



THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS

THE CONSTITUTIONAL  
PROTECTION OF  
HUMAN RIGHTS



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HUMAN RIGHTS



The Danish Institute for Human Rights drafted "The Constitutional Protection of Human Rights" as part of its endeavour in the Middle East and North Africa.

The team that produced this brief comprises:

Thomas Trier-Hansen, lawyer, Nordic Law Group Aps. , former Chairman of the Court of Greenland is the main author.

Lisbeth A.N. Thonbo, Head of Department a.i.; Anders F. Buhelt, former Head of Department; Paul Dalton, Senior Adviser; Lise G. Hendriksen, Head of Section; Stéphanie Lagoutte, Senior Researcher; Bent Vase, Corporate Management Adviser to DIHR and Mazen Shaqoura improved the content and language of the document.

Annali Kristiansen, Senior Adviser, DIHR, initiated and directed the process leading to the present document.

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Wilder Plads 8K

DK - 1403 Copenhagen K

Phone +45 3269 8888

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# 1. PREFACE

In recent years, new constitutions have been discussed, drafted and adopted in many places of the World. The constitutional protection of human rights is one of the core elements of these processes. In Latin America, Bolivia and Ecuador have been at the forefront of highly participatory drafting processes. As a result, the new constitutions now include detailed catalogues of human rights and indeed a further development of rights, such as the recognition of the right to water. In Europe, Norway and in Asia, Nepal are currently debating their constitutional frameworks and the place to be given to human rights protection.

With the concentration of constitutional work in Egypt, Morocco, Tunisia and Yemen, the idea of publishing a brief on the Constitutional Protection of Human Rights came about through conversations with partners in the Middle East and North Africa.

The Danish Institute for Human Rights has addressed human rights protection in constitutions and law-making both through research and concrete advice since the 1990s. While there will always be specificities to any constitution, there are also some fundamental conditions that should be met in order to

ensure an effective and efficient protection of human rights at the domestic level.

The purpose of this brief is thus to highlight the fundamental elements for ensuring an effective and efficient protection of human rights within a constitutional framework. It is meant to provide the reader with an overview of the important discussions that may arise in the course of drafting, amending or analysing a constitution. This brief focuses on the principles of and human rights at large, remedies to human rights violations and relations between national and international human rights law. Specific issues such as citizenship, nationality or minority rights are not addressed here as these areas require more thorough analysis. This brief builds on extensive empirical research of constitutions, constitutional processes and jurisprudence from most parts of the World. Each chapter provides an analysis, examples of constitutions and spheres of discussion that should help pinpoint and address human rights and related issues in constitutional processes.

The target groups for the brief are professionals that work occasionally with constitutional processes but who are not specialists in constitutional law.

## 2. INTRODUCTION

A state based on rule of law<sup>1</sup> is characterized by foreseeability, accessibility, accountability, separation of powers, as well as recognition and protection of rights of every person. Consequently, rule of law is fundamental for the fulfilment of human rights.

The United Nations has defined rule of law as: “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”

The rule of law and transitional justice in conflict and post-conflict societies, report of the Secretary-General, 23 August 2004 (United Nations S/2004/616).

The constitutional framework plays an important role to that effect by regulating the relationship between the various branches of government as well as the powers and functions of these, ensuring an appropriate balance between the state and the people, and regulating the relationship between domestic and international law. The constitution is rightly regarded as the supreme law of the land.<sup>2</sup>

### THE HIERARCHY OF LAWS

- The highest level of law is the Constitution.
- The second layer in the hierarchy of laws consists of procedural, organic, and substantive laws that must all derive from the Constitution.
- The third layer consists of sub-decrees and bylaws, which must derive from the above-mentioned laws within the second layer of the hierarchy of laws.
- All administrative decisions must have basis in law or in a sub-decree founded in law, if they are to have implications on the rights of the individual.
- According to the hierarchy of laws an inferior law must always conform to a superior law.

As the supreme law of the land, the constitution places certain limits on the sovereignty of the Parliament and in many cases defines the set of values of that country.

Historically the concept of human rights has, in general terms, developed from being a few procedural guarantees against arbitrary interference from the authorities and guarantees of certain freedoms<sup>3</sup>, into an internationally inspired framework for ensuring and promoting the rights of a person or group of persons as well as protecting against interference from the state or other actors.<sup>4</sup>

More recently some constitutions, often due to the domestic political agenda, also contain a type of obligation upon the state to ensure basic social services to the people.<sup>5</sup>

Since the beginning of the 20<sup>th</sup> century, human rights have become intensively internationalized. While the national constitutional rights and freedoms initially influenced the international agenda,<sup>6</sup> the creation of the United Nations and the adoption of the Universal Declaration of Human Rights (UDHR) have been fundamental and an inspiration for many post World War II national constitutional processes all over the world. The United Nations covenants on Civil and Political, and Economic, Social and Cultural Rights<sup>7</sup>, the regional human rights instruments<sup>8</sup> and the various thematic human rights conventions have later supplemented the UDHR as a source of inspiration when drafting national constitutions.<sup>9</sup>

Today, national constitutional human rights frameworks vary from a few states without a written constitution per se<sup>10</sup>, to states with a limited set of freedoms and rights enshrined in the constitutions<sup>11</sup> and to a large number of states with comprehensive bills of rights<sup>12</sup> incorporated into the constitution.<sup>13</sup>

## CONVENTIONS

- A convention is a result of a drafting and negotiation process.
- Once the final text is formulated, the convention is adopted with the consent of all the states participating in its drafting or sometimes by a vote at the conclusion of an international conference.
- The consent of the state to be bound may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
- A state may sign a convention subject to ratification, acceptance or approval. Consequently, the state is not internationally bound by the convention.
- A state that has signed a convention subject to ratification etc. is still internationally obliged to refrain from acts which would defeat the object and purpose of a convention until it has made its intention clear not to become a party to the convention.
- The internal effect of the ratification depends on the legal system of the ratifying state.

International human rights instruments do not dictate how State Parties should implement the rights covered by the instruments. However, the State Parties are obliged to respect and ensure the rights effectively and in good faith according to their international obligations, cf. article 26 of the Vienna Convention on the Law of Treaties.<sup>14</sup>

In theory, the optimal protection of human rights is to insert a list of human rights guarantees into the constitution. This recognition at constitutional level ensures that all branches of government are bound by the rights in their actions, and that legislation shall respect these rights due to the constitution's hierarchal supremacy.

Furthermore, it will automatically foster more public support for the human rights enumerated in the constitution, if their inclusion is a result of a participatory constitutional process and adopted by the people through a national referendum.<sup>15</sup> Such inclusion also fits into the notion of a constitution, whereby it is a binding legal document (with the force of law) by which a society organizes a government for itself, defines and limits its powers, and prescribes the relations of its various organs inter se, and with the people.<sup>16</sup>

In practice, however, there is no guarantee that the constitutional recognition of human rights by itself leads to a reduction in human rights violations in a country or provides more effective protection against human rights

violations. Lack of respect for the constitutional values, rights, and enforcement mechanisms may often go hand in hand with the presence of authoritarian regimes, absence of rule of law, lack of accountability, scarcity of resources and low public awareness about rights and duties in a particular country.

The brief analyses the main prerequisites within the constitutional framework that is likely to optimize the protection of human rights at national level.<sup>17</sup> Consequently, the brief focuses on human rights as guiding principles and core values as part of a national policy and identity, the character of human rights, the available national remedies and human rights mechanisms and the relationship to relevant international human rights instruments and systems.

Chapter 3 covers three elements: The constitutional framework's relevance for granting human rights effectiveness and efficiency, examples from other constitutions and finally a set of points to be addressed through discussion. These spheres of discussion are intended to guide the evaluation of an existing or the drafting of a new constitution.

Finally, Chapter 4 of the brief discusses further the inter-linkage between constitutional protection and effective and efficient protection of human rights.

The analysis contains frequent references to a number of national constitutions. Some of



the constitutions referred to are from countries with similar legal, political, cultural or historical contexts to those countries in the Middle East and North Africa where constitutional reform processes are now underway. Others illustrate particular issues that are likely to arise in the context of these processes. Some of the constitutions were developed in countries in transition<sup>18</sup> or in countries with a young democracy,<sup>19</sup> others in the Middle East.<sup>20</sup> Finally, some have been selected due to their origin in civil law systems, since many of the countries in the Middle East and North Africa are based on the civil law rather than the common law system.<sup>21</sup>

## 3. HUMAN RIGHTS

### THE CONSTITUTIONAL FRAMEWORK

#### 3.1. THE PREAMBLE

A preamble usually contains introductory remarks to the constitution. Sometimes the preamble is just a few words; sometimes it is a resume of historical facts, an explanation or a confirmation of a set of values.

#### THE APPLICABILITY OF THE PREAMBLE

Many constitutions make a general reference in the preamble to values such as respect for human rights, human dignity, rule of law, social justice, equality and democracy.<sup>22</sup> Although the preamble might be seen as a non-binding declaration, its potential for binding impact should not be underestimated.

In some instances, the preamble may contain reference to national human rights laws or international human rights standards.<sup>23</sup> By virtue of this reference, the national courts may set aside domestic legislation contravening such human rights standards if they are identifiable.<sup>24</sup> On other occasions, a preamble has been used as a guideline for interpretation or as a value to be observed by the branches of government.<sup>25</sup> The Constitution of Morocco

states that the preamble is an integral part of the Constitution.<sup>26</sup>

#### FOUNDING RELIGIOUS VALUES IN A CONSTITUTIONAL CONTEXT

In countries with a strong consciousness regarding the religious foundation of the nation, the preamble may refer to a specific religion as one of the core values of the State.<sup>27</sup> The recognition of a specific religion as a state religion in the constitution is not uncommon either.<sup>28</sup>

Some constitutions do not make any reference to a specific religion, but instead recognize religious diversity in the preamble.<sup>29</sup> Other constitutions are based upon the principle of secularism and recognise the freedom of religion of all individuals.<sup>30</sup> The Constitution of Turkey emphasizes explicitly the principle of secularism. However its bill of rights includes the right of everyone to freedom of conscience, religious belief and conviction. The separation of state and religion in the Constitution of Turkey may be regarded as a guarantee of the freedom of belief and religion of everyone.

The recognition of a specific religion as a state religion may result in certain challenges in relation to the status of other religions and may have a bearing upon the protection, promotion and fulfilment of human rights. Most importantly, the predominant position of a religion in a constitution and a state must never prevent the freedom of religion of persons belonging to other religions: Discrimination based on religion must be prohibited.

A state religion may also have an adverse impact on human rights if religious texts and their interpretation by religious authorities are seen as legal sources of law that may prevail over human rights in the event of a conflict of norms. Religious texts (and their interpretation) as a source of law may have some shortcomings in relation to the rule of law principle: A rule derived from religious authorities might not be foreseeable and accessible and is potentially subject to inconsistent interpretation. In the same way, the recognition of religious authorities as the primary source of law may have an adverse impact on the constitutional protection of human rights if the constitution is subject to religious authorities in the event of a conflict, in which religious authorities are placed above the constitution in the hierarchy of laws.

In all situations, the constitutional recognition of the freedom of belief and religion of all and the prohibition of discrimination on the basis of religion is a paramount guarantee against the possible negative impact of a state religion or the predominance of a religion in one country.

The relationship between constitutional supremacy and any officially recognized religion is always a complex issue.

In the case of Islam, Intisar A. Rabb distinguishes between three sets of constitutionalisation of Islamic law:<sup>31</sup>

- Dominant constitutionalisation – where a constitution explicitly incorporates Islamic law as the supreme law of the land (Example: Iran, where jurists effectively control the government and interpretive legal decisions);
- Delegated constitutionalisation - where a constitution incorporates Islamic law but delegates its articulation to the jurists (Example: the Gulf Arab states, where interpretive authority over Islamic family law in particular is vested in the classes of jurists);
- Coordinated constitutionalisation – where a constitution incorporates Islamic law, laws of democratic processes, and liberal norms, placing them all on equal footing (Example: Egypt and Morocco, where the government and interpretive decision-makers have devised schemes of differing relationships with the jurists).

Some constitutions of Muslim countries refer to Islam as a religion: The Constitution of Afghanistan states that no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan (article 3). The Constitution appears here to refer to Islam as a religion and not as Islamic law. Other constitutions refer to the Islamic Sharia as a principal source or main source of legislation

such as Egypt,<sup>32</sup> Qatar, Kuwait and Bahrain.<sup>33</sup> Article 2 of the Constitution of Iraq states that Islam is the official religion of the State and is a foundation source of legislation: “No law may be enacted that contradicts the established provisions of Islam”. Intisar A. Rabb has claimed that the translation of this provision from the Iraqi constitution into English may have contributed to some misunderstandings. She argues that the text reads: “No law can be passed that contradicts Islam’s settled [legal] rules [or settled Islamic (legal) rules] (thawabit ahkam al-Islam).” Consequently it is Islamic Law that is incorporated and not the religion of Islam per se.<sup>34</sup>

Article 2 of the Constitution of Iraq reads on: “B. No law may be enacted that contradicts the principles of democracy. C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.” Therefore the Constitution of Iraq appears to place Islamic principles (or Law), democratic principles and fundamental rights and freedoms on an equal footing.<sup>35</sup>

Instituting Islamic law as the principal source of law in a country may result in the discriminatory treatment of non-Muslim individuals living in that country. It could be argued that by recognizing Islamic law as a source of law on an equal footing with other sources, the assumption of primacy of one of the sources of law over the other is reduced and the supremacy of the constitution is likewise reconfirmed.

For example, the Constitution of Morocco in its preamble states that it is a sovereign Muslim state and that pre-eminence given to the Muslim religion within the national ‘reference frame’ is on an equal footing with the values of the Moroccan people of openness, moderation, tolerance and dialogue for the mutual understanding of all cultures and peoples of the world.

The relationship between constitutionally protected rights and religious values is not only a question in relation to Islam, but to any religion.

For instance, the preamble of the Constitution of Ireland emphasizes that “in the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial...” In a number of cases this preamble has been applied by the Supreme Court of Ireland in determining the constitutionality of bills and laws that have interfered with e.g. the right to privacy. In some cases, the Supreme Court has rejected claims of unconstitutionality on the ground that the bill/law in question was guarding the Catholic principles and in light of these principles the interference with the right to privacy was permissible.<sup>36</sup> In these cases, Catholic principles have been considered as having supremacy over human rights. However, it has also been noted by the Irish Supreme

Court that the Irish people could change the Constitution if Catholic principles should cease to precede.<sup>37</sup>

The impact of incorporating various forms of reference to religion into the preamble or fundamental principles on the protection, respect and promotion of constitutional anchored rights and freedoms in States varies in the light of the interpretation of different constitutions. However, potential conflicts between religious values and human rights can be solved fairly and transparently in a society based upon the principle of the rule of law.

#### SPHERE OF DISCUSSION

- Is the constitution regarded as the supreme law of the land?
- What is the legal effect of the preamble according to the national legal traditions when determining the constitutionality of legislation, actions or omissions?
- Should specific human rights be explicitly mentioned in the preamble, i.e. by reference to national or international instruments?
- Should the preamble make a general reference to human rights?
- Should the preamble make reference to the religious foundation of the state and what are the consequences of so doing?
- How is foreseeability and respect for the hierarchy of laws ensured if a religious authority is considered a legal source?

### 3.2. FUNDAMENTAL PRINCIPLES AND VALUES

#### THE RATIONALE FOR MAKING REFERENCE TO FUNDAMENTAL PRINCIPLES AND VALUES

A general reference to respect for human dignity, human rights, rule of law and democracy has been included in many national constitutions through the incorporation of a set of fundamental principles, guiding principles, founding provisions, fundamental values etc.<sup>38</sup>

These general references stress the inter-linkages between rule of law, democracy and human rights as well as the fact that the state should both respect human rights and actively ensure the enjoyment of such rights. The fundamental principles are often regarded as 'national ambitions' and imperative in policy-making, decision-making or any other state action as well as for national co-existence.

#### THE NORMATIVE STATUS OF FUNDAMENTAL PRINCIPLES

Normally, constitutions incorporate the set of principles and values into the aim and duty of the state in general terms,<sup>39</sup> or into the various provisions determining the mandate and functions of the branches of government.<sup>40</sup>

Others are more detailed in their approach.<sup>41</sup> The Constitution of Malawi, for instance, contains a set of principles for national policy. The principles are directory in nature (that is not directly binding or justiciable) but courts are entitled to have regard to them in interpreting

and applying any of the provisions of the constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of the constitution.<sup>42</sup>

The Constitution of Sierra Leone of 1991, with subsequent amendments, includes a number of fundamental principles similar to those in the Constitution of Malawi. However, it also stresses that the provisions contained in that chapter do not confer legal rights and are not enforceable in any court of law, but the principles contained therein must nevertheless be fundamental in the governance of the state, and it must be the duty of parliament to apply these principles in law making.<sup>43</sup>

The fundamental principles may also have some importance when national courts or other adjudicating bodies interpret laws and decide the matters before them. In that sense, the principles have more or less the same status as the preamble. If the constitutional text makes reference to another legal text (a convention, a national instrument etc.), the normative basis for the fundamental principles is clearly established.<sup>44</sup> If not, the fundamental principles themselves would usually not be regarded as legal norms as such.

