Economic, Social and Cultural Rights in the Constitutions of Transitional Countries: Examples for the Arab Democratic Transformation

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Tunisia is well on its way to debating its new constitution through the postrevolutionary Constituent Assembly. However, ideology, identity politics and interpretations of history still intervene to affect material priorities, accountability issues, victims’ rights, questions of participatory decision making, and national reconciliation. Nonetheless, the rewriting of the constitution potentially could provide all Tunisians a chance at real reform, to exercise full citizenship effectively and put in place a vanguard to prevent future abuses of power. This occasion also provides the related opportunity for citizens to re-envision their state, giving it citizenship greater meaning and citizens a true stake in its conception.

Many serious constitutional proposals relate to economic, social and cultural rights (ESCRs) of citizens and aid in statecraft: the art of leading and managing the state as comprised of (1) the land, (2) its peoples and (3) its institutions, including government. Enshrining human rights to regulate public and private property, including housing, water and land in the constitution, is vital for the long-term success of statecraft.

ESCRs in the constitution ensure that the constitution forms a cornerstone of a stable and sustainable and democracy in the state. Enshrining ESCRs ensures that the state respects, protects and fulfills the indivisible bundle of rights of all people in the country with corresponding state obligations that, in practical terms, apply to all law and bind the government—the legislature, the executive, the judiciary—and all organs of state. In ethical terms, ESCRs are indispensable to affirming the values of human dignity, equality and freedom.

Examples from the new generation of constitutions in transitional states are instructive as to how to enshrine state obligations to respect, protect and fulfill ESCRs, as explicit, for example, in the South African Constitution’s Article 7. However, constitutions do not often stipulate how this will take place in practice. That detailed task is reserved for legislators, policy makers and the judiciary.

In applying the methodology of ESCRs, the International Covenant on Economical Social and Cultural Rights (ICESCR), which Tunisia ratified on 3 January 1976, provides the framework of state obligations corresponding to each right. Tunisia, now, as other reforming states preceding it, can benefit from the Covenant’s binding obligations that, in their necessarily general terms,

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nonetheless go far in answering the question of how the rights are to be respected, protected and fulfilled.

The Covenants’ over-riding principles that apply to each of the rights enshrined in ICESCR are:

- Self-determination (Art. 1.1)
- Nondiscrimination (Art. 2.2)
- Gender equality (Art. 3)
- Rule of law (Art. 2.1)
- Progressive realization (Art. 2.1)
- Maximum of available resources (Art. 2.1)
- International cooperation (Art. 2.1)

We will start with these over-riding principles of implementation of states’ ESCR obligations, exploring examples from the transitional constitutions of Brazil (1988), Colombia (1991), Ecuador (2008), Kenya (2010), and South Africa (1994).

Self-determination

Article 21(3) of the Universal Declaration of Human Rights reflects the customary law principle that “the will of the people shall be the basis of the authority of government.” The Constitution of Kenya, in Chapter One—Sovereignty of the People and Supremacy of This Constitution, reflects that norm and sets forth that “(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution”; “(2) The people may exercise their sovereign power either directly or through their democratically elected representatives”; and that “(4) The sovereign power of the people is exercised at—-(a) the national level; and (b) the county level.”

The Ecuadoran Constitution’s “Chapter Four: Rights of communities, peoples and nations” is most explicit in recognizing the internal self-determination of communities and peoples within the land of the state. Article 56 through 60 recognize, in detail, the rights and freedoms of, and corresponding state obligations toward indigenous peoples, Afro-Ecuadