

READING THE CONSTITUTION:

IN SEARCH OF RIGHTS

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Shirkat Gah; Women's Resource Center, Lahore-Pakistan

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Published by: Shirkat Gah,
Women's Resource Centre,
P.O. Box 5192, Lahore-Pakistan
<http://www.sgah.org.pk>

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Karachi: shirkat@cyber.net.pk

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Revised by: Aisha Shaheed

Formatted by: Imran Javed Qureshi

Printed by: Shahid Pervaiz (Creative Designer)

We are grateful to NOVIB, NORAD & SDC
for their support of this booklet.

Reading the Constitution: In Search of Rights

A Constitution is the supreme law of a state and sets the framework for the development and functioning of both the legislature and administration. The object of the Constitution is to limit the arbitrary action of the government, subject it to judicial review, to guarantee rights of the governed and to define the position of the sovereign power.

There are various models of Constitutions in the world. This write-up is not looking at the technicalities of different models or offering a comparative analysis of those. It is an attempt to facilitate the reading of a Constitution, in search of Fundamental Rights, no matter what particular system of democratic governance, presidential or parliamentary, it has adopted. It provides some guidelines and pointers in looking at the position of rights in the Constitutions, states promises to ensure those rights, mechanisms for enforcement of rights, especially the powers and functions of the Courts and other Constitutional institutions bodies which facilitate promotion of rights.

Different Constitutions have different forms, which present the Fundamental Rights they guarantee, e.g. a separate chapter on Fundamental Rights, or a chapter on the rights and duties of citizens. These specific provisions shape the content of specific rights; however, the general philosophy of these rights is anchored in the Preamble of the Constitution. The Preamble is very important as it establishes a direction by describing the fundamental

values of a nation, upon which the Constitution rests. These values, which include history, basic philosophy and ideology, are termed 'Constitutionalism' and serve as the basic norm for a harmonious reading and interpretation of the Constitution and contribute to the development of Constitutional law.

Issues have been discussed in a question-and-answer format for easy comprehension and points been illustrated with examples from different Constitutions primarily of the countries of South Asia and of South Africa.

What are Fundamental Rights?

Right in law is an interest which is created and enforced either by the Constitution or by ordinary law. A fundamental right is something that is owed to a citizen by the state. The notion of 'Fundamental Rights' is reserved to those rights which are based or derived from the National Constitution and whose validity can be guaranteed by the court. It is through Fundamental Rights that people are elevated to the status of citizens from that of subjects.

Fundamental Rights can be divided into different categories. A more general division in the international human rights instruments, conventions and Constitutions of most countries is:

- a) **Civil and Political Rights.** These are also termed 'classic' rights. The Rights to life, liberty, fair trial, association, and the right to elect and be elected fall in this category.

- b) **Economic and Social Rights,** Examples of such rights are the right to social protection, the right to work, the right to collective representation and the right to basic levels of health care.

Civil and political rights serve as a constraint upon the unwarranted interference of governments in the everyday lives of their citizens and put a limit on their authority.

Social rights place a positive obligation on governments to ensure that their people can live and work in conditions that provide a basic level of human dignity. In the Constitution such obligations are generally expressed along with Fundamental Rights and reiterated in the Principles of State Policy.

Civil and political rights are considered 'justiciable' whereas social rights are treated as general objectives that do not benefit from full judicial complaint procedures. Social rights are thus subject to political supervision rather than protection in a courtroom.

1. Are the following rights covered?

There are certain 'umbrella' terms which broadly describe basic freedoms. Under these, many more specific rights may be delineated. These can include, but are not limited to, the following:

- **Right to dignity of a person**
- **Right to life liberty and freedom to security of person, including**
 - protections against any arbitrary action of the state, violating this right

- a person who is accused of an offence has the right to know the charges against him/her
- right to be defended by a counsel of choice
- the accused to be treated as innocent until proven guilty by a competent court in an open and fair trial
- protection against any retrospective punishment
- protection of a convicted person against any degrading punishment
- protection against torture and forced confession
- **Privacy of home**, protection against any intrusion in lawful communication, freedom of travel and residence, etc.
- **Equality before law and equal protection of law**
 - Protection against any discrimination on any basis e.g. gender, race, ethnicity, caste, religion
 - Rights against Exploitation e.g. trafficking of human beings, forced labour, slavery
- **Freedom of expression**, of free speech, association, to elect and be elected
- **Freedom of religion, belief and opinion**
- **Freedom to practice culture**
- **Freedom of trade and occupation**
- **Right to petition**

These rights can be expanded into many other related rights.

2. Do these rights exist for every citizen? Is this implied or explicitly stated?

While looking for rights, check if these are for all citizens and there are no distinctions or classifications on any grounds whatsoever. This can be checked in the language and content describing a particular right, especially the right to employment and any rights of an economic and social nature where rights are mentioned but their regulation is subject to the laws on those matters. In these laws, distinctions and classifications are made which many times affect women negatively. For example women are not permitted to join many professions on the plea that the requirements of that profession can not be met by members of the female sex. Similarly, minorities do not enjoy freedom of religion in many Constitutions in the same manner as does the majority community.

3. Are Fundamental Rights only for the citizens of state?

To enjoy Fundamental Rights mentioned in the Constitution of a country is not the exclusive right of the citizens of that country. Different countries have varying policies, but some basic rights are available to anyone who is in that country, even temporarily. Generally, basic civil liberties like the right to life safeguards against any arbitrary arrest and detention, the right to a fair trial and the presumption of innocence till proven guilty by a competent court these are rights available to everyone irrespective of the citizenship or residency status of an individual. Article 4 (part of introductory chapter) of Pakistan's Constitution does not distinguish between a citizen and non-citizen for her/his protection under the law and right to be treated in

accordance with law as the inalienable right of every individual. Similarly, Article 14 of the Sri Lankan Constitution provides that a non-citizen after a particular length of stay can enjoy the right to freedom of speech, assembly, association, occupation and movement on the same footing as citizens.

4. Is supremacy of Fundamental Rights clearly mentioned?

Fundamental Rights become meaningful only if these are mentioned as a 'touchstone' or the reference point for all the laws and the policies; they bind together all the organs of the state. Any law, state action or policy which is inconsistent with these rights can be made subject to judicial review and declared void.

Examples of such provisions in different Constitutions are:

South Africa, Article 8(1) of the Constitution states, "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

Bangladesh, Article 26 of the Constitution declares, "Laws inconsistent with Fundamental Rights to be void." Sub-part 1, stipulates that all existing law inconsistent with the provisions of this part (Fundamental Rights) shall, to the extent of such inconsistency, become void on the commencement of this Constitution.

Article 26(2) prohibits the state from enacting any law inconsistent with Fundamental Rights.

India, Article 13 of the Constitution states,

(1) "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

Pakistan, Article 8 of the Constitution includes a similar provision.

5. Are only future laws subject to the standards set out in the Fundamental Rights? What about laws which predate the Constitution?

This aspect is to be checked clearly. It is either mentioned in the Fundamental Rights chapter or in the provisions related to adoption of laws predating the Constitution. Generally laws governing functioning of armed forces and compulsory services are exempted from application of Fundamental Rights. Constitutions of different countries have adopted their own schemes on laws predating the Constitution. Pakistan and Bangladesh Constitutions via Articles 8(3)(b) and Article 47(2) respectively have exempted certain laws from the application of Fundamental Rights. However, both countries' Constitutions have left it to respective legislatures to bring those laws in conformity with the provisions of Fundamental Rights.

Exceptions granted to either pre-existing laws or laws enacted after the adoption of the Constitution mostly affect women and other disadvantaged sections of society. This is most often the case in countries with a colonial and/or monarchical past.

6. Is there any clause aimed at eliminating 'customs' and usages that contradict the Fundamental Rights section?

Customs and usages acquire force of law either through their historic existence and practice or by recognition through court decisions. Many customs and usages have negative implications if not for all then at least against certain sections of society. In many societies it is customary to deny women their share in inheritance. However, Fundamental Rights provisions do declare such customs as void.

Article 13(3)(a) of the Constitution of India in the definition of 'law' includes custom or usage having force of law to be void if it is in derogation of provisions of Fundamental Rights. Similarly article 8(1), of the Pakistan Constitution declares that, "any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by chapter of Fundamental Rights, shall, to the extent of such inconsistency, be void."

7. Do these specify 'equality before the law' AND 'equal protection of the law'?

What does this principle of equality before law and equal protection of law mean?

It means that among equals the law should be equal, that it should be administered equally and that all alike should be treated alike. Equality before law is a negative concept: it discourages and negates all special privileges to any citizen or class and subjects them to the ordinary law of the land. It implies absence of any special privileges in favour of an individual. Equal protection of law has a positive connotation and it declares that all citizens must have equal protection if placed in the same circumstance and situation.

In a Constitution, the principle of equality before the law and equal protection of law provides mechanisms, which on the one hand put a limit on any discriminatory action/legislation by the state in relation to the civil liberties of citizens. On the other, it provides safeguards to citizens against any discriminatory policy/legislation which may become a hurdle or that may deny citizens' rights to pursue their social and economic rights.

Equal protection to all is the basic principle on which justice under the law rests.

Article 7 of the Universal Declaration of Human Rights, states that all are equal before law and are entitled without any discrimination to equal protection of the law.

8. Are there any provisions for the affirmative action to promote equality?

Although equality before law and equal protection of law is the fundamental principle of rights in the Constitution, in every society there are inherent inequalities. The principle of equality before law can only be applied amongst equals, people who are placed in similar circumstances. Constitutions provide special measures and mechanisms to provide for equal opportunities to those sections of society who have been disadvantaged as a result of long term discrimination. Many Constitutions provide special measures for disadvantaged sections of society, like women, minorities, and people living in underdeveloped or less developed regions of the country.

Affirmative action provisions allow the state authorities to make 'fair classifications' and 'distinctions.' The principle to be followed is that the justification for differentiation or 'classification' must be to achieve a legitimate purpose.

There are different practices about affirmative action, e.g. reservation of quotas in jobs, in educational institutions for the people belonging to areas of the country where the education and other facilities are not at par with the rest of the country.

Similarly, women do not get the same opportunities to come into electoral politics, so a specific number of seats are reserved for them in elected forums including the Parliament of the country.

9. Are protections against 'prejudicial actions' of the state clearly spelled out?

Fundamental Rights provide protections to citizens and all those who are subject to state law against any action of the state which is in derogation of these rights. Any action of the state in transgression of standards and procedures mentioned in the Fundamental Rights is void.

Protections of rights against the government and other state authorities are in two forms. **One is substantial and the other is procedural.** The substantive ones are an end in themselves e.g. the dignity of a person is inviolable. Procedural ones provide for the procedures to be adopted by the state in dealing with individuals e.g. Article 33 of the Bangladesh Constitution provides for safeguards against arrest and detention. A similar right is mentioned in Article 10 of the Pakistan Constitution and Article 22 of the Indian Constitution. This right provides procedures which state authorities are bound to adopt in the arrest or detention of a person alleged to have committed an offence. These procedures mention the rights of the accused, such as:

- the accused shall be informed of the charge against her/him
- the accused will have the right to defend herself/himself through a legal counsel of her/his choice
- the alleged cannot be detained beyond a certain period without written authorization of a judicial officer

The mandatory procedures for the state authorities become the rights of the accused. These procedural rights are in fact dealing with the substantive right of life and liberty of an individual.

10. Are the rights inviolable?

All legal texts draw their meanings from the plain meanings of the words used in the text. Words used to describe of rights are of utmost importance. Generally the words used in Fundamental Rights texts of the Constitution are such that they have broader meanings and are not restrictive in approach. Such words place the onus of enforcement upon the courts. For example, there are two ways to describe the dignity of a person. Some Constitutional texts prescribe that dignity of person (old texts use the word 'man' instead of 'person') is to be respected while some say it is inviolable (meaning it can never be violated in any form whatsoever). The use of the word *inviolable* places restrictions upon any degrading forms of punishments even of convicted persons, sentenced with rigorous imprisonments permitted under the law.

Another important term when describing a right is '*inalienable*,' meaning something that can never be taken away. For example, the inalienable right of an individual to be treated in accordance with law. The mention of this term places restrictions upon the state such that even in situations of emergency when some of the Fundamental Rights may be suspended (as per Constitutional provisions) no arbitrary or detrimental actions can be taken against individuals.