Although fundamental principles are not actual norms, a court may in some jurisdictions refer explicitly to the imperative (that is, 'binding') nature of the fundamental principles in determining the constitutionality of the matter before it.

The Constitutional Court of Colombia held that changes to a pension scheme violated the rights of retired persons. In determining the matter, the court made extensive reference to the fundamental principles of the constitution and in particular emphasized that:

“Colombia is a social rule of law state in accordance with article 1 of the Constitution. Among other things, this material definition implies that the traditional state or the state ruled by law now has a special, inherent characteristic which is exactly its social nature. At the same time, this nature leads to the conclusion that the human being is more important than the state since the state is at the service of the human being.”<sup>45</sup>

The South African Constitutional Court recognized the concept of **ubuntu** as a fundamental value in South Africa.<sup>46</sup> The “outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept.”<sup>47</sup> In the light of this argument, amongst others, the death penalty was found unconstitutional.

“Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation”, Constitutional Court of South Africa, CCT3/94, S v Makwanyane and Another, para. 308.

The Constitution of India includes a set of directive principles. A directive principle imposes upon the state an obligation to ensure that the directive principle is incorporated into state policies. Consequently, the principle does not as such give the individual an enforceable right. These principles were for a long time regarded as unenforceable by the Constitutional/Supreme Court of India. However, the Court appears to have moved away from this approach. In a judgment from 1987, the petitioner sought cancellation of a mining lease for excavation of limestone granted in favour of a mining company as it posed a danger to adjoining land, water

resources, pastures, ecology and environment. The Court concluded that to:

“...ensure the attainment of the constitutional goal of the protection and improvement of the natural wealth and environment and of the safeguarding of the forests, the lakes, the rivers and the wildlife and to protect the people inhabiting the vulnerable areas from the hazardous consequences of the arbitrary exercise of the power of granting mining leases and of indiscriminate operation of the mines on the strength of such leases without due regard to their life, liberty and property, the court will be left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions including the direction as to the closure of the mines, the operation whereof is proving to be hazardous and the total prohibition of the grant or renewal of mining leases till the Government evolves a long-term plan based on a scientific study with a view to regulating the exploitation of the minerals in the State without detriment to the environment, the ecology, the natural wealth and resources and the local population.”<sup>48</sup>

The directive principles became essential in understanding and interpreting the content and meaning of fundamental rights enlisted in the Constitution of India.<sup>49</sup>

The Colombian, South African and Indian decisions are evidence of a value-based approach to constitutional interpretation that effectively contributes to the protection of human rights.<sup>50</sup>

### SPHERE OF DISCUSSION

- Should the constitution include a set of fundamental principles/values?
- What is the applicability of fundamental principles/values according to the national legal traditions when determining the constitutionality of legislation, actions or omissions?
- Should the fundamental principles/values make reference to specific human rights or contain a general reference to human rights?
- Should the statement of fundamental principles / values be directory or mandatory in nature?
- To what extent should courts be entitled to refer to these fundamental principles / values when determining the constitutionality of law and / or the rights / obligations of individuals and the State in petitions coming before it for determination?

### 3.3 BILL OF RIGHTS

While the preamble and/or the fundamental principles sections of a constitution reflect ambitions and overall values, the bill of rights articulates the values into legal principles or rules.<sup>51</sup>

The character of the rights enumerated in the constitution may vary from a few fundamental freedoms to a large number of civil, political, economic, social, cultural, environmental rights for both individuals and groups. Some of the rights are formulated more vaguely than others, and some are subject to limitations. Some rights cannot be derogated from: They are absolute. The list of rights may only be changed through a special legislative process, which is a process subject to stricter requirements than the usual legislative process.

### THE LIST OF RIGHTS

There is no clear picture of an international or national model for the set of rights that a constitution must guarantee. Traditionally the rights covered by many constitutions were the political and civil rights and freedoms.<sup>52</sup> Today the number of rights has been extended to a wide-ranging catalogue of rights often inspired by the International Bill of Human Rights and other international and regional conventions.

Nevertheless, a referral to or an adoption of globally or regionally recognized rights may not be sufficient in order to achieve an effective constitutional protection. The rights shall be founded in the reality of the particular nation




and reflect the ambitions and concerns of that nation. Consequently, the drafting and national hearing (stakeholder) processes are of particular importance when designing a bill of rights.


Over the past few decades, various states have undertaken constitutional drafting or revision processes for different reasons: New democratization processes, constitutional reforms in order to make the constitution reflect a new national agenda<sup>53</sup>, or an ambition to strengthen democratic institutions, rule of law and human rights.<sup>54</sup>

Generally speaking, states that adopt a comprehensive list of human rights in their constitution today take their point of departure in the international human rights instruments adopted since the establishment of the United Nations, and most prominently the International Bill of Human Rights.<sup>55</sup>

When India became independent in 1947, the Constituent Assembly of India had the responsibility of drafting a constitution. From the very start, the intention was to include a list of fundamental rights as well a set of directive principles.<sup>56</sup> India found its inspiration in the Bill of Rights of England (1689), the Constitution of The United States of America (1787), the French Declaration of the Rights of Man (1789) and the Constitution of Ireland (1937)<sup>57</sup> as well as in the work of the United Nations in drafting the Universal Declaration of Human Rights.<sup>58</sup> Interestingly the Declaration was adopted in December 1948 and the third and final draft



**The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights as well as their Optional Protocols.**



of the Constitution of India was adopted in November 1949.

The rights enumerated in the various constitutions have traditionally been primarily civil and political rights and freedoms.<sup>59</sup> In recent decades an increasing number of new or revised constitutions have included economic, social and cultural rights – albeit in different forms and sometimes only to a very limited extent.<sup>60</sup> Furthermore, rights such as the right to a clean environment and collective rights are also recognized in an increasing number of constitutions.<sup>61</sup>

Some constitutions also grant rights that reflect their specific history and are not explicitly known from other constitutions or international instruments.

For instance, article 43 of the Constitution of Malawi contains a codification of the common law principle of natural justice (No person shall be condemned unheard) giving the principle constitutional status. Mindful of the fact that

under the one party regime the Government had often shown scant regard for this principle, it made sense to the drafters of the 1993 Constitution to incorporate the principles of natural justice into the Constitution.<sup>62</sup>

In South Africa, the issue of the right to a language figures prominently in the Constitution, as a result of its repressive past.<sup>63</sup> The equality clause in article 9 is another example. After apartheid, South Africa formulated a very comprehensive equality and non-discrimination clause that still appears to be one of the most progressive national constitutional provisions as it includes explicitly the criteria of race, gender, sex, **pregnancy**, marital status, ethnic or social origin, colour, **sexual orientation, age, disability**<sup>64</sup>, religion, conscience, belief, culture, language and birth.

In Ecuador the right of the people to live in a healthy environment is included and special attention is granted to the rights of nature.<sup>65</sup> Ecuador has on several occasions experienced conflicts between extraction industries and local, mainly indigenous, populations about the protection of the environment.

In Turkey, several provisions reflect the legacy of the founding father of Modern Turkey, Atatürk, e.g. the principle of the protection of youth.<sup>66</sup> As many Turks live outside Turkey, the Constitution also obliges the state to ensure their rights and ties with Turkey.<sup>67</sup> In the Constitution of Bolivia, the Bolivians who live abroad are granted access to the National

Public Defender that is mandated to promote their human rights.<sup>68</sup>

The Constitution of Colombia includes a provision on access to the electromagnetic spectrum which is an inalienable and imprescriptible public resource subject to the management and control of the state. Equality of opportunity is guaranteed in the access to its use within the limits determined by law.

In Cambodia, the commerce of human beings, exploitation of people in prostitution, and obscenity which affects the reputation of women, is prohibited.<sup>69</sup>

Finally in India, one of the concerns of the debates of the Constituent Assembly was the rights of minorities. Consequently, the constitution reflects a combination of social pluralism, secularism and protection of and respect for minorities.<sup>70</sup>

### SPHERE OF DISCUSSION

- Will the constitutional drafting process include a broad stakeholder hearing process?
- Should the constitution include a bill of rights?
- If so, are there any risks in including too many rights?
- Is it beneficial to gain inspiration from international instruments or constitutions?
- Are there any issues in the national historical context which should be reflected in the constitution?

### ENFORCEABILITY AND JUSTICIABILITY

Regardless of the number of rights enumerated in a constitution, each provision needs to be enforceable and justiciable. This means that the domestic courts shall have the jurisdiction to enforce these provisions when the right in question is being claimed before a court (or any other adjudicative body).<sup>71</sup> Interpretation by domestic courts is likely to result in a dynamic application of the constitutional provisions over the course of time.

