or not they are a majority. A self-defined minority may, in addition to claiming legal rights, need to overcome stigma and the idea that it can be dismissed as ‘deviant’. Yet even relatively ‘objective’ criteria of minority status, such as population size, can still be arbitrary. In devising special measures to protect minorities, the Indian Constituent Assembly sitting in 1949 did not consider Indian Muslims to be a constitutional minority even though in numerical terms they were a de facto minority. But it considered low-caste Hindus and the untouchables a minority even though, in religious terms, they were undeniably members of the dominant Hindu faith of the majority. At the same time, when constitutional talks peg minority status to numbers, the risk is that the important principles will be overshadowed by a calculus of division of groups and multiplication of minorities that may be counterproductive. International law may be a guide but it is not adequate since, while it recognizes some categories of minority status, some are more defined than others. For instance, ‘indigenous peoples’ are better defined than ‘ethnic group’ in the **UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**. There are also multi-ethnic conflict-affected states where the dominant group is actually a de facto numerical minority. Yet in other cases, a numerically dominant group has been held at a political disadvantage through election-driven alliances of minority groups.

Part of the effort required of constitution builders entails avoiding generating areas of discussion which prolong tensions deriving from definitions of diverse groups and their identifying elements. With respect to minorities, it is important to note that definitional categorizations often vary in the same way as with the classification of majorities. For instance, in the Bolivian case, the original, indigenous farmer population could be described as a single distinct group. The result was that some of the diverse peoples who constitute it would cease, within this context, to be minorities, with resulting limitations on the exercise of their rights. Generic classifications can lead to excluded minorities or majorities becoming invisible.

Defining who constitutes a minority is challenging. The legitimacy of a self-defined minority group may be questioned by non-members. Even relatively 'objective' criteria of minority status, such as population size, can still be arbitrary. International law may be a guide but is not adequate.

Moreover, the ambition of constitution builders may be to change the terms of differentiation as a valid attempt to break out of recurrent cycles of conflict. Human rights may offer an option to standardize all groups. This has usually been done by putting the terms of recognition of difference into the constitution and by prohibiting discrimination on these terms. In fact, these terms may move the contestation away from the minority–majority axis. For instance, differentiation by terms such as origins, age and even gender may be used to prohibit discrimination even though it may be the majority of young people and women, relative to numerically fewer older citizens and males, who are disadvantaged. Finally, there is a problem of the assumption of homogeneity. In reality, every 'minority' group is itself dynamic and may consist of minorities within minorities. Some minority classifications can also reinforce others.

Constitution builders may aim to change the terms of differentiation as part of a valid attempt to break out of recurrent cycles of conflict, but they need to avoid generating areas of discussion which prolong tensions deriving from definitions of diverse groups and their identifying elements.

Mobilization of minority groups during constitution building in order to demand specific rights has been a common feature in deeply divided and conflicted-affected states. Minority groups may be insular and concentrated in a defined territory, for example, indigenous peoples, or dispersed across the state, for example, homosexuals. In contexts of deep social division, minorities may be mobilized in terms of 'fixed' identity boundaries, in response to which constitution builders frame various rights options, for instance:

- *Religious minorities.* Assuming that some kind of constitutional protection of particular religions is accepted, constitution builders have devised different specific measures to protect religious minorities. Special protection for minorities has been accommodated in constitutional systems that are nominally secular and do not in general recognize rights rooted in religion. Other measures have been needed precisely because constitution builders have come under pressure to

designate a particular religion as ‘official’ or ‘traditional’ or because of the actual influence of a particular religion on society. Measures can be tangible, rather than merely recognize principles such as freedom of conscience. For instance, the right of religious groups to organize their own schools and other communal services (hospitals, shelters etc.) is important and tangible, considering that in conflict-affected states a key role of religious groups is to supplement public services on behalf of their communities. Measures to apply religion-based laws have also been considered where religious groups had a distinct normative framework. Either room could be made in the formal legal system to recognize and enforce religion-based norms that benefit only specific groups or parallel legal systems could be accommodated. The inclusion of Islamic law within

the formal legal system under the new Constitution of Kenya (2010) was one of the most controversial and intractable issues. As a show of respect and accommodation for the country’s Muslims, who make up approximately 9 per cent of the population, the new Constitution has permitted the establishment of *Kadhi* courts within the formal system which will specialize in family law disputes involving private parties who are both Muslims. In many countries the discussion has unfolded under a rubric of secularism and its implications.

Measures to protect minorities have been accommodated in constitutional systems that are nominally secular and do not in general recognize rights rooted in religion. Other measures have been needed precisely because constitution builders have come under pressure to designate a particular religion as ‘official’ or ‘traditional’ or because of the actual influence of a particular religion on society.

- *Racial minorities.* International human rights law dealing with discrimination on racial grounds is one of the oldest, dating back to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which entered into force in 1969 as a reaction to widespread anti-Semitism. Article 1 of the CERD defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. Less clear is the actual meaning of ‘race’ which the instrument does not distinguish from ‘ethnic origin’. Under the CERD, racial profiling, racial segregation and apartheid are all inadmissible. At the national level, some countries have provided options for groups to mobilize on the basis of ‘race’ even though constitution builders treated it as an inadmissible criterion of differentiation. South Africa offers an illustration. The Constitution of 1996 expressly states that the state is founded as a ‘non-racial democracy’. In talks leading to the establishment of a Constituent Assembly in 1994, the term ‘multi-racial’ was considered and rejected ostensibly because it could open the door to the sustenance of race-based classifications, hence allowing some validation of the apartheid-era distinctions that the constitution builders set out to invalidate completely.

A constitutional principle was then agreed between the key parties that the Constitution to be framed would provide for a non-racial democracy. At the same time, consideration of the inequality between the racial white minority and the huge black majority was not rejected. In fact, since the establishment of the Constitution, South Africa has pursued policies that are highly debated and contested, which aim for the empowerment of ‘black South Africans’ as a racial category. These policies were closely modelled on Malaysia’s preferential treatment for Malays as a racial group, which were designed to transfer control of the economy to the majority racial group. Finally, a number of constitutions have specifically prohibited racial hate speech and/or withheld recognition from political parties that are not compatible with racial harmony.

- *Ethnic minorities.* If constitution builders have accepted moving away from assimilationist ‘nation building’, then options for recognizing the organization and mobilization of people for involvement in public affairs along ethnic lines are admissible. Constitution builders have for instance allowed ethnic minorities to enjoy language rights, to benefit from territorial reserves whose resources they can exploit, to be represented in decision making at different levels of government, to use their own law and customs, and to retain their traditional forms of authority within or outside the formal system of government. These measures are context-sensitive; in some cases, the impact of ethnic leadership in formal government is in fact considerable even though the constitution relegates them to civil society, for example, in Nigeria. In others, their impact on formal government is marginal even though the constitution allows formal recognition of their roles, for example, in South Africa. To organize the options, constitution builders could consider whether the goal is to permit ethnic minorities to set a stamp on the evolution of national politics, or merely to be permissive to cultural differences in society. As regards the former, the constitution may need to cater for representation and participation in government at different levels.
- Constitution builders have allowed ethnic minorities to enjoy language rights, to benefit from territorial reserves, to be represented in decision making at different levels of government, to use their own law and customs, and to retain their traditional forms of authority within or outside the formal system of government. These measures are context-sensitive.***
- *Indigenous peoples.* Constitutional recognition of indigenous peoples is sometimes conflated with that dealing with ethnic minorities. Indigenous people may be distinguished by pointing out their ‘first nation’ status. This means recognizing that they were the original dwellers of the territory (in whole or in part) that is now subsumed by the state whose constitution is being framed. Most constitutional options related to these groups are closely intertwined with the issues of ownership and control over their lands and the right to cultural self-determination. The two are seen as integral elements to the expression of an indigenous identity. In other cases, as in the Philippines, demands by first

nations may extend to political claims. Distinguishing cultural from political claims may be part of resolving the demands, and international law, specifically the International Labour Organization (ILO) Convention 69, has been used as a guide for the former. Political claims on the other hand will require options for real autonomy and/or participation and representation in mainstream public life. It may be worthwhile to stipulate what happens when valuable resources are discovered or are being exploited in the lands of indigenous peoples as this is usually a factor in serious conflicts. In addition, constitution builders have used options such as resettlement of the people concerned in equally viable lands where this is possible and where the environmental harm to original lands does not permit continued residence anyway. These options may include a right to restitution to a people's original lands if forced evictions are part of the issue. Yet other options involve consultation devices which may or may not be binding, intended to enable indigenous people to have a say (and benefit) in the exploitation of their lands.

- *Refugees and displaced people.* Surprisingly, many constitutions are silent on the rights of refugees and people displaced from their homes by conflict. This is surprising because the numbers may in fact be quite high in conflict-affected states. Part of the problem is that this issue is considered to be a 'temporary' administrative issue that will be resolved once these people are resettled somewhere. Partly it is also due to the politics of cultivating citizen allegiance through recognition of rights. Yet in addition to conflict, many people are displaced when their citizenship is denied. With a constitutional design that largely assigns the transfer of citizenship to family descent and naturalization of individuals, the mass of displaced people and refugees have few options. In addition, their chances of lobbying the constitution builders are limited in

practice, bearing in mind that citizenship has been a condition for political participation. This calls for constitution builders to have an enlightened and proactive approach to use the constitution to redress the vulnerability of these minority groups.

Mobilization of minority groups during constitution building in order to demand specific rights has been a common feature in deeply divided and conflicted-affected states.

8.1.2. The prohibition of discrimination and the provision of special measures

Depending on the kind of claims presented by the groups that are driving constitutional change towards recognition of minority rights, and the opposition thereto, constitution builders may consider two approaches. These are to protect minorities by means of:

- the prohibition of discrimination; and
- the provision of special rights and measures (not to be confused with privileges).

The prohibition of discrimination

Entitlement to non-discrimination or equal treatment per se is straightforward. Nearly all constitutions are unanimous in including provisions to prohibit discrimination on

grounds such as origin, language, gender, age, ethnicity, race and so on. Constitution builders also aim to change the terms of recognition of differences from fixed identity terms to fluid ones. An example is the prohibition of self-identification in ethnic terms or the prohibition of single-ethnicity political parties. This can be done in tandem with constitutional encouragements for the formation of civic associations, in order to benefit from the enjoyment of rights that are denied to other kinds of associations. The idea here is that all individuals are able to exercise similar rights by forming voluntary associations instead of permitting rights to be claimed only by those who belong to groups whose identity is fixed. The result is that the constitution is the only recognized common basis of exercising rights and the only source of rights, not custom or religion. Second, this approach comes across as inclusive: the protection of minorities is part and parcel of protections covering everyone else. Encompassing protections may be easier to agree on during negotiating processes than special measures for the benefit of particular groups.

Besides prohibiting discrimination on grounds such as origin, language, gender, age, ethnicity, race and so on, constitution builders have also aimed to change the terms of recognition of differences from fixed identity terms to fluid ones, for example, by prohibiting self-identification in ethnic terms or single-ethnicity political parties.

Reliance on an equality clause assumes sufficient public knowledge and access to courts; it also assumes that members of minority groups confronted with violations are aware of these rights and are actually in a position to turn to constitutional courts for a solution.

The provision of special rights and measures

In conflict-affected societies, recognition of minority rights may require special measures either to protect particular groups from persecution or to enable them to move away from marginalized status and join mainstream society. Special rights are granted in order to enable minorities to preserve their identity, characteristics and traditions. Grant of special rights suggests that constitution builders are prepared to accept resulting differences in treatment between minorities and the rest of the society. This resulting difference in treatment may be justified as promoting effective equality and the welfare of a community as a whole, in terms of the overall intentions of the constitution being built.

Special measures can embrace multiple forms, with constitution builders exercising preference for one or several depending on context. In general, these may include:

- territorial autonomy or decentralization or the ‘vertical separation of power’ (see chapter 7 of this Guide on decentralization);
- power-sharing devices (see chapter 4 on the executive branch);
- legal pluralism (see chapter 6 on the judiciary);
- cultural autonomy (or constitutional recognition of and authorization for cultural diversity);
- consociation arrangements (which are a special form of power sharing considered

Special rights may be granted in order to enable minorities to preserve their identity, characteristics and traditions if constitution builders are prepared to accept the resulting differences in treatment between minorities and the rest of the society. These differences in treatment may be justified as promoting equality and the welfare of a community as a whole.

divisive issues, which may also have to do with the possibility that they are misunderstood and highly politicized terms.

The right to self-determination

Self-determination is not the same thing as formal independence. International law recognizes a right to self-determination within an existing state. In effect, a legitimate group has a right to choose its own destiny, but the choice does not have to be exercised in any particular way. The concept can include claims for different forms of autonomy; it can embrace complete separation and secession at one extreme and limited forms of autonomy at the other. In practice, any claim for autonomy could be seen as controversial irrespective of its form. This includes cultural autonomy of a minority group when it is perceived as negatively affecting the aggregated interests of those who do not belong to the minority group. However, while self-determination does not automatically imply independence, nor does it deny the possibility of seeking and successfully achieving it.

Self-determination conflicts that involve claims to international recognition of statehood have been multivalent and extremely complex, lasting over many years and usually involving international third parties in their resolution. In some cases, settlements have been reached after years of gruelling negotiations, resulting in the cessation of armed conflict, and in forms of autonomy and power sharing that are still in the implementation stages. Examples are Northern Ireland and the United Kingdom's Good Friday Agreement, signed in 1998; the complexities of the two entities that form Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and the Republika Srpska) following the 1995 Dayton Agreement; the power-sharing and autonomy arrangements

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for some conflict-affected states);

- electoral system-based power sharing (particularly elevating forms of proportional representation—see the International IDEA Handbook on electoral system design);²
- the right to self-determination; and
- affirmative-action rules and policies.

The rights to self-determination and affirmative action are highly contentious and

of 2001 for Bougainville's autonomy from Papua New Guinea, and that of tribal minorities from Azawad in Mali (1996 agreement); and, most recently, the 2006 autonomy agreements for South Sudan that resulted in a peaceful vote for independence via referendum in 2011. In other cases, the situations are still unresolved. This is so with the self-determination of Kosovo Albanians in 2008, and in the same year the breaking

away of South Ossetia and Abkhazia from Georgia. Reflecting on these cases may be useful to help constitution builders appreciate the stakes involved when constitutional means are still within reach to resolve minority claims to self-determination in deeply divided and conflict-affected states. Considering that the risk of conflicts in recent years has been highest in conditions where the state is fragile—in big as well as small states—the evolution of constitutional measures that ‘work’ in different contexts is extremely useful.

By granting the right of self-determination to minorities, the Ethiopian Constitution adopted in December 1994 has been characterized as a minority-friendly constitution. It was framed by an elected Constituent Assembly that was in fact dominated by an armed group that had militarily deposed a ruling Marxist junta. The Constituent Assembly, with the objective of establishing political legitimacy among different ethnic groups of Ethiopians, a number of which were actually involved in insurgencies against the state, decided to reconfigure the unitary Ethiopian state into an ethnic federation. The new Constitution has recognized for every officially recognized ethnic group in Ethiopia the right to self-determination up to secession (Article 39.1). It recognizes a wide range of individual and collective human rights according to the treaties which Ethiopia has ratified. At the same time, the Constitution establishes that the ‘nations, nationalities and peoples’ of Ethiopia are the minimum component parts of the country as opposed to individuals. When it comes to implementation, the Constitution has clearly made ethnicity the most relevant marker of identity in the state. Since a great deal of power is consolidated in the Prime Minister, to whom the Cabinet is accountable and who is also the commander of all armed forces, the evolving human rights culture is designed to be dependent on political negotiation with the centre. To reinforce the political dimension, the Constitution vests all authority to interpret any provision of the Constitution, including in disputes in courts, in the National Assembly. Ethiopia’s approach to self-determination is quite unique in conceding self-determination to the extent of including a prospect of secession.

Self-determination conflicts that involve claims to international recognition of statehood have been multivalent and extremely complex, lasting over many years and usually involving international third parties in their resolution.

Spain offers a different approach. The country consists of three ‘historic nations’—Catalonia, the Basque Country and Galicia—each with its own identity and nationalist movements. The Constitution of Spain (1978) attempted to create self-government within the three historic nationalities while extending that principle to any other region that requested it. It established varied degrees of autonomy in the three historic nations and in the remainder of Spain, though in principle all eventually could attain the same level. Autonomy movements quickly spread and 17 autonomous governments sprang up. Despite recognizing the rooted nature of these nations, the constitution builders deliberately rejected any contention that any group had legal rights other than those provided in the constitution itself.

Hence, while there are many contexts in which claims to self-determination will be

pushed by diverse drivers of change, in practice constitution builders view self-determination as a flexible legal and political framework in which the expression of substantive rights is dynamic. Within the given context, constitution builders may work with options that are interrelated, emphasizing dispersing autonomy and consolidated commonalities as needed. It is also crucial that constitution builders take account of the difficulty of implementation by catering for the means of adjudicating disputes between autonomous self-determining entities and other entities that are involved in these complex cases.

Affirmative action/positive discrimination

Affirmative action can take many forms—preferential treatment of minority groups in public education or employment; cultural measures such as state-funded support for education in the local language; or symbolic measures such as official apologies. Within these forms, further distinctions can be drawn. First, the state may be able to benefit one group without harming another—for instance, by providing state education in the local language. Second, by contrast, the state can engage in positive discrimination, which distributes finite resources—such as entry to universities—to a favoured group, thereby harming other groups. Since the state is redistributing resources between groups, these issues are politically charged.

Initial key questions here include: has the state historically marginalized any particular group? If so, can constitutional measures remedy their plight and secure equality? What is the optimal constitutional design for these measures—legally enforceable measures or authorization by legislation of discretionary measures that are politically viable and subject to available resources.

If affirmative action is on the agenda, the issue may also be what forms are appropriate in order to achieve desired goals. Practitioners could consider the following issues.

- Should constitutions employ *quotas or reservations*? Should such devices be binding or non-binding?
- What form or type should affirmative action take? Should the programme be of fixed duration or be open-ended? By what measures should potential beneficiaries qualify? By simply belonging to a particular group?
- Can many groups benefit from affirmative action at the same time?

- Should courts enforce or delineate the bounds of affirmative action?

Quotas and reservations are two common constitutional mechanisms for affirmative action. Both embrace special positions for specific groups but serve different functions. Quotas may be required to give effect to the principle of equality of opportunity, so that individuals in specified minority groups can ‘catch up’. Quotas assuage fears of continued

Affirmative action can take many forms. The state may be able to benefit one group without harming another—for instance, by providing state education in the local language—or engage in positive discrimination, which distributes finite resources to a favoured group, thereby relatively harming other groups.

repression and promote integration because they bring these victim groups into the architecture of power. Reservations are about spaces for these groups that may not affect power. They create separate zones where minority groups are the only players.

Constitutions may distinguish between equalization in terms of opportunity and in terms of outcome. In practice, constitution builders target most affirmative action schemes at procedural equality—or equality of opportunity—rather than substantive results.

Implications of affirmative action

These measures remain hotly contested. In fact, many affirmative-action policies generate new controversies over time. In one sense, they contradict the purpose of a constitutional ambition to move the society beyond labile classifications of identity. Studies may also show mixed results in relation to their specific purpose to uplift specific groups. Whether implementation is by legal means or through political programmes, it may be seen in practice that more legal conflicts ensue.

The second implication seems to be that once affirmative action is constitutionally sanctioned it acquires its own political impetus. Subsequently, it may become difficult to do away with it even when it is doubtful that it is needed. Once it has been implemented—as in Malaysia, where constitution builders originally intended affirmative action to extend for 30 years—popular pressure may prevent the cessation of affirmative action: the Malaysian programme has survived for 40 years and is still in being.

The third implication has to do with a general ‘law of unintended consequences’. Instead of bringing reconciliation, the policies may risk driving wedges between groups as the winner/loser equations change in specific cases. Lowered standards for participation by some groups, for instance in employment in public service, may actually reduce the quality of services, raising new collective protests. In spite of the existence of affirmative action programmes, inequality may persist, breeding resentment among affected groups that constitutional implementation is taking too long to redress their situation, resulting in de-legitimization of the constitution. Constitution builders may need to create systems for constant review of affirmative-action programmes—whether constitutionally recognized or not—to ensure that the programmes remain an engine of growth for historically disadvantaged groups.

Finally, in some countries—such as Bolivia, Malaysia and South Africa—the group historically discriminated against and deprived of economic opportunities is actually the numerical majority. Affirmative action as applied to majorities rather than minorities has a very different impact at the societal level.

Affirmative-action measures remain hotly contested. Many such policies generate new controversies over time. Studies can also show mixed results. Once they are constitutionally sanctioned they acquire their own political impetus, and they may risk driving wedges between groups as the winner/loser equations change.

8.2. Rights of women

Demands for constitutional guarantees of the rights of women are also not tension-free; in fact, such tensions are not unique to post-conflict or conflict-affected constitution building. Many of these rights are often construed within the framework of the international human rights law of individuals, in particular the United Nations **Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW), which entered into force on 3 September 1981 (see box 3).

The areas that produce the greatest tensions are revealed by the number and nature of reservations by states parties to CEDAW, with most substantive reservations in the areas of *equality in political and public life, equality in employment, equality before the law, and equality in marriage and family relations*.

Box 3. The Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW provides for:

- embodiment of the principle of equality between women and men in national constitutions and other laws (including its practical realization);
- modification of cultural patterns with a view to eliminating prejudices against women and stereotypes of their inferiority;
- the suppression of all forms of trafficking in women and the exploitation or prostitution of women;
- equal participation in politics and public life;
- equal rights to acquire, retain or change nationality (including equal rights to transfer nationality to children);
- equal rights in education;
- the elimination of discrimination in the field of employment;
- no discrimination on grounds of marriage or maternity;
- equal access to health care (including family planning);
- entitlement to equality before the law; and
- equality in the field of marriage and family relations.

8.2.1. Equality in political life

Equality between men and women is at face value generally accepted; equality provisions commonly appear across very different constitutional systems. The Constitution of Egypt (1971) recognized the equality of men and women and even specifically guaranteed the equality of women in the economic, political, social and political spheres, while still complying with Islamic jurisprudence. The Constitution of Greece (1975), which recognizes the Eastern Orthodox Church of Christ as a dominant religion, also decrees that Greek men and women have equal rights and obligations. In the relatively new Constitution of Swaziland (2005), which established a hereditary monarchy, women

also have the right to equal treatment, a right that entails equal opportunities in political, economic and social services. Additionally, that Constitution states that no one can compel a woman to follow or uphold any custom that her conscience opposes. The Constitution of East Timor (2002), framed for a country where some women were even armed combatants in the liberation struggle, states that women and men shall have the same rights and duties in all areas of family life and in the political, economic, social and cultural spheres. In practice, the application of these provisions differs, a fact that is explained by power dynamics and the scope of constitutions to affect social, cultural and economic life.

There is a trend to encourage gender-neutral language in constitutions. It is common for constitutions to mention the term ‘gender’, for instance, to prohibit discrimination, but without attempting to define the term explicitly. Practitioners can go even further. Proposals submitted to the Constituent Assembly in Nepal, if adopted, will transcend binary gender options—male and female—and include ‘third gender’ and ‘trans-gender’ categories. Gender-neutral drafting as such is not necessarily enough to establish which rights women actually enjoy.

A real practical barrier and challenge to women’s equal participation in politics, rather than religion or societal culture, is the behaviour of political parties in many countries.

A real practical barrier and challenge to women’s equal participation in politics, rather than religion or societal culture, is the behaviour of political parties in many countries. Previously, constitutions have not regulated political parties. Increasingly some are doing so with examples such as Brazil and Rwanda (which so far has a very high proportion of female representation in the legislature). Constitution builders may need to consider options that will influence political parties’ selection of candidates and the advancement of women as political actors, with real penalties for parties that do not comply. In addition, quotas for women’s political representation, while not a panacea, have enabled the presence of women at the national level, even without grass-roots support, to participate in deciding important political and legal issues; this is a tangible accomplishment.

Quotas for women’s political representation, while not a panacea, have enabled the presence of women in politics at the national level.

8.2.2. Equality in marriage and family relations

The main tension here is between on the one hand commitments to the equality of women and men in family life and on the other hand a commitment to provide formal recognition for competing legal norms that in practice embrace inequality between women and men in family life. As noted earlier, constitution builders aim and should aim to use constitutions to embody international commitments, for example, those under CEDAW. At the same time, the resolution of conflict, especially where it requires formal recognition of ethnic nations or religious groups in order to win the support of key actors in society, may result in constitutions that contain a contradiction.

Constitution builders may have an option to use the principle of supremacy of the constitution to prevail over contradictory legal norms. This may be justified on conflict resolution grounds, as an incentive to harmonize the ways in which diverse groups are treated in the state. A starting point may be to enumerate the applicable legal norms under the express recognition that those which contradict the constitution are invalid. Since this is within the legal domain, an institutional guarantee may empower the courts to strike down other legal norms on the basis of a legal finding of inconsistency. Constitution builders have evolved approaches that ensure that the actions of courts are viewed as legitimate by the groups whose concern is the continued existence of and respect for alternative legal norms. One approach borrowed into the South African Constitution from the practice of Latin American constitutional treatment of indigenous peoples' rights is to conflate the contentious issues into a legal problem that is assigned to the formal judicial system and its appeal structures. This means that consistency in legal interpretation is assured and that all legal norms are treated seriously. In the Latin American example, adjudication over the application of indigenous laws is part of the formal judiciary's job. In the South African example, the Constitutional Court has the power to 'develop' customary law, which is often based on patriarchy. In a famous case, the Court used this power to strike down the practice of primogeniture—succession to property along the male line—and required concerned groups to modify the practice of succession to permit female inheritance. For the courts to enjoy legitimacy in performing this job, constitution builders will need to address their composition. The absence of pluralism on the bench may be used to reject decisions arrived at by judges who are not schooled in or have no appreciation for the legal norms concerned or the interests of the groups advocating them.

There may be a tension between on the one hand the commitments in the international instruments to the equality of women and men in family life and on the other hand a commitment to provide formal recognition for competing legal norms that in practice embrace inequality between women and men in family life.

Implications

What should constitutional protections of the rights of women achieve? As a start, the very participation of women in constitution building is consequential: if women are mobilized to decide constitutional issues they will generally ensure that constitutions address issues that are pertinent to the legal and societal status of women. Such groups often create space on the constitutional agenda for women's issues, including in difficult post-conflict negotiations.

The rights of women are likely to improve if the national government is committed to such an objective and if it subordinates customary and local gender laws despite resistance from traditional leaders. If a society is fractured along the lines of plural nations or tribes, national politicians may be less willing or committed to legally elevating a particular type of cultural/social life at the national level.

If political channels are closed to women, constitution builders may consider allowing them to turn to legal measures that provide the opportunity to present rights claims. A legal decision in some cases may actually work politically, allowing politicians to support a legal finding and acquiesce, where a similar decision by political bodies would spark a backlash. Constitution builders will then need to consider the existence and ambit of exceptions to equality clauses in the constitution.

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If the constitutional system is intended to multiply the number of power centres, the implications for the rights of women will still vary. Women may need to negotiate rights in both local and national spaces. This is particularly the case if local governments are fairly independent or able to resist the national assertion of authority. Women's rights may hinge on local customs and regional political opinion. The actual protection of their rights will vary from one region to another. In some cases the existence of general constitutional principles concerning women's rights may provide a basis for lobbying local governments to comply. Increasing the local participation of women in political decision making would strengthen women's positions. And a 'race to the top' may ensue, as regions consider affirmative-action policies operating in other regions as 'best practice'. Mobilization here may follow the bottom-to-top mobilization of women's rights, as seen in Bolivia. In the absence of a national consensus on the rights of women, practitioners in each setting will have to weigh whether to address local discriminatory practices in the constitution.

Women's rights may hinge on local customs and regional political opinion. The protection of their rights will vary from one region to another. Increasing the participation of women in local political decision making and their bottom-to-top mobilization would strengthen their positions

Finally, constitution builders have recently established special constitutional bodies that are dedicated to advancing or protecting the rights of women. The range of their functions actually differs, from those with power to redress individual cases to those that are restricted to advising policymakers and legislators. The creation of bodies such as gender ombudspersons and women's human rights commissions presumes an ability to monitor public officials independently. Debate is ongoing as to whether women's rights are best protected through institutions that are solely concerned with the concerns of women, insofar as these are ascertainable, or whether women's rights are not best served by requiring all public institutions to foster a human rights culture that respects the equality of women and men. Emerging options for the latter include the requirement in Kenya's new Constitution that the composition of all public bodies must include one-third of members from each gender. In addition, there is encouragement for public offices to ensure that their heads and deputy heads represent both genders.

8.3. Economic, social and cultural rights

During constitution building in conflict-affected societies, negotiation over the role, status and application of the ECOSOC rights is also fraught with tensions. The ECOSOC rights give rise to acrimony precisely because they concern who gets a share of limited resources, although if resources are adequate this can limit the acrimony. The Iraqi Constitution guarantees enforceable ECOSOC rights—including a right to free education, both child and adult health care, a safe environment (though this is undefined), social security, a suitable income, appropriate housing and a decent standard of living for

all Iraqis—without regard to the availability of resources, partly because the country has oil revenues. In addition, the Constitution mandates the complete eradication of illiteracy without qualification. In contrast, most countries operating under resource constraints guarantee citizens only their most immediate concerns such as access to education, health care and housing.

The ECOSOC rights give rise to acrimony precisely because they concern who gets a share of limited resources. Most countries operating under resource constraints guarantee citizens only their most immediate concerns such as access to education, health care and housing.

The major practical tensions involve two issues: first, what to include and to omit in the constitution with respect to these rights; and, second, what implications will arise from their inclusion in the constitution and how to redress those that spur new conflicts.

8.3.1. What to include?

Prolonged and intractable conflict may propel support for the expansive inclusion of economic, social and cultural rights in the constitution in order to:

- provide a framework within which decisions affecting the development, use and allocation of resources can be evaluated, particularly where one cause of conflict concerns who gets access to and benefits from state resources;
- bind the legislative and policymaking authorities and decision-making processes to new constitutional standards on resource use;
- symbolize that the economic, social and cultural agency of individuals is an important attribute of citizenship in the state, and that these entitlements mean citizens are not to be seen as dependent on patronage in ethnic, religious, clan, political party or other associations;
- advance reconciliation through recognition of the ECOSOC rights of specific groups who have been pushed into conflict with the state due to prolonged and unfair displacement into the economic, social or cultural periphery of the state; and
- as with all human rights, under the concepts of the indivisibility of rights, win legitimacy for a constitution that stipulates the ECOSOC rights and consequently allegiance to the new ‘social contract’.

The core ECOSOC rights are formulated in an international UN treaty—the ICESCR, which entered into force on 3 January 1976 (see box 4).

Box 4. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides, inter alia, for:

- the right of peoples to self-determination (which includes ownership and control of their own natural resources and means of subsistence);
- the right to work (which includes a right to free choice of livelihood);
- the right to just and favourable conditions of work (which includes fair pay, equal remuneration for equal work, safety at work, decent living standards, promotion based on merit, and reasonable periods of rest/vacation);
- the right to form and join trade unions and associations (including a right to strike subject to applicable laws);
- the right to social security (pension, social insurance);
- the protection of the family (reasonable and paid maternity leave, punishment for the social and economic exploitation of children and young persons);
- the right to an adequate standard of living (freedom from hunger, adequate food, clothing and housing);
- the enjoyment of the highest attainable standard of physical and mental health (including medical treatment and service for all in the event of sickness);
- the right to education (including compulsory and free primary education for all); and
- participation in cultural life and the opportunity to benefit from scientific progress (including the protection of the scientific, literary and artistic rights of authors).

Since most states have by now ratified this instrument, the inclusion of economic, social and cultural rights in constitutions in recent processes of constitution building has been the rule rather than the exception. Many constitutional provisions have adopted the human rights language of the ICESCR. Even countries such as India, whose Constitution of 1949 predates the ICESCR, have found a way to ‘constitutionalize’ them through a Supreme Court decision in that country that these rights concern basic needs that are integral to a right to life, which is protected in the Constitution. The ICESCR requires states to promptly remove obstacles to the immediate fulfilment of a right. While rights may be progressively realized, obstacles and elements of discrimination should be removed immediately. Authorities violate the Covenant if they fail to meet a human rights standard that is already within their means and ability to meet. In the course of progressive realization of rights, limitations

The inclusion of economic, social and cultural rights in constitutions in recent processes of constitution building has been the rule rather than the exception.

should be kept in check and avoided save where resources become limited, so these rights call for constant improvement of the situation and the resumption of progressive realization as soon as resources allow.

Rather than being a blueprint, the ICESCR leaves it to national actors to determine the degree of variation required by their circumstances, their legal system and the available means. Constitution builders may expand on it to provide for additional rights that are not included in the instrument, for example, the right to clean drinking water in the Interim Constitution of Nepal.

The adoption in the constitution of the ECOSOC rights does not necessarily imply the adoption of a specific economic system (a liberal or centrally planned economy), but this may be expressly or implicitly the result of the way in which the corresponding constitutional provisions are introduced.

Economic, social and cultural rights require systematic governmental action and depend on the availability of resources for their fulfilment. Under the ICESCR, they may be progressively realized depending on the available means, but states are obliged to take steps to remove obstacles and elements of discrimination immediately.

The underlying question for anyone drawing up a constitutional text is whether it is admissible to use people as means to achieve medium- or long-term economic objectives. Many constitution builders do not support this perspective and insist that economic objectives should be sacrificed when the rights and well-being of people are thereby negatively affected.

In the same regard, adopting an economic system or model may lead to the opening up of ongoing discussion areas, but this is almost inevitable where the constitution is identified as an instrument which sets out a specific government programme.

8.3.2. What are the implications?

Demands for constitutional protection of these rights have been hotly contested, particularly on the issue of how they will be enforced and implemented.

Who will be the 'real' bearers of these rights?

A starting point is consideration of the issue of on whose behalf these rights will be implemented. Are there groups that constitution builders intend to benefit on account of any particular circumstances, for example, individuals and groups living in extreme poverty? For instance, in reaction to a problem of chronic malnutrition in mountainous Bolivia, a right to food was included in the new Constitution with the intention of supporting redistribution of a tax on hydrocarbons to feed people. Or can social rights aim at reinforcing demand for social safety nets that are calibrated to reduce social or gender inequalities? It is often the case that groups demanding the inclusion of these rights in the constitution view this as a means to an end. Constitution builders may opt to consider provisions in the constitution that merely stipulate these rights as a starting point that needs to be reinforced by directive guidance. For instance, the guarantee of a right to education may be reinforced by a commitment to a goal of achieving universal

primary education. This may lead to an integrative design between the rights guaranteed in the constitution and the broader developmental and other goals of the state as well as its major priorities that are also catered for in the constitution.

The question whether these rights should be pegged to citizenship is not easily resolved. Rights that are stipulated in constitutions should have a general application to everyone and constitutions should aim to avoid discriminating between individuals and groups on arbitrary grounds. At the same time, the issue of who actually bears the various economic and social rights is heavily contested. For instance, will non-citizens also be entitled to claim a right to work or to access to adequate housing? Considering the nature of the obligations incurred, meeting which will require the deliberate allocation of a state's assets and resources, officials may prefer the entitlements to be restricted to citizens. This line is also strongly supported by nationalists and related groups and is often a major factor in xenophobic and anti-migration sentiment. The inclusion of these rights is furthermore often framed as a social contract between citizens, as essential contributors to taxes, and officials who ensure that public services benefit contributors. Politically, the arrangement helps to secure the support and allegiance of those who contribute to the government that provides services through their taxes. But this equation excludes those who cannot prove citizenship or are in fact non-citizens, such as refugees and other aliens.

In addition, even the use of these rights as an important attribute of citizenship does not resolve the contestation between different groupings within the state. Public officials naturally resist the implication that members of the armed forces or the public service can realistically enjoy a right to strike. In some countries, constitution builders have used the opening in the ICESCR to qualify who is entitled to enjoy this kind of right. There are varied options. In South Africa the judiciary has stated that the members of the defence forces can strike; in other countries this is expressly ruled out. In a context affected by conflict, the idea that members of the armed forces have a right to strike may appear astonishing, particularly when constitution builders are even contemplating making it a citizen's duty to undertake national service.

How will the rights be implemented?

Constitution builders have considered options for implementing and enforcing these rights through (a) legal and (b) political measures.

Typical criticisms of the constitutionalization of economic and social rights can be summarized as follows. First, since these rights require systematic governmental action, it is clear that they depend on the availability of resources for their fulfilment. Yet the resources may be scarce. Given the assessment by the World Bank that conflicts set back development by 10–15 years, it can be assumed that constitution building in countries affected by conflict is dealing with resources made even scarcer by conflict. Second, determining the use and allocation of scarce resources is a political process subject to electorally competing ideas of the good life. From this perspective, the attempt to calculate a 'core minimum content' for what will be a right to a claim on scarce resources is too contentious to be couched as a constitutional right. Third, even if it is accepted

that state assets and resources should be used according to a rights-based approach, here the rights-based claims are in competition between different contesting groups and the constitution should not elevate any particular claim over any other. Fourth, it cannot be within the mandate of unelected judges to decide on the varied contests that arise. Moreover, they lack adequate policy relevant information, such as statistical data, to make a competent decision.

How will economic, social and cultural rights be implemented? Including them in the constitution per se does not end contests between competing claims.

Despite these criticisms, many vulnerable individuals and groups whose access to and involvement in political processes limit their ability to secure political action in their favour have tended to use constitution building to demand legal enforcement of these rights. Opposed to them have been groups which preferred, for various reasons, to let elective institutions decide on the contestation. Constitution builders ought to be aware that constitutionalization per se does not end these contests. In general, however, some rights have been made legally enforceable, perhaps in recognition of the impact of international law under the ICESCR. Labour relations and related rights (to strike, to form trade unions and associations, not to be subjected to forced labour, to protection from work-related harm, etc.) are generally legally enforceable.

Legal enforcement

The direct consequence of permitting legal enforcement is that judges may be required to deal with implementation of the ECOSOC rights when disputes arise concerning them between litigating parties. To facilitate this, constitution builders have generally considered:

- clearly enumerating the ECOSOC rights in the bill of rights without any distinctions and with as few limitations as politically acceptable;
- recognizing the mandate of a judicial body such as a constitutional court to determine disputes involving any provision of the constitution;
- providing that people should face no discrimination in the enjoyment of the ECOSOC rights; non-discriminatory enjoyment of the ECOSOC rights is in terms of the ICESCR immediately realizable;
- directly authorizing and mandating legislatures to make laws to make the ECOSOC provisions operational; in some few cases, time frames have been used;
- articulating principles and criteria to guide legislation on the ECOSOC rights in order to strengthen judicial scrutiny of the latter;
- expressly bolstering civic-minded groups so that they have the legal standing to initiate and prosecute court cases; and
- expressing the connection with international law to augment domestic law.

Implications of legalization

Under international law, the legal obligation to implement economic, social and cultural rights is pegged to minimalist standards of ‘core content’. One key aim is to achieve global standardization in the ways in which different states with different legal systems treat these rights. Core content is a baseline for future progressive realization. While the ICESCR allows for ‘progressive realization’ of the rights contained in the Convention, there are two obligations that apply fully and immediately to all economic, social and cultural rights irrespective of the availability of resources: the obligation to ensure non-discrimination and the obligation ‘to take steps’ towards the realization of these rights.

Enforcement may also need several pieces of new legislation. Practitioners can also refrain from using language in the constitution that allows indefinite delay in enacting the required legislation. A violation of the ICESCR can still occur in spite of progressive realization if a state party does not take a measure that is within its existing means to achieve. Greater standardization at a global level has been aimed at through clarification of the nature of states’ obligations under the ICESCR. States have an obligation to take measures and provide the means that facilitate the fulfilment of these rights, for example, to establish the necessary legislation. This is an *obligation of conduct*. In addition, the fulfilment of these rights is embodied in particular results in specific cases, including those that the ICESCR Committee may require of state parties when following up on their reports. Here, there is an *obligation of outcome*. In embodying the ICESCR in the constitution, constitution builders may find it useful to evaluate the nature of the obligations it will impose.

Legalization of implementation in national constitutions may allow judiciaries to align themselves with the developing international law, or to develop their own lines of implementation in the interest of the domestic legitimacy of their actions. That means that more variations can be seen in legal enforcement since it is subject to the existing legal system and tradition in each state.

South Africa offers an illustration of the effect of the legalizing option. The Constitution of 1996 not only recognizes economic, social and cultural rights; it also includes them in a legally enforceable Bill of Rights, and it establishes a Constitutional Court as the custodian of the Bill of Rights. Since 1996 the Court has issued orders dealing with the implementation of these rights in relation to access to adequate housing, access to HIV medication, and the right to clean drinking water, in a case where it even developed a calibration of individual entitlement in terms of litres per day. In one of its early decisions, the Court formally departed from the ‘minimum core content’ rule and adopted a new judicial standard of ‘reasonableness’. When deciding over the government’s conduct in relation to one of these rights, the Court will aim to consider whether it was reasonable in the light of the circumstances surrounding it. Reasonableness is actually a fairly common judicial approach in common law countries, which also take the view that rights do not as such have a ‘minimum content’. South Africa’s Constitution was certified by the same Constitutional Court, as part of the negotiating process, ahead of its promulgation. The Court had a good opportunity to weigh in on the issue of

enforceability of the ECOSOC rights, which partly explains their legal enforceability in that context. From its perspective during the certification procedures, rights only grow through use by citizens and their content evolves through legal interpretation. The Court mentioned the right to freedom of expression as an example of a right that has grown through judicial interpretation. It also mentioned that, at least in South Africa, courts adjudicating on rights follow a cardinal rule of not deciding more than is absolutely necessary in a particular case in disputes between parties. Hence a key to what judiciaries can be able to do via legal enforcement could be seen in the light of the need for domestic legitimacy for their roles as such, rather than as being based on an international legal regime that says how these rights should be legally implemented.

In India, the legalization of a human rights culture, spurred on by the unique role of public interest litigation, has also permitted the country's top court—the Supreme Court of India—to develop an Indian approach to enforcement. The Constitution of India of 1949, predating the ICESCR, unsurprisingly did not include economic, social and cultural rights. Instead the Constituent Assembly agreed to open the door to influence policymakers by means of directive policy guidelines that were stipulated to facilitate a socialist transformation of the new nation. Yet the Supreme Court was able to decide that these rights embody the basic needs of any individual and as such must be an integral part of the legally enforceable right to life. The Supreme Court's assumption of its role has not been free of controversy; in fact, institutional conflicts between the Supreme Court and the legislature in India around the implementation of human rights are not new. A conflict arose between the Supreme Court and the legislature after the former adopted a legalistic approach to strike down a redistributive property law. Due to protracted debate, the Constituent Assembly of India had opted to recognize property rights in sections dealing with 'directive principles' rather than in an enforceable bill of rights. The legislature vocally opposed the ruling in *Sankari Prasad Singh versus Union*

of India, stating that the Constitution of India does not protect private property as such, but instead promotes measures that permit the majority of capital-poor Indians to access property in an equitable fashion. To protect agrarian reform from court action, the legislature passed the Ninth Schedule Amendment (1951) to the Indian Constitution, which curtailed the jurisdiction of courts in this and other areas.

Courts will be in a position to deal with all the issues that will arise in enforcing economic, social and cultural rights. Constitutions builders may also have to rely on political actors to address these rights, but they will still need implementation procedures.

With legalization, constitution builders will need to consider the effect of permissible constitutional limitations in relation to these rights. Limitations on constitutional rights may be justified; it is common for constitutions to include a clause that lays down the standards that apply for limitations. Some of these standards are concerned with specific rights or the purpose of the limitation.

One concern has been that legalization of economic, social and cultural rights will overburden the judiciary with litigation. In the case of South Africa, where the rights are

legally enforceable, the workload in the courts, counting decisions of the Constitutional Court from 1996, reveals that a greater proportion of the caseload is still related to civil and political rights, and in particular rights within the criminal process. Constitution builders, however, should be aware that legalization does not always mean that courts will be in a position to deal with the issues that will arise. They may therefore also have to rely on political actors to address the ECOSOC rights.

Political choices

Many of the issues that are raised by the contestation for economic, social and cultural rights extend beyond constitutional frameworks; in particular, the role and impact of economic development and globalization since 1990 cannot be ignored. On the one hand, some of the international resources that conflict-affected states could rely on to reinforce expansive economic and social rights are now greatly diminished. On the other hand, the dominant ideological context is pushing states to adopt free-market choices in which private actors rather than the state assume a greater responsibility for the delivery of many of the services contemplated by these rights. If the reality is one of state deregulation of industry, privatization of state assets, investor-friendly tax incentives, austere public spending budgets, and a flexible job market, then what scope will constitution builders give to the ECOSOC rights? How much of a public space will there be to support all segments of society to participate fully in the economic life of the state, including in the choice of economic policy, when the state's sovereignty over the economy is shared with technocratic, supranational entities? These kinds of questions are critical. They need not lead to symbolic and token constitutional measures, but they may be a reason to assign the implementation of these rights to political actors and to leave more room for politics to negotiate the available spaces.

The treatment of the ECOSOC rights as part of a political foundation of the constitution, rather than a predominantly legal one, still requires implementation procedures. Constitution builders have considered several options whose common or underlying character is the reliance on non-judicial enforcement procedures. Options have included the following.

- ECOSOC rights are included in the constitution, including in a bill of rights, subject to express limitations on judicial enforcement.
- The rights are included as 'directive principles of state policy' aimed at political actors and policymakers.
- The ECOSOC rights can still be reinforced by other enforceable rights. Since the enjoyment of these rights depends on policies, as well as the use of tax money, practitioners can weigh in to enable citizens to scrutinize government policy and spending and their implications for the ECOSOC rights. This can be done through a constitutional obligation to recognize the right to access to official information and by authorizing the legislation to give it operative effect.

- Another arm of implementation is to establish an institution that can assist ordinary citizens to get help. Ideally, such an institution is independent of the executive policymakers and the legislators who determine budgets. Its distinctive feature is its non-judicial character. The ombudsman is one such public protector. In many countries, these can investigate violations of the ECOSOC rights and make recommendations for legal and administrative reform.

These kinds of options may, crucially, make it clear who is to be held accountable for non-implementation of these rights. The language of directive principles can clearly state who is responsible; if legislation is expressly required, the information can be used to lobby parliaments and to monitor the record of parliamentarians. In Latin America, civic groups pushing for meaningful ‘economic citizenship’ on behalf of indigenous peoples and other vulnerable groups have used provisions in directive principles to demand human rights impact assessments in official development projects. For the drivers of change in different ethnic groups, the ECOSOC rights might provide a tangible measure for examining claims of discrimination—to separate the perception of discrimination from actual discriminatory practices.

The constitution may not definitely resolve the issue of economic, social and cultural rights but it can set out principles to guide decision makers. If they are deeply contested in meaning and effect, enshrining these rights in a constitution may prove counterproductive.

A stable and flexible human rights culture may require courts and legislatures to strike a balance between legal and political safeguards. Constitution builders can also link developmental goals to the ECOSOC rights and create an economic council to advise the executive or all public authorities on economic policies, including the implementation of rights.

The constitution may not definitely resolve the issue but can set out principles to guide decision makers. If they are deeply contested in meaning and effect, enshrining the ECOSOC rights in a constitution may prove counterproductive. That conflict will persist unless economic and material conditions improve for the poor, a result that is perhaps beyond the reach of a constitution. Enshrinement can also expand institutional conflict between the executive and the judiciary or between courts and parliaments. There is no single road to the full realization of the ECOSOC rights, and successes and failures have been seen in different constitutional systems.

9. Conclusion

The relationship between a human rights culture and constitution building is complex given the centrality of demands for and contests over rights in societal divisions and conflicts. Human rights play a central role in conflict settlement between groups, yet their inclusion in the constitution of a conflict-affected state is not tension-free. Over time, the scope and significance of human rights have expanded. They not only limit the powers of government vis-à-vis individuals in a free society; marginalized individuals and groups also claim them as vehicles for continued involvement in political and economic governance. In socially diverse, deeply divided and conflict-affected states, the constitution has become a contested framework for the way in which individuals and groups will live their lives. Its purpose extends beyond the narrow scope of a constitution as law. Because constitutions cannot guarantee their own protection, but need political will and dynamic institutions that are able to act, constitution builders need to focus beyond the inclusion of rights in bills of rights. It may be possible to give more attention to defining appropriate constitutional measures that will support rights within the given power system, rather than separate from it. Constitution builders also have to consider how different institutional designs assign political power, and how differing visions of the constitution contribute to shaping a human rights culture. In that way the rights could serve as an integral limb of the moral basis for the legal and political foundations of the constitutional system, rather than in parallel to it.

It is true that conflict and deep division can compound the problems of building a human rights culture under a durable constitution. The experience of authoritarianism, ethnic fractures, violence, possibly long periods under emergency rule where suspension of rights was prolonged, a

Human rights play a central role in conflict settlement between groups, yet their inclusion in the constitution of a conflict-affected state is not tension-free. In socially diverse, deeply divided and conflict-affected states, the constitution has become a contested framework for the way in which individuals and groups will live their lives.

weak judicial oversight culture and lack of legal literacy among ordinary people, the absence of strong pressure groups if they are not recognized or encouraged, the problem of multiple organizations concerned with rights only to the extent that they involve their own constituencies and so on—all these factors point to the difficulties faced by many countries that are grappling with building constitutions. Practitioners have to strike the balance, recognizing the limitation of constitutions and human rights foundations, but also see possibilities to open spaces that did not exist before and to allow mobilization of groups in public affairs that was not possible before.

Table 1. Issues highlighted in this chapter

Issues	Questions
1. Defining your human rights culture	<ul style="list-style-type: none"> • Why should human rights be included in a constitution? • Which rights will be included in a constitution? • How do the experience of conflict and the contextual situation determine which rights will be included in or excluded the constitution? • How does thinking in terms of a human rights culture rather than focusing only on human rights options in constitutions assist constitution builders to approach rights more holistically or comprehensively?
2. Constitution-building processes and human rights culture	<ul style="list-style-type: none"> • How does the process used to frame a constitution relate to what it ultimately contains concerning human rights? • How do the nature or rationale of a constitution and the kind of political system it establishes provide a textual framework to shape the scope of human rights?
3. Human rights culture in a conflict context	<ul style="list-style-type: none"> • How should constitution builders treat a past culture of gross violation of human rights in order to build a new constitutional culture of human rights? • How does the system of allocating power in the light of societal conflict shape the constitutional human rights culture? • Does it matter for the implementation of human rights if a constitution elevates political dialogue or (alternatively) treats judicial or legal approaches as preferred processes for the resolution of serious social disputes? • How do conflicts between domestic laws and international human rights law affect a human rights culture?

4. Deciding on human rights options in constitutions	<ul style="list-style-type: none"> • What criteria do constitution builders generally consider before deciding on what human rights options to build in to a constitution? • What implications do distinctions between individuals, groups and peoples have for the human rights language in a constitution?
5. Enforcement of human rights	<ul style="list-style-type: none"> • Why is it critically important that constitution builders think carefully about enforcement up front when framing human rights options in a constitution? • What issues concerning enforcement will generally arise?
6. Human rights as factors of social tension	<ul style="list-style-type: none"> • Can constitutional guarantees for human rights risk increasing conflicts in societies, instead of mitigating them? • What kinds of tensions arise in the discussion of human rights during constitution building? • Which issues are likely to draw greater tensions during constitution building in diverse contexts? • What risks accompany implementation of the constitution when it comes to guarantees for rights that are highly contested, and how can these be minimized?
7. Consensus on human rights culture amidst divisiveness of specific rights	<ul style="list-style-type: none"> • Are there rights that are more likely to spark divisiveness than others? • What tensions do guarantees of minority rights give rise to and how can constitution builders increase consensus on these rights? • What tensions do guarantees of the rights of women give rise to and how can constitution builders increase consensus on these rights? • What tensions do guarantees of economic, social and cultural rights give rise to and how can constitution builders increase consensus on these rights?
8. Conclusion	<ul style="list-style-type: none"> • When it comes to using the constitution-building process to build a culture of human rights, what is it important for constitution builders to be aware of?

Notes

- ¹ Glenny, Misha, *The Balkans 1804–1999: Nationalism, War and the Great Powers* (London: Granta, 2000), paraphrasing from pp. 32–38.
- ² International IDEA, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2005).

Key words

Human rights, Fundamental rights, Civil liberties, International standards, Human rights culture, Civil rights, Political rights, Cultural rights, Economic rights, Social rights, ECOSOC rights, Citizenship, Affirmative action, Positive discrimination, Women's rights, Religious rights, Minority rights, State of emergency, Ombudsman, Human rights commission, Vulnerable groups, Marginalized community, Gross violations, Amnesty, Immunity, Transitional justice

Additional resources

- **United Nations Office of the High Commissioner for Human Rights**

<<http://www.ohchr.org/EN/Pages/WelcomePage.aspx>>

The High Commissioner is the principal human rights officer for the UN and leads its human rights efforts by conducting research, education and the dissemination of public information. The website has programmes for implementing human rights and resources on human rights, as well as training materials and a forum on current human rights challenges.

- **UN Human Rights Council**

<<http://www2.ohchr.org/english/bodies/hrcouncil/>>

The Human Rights Council is an intergovernmental body within the UN system made up of 47 states responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 with the main purpose of addressing situations of human rights violations and making recommendations on them.

- **United Nations Development Programme Democratic Governance focus on Human Rights**

<http://www.undp.org/governance/focus_human_rights.shtml>

The United Nations Development Programme (UNDP) supports human rights development by building the capacity of human rights systems and institutions, engaging with international organizations, and promoting national judiciaries. The UNDP website provides resources and has a support programme for human rights practitioners.

- **African Commission on Human and Peoples' Rights**

<<http://www.achpr.org/>>

The Commission was established under the African Charter on Human and Peoples Rights to ensure compliance with the Charter by member states.

- **Charter of Fundamental Rights of the European Union**

<http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm>

All member states of the European Union (EU) are bound by the Charter of Fundamental Rights, in force since 2007. The core values of the EU are set out in the Treaty of Lisbon and include human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

- **Arab Human Rights Index**

<<http://www.arabhumanrights.org/en/>>

The Human Rights Index for the Arab Countries, sponsored by the United Nations Development Programme on Governance in the Arab Region (UNDP-POGAR), is a repository for the entire set of UN documents pertaining to human rights and the responses, including reservations, by the Arab member states to the committees that monitor the core international human rights treaties.

- **Inter-American Commission of Human Rights**

<<http://www.cidh.oas.org/what.htm>>

The Inter-American Commission on Human Rights (IACHR) is one of two bodies in the inter-American system for the promotion and protection of human rights under the umbrella of the Organization of American States (<<http://www.oas.org/>>). The Commission has its headquarters in Washington, DC. The other human rights body is the Inter-American Court of Human Rights, which is located in San José, Costa Rica.