Similarly, for the laws to be in accordance with the provisions of Fundamental Rights mentioned in the Constitution, the use of words like 'inconsistency' rather than 'in conflict' provide different meanings and stricter criteria for the courts to judge the validity of any law, should a dispute arise about a statutory provision infringing upon the rights of citizens.

11. Are there any conditions or exceptions attached to specific rights?

No statement of rights in any charter or any Constitution is absolute. All liberties and **freedoms are subject to some regulations**. The key point is that these regulations should not infringe upon rights in any arbitrary or unreasonable manner, nor should they exceed the legitimate purpose of meeting the just requirements of society as a whole. The state, through legislation and policies, can make regulations for the collective good. For example, freedom of information and freedom of expression cannot be curtailed arbitrarily. However, in a court case of sexual violence against a minor or a woman, the press can be restricted from reporting the name or printing the photograph of the survivor for her/his protection and to avoid 'unfavourable' adverse publicity.

For certain rights, the text in the Constitution may describe a particular right in the first part of the statement and the latter part qualifies it. Conversely, the conditions and qualifications may be mentioned first and then the right of citizens is described. For example Article 37 of the Bangladesh Constitution provides the right to peaceful assembly and to participate in public meetings and processions peacefully and without arms, subject to any

reasonable restrictions imposed by law in the interests of public order or public health. Such a qualification or condition in the first part of the article weakens the exercise of a particular right.

12. Can conditions / restrictions negate basic rights?

The insertion of conditions and qualifications does not imply that these can water down a substantive right. Any condition or qualification has to promote a specific legitimate aim, e.g. in the interest of public safety. Any infringement is to be specifically regulated by the law and has to be in line with the spirit of the right mentioned in the Constitution. Any interference with the right has to be a proportionate response to the legitimate aim. If the aim can be achieved by a less intrusive method then that is to be applied instead.

13. Check for any contradictions between Fundamental Rights (one may affect the other) e.g. (a) freedom of movement vs. (b) right of employment?

All rights are interrelated. If one right is curtailed it affects other rights. For example if there are restrictions imposed upon the freedom of movement and freedom to reside in any part of the country, then this restriction will automatically affect the right to employment although there may be no such restriction on that right.

14. Can Fundamental Rights be suspended?

Most Constitutions of the world provide for emergency situations when the Fundamental Rights can be suspended and laws be enacted which can curtail basic liberties during the period of emergency. The points to check are:

- What procedural requirements are mentioned in the Constitution to exercise power of emergency?
- If the authority is with the President, then is it his/her discretion or does the President's decision have to be endorsed by the parliament?
- Are there necessary checks and balances against the abuse of emergency powers and a clear mention of the rights which can not be effected, even in a period of emergency? For example, the right to be treated in accordance with law can not be taken away under any circumstances. Another important aspect is judicial supervision of the proclamation of emergency

Article 37 of the South African Constitution provides the procedure to declare and enforce a state of emergency by the parliament. It also mentions the duration of emergency procedure for any extension in the period of emergency and a clear list of rights which can not be derogated. For example, the right to human dignity and the right to life can not be derogated under any circumstances.

The same article empowers court to decide on the validity of:

- a) a declaration of a state of emergency

- b) any extension of a declaration of a state of emergency, or
- c) any legislation enacted, or other action taken, in consequence of a declaration of state of emergency

In Pakistan and Bangladesh the power to declare emergency is held by the President, but in both countries such a declaration is to be placed before the Parliament for approval. Any extension in the period of emergency is to be done by the Parliament. Although, the Constitutions of both these countries permit special enactments which can affect Fundamental Rights, the right to be treated in accordance with law, right to life, liberty, and the prevention of arbitrary detention can not be denied. Laws or parts of laws that are not in conformity with the Fundamental Rights, cease to exist on termination of the emergency period.

Note: Procedure and other conditions related to emergency situation, suspension of Fundamental Rights during emergency may not always be mentioned in a chapter of Fundamental Rights. It may be in a separate chapter dealing with emergency and powers of the state.

15. Who interprets the Constitution and decides whether a law is in conformity with the provisions of the Constitution or not?

In democratic set-ups, the system of governance is based upon the principle of separation of powers between different organs of the state. Constitution defines powers and functions of the executive, legislature and judiciary.

The legislature has the responsibility to legislate within the parameters determined by the Constitution, executive to implement law and it is the task of the judiciary to interpret law including the Constitution.

Constitutions of different countries provide for this function to the courts. This is usually the jurisdiction of the superior courts, which often includes the Supreme Court. Certain Constitutions provide for additional courts, which may operate at the provincial, state or national levels. Some countries have separate Constitutional courts in addition to the Supreme Court. Such a Constitutional court has the final authority to adjudicate upon Constitutional matters.

South Africa, in addition to its Supreme Court of appeal, has a special Constitutional Court. It is the highest court in all Constitutional matters. Article 167 (7) of the South African Constitution defines a Constitutional matter, **“A Constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.”** Amongst other functions of this court, it is the court which is empowered to decide:

- disputes between organs of state in the national or provincial sphere concerning the Constitutional status, powers or functions of any of those organs of state
- constitutionality of any amendment to the Constitution
- decisively whether an Act of the Parliament, a provincial Act or conduct of the President is Constitutional

A matter can be brought directly before the Constitutional Court to examine the constitutionality.

Constitutions of India, Bangladesh and Pakistan confer power of interpretation of all laws including the Constitution to the Supreme Court, and a law declared by the Supreme Courts of these countries is binding on all other courts.¹ So, Superior Courts in the countries mentioned above have power of 'judicial review' of the Acts of their legislatures and all the actions of the executive. Judicial review is the power of the courts to review decisions of another department or level of the government. This review can be on question of fact or on question of law or both. In Constitutional petitions for enforcement of Fundamental Rights, courts do not go into disputes of 'fact'. They examine the legality of the action and the validity of the law involved.

They can strike down a law or a policy if it is not in conformity with the Fundamental Rights or violates any other provision of the Constitution. They can declare any action of the executive as illegal, and of no effect if it is not in conformity with the Constitution or the relevant law.

In India, Bangladesh and Pakistan Supreme Courts also have advisory status and the President of the country can refer any question of law, which the President considers of public importance, to the Supreme Court for consideration and seek opinion.

¹ Under Articles 141, 111 and 189 of their respective Constitutions.

16. What are the mechanisms in the Constitution for the enforcement of Fundamental Rights?

Although it is the duty of the legislature and the executive to protect and promote basic rights of the citizens, in reality these institutions can transgress rights. Many Constitutions of the world provide for quick and adequate mechanisms for redress and enforcement of basic rights. This power is given to the courts. Provisions for enforcement of the rights may not always be provided in the chapter of rights. Be sure to check the provisions related to powers and functions of the Courts constituted under the Constitution.

The Constitutions of South Africa, India and Bangladesh have enforcement provisions within the chapters of rights.² These Articles in the respective Constitutions provide for the right to petition in the courts to seek redress in situation of violation of rights by any state functionary.

17. How do courts enforce Fundamental Rights?

Courts enforce rights through their power of 'judicial review' and by issuing writs (orders requiring performance of a specified act) to relevant state functionaries.

Article 199(1)(c) of the Constitution of Pakistan, empowers High Courts to issue orders, on the application of an aggrieved person, to the state authorities or functionaries for the enforcement of Fundamental Rights.

² Related articles of the Constitutions are: 38 of South Africa, 32 of India and 44 of Bangladesh.

Article 184(3) of Pakistan Constitution permits filing a petition directly in the Supreme Court for enforcement of Fundamental Rights, if a matter of public importance is involved.

Validity of Law

One can move a petition in the court challenging a law as a whole or a part of it, if it is inconsistent with Fundamental Rights and abridges or curtails rights. The court will examine the law and if found to be transgressing the limits set out in the Fundamental Rights, can declare the law, or part of the law, void and of no effect.

Legality of Action

If any action of a state functionary impinges upon your Fundamental Rights then such an action can be challenged before court on the ground that it is not in accordance with law or it is in excess of the limits set by law or it is without the authority of any law. The court will examine the legality of such action and if found to be unlawful on any of the grounds, will declare it illegal and of no legal effect.

Specific Writs by Courts

Courts which are empowered by the Constitution in India, Bangladesh, Pakistan and South Africa can issue the following writs:

- **Certiorari**

Such a writ is issued to an authority passing an order, where it has acted without jurisdiction or in excess of it or in violation of any principles of natural justice.

- **Mandamus**

This is a writ issued to a public functionary requiring him/her to do some specific thing required by law. Its principal object is to compel government or its officer(s) to carry out the mandate given by law.

- **Prohibition**

This is issued to a public authority or state functionary refraining him/her from doing anything he/she is not permitted by law to do.

- **Quo warranto**

Such a writ is issued to inquire by what authority of law a public office is being held. It deals with the legality of an appointment.

The above mentioned writs are not a matter of right for the aggrieved or affected person. These are the prerogative of the court and in certain instances courts can refuse to issue a writ. The main principle for issuance of any of such writs is that if the court is satisfied that no other adequate remedy is provided in law for redress. Power of courts to issue these writs is most vital to keep the administrative authorities in check and within the confines of law. Not all Constitutions continue to use archaic Latin terminology.

- **Habeas Corpus**

The writ of habeas corpus is issued against any illegal, improper detention of any person by state authorities or by any private person. This writ is the primary

safeguard against any prejudicial action of state violating personal liberties of an individual. Even if an individual is accused of an offence, the writ of habeas is a security against any procedural violation of law by the law enforcement agencies. For the issuance of this writ, the petitioner does not have to be an 'aggrieved person' or have been directly affected. It can be filed by any concerned person for the liberation of an illegally detained person.

18. Is it necessary to be an aggrieved person or a directly affected person to file a petition for issuance of a writ of the court?

In all matters it is not a condition to be directly affected to qualify to be a petitioner for issuance of a writ of court. In matters of public interest, concerned individuals, groups, women's and human rights organizations can petition courts for the protection of Fundamental Rights. Such litigation, commonly termed as Public Interest or Social Action litigation, is in practice in South Asian countries. Courts in India, Bangladesh and Pakistan have enlarged the definition of 'aggrieved person' and allowed petitions from groups, individuals other than those who have been directly affected.

Section 38 of the South Africa Constitution, providing for the enforcement of rights, states:

"Any one listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant

appropriate relief, including a declaration of right. The persons who may approach a court are:

- a) anyone acting in their own interest
- b) any one acting on behalf of another person who can not act in their own name
- c) any one acting in the public interest, and
- d) an association acting in the interest of its members"

19. Does the Constitution provide for other institutions for enforcement of the Constitution, e.g. Commissions or tribunals?

Constitutions of many countries provide for the setting up of Commissions, tribunals and such other institutions to support the Constitution and facilitate Constitutional democracy. Commissions can be on specific subjects like elections, women, gender equality, human rights, labour, minorities or for specific geographical areas, e.g. for people living in far-flung, underdeveloped areas. One major task of such commissions is to act as monitoring bodies on the specific issues for which they have been set up. Human rights commissions monitor the state of human rights in the country, inquire into complaints of violations of rights and pursue relevant state authorities for redress. They also carry out public awareness programmes.

The Constitution of South Africa has set up the following commissions:

The Human Rights Commission, The Commission for the Promotion and Protection of the Rights of the Cultural and

Linguistic Communities, The Commission for Gender Equality and The Election Commission.

In India and Pakistan, Commissions on Status of Women have been set up under ordinary legislation. Similarly there are other commissions or tribunals on the subjects mentioned above.

20. Does the Constitution provide for mechanisms to give effect to the International Commitments of the State?

The Constitution is the supreme law of the country. However, once a state ratifies a convention of the United Nations, it becomes binding for that state to bring its laws in conformity with the provisions of that convention. The state is then obliged to report their progress to the relevant Commissions and committees of the UN.

When new Constitutions have been adopted in the recent past, such as South Africa and Afghanistan, they make specific mention - in either the preamble or the Fundamental Rights chapter - that the state has explicitly become party to international conventions and those will be respected in the domestic legislation.

Countries with pre-existing Constitutions that have ratified international conventions (or signed international and regional treaties), have subsequently enacted a Bill of Rights to give effect to these conventions, e.g. Human Rights Act of 1998 in the UK and the Bill of Rights Act of 1990 in New Zealand. Although these are ordinary

enactments, they function in a framework which can be called "Constitutional."

Article 253 of the Constitution of India mentions it as power of the Central Parliament to give effect to international agreements through legislation.