In general, the civil and political rights have been regarded as both enforceable and justiciable, whereas the justiciability of economic, social and cultural rights has been questioned. For a court to decide a matter, the rule in question has to be rather precise and leave no question about who is the duty-bearer or the right-holder.<sup>72</sup> Consequently, the argument against the justiciability of economic, social and cultural rights has often been that such rights are impossible to adjudicate as they are primarily aspirational or political goals to be achieved progressively. They are dependent on domestically available resources, and judicial adjudication would interfere with difficult political decisions of how to distribute possible scarce resources.

However, to dismiss the enforceability and justiciability of economic, social and cultural rights *per se* without attempting to examine the contents and scope of the right in question, would be wrong. In 1998, the UN Committee on Economic, Social and Cultural Rights stated that:

“While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”<sup>73</sup>

Nowadays, the claim that economic, social and cultural rights are not justiciable is challenged and generally in the process of being abandoned. National courts increasingly assess the contents of these rights and in 2008 the UN adopted an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights allowing the State Parties to recognise the competence of the Committee

on Economic Social and Cultural Rights to consider complaints from individuals.<sup>74</sup> The Protocol is seen as a confirmation of the justiciability of economic, social and cultural rights.

Furthermore, human rights provisions must be self-executing in order to be directly applicable. It is for the courts (or any other judicative body) to determine whether a right is self-executing. If the right is clear and specific the courts are likely to recognise it as self-executing and directly applicable. Otherwise, there is a need to convert the provisions into actual rights through other legislative measures.

Provisions are, generally, more likely to be directly applicable before a court or state authority if the provision entitles a person/group of persons to a specific right (every person has the right to ...).

Other provisions are less likely to constitute directly applicable rights either because the right is rather vaguely formulated, or the state is required to take certain initiatives in order for the citizens to enjoy that right. If so, the right in question will be regarded as a programmatic provision and not an enforceable right.

Nevertheless, the fact that the right granted by the provision needs to be supplemented by enabling legislation does not as such exclude the provision from being self-executing. "The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing,

is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing."<sup>75</sup>

However case law from the various constitutional or supreme courts around the world indicates that even constitutional provisions that do not appear self-executing, may still be invoked successfully before the courts.

The Italian Constitutional Court has occasionally expressed that certain constitutional provisions are basically programme statements but may still contain limitations upon the legislature or the executive. For instance article 4 of the Italian Constitution holds that:

"The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective."

The provision does not give the individual an enforceable right to a specific job, but the Italian Constitutional Court held that the state shall ensure that the individual has the opportunity to seek a preferred job corresponding to the skills of the individual.<sup>76</sup> In another decision, the Court held that the right to work is a fundamental human right, and a provision in a law that unreasonably limits the access to positions within the public service would be

unconstitutional.<sup>77</sup> On other occasions, the Constitutional Court has concluded that the legislature decides how to implement the right to health,<sup>78</sup> but the right includes an obligation upon the state to at least provide some sort of minimum level of health care.<sup>79</sup> If the state does not fulfil its obligation, the court may quash provisions of a law that do not comply with the protected rights, even if the constitutional provision directly grants a right to the individual.

The Constitutional Court of Colombia has also considered the difference between self-executing and non-self-executing provisions of the Constitution. The Court considers the rights relating to freedom and equality and certain rights relating to dignity and life as self-executing.<sup>80</sup> Economic, social and cultural rights might be indirectly applicable when they are closely and concretely related to the enjoyment of the directly applicable rights.<sup>81</sup> This could be the case for instance, when the right to family life is claimed to have been violated because the state is not enforcing environmental laws<sup>82</sup> or when right to life is claimed to have been violated because the state has deprived a person of his or her livelihood.<sup>83</sup>

Whether a constitutionally protected right is self-executing and enforceable depends on its wording and whether the standard is sufficiently clear to provide the basis for a court to apply it. At the end of the day, this assessment depends on the national courts. However, the effective and efficient protection, respect and promotion of human rights are more likely to succeed if the constitutional provisions are clearly

formulated and enable the citizens to invoke them directly before the courts.

### SPHERE OF DISCUSSION

- Should the enumerated rights be enforceable and directly applicable?
- What are national courts' criteria, if any, for accepting enforceability and direct applicability?
- Do programmatic provisions have any impact upon the interpretation of constitutionality of national legislation, decisions, actions and omissions?

### DEROGATION

In a state of emergency, the constitution may under certain conditions allow the government to derogate from the rights enumerated in the Constitution. Derogation is a partial or complete suspension of a right. The constitutionally accepted derogation from fundamental rights and freedoms is a threat to their effective enjoyment. Consequently, most constitutions differentiate between derogable and non-derogable rights even under a state of emergency.

In order to determine the effectiveness of the constitutional protection of human rights, the first step is to determine whether the declaration of a state of emergency is subject to substantive and procedural guarantees. If the state of emergency can be declared easily and the courts are not given any powers to hear applications that challenge the declaration or to review the derogation, the effective protection will become illusory.

The state may only derogate from a limited number of rights and only to the extent strictly required by the situation.<sup>84</sup>

The next step is to carefully determine which are the rights that cannot be derogated. In international law, rights related to physical integrity, such as prohibition of torture, genocide, slavery, and the prohibition of retroactive penal laws, imprisonment for not fulfilling contractual obligations, the right to equal recognition before the courts, freedom of conscience and religion,<sup>85</sup> are regarded as non-derogable. The right to life is non-derogable if the constitution prohibits the death penalty (or the state has ratified international conventions prohibiting the death penalty). It should be noted that the list of non-derogable rights in each constitution may be expanded due to the experience of the state in question.

Non-derogable rights are often referred to as 'absolute rights'.

### SPHERE OF DISCUSSION

- Is the process for declaration of a state of emergency clearly described and subject to strict requirements?
- Do the courts have powers to review the declaration and possible derogations during a state of emergency?
- Which non-derogable rights should be listed?

### LIMITATIONS

Most human rights may be subject to limitations if the limitation is in accordance with certain conditions.

In international human rights instruments the basic conditions are: the interference with a right must be provided for by a law, must pursue a legitimate aim and it must be proportional.<sup>86</sup> All three conditions have to be fulfilled; they are cumulative. These basic conditions are reflected in many constitutions. Sometimes the constitution contains all the conditions in a general limitation provision.<sup>87</sup> On other occasions, the limitation is integrated into the provision itself.<sup>88</sup>

Both approaches may be effective for the respect for human rights. However, if the limitation clause is vague or not well-defined, the respect for the enumerated rights in the constitution is likely to be less effective.

Regardless of the chosen approach the interference should be in accordance with law. The law might be written or unwritten. Common law – based on caselaw and customary law are regarded as fulfilling the criteria of law.

Customary or traditional law is recognised in a number of constitutions. However, if a constitution recognises customary or traditional law, the constitution may also stress that its application has to comply with the fundamental rights enlisted in the constitution.<sup>90</sup>

The law – written or unwritten – should nevertheless be predictable, foreseeable, and accessible. Furthermore, the law shall not in general impair the enjoyment of fundamental rights. Once it has been determined that the interference is in accordance with the law,

In general and simplified terms, customary or traditional law is characterized by:

- Preservation of peace and community harmony in a society where people, their role and status are defined by their attachment to family and clan
- Oral, simple and flexible proceedings and adjudicators that are chosen through mechanisms that are often based on status or reputation, and sometimes on heredity
- Accountability that is ensured through community bonds, mutual obligations and reputation, so that failure to live up to the demands of fairness and impartiality would bring shame and a consequent loss of status
- Substantive rules that are derived from tradition that may be thought of having existed since time immemorial, supplemented by common sense and perceptions of community consensus.
- A system that is often oriented to a local framework and a stable social structure that is conscious of well-defined social and gender roles, with corresponding rights and obligations.

Informal Justice Systems – charting a human rights based approach. A study of informal justice systems.<sup>89</sup>

the actual interference also has to pursue a legitimate aim and be proportional in order to be lawful.

Occasionally the scope of the right is explicitly defined in the provision,<sup>91</sup> and consequently, if the circumstances of the matter fall outside the scope of the right, the right is not applicable to such circumstances. On other occasions it is possible to identify some implied limitations within the concerned right. For instance the right of a citizen to vote cannot be invoked by a non-citizen. Implied limitations may also cover the question whether the right was intended to go beyond the extent expressly provided. If not, the scope of the right will be restricted.<sup>92</sup>

Finally, the interpretation of the scope of a right may also imply a limitation on the respect, protection and enjoyment of another right. If the scope of the human rights is interpreted narrowly by the authorities and courts,<sup>93</sup> the impact will be negative upon the effectiveness of enumerated rights. Likewise, if the permissible limitations are interpreted too broadly then the rights risk becoming irrelevant in practice.<sup>94</sup>

#### SPHERE OF DISCUSSION

- If rights are subject to limitations what should be the conditions for such limitations?
- Have any limitations (in the existing / draft constitution) been formulated in a sufficiently clear manner?
- Are the protected rights formulated in a sufficiently clear manner?