- **Inter-Parliamentary Union**

<<http://www.ipu.org/english/whatipu.htm>>

The Inter-Parliamentary Union (IPU) is the focal point for worldwide parliamentary dialogue and works for peace and cooperation among peoples and for the firm establishment of representative democracy. The IPU carries out work on thematic human rights issues.

- **World Legal Information Institute**

<<http://www.worldlii.org/>>

The World Legal Information Institute maintains a rich catalogue of legislation and key judicial decisions from different countries. The catalogue can be searched by country and subject matter.

- **Government Legal Information Network**

<<http://www.glin.gov/search.action>>

The Law Library of the US Congress maintains this online network which has information on legislation from a number of countries across the world and is searchable by subject.

- **International Network for Economic, Social and Cultural Rights**

<<http://www.escr-net.org/>>

The ESCR advocates a link between human rights and economic and social justice in order to reduce poverty and inequality by providing a resource for national actors to reach out globally for new disciplines and approaches to addressing these issues. This non-profit, non-governmental organization provides on its website an interactive network of experts and practitioners working to support the development of economic, social and cultural human rights around the world.

- **Council of Europe**

<<http://www.coe.int>>

The Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The website has resources, publications and training materials geared towards strengthening human rights enforcement.

- **HUDOC: The Case Law of the European Court of Human Rights**

<<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>>

HUDOC is a database of cases and decisions by the European Court of Human Rights and the former European Commission of Human Rights.

- **Asian Legal Resource Center**

<<http://www.alrc.net/>>

The non-governmental organization the Asian Legal Resource Center (ALRC) promotes cultural, economic and social rights while working closely with national and international actors and emphasizing national autonomy. The website provides resources and training for legal professionals to strengthen human rights enforcement and the rule of law.

- **International Centre for Transitional Justice**

<<http://www.ictj.org>>

The International Centre for Transitional Justice (ICTJ) is an international non-profit organization that works to help societies address human rights violations by building trust in national institutions as human rights guardians. The site advises states and policymakers on issues of transnational justice and human rights and offers a publications library relating to research on these same topics.

- **United for Human Rights**

<<http://www.humanrights.com/home.html>>

United for Human Rights (UHR) works at the international, national and local levels to implement the Universal Declaration of Human Rights by providing educational resources and information on human rights history, efforts and terminology, along with a database of organizations devoted to human rights issues.

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Constitutions

(English versions accessed from <<http://confinder.richmond.edu>>)

- Constitution of Brazil, 1988
- Constitution of Colombia, 1991
- Constitution of Bolivarian Republic of Venezuela, 1999
- Constitution of Ecuador, 2008
- Constitution of Bolivia, 2009
- Constitution of India, 1949
- Constitution of Malaysia, 1957
- Constitution of East Timor, 2002
- Constitution of Afghanistan, 2004
- Interim Constitution of Nepal, 2007
- Constitution of Iraq, 2005, Articles 20, 30, 37
- Constitution of Hungary, 1949, amended version 1989
- Basic Law, Germany, 1949
- Constitution of Greece, 1975
- Constitution of Spain, 1978
- Constitution of Egypt, 1971
- Constitution of Ethiopia, 1994
- Constitution of South Africa, 1996
- Constitution of Nigeria, 1996
- Constitution of Rwanda, 2003
- Constitution of Swaziland, 2005
- Constitution of Kenya, 2010

Glossary

Affirmative action	A range of formal measures mandated by law or official policy, usually for a fixed or determined period, in order to give preferential treatment to specific individuals or groups so as to bring them to the same level as others, without intending thereby to disadvantage others
Citizen rights	Rights that the individual has on the basis of belonging to a state
Citizenship	A formal or legal status of belonging to a state usually by being born to citizens of that state or by being conferred such status through formal procedures
Civil rights	Rights related to participation in an open civil society. Examples include freedom from discrimination, equal treatment before the law, the right to freedom of the person and personal integrity, the right to privacy, the right to property, the right to fair trial and the administration of justice, protection from servitude and forced labour, freedom from torture, the presumption of innocence, and entitlement to due process in all situations where one's rights may be affected.
Constitution building	Processes that entail negotiating, consulting on, drafting or framing, implementing and amending constitutions
Customary international law	Rules of international human rights and humanitarian law that are considered to be universally accepted and therefore always legally binding in all situations, for example, the prohibition of slavery
Democracy	A system of government by and for the people. Literally means 'rule by the people'. At a minimum democracy requires: (a) universal adult suffrage; (b) recurring free, competitive and fair elections; (c) more than one serious political party; and (d) alternative sources of information. It is a system or form of government in which citizens are able to hold public officials to account.
Democratization	The process of creating or improving a democracy, which a constitution can aid by designing institutions and processes which entrench popular control, political equality and human rights
ECOSOC rights	An acronym that refers to economic, social and cultural rights, such as those provided for in the International Covenant on Economic, Social and Cultural Rights and other similar international human rights instruments. These rights are considered to relate to economic well-being, social welfare and enjoyment of culture.

Gross violations	Large-scale or systemic human rights abuses, often coupled with state repression and state violence against ordinary people
Human rights	Entitlements or claims that individuals have and enjoy on the basis of their humanity or human dignity and individual freedom
Human rights culture	An environment where ordinary people are routinely in a position to challenge public officials and in which those in authority respect human rights in practice
Minority rights	The individual rights applied to members of racial, ethnic, class, religious, linguistic or sexual minorities; the collective rights accorded to minority groups
Negative rights	Rights that protect against improper action and decisions by government officials
Obligation of conduct	An obligation of the state to take measures and provide the means to facilitate the fulfilment of the ECOSOC rights
Obligation of outcome	An obligation of the state to see that measures undertaken fulfil the ECOSOC rights, that is, have the desired result
Ombudsman	An official who is mandated to receive complaints from the public and enabled to inquire into them, usually relating to behaviour of officials
Political rights	Rights relating to political participation such as the right to vote, to stand for election and be elected, to freely form and join political associations, to freedom of expression and information, and to institutional guarantees for free, independent media
Positive discrimination	Deliberately permitting <i>affirmative action</i> measures to give an advantage to a specified group even though this will disadvantage others, usually justified by the need to remove and reverse illegitimate inequality
Positive rights	Rights which require government officials to take certain actions to support the fulfilment of freedoms guaranteed by the law or the constitution
Self-determination	The formal ability of a group to govern itself or to claim the right to take its own independent decisions over its collective welfare and political destiny
Solidarity rights	Rights that are meant to be claimed and enjoyed collectively or through membership of a society, within communities, groups and associations

- Transitional justice Legal and other remedies or measures to redress grievances and wrongs such as violations of human rights or acts of corruption that were committed in the past, typically only used during periods of major political change
- Women's rights Rights relating to women such as equality in political and public life, equality in employment, equality before the law, and equality in marriage and family relations

About the author

Winluck Wahiu joined International IDEA in 2006. In 2008, he was acting Head of Mission for IDEA in Nepal, where he helped to establish a programme in support of a participatory process of constitution building in the country. He was also involved in the process leading to the framing of Kenya's new Constitution in 2004–2005, primarily as a legal adviser to the Ministry of Justice and the Parliamentary Select Committee responsible for the process. He has also advised the umbrella human rights organization in Uganda (2004) and the Law Society of Swaziland (2004) on the process of constitutional change in those countries. Between 2001 and 2005, Winluck coordinated the African Human Rights and Access to Justice Programme, a joint initiative of the Kenyan and Swedish sections of the International Commission of Jurists together with its Secretariat in Geneva, supporting the national implementation of human rights norms through constitutional litigation in 16 Sub-Saharan countries. He is a constitutional practitioner and a graduate of the University of Nairobi, and has been honoured with a commendation (2005) of the Law Society of Kenya for his role in the country's constitutional process.

International IDEA at a glance

What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the field of elections, constitution building, political parties, women's political empowerment, democracy self-assessments, and democracy and development, IDEA undertakes its work through three activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.