- Based on existing practice, do national courts interpret rights progressively and limitations narrowly?
- Should customary or traditional law be recognised by the Constitution and what should be its status?

### CHANGES TO THE LIST OF RIGHTS

One of the reasons for accordng a list of rights and principles constitutional status is to entrench into national law certain fundamental rights provisions in such a way that they cannot easily be disregarded or abolished subsequently. Constitutional amendments are usually more difficult to carry out as they have to follow a 'special procedure', irrespective of the nature of the amendments.<sup>95</sup> A special procedure is a procedure subject to some stricter requirements than the usual procedure. Not all national constitutions require the holding of a public referendum for changes to be made to the constitution's text.<sup>96</sup> Furthermore, some constitutions distinguish between procedures for amendment depending on the character of the amendment. The Constitution of Spain distinguishes between the procedure for amending the constitution (which is still distinctive from ordinary procedures) and a very complex procedure for amendment that has a bearing upon the list of fundamental rights and duties which includes a national referendum.<sup>97</sup> The South African Constitution also makes this distinction; however, an amendment to the bill of rights is not sent to a national referendum.

Instead it requires the support of the National Assembly with a supporting vote of at least two thirds of its members; and of the National Council of Provinces, with a supporting vote of at least six provinces for it to be adopted.<sup>98</sup>

As indicated above, the procedures vary, but it is particularly important for the effective protection of the rights enumerated in the constitution that the procedures for amendment are not ordinary procedures and that it is not possible to hamper with the procedures.

### SPHERE OF DISCUSSION

- What should be the conditions for amendments to the constitution?
- Should any special procedure be provided for in the constitution for making amendments to the chapter on human rights?



### 3.4. REMEDIES AND NATIONAL HUMAN RIGHTS MECHANISMS

#### THE JUDICIARY – ITS MANDATE, FUNCTIONS AND POWERS

If it is not possible to bring alleged violations of human rights before the national courts or other adjudicative bodies, human rights protection becomes ineffective in practice.<sup>99</sup> Consequently, the national constitutional framework shall establish bodies that are empowered to handle such allegations and enforce the rights. These bodies shall likewise be empowered to remedy the violation effectively.<sup>100</sup>

National courts<sup>101</sup> play a fundamental role in this enforcement as long as the authorities respect their final decision and the courts have a reputation of being independent, impartial, efficient and representing the highest quality. The longer a matter is pending before the court, the less effective is the respect and protection of the rights, in particular for those persons with less financial or other resources. Some constitutions have established certain speedy court procedures if the matter concerns human rights issues.<sup>102</sup>

Access to the courts plays another important role. Access means both physical access and access to legal assistance. Many constitutions grant access to free legal representation in some or all criminal cases,<sup>103</sup> but few, if any, guarantee free legal assistance or representation to persons alleging a violation of their constitutional or human rights. It could

be argued that access to free legal assistance in such cases is just as essential as it is for persons facing criminal charges.<sup>104</sup>

The structure of the system of courts varies from country to country. Some countries recognize the traditional courts or religious courts empowered to handle certain cases, while others do not. Traditional or religious courts as well as other similar alternative conflict resolution bodies may have an, often ignored, impact on the protection of human rights. Alternative conflict resolution bodies must respect the constitution just as the formal justice system does.<sup>105</sup> Although the alternative conflict resolution system is recognized by the constitution, it is often required to have some formal linkage with the formal justice system, e. g. in the form of an oversight of its decisions by a High Court, an Appeal Court or the Supreme Court.<sup>106</sup>

One question that often arises in relation to the protection of constitutional rights is whether the establishment of a Constitutional Court vested with specific powers to consider matters concerning the interpretation of provisions in the constitution provides a more effective and efficient protection than leaving such matters to a superior court of general jurisdiction, e.g. the country's Supreme or High Court.

Such courts are the highest entity within the court system. Their functions vary and the access to the court might be subject to specific conditions.

Countries with a common law system generally do not have a Constitutional Court as such. A similar mandate of constitutionality control is being exercised by ordinary courts during the course of examining concrete cases. Most often it is the Supreme Court or a court of appeal of the country that will rule on the conformity of a law to the constitution.<sup>107</sup>

One of the potential benefits of having a Constitutional Court or another court with a similar mandate is the fact that the court is explicitly mandated to examine the constitutionality of law without taking its point of departure in a concrete matter. Constitutional courts may also issue opinions based on a request from other branches of government regarding the constitutionality of treaties, agreements, and bills.<sup>108</sup>

If the court's mandate to assess the constitutionality of a law is limited to concrete cases brought before it by an applicant, then the protection of the constitutional rights might be less effective; especially if in practice is difficult for ordinary persons to access the court or the parliament does not have sufficient resources to assess constitutionality in the law-drafting process.

#### **OTHER CONSTITUTIONAL MECHANISMS**

Courts are often supplemented by other national mechanisms that contribute to the effective respect, protection and promotion of human rights, for example national human rights institutions and/or ombudsman's institutions. In some cases, the establishment

of these institutions will be provided for in the constitution.

These institutions often have a mandate to receive and consider complaints, to submit amicus briefs, or to bring cases before the courts on behalf of alleged victims of human rights violations. They may also have a mandate to provide remedies to the complainant either directly described in the constitution or in the enabling legislation.

Accreditation by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights indicates that the institution complies with the so-called Paris Principles.<sup>109</sup> However, a lack of independence, sufficient resources and/or public trust in the institution and its decisions will eventually diminish its status as a constitutional human rights watch dog.

In addition to these institutions with an explicit human rights mandate, institutions such as the public prosecutor, the electoral commission/body or anti-corruption agency will have an impact on the effective respect, protection and promotion of human rights. It should be added that administrative courts – where they exist – must meet the same requirements in terms of human rights protection as ordinary courts.

#### **SPHERE OF DISCUSSION**

- What are the powers of the ordinary courts?
- Should a Constitutional Court or a Supreme Court with similar functions be established?

- What should be the available human rights mechanisms, their independence, mandate, function, remedies and interaction?
- What should be the resource structure for the various mechanisms?
- Should traditional conflict resolution be recognised by the Constitution?

### 3.5. PRESENT AND FUTURE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

#### INTERNATIONAL INSTRUMENTS' POSITION IN THE NATIONAL LEGAL HIERARCHY

The relationship with international treaty bodies, the process for signing, ratifying and incorporating international instruments into national legislation as well as their status in the legal hierarchy of the state is a fundamental part of a modern constitution. Traditionally, national legal systems follow two different procedures for incorporating international law into national legislation: Monism and dualism.<sup>110</sup>

In the majority of monist states the international conventions are assumed to be part of national law from the moment the state has ratified the convention in accordance with its internal procedures. Consequently, the national judge can immediately apply the provisions of the convention.

In general, the international convention will prevail if a national law contradicts international obligations.<sup>111</sup> The international convention is regarded as having supremacy even without being incorporated into the domestic legislation. In other cases the international convention

is regarded as a national law and it will only prevail if the convention has been ratified after the national law has entered into force (the principle of *lex posterior*).

Countries with a civil law system are more likely to have adopted monism.<sup>112</sup> The constitutions of Spain,<sup>113</sup> France,<sup>114</sup> Turkey<sup>115</sup> and Chad<sup>116</sup> are examples of monist systems.

The Constitution of Egypt has also adopted monism<sup>117</sup>. However, through its reservations Egypt frequently adopts international human rights conventions while also “taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument ...”<sup>118</sup> Such reservations have been criticized for their lack of clarity.<sup>119</sup>

The Constitution of Japan also confirms monism but in a slightly different manner by stating that: “The treaties concluded by Japan and established laws of nations shall be faithfully observed.”<sup>120</sup>

In a number of countries it is the dualistic system that prevails.<sup>121</sup> These countries are often common law countries, but countries like Denmark and Norway also adhere to the dualist system. In the dualist system the international conventions are only part of national law if they are incorporated into national legislation. The parliament must enact an enabling law<sup>122</sup> and in case of a conflict between a national law and an international convention it is the former that may prevail.

Other countries attempt to combine the monist and the dualist system. In Malawi – generally speaking characterized as a dualist system – the constitution has, nevertheless, adopted a provision whereby:

“Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.

2. International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.

3. Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.”<sup>123</sup>

Apparently the provision emphasizes the dualist system except in certain cases. Consequently, a number of international human rights instruments that Malawi ratified during its authoritarian past, which were never up-held then, became part of national laws and theoretically strengthened the respect, protection and promotion of human rights in Malawi and before the Malawi courts.

### THE EFFECTIVE NATIONAL RECOGNITION OF INTERNATIONAL INSTRUMENTS: THE IMPACT OF MONISM OR DUALISM

One of the major advantages of having a monist system is the fact that the international instruments are directly applicable at national

level<sup>124</sup> and generally regarded as superior to national legislation in case of conflict of norms. Consequently, the international treaties may be a supplement to the rights recognized in the constitution and the constitution facilitates that new human rights development automatically becomes part of national law.

In the dualist system the international conventions cannot be applied directly. The awareness of international human rights conventions may thus be less prominent as they are not part of national law and public conscience. If the parliament does not enact the convention, the chances of the convention becoming a living instrument domestically appears less likely. However, public authorities and courts may apply international conventions indirectly when interpreting national law. In this way they may construe their decisions in such a manner that they avoid the conflict with the international obligations. The court may refer to the respect for international obligations as a principle that is binding upon the state.

Although the dualist system appears less open to international human rights development the respect, protection and promotion of human rights may be enhanced through a progressive interpretation of domestic human rights with reference to international law.

### SPHERE OF DISCUSSION

- What is the status of international instruments within the national legal hierarchy?
- What is the applicability of international instruments at national level?
- Are ratified international instruments published?

## 4. CONCLUSION

# INTER-LINKAGE BETWEEN CONSTITUTIONAL PROTECTION AND EFFECTIVE AND EFFICIENT PROTECTION OF HUMAN RIGHTS

To summarise, the effective and efficient protection of human rights at domestic level requires an adequate constitutional framework that has been adopted after a participatory national process. There is no universal standard for such constitutional framework but a number of factors may contribute to the effective and efficient protection of human rights.

The constitution has to effectively address the actual rights. The approach may vary, but there appears to be an international tendency towards combining a set of overall values or fundamental principles with a bill of rights. The bill of rights may cover civil, political, social, economic and cultural rights, but also other rights such as a right to a clean and healthy environment. The enumerated list of rights may reflect international standards as well as national experiences and political agenda.

A constitutional set of values or principles and a bill of rights are not sufficient instruments for an effective and efficient protection of human rights if the constitution does not provide for other measures facilitating their protection and enforcement in practice.

Once the rights have been incorporated into the constitution, the risk of debilitating the rights needs to be minimized. It could be considered a potential threat to the protection and enforcement of human rights if the constitution does not favour the protection of human rights when human rights and other fundamental principles or values conflict. Another potential threat is the possibility of amending or suspending the constitution. Consequently, amendments to the enumerated rights and the use of state of emergency should only be possible when subjected to some very strict conditions and control by the ordinary courts.

In order to apply and enforce the rights before authorities and adjudicative bodies, the rights need to be clearly formulated without leaving too much, if any, room for limitations. Otherwise there is a risk that the bill of rights will become meaningless and not be a living instrument at domestic level. If the constitution makes direct reference to the international obligations of the state (international instruments and jurisprudence), the integration of international human rights obligations or case law into the decision making processes at domestic level could be facilitated.

Finally, independent, strong and easily accessible national mechanisms for promotion, protection and enforcement of human rights are essential (national human rights institutions, ombudsman institutions etc.). The constitution shall ensure the independence and effectiveness of such bodies and the implementing laws shall provide these bodies with the sufficient financial, human and technical resources.

# ENDNOTES

## 2. INTRODUCTION

- 1 According to Ian Brownlie the rule of law concept contains the following elements:
    - i) Officials' action is based upon authority conferred by the law; ii) The law conforms to substantial and procedural standards; iii) There is a separation of powers – the judiciary is not subject to the executive; iv) All legal persons are subject to the law on a basis of equality; and v) There is an absence of wide discretionary powers in the government. See Brownlie, Ian: *The Rule of Law in International Affairs*, Hague Academy of International Law, Martinus Nijhoff, 1998.
  - 2 The supremacy of the constitution is a result of various factors: The constitution may only be amended in accordance with a specialized procedure that differs from the usual law-making process; the text of the constitution grants it supremacy and all branches of government are subjected to the constitution including the legislature.
  - 3 E.g. Magna Carta from 1215 or rules of Habeas Corpus (the ancient common law prerogative writ).
  - 4 E.g. UN Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework
- is the latest and most prominent guidelines for regulating the responsibilities private companies in relation to the protection of human rights.
- 5 E.g. article 152 (1) (b) of the South African Constitution establishes that the objectives of local government are to ensure the provision of services to communities in a sustainable manner. The constitution of Ecuador article 277 (1) states that the general duties of the State in order to achieve the good way of living shall be: ...to provide public services.
  - 6 The Constitution of Mexico from 1917 was probably the first constitution to include social rights, which inspired the Constitution of the Federation of Russia.
  - 7 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights as well as its two optional protocols and the UN Covenant on Economic, Social and Cultural Rights.
  - 8 The European Convention on Human Rights, the Inter-American Convention on Human Rights, the African Charter for Human and Peoples' Rights and the Arab Charter for Human Rights.

- 9 E.g. Constitution of Lebanon, Constitution of South Africa and the Constitution of Malawi.
- 10 E.g. the United Kingdom where the constitution is not a single written document, but a set of written and unwritten laws and principles.
- 11 E.g. the Scandinavian countries, Malaysia, Australia and the United States of America.
- 12 In common law jurisdictions, such a list of rights is called a bill of rights. However, the term bill of rights is used by others that do not belong to a common law jurisdiction. For the sake of this analysis, the term bill of rights is used to cover both the common law term and a list of rights granted by a constitution.
- 13 Most Latin American and African countries, Turkey, India and some of the Eastern European countries, e.g. Serbia. The European Union has incorporated into its fundamental treaties the Charter of Fundamental Rights of the European Union
- 14 Article 26 of the Vienna Convention on the Law of Treaties codifies the principle of "pacta sunt servanda": "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
- 15 In 1789, the Congress of United States discussed whether to enumerate a bill of rights in the Constitution. Member of the House of Representatives, James Madison addressed the House on 8 June 1789 on the Necessity of Amendments to the Constitution, concluding that "It may be thought all paper barriers against the power of the community, are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to control the majority from those acts to which they might be otherwise inclined."
- 16 Nwabueze, B.O.: Constitutionalism in the emergent states, Fairleigh Dickinson University Press, 1973, p.2.
- 17 Rights often go hand in hand with duties, and an increasing number of constitutions include a chapter on the duties of the individuals. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by the UN General Assembly (resolution 53/144) emphasizes that "everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible (article 18)." The duties shall be balanced and not make the enjoyment of rights illusory. The duties are, however, not described in the present analysis.
- 18 E.g. the 1996 South African Constitution was the first constitution after the abolishment of Apartheid and the 1996 Constitution of Chad with its 2005 amendments.



- 19 E.g. the 2008 Constitution of Ecuador reflects a country that was previously ruled by a military regime (ended formally in 1978), but with its recent constitution has granted rights that go beyond the rights granted in international instruments and other constitutions in Latin America. The Constitution reflects e.g. social demands, right to a clean environment, including rights of nature.
- 20 E.g. Constitutions of Turkey, Iraq (2005) and Chad.
- 21 E.g. Constitutions of France, Spain and Italy.

### 3. HUMAN RIGHTS – THE CONSTITUTIONAL FRAMEWORK

#### 3.1. THE PREAMBLE

- 22 Constitutions of South Africa, Ecuador, Turkey and Chad but not the one of Malaysia.
- 23 Constitutions of Chad, Morocco and Turkey.
- 24 E.g. the French Conseil Constitutionnel in its decision 71-44 DC of 16 July 1971. A reference in the preamble of the 1958 Constitution to the 1789 Declaration of Rights forms the basis for determining whether a law was in conflict with the right to association.
- 25 E.g. South African Constitutional Court in: Government of South Africa et al. against Irene Grootboom and others, CCT 11/00, para 1 or Minister of Home Affairs and Another v Fourie and Another CCT 60/04, para. 138. In a decision published 16 April 2008 by the Turkish Constitutional Court, the court found that a provision in the Law on Direct Foreign Investments was conflicting with article 2 of the constitution and in the context of the fifth paragraph of the preamble.
- 26 The Constitution of Morocco of 30 July 2011, preamble.
- 27 E.g. the Constitution of Ireland and the former Constitution of Tunisia.
- 28 The Constitution of Denmark article 4, the Constitution of Norway article 2, or of Argentina article 2.
- 29 E.g. the Constitution of Chad, of Lebanon and of Ecuador (combined with article 1).
- 30 The Constitution of France or of Turkey.
- 31 Rabb, Intisar A. "We the Jurists: Islamic Constitutionalism in Iraq," University of Pennsylvania Journal of Constitutional Law, Vol.10, 2008, pp. 527-579.
- 32 The 1980 Constitution with subsequent amendments. It has for many years sparked controversy and is being reviewed.
- 33 E.g. the Constitution of Kuwait, article 2 and of Qatar, article 1: "the Islamic Sharia shall be a main source of legislation"; and the Constitution of Bahrain, article 2: "Islamic Sharia is a principal source for legislation".
- 34 Rabb, Intisar A.: see note 31
- 35 Rabb, Intisar A.: see note 31
- 36 Norris v. A.G. [1983] IESC 3; [1984] IR 36 (22 April 1983).
- 37 Supreme Court Decision on the Regulation of Information (Services out-side the State for Termination of Pregnancies) Bill, 1995, No. 87 of 1995: 43 SC, 11.R Hamilton. It should be noted that the European Court

of Human Rights has examined a number of Irish cases related to the relationship between religion, the constitution and human rights: *Airey v. Ireland*, 9 October 1979 (prohibition of divorce), *Norris v. Ireland*, 26 October 1988 (criminalisation of homosexuality), *A, B and C v. Ireland*, 16 December 2010 (prohibition of abortion).

### 3.2. FUNDAMENTAL PRINCIPLES

- 38 E.g. Constitutions of South Africa, Turkey, Ecuador, Colombia, Brazil, Ethiopia, India and Malawi.
- 39 E.g. the Constitution of Turkey article 5, the Constitution of Spain article 9(2) or the Constitution of Colombia article 2.
- 40 E.g. the Constitution of Cambodia article 52 or article 41 of the South African Constitution.
- 41 E.g. the Constitution of the United Republic of Tanzania part II.
- 42 Articles 13-14 of the Constitution of Malawi.
- 43 Article 14 of the Constitution of Sierra Leone.
- 44 If a fundamental principle only refers to e.g. the respect of internationally recognized human rights, the actual contents of that principle is uncertain. On the other hand, if the fundamental principles refers e.g. to the Universal Declaration of Human Rights, the norms can actually be derived from that instrument.
- 45 Constitutional Court of Colombia, case C-546/92.
- 46 A reference to Ubuntu was made in the epilogue to the interim constitution of South Africa, but omitted in the final Constitution. Nevertheless, the Ubuntu is regarded as a fundamental value in South Africa; see also "Law in the uBuntu of South Africa" by Drucilla Cornell and Nyoko Muvangua, published at [http://isthisseattaken.co.za/pdf/Papers\\_Cornell\\_Muvangua.pdf](http://isthisseattaken.co.za/pdf/Papers_Cornell_Muvangua.pdf).
- 47 Constitutional Court of South Africa, CCT3/94, *S.V. Makwanyane and Another*, para 25 and 106-117.
- 48 The Supreme/Constitutional Court of India, *Kinkri Devi and Anr. vs. State of Himachal Pradesh and Ors* decided on 29 May 1987, par. 8.
- 49 The Supreme/Constitutional Court of India, *Olga Tellis v Bombay Municipality Corporation*, decided on 10. July 1985, para 33 "...The Principles contained in Articles 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21..."

50 The Constitutional Court of Spain in its decision 176/2011, 8. November 2011 declaring a law unconstitutional as it was, **inter alia**, not respecting the principles in articles 1 (1) and 9(1) of the Constitution.

### 3.3. BILL OF RIGHTS

51 A legal rule is traditionally a question of whether the facts in a specific case fall within the scope of the legal rule and if that is so, the rule will indicate the consequences. E.g. an accused person has a right to a legal aid. A norm that contains a legal principle is usually subject to interpretation as the wording leaves room for interpretation, e.g. the right to a family life. The legal principles could be regarded as vague, but they are also flexible and give the courts and others empowered to apply the rule in the light of the present day conditions and to broaden their application.

52 E.g. the Constitution of Denmark, Finland (before the amendments in 1972 and later a larger revision in 1995), the United States, the Netherlands before the revision in 1983, and Lebanon.

53 E.g. the 2008 Constitution of Ecuador and the 2009 Constitution of Bolivia.

54 In Norway, the human rights committee of Parliament has just published a report on how to protect human rights in the Constitution.

55 E.g. Turkey, Chad, South Africa, Spain and the Netherlands.

56 Similar to the principles known from the Constitution of Malawi and the Ivory Coast, they shall not be enforceable by any court,

but are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

57 E.g. Constituent Assembly of India, Volume II, Monday the 20th January 1947.

58 The debates from the Constituent Assembly do not reflect this inspiration, probably because the fundamental rights in the Indian constitution were already drafted at the time of adoption of the Universal Declaration. However, the impact is still acknowledged, e.g. in the case of Maneka Gandhi vs. Union Of India, Supreme Court decision on 25 January, 1978. The Court held that "...[m]oreover, it may be noted that only a short while before the Constitution was brought into force and whilst the constitutional debate was still going on, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December, 1948 and most of the fundamental rights which we find included in Part III were recognized and adopted by the United Nations as the inalienable rights of man in the Universal Declaration of Human Rights."

59 Constitutions of Lebanon, Turkey, Iraq, India, Malaysia, Cambodia, Chad, Malawi, South Africa, Tanzania, Ecuador, Colombia, Bolivia, Brazil, Venezuela and Mexico.

60 Constitutions of Lebanon (only, the right to education), Turkey (comprehensive), Iraq (comprehensive), India (comprehensive), Cambodia (comprehensive but through a reference to international instruments), Chad (comprehensive),

- Malawi (comprehensive), South Africa (comprehensive), Tanzania (only the right to work), Ecuador, Colombia, Bolivia, Brazil, Venezuela and Mexico.
- 61 E.g. Constitutions of Bolivia, Brazil, Colombia, Ecuador, India, South Africa and Venezuela. Other constitutions partly recognize collective or environmental rights. See for instance the Constitution of Cambodia (collective right to ownership of property and that the State shall protect the environment), Chad (right to healthy environment), Malawi (protection of the environment is part of the fundamental principles and the Constitution includes a right to development for peoples) and Turkey (a right to a healthy environment but not a reference to collective rights). The Constitution of Iraq does not include a reference to environmental rights or collective rights as such, but recognizes Iraq as a multiethnic, multi-religious and multi-sect country. More than 90 constitutions include a duty of the state to prevent harm to the environment, see: Barry E. Hill, Steve Wolfson & Nicholas Targ: *Human Rights and the Environment: A Synopsis and Some Predictions*, Georgetown International Environmental Law Review, Vol 16, Issue 3, 2004, p. 359.
- 62 A similar provision is found in the Constitution of South Africa section 3.
- 63 E.g. sections 6 in conjunction with sections 29-31.
- 64 The emphasized criteria are those that differ from the criteria known from international instruments.
- 65 The preamble of the Constitution emphasizes the commitment of Ecuador to a new form of public coexistence, in diversity and in harmony with nature, to achieve a good life, the *sumak kawsay*. The rights of nature are part of that commitment and value.
- 66 Article 58.
- 67 Article 62.
- 68 Article 218.
- 69 See article 46, which concerns both national and international commerce of human being, including trafficking.
- 70 E.g. the Constituent Assembly of India discussions on Friday, the 24th January 1947 about the election of an advisory committee to the assembly, or Hon. Judge S.M. Sikri, C.J. in in the Supreme Court of India judgment *Kesavananda Bharati Sripadagalvaru and Ors against State of Kerala and Anr paras. 182 – 193*.
- 71 Justiciability refers to those matters, which are appropriately resolved by the courts. That means that a matter can only be determined by the court if it is not hypothetical or abstract. If a right is not justiciable, it will then lack legal recognition and cannot be defended or invoked directly in court.
- 72 This brief does not address these issues in detail, although they are key to accessing human rights/are key to human rights promotion, protection and fulfillment.
- 73 General Comment no. 9 (E/1999/22).
- 74 40 countries have signed and 8 countries have ratified the protocol (25 May 2012). The protocol will come into force when 10 countries have ratified the protocol.

- 75 The Supreme Court of Florida in *Gray v. Bryant*, 125 So.2d. p. 846.
- 76 Judgment no. 45/1965, 26. May 1965, **considerato in diritto** para. 3.
- 77 Judgment no. 108/1994, 23. March 1994, **considerato in diritto** para. 2.
- 78 Article 32 of the Constitution: "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent."
- 79 Judgment no. 509/2000, 13. November 2000, **considerato in diritto** para. 4.
- 80 The Constitution of Colombia article 85 lists a number of rights that are immediately applicable.
- 81 Sentencia de Tutela n° 506/92 de Corte Constitucional, Augusto 21, 1992 para.2
- 82 E.g. the European Court of Human Rights, *López Ostra v. Spain*, December 9 1994.
- 83 The Supreme/Constitutional Court of India, *Olga Tellis v Bombay Municipality Corporation*, decided on 10. July 1985, para. 2.3, "...Evidently, they [the applicants] choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life."
- 84 UN Human Rights Committee, General Comment no. 5.
- 85 UN Covenant on Civil and Political Rights article 4 or the Constitution of Turkey article 15.
- 86 Usually regarded as a necessity test in the context of a democratic society.
- 87 The Constitution of Turkey, article 13; of Iraq, article 46; and of South Africa, article 36.
- 88 E.g. Constitution of Chad, article 27; of Malaysia, article 10; of Italy, article 14; of India, article 19 and of Colombia, article 37.
- 89 Informal Justice Systems – charting a human rights-based engagement. A study of Informal Justice Systems: Access to Justice and Human Rights, 2012 copyright of UNDP, UNICEF and UN- Women. Drafted by the Danish Institute for Human Rights.
- 90 E.g. article 39 of the South African Constitution: "...when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Article 149 of the Constitution of Peru emphasises that authorities of the Peasant and Native Communities, with the support of the Peasant Patrols, may exercise jurisdictional functions within their territory in accordance with customary law, provided they do not violate the fundamental rights of the individual. Similar provisions are found in the constitutions of Bolivia, Ecuador, Kenya and Malawi.
- 91 E.g. forced labour is prohibited unless it is work required of an individual while serving a prison sentence, Constitution of Turkey article 18.

- 92 The fundamental rights are usually not intended to be extended to the unborn child.
- 93 The interpretation of ambiguous laws may vary depending on the legal traditions of the state in question. Civil law countries are looking more at the text, the context of the ambiguity provision compared to the surrounding provisions and the preparatory work of the provision (the law is the primary source), while common law (the law has to be interpreted in the light of existing case law) is looking at the context of the concrete case, the legislation as a whole, giving effect to certain rules for interpretation and previous case law from higher courts (principle of stare decisis).
- 94 In some constitutions it is clearly emphasized that the interpretation has to be in favour of the human rights, e.g. Constitution of Kenya article 20. The Colombian Constitution article 93 recognizes that the interpretation has to be in accordance with international human rights conventions ratified by Colombia. The Constitution of Spain emphasizes that the recognized rights shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.
- 95 E.g. the Constitution of Denmark may only be amended following a very comprehensive procedure regardless of the character of the amendment. Any amendment has to be adopted in a bill

passed by Parliament, followed by election to a new Parliament. The new Parliament has to pass the same bill and then the bill has to be adopted through a national referendum, where a qualified majority has to favour the amendment before the amendment is adopted, cf. article 88. A similar process is provided for in the Constitution of Japan (article 96). An amendment of the Constitution of Turkey requires a national referendum depending on the majority of votes in the National Assembly favoring the amendment and/or whether the President wishes to submit the amendment to a national referendum, cf. art. 175.

- 96 E.g. Constitution of Mexico article 135. The Constitution of Chad allows revision as long as the revision does not interfere with the list of fundamental rights. Any amendment has to be adopted through a referendum, cf. article 224-225.

97 Article 168.

98 Section 74.

### 3.4. REMEDIES AND NATIONAL HUMAN RIGHTS MECHANISMS

- 99 E.g. the Constitution of Turkey, article 40; of South Africa, article 38 and of Colombia articles 86-89.

100 E.g. through declaring the law or action invalid, order just compensation or undue the wrongs

101 Could be the formalized court system but also traditional or religious courts

102 See e.g. the Constitution of Spain article 53 whereby any “citizen may assert a claim to protect the freedoms and rights recognized in section 14 [equality before the law] and in division 1 of Chapter 2 [fundamental rights and public freedoms], by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (recurso de amparo) to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognized in section 30”.

103 E.g. the Constitution of Iraq, article 19 and of Kenya, article 50.

104 The Constitution of South Africa, article 38 and the Constitution of Kenya without paying a fee, article 22, entitle others than the victim to approach the court in order to enforce the bill of rights. The Constitution of India article 39A stresses that the state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

105 See article 149 of the Constitution of Peru, whereby authorities of the Peasant and Native Communities, with the support of the Peasant Patrols, may exercise jurisdictional functions within their territory in accordance with customary law, provided they do not violate the fundamental

rights of the individual. Similar provisions are found in the constitutions of Bolivia, Ecuador and Kenya.

106 See for instance article 149 of the Constitution of Peru; article 171 of the Constitution of Ecuador and article 192 of the Constitution of Bolivia. The Kadhis’ courts in Kenya have jurisdiction over the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts. However, the courts are subordinated courts at the same level as the Magistrates courts.

107 E.g. the Supreme Court of India (partly before the amendment of article 131A in 1977), the Supreme Court of Ghana (article 130 of the constitution), or the Court of Appeal of Uganda together with the Supreme Court of Uganda (when hearing appeals from the Court of Appeal sitting as constitutional court), article 131 together with article 137. the Constitution of Iraq, article 93 establishes a Federal Supreme Court with functions similar to a Constitutional Court.

108 See the Constitution of Guatemala article 272. The 2011 Constitution of Morocco empowers the Constitutional Court to examine laws prior to their promulgation in order to pronounce their conformity with the Constitution (see article 85 or 132), but also if the question arises as part of court proceedings when the question is

maintained/supported by one of the parties and it addresses the rights and liberties guaranteed by the Constitution (see article 132). A disposition that has been declared unconstitutional cannot be promulgated or put into effect/applied.

- 109 Principles relating to the Status of National Institutions, adopted by the UN General Assembly resolution 48/134 of 20 December 1993.

### 3.5. PRESENT AND FUTURE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

- 110 In a monist system the national law and international instruments ratified by the state are part of a single legal system. In a dualist system the two systems are separated from each other.
- 111 Section 10 (2) of the Constitution of Spain: "Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain."
- 112 The legal systems are traditionally divided into three main traditions: Civil, common and socialist systems. A legal system reflects a notion about the nature and contents of law, and how to legislate and apply law. The civil system has its roots in Roman law and continental Europe. Common law has its roots in England and socialist law is basically rooted in the former Soviet Union. However, other legal traditions such as Islamic law, Hindu law and to some extent Scandinavian law (based in the civil law system) should not remain unnoticed. Today, it is difficult to find any country that has not benefitted from more than one legal tradition in one way or another (China for instance appears to combine civil law with socialist law, and Egypt combines law of Sharia – mostly in areas of family law – with civil law). However, countries that have been influenced by France, Spain, Germany and Holland usually follow the civil law system, while countries influenced by England (and the Commonwealth) are inspired by the common law system.
- 113 Section 96: "Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system."
- 114 Article 55: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party."
- 115 Article 90: "International agreements duly put into effect bear the force of law. ... In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".
- 116 Article 222: "Treaties or agreements regularly ratified have, as soon as they have been published greater authority than that of laws..."



117 Article 151 of the 1980 Constitution with subsequent amendments The Constitution has for many years sparked controversy and it being reviewed.

118 Human Rights Committee, Reservations, declarations, notifications and objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols. U.N. Doc CCPR/C/2/Rev.4., 1995.

119 See the UN Committee under the ICCPR, CCPR A/58/40, 2003. The Committee considered the third and fourth periodic reports of Egypt, (CCPR/C/EGY/2001/3) at its 2048th and 2049th meetings, held on 17 and 18 October 2002 (CCPR/C/SR.2048 and CCPR/C/SR.2049), and adopted the following concluding observations at its 2067th meeting (CCPR/C/SR.2067) on 31 October 2002.

120 Article 98(2).

121 E.g. the United Kingdom, India (e.g. article 253 of the Constitution states that the legislature has exclusive powers to implement international obligations through national legislation, and article 51 articulates that respect for international law is a directive principle, and consequently not directly applicable) or Uganda (see Ratification of Treaties Act, Act no. 5 of 1998.

122 Another process is to harmonize existing laws or to conclude that national law is in compliance with its international obligations.

123 Section 211 of the Constitution.

124 If the provision itself is sufficiently clear and appears to be self-executing.

# THE DANISH INSTITUTE FOR HUMAN RIGHTS

"The Constitutional Protection of Human Rights" is part of the endeavour of the Danish Institute for Human Rights in the Middle East and North Africa.

The purpose of this brief is to highlight the fundamental elements for ensuring an effective and efficient protection of human rights within a constitutional framework. It is not a thoroughly comparative research or analysis. It is rather meant to provide the reader with an overview of the important discussions that may arise in the course of drafting, amending or analysing a constitution. The paper is aimed at professionals who occasionally work with or address constitutional processes.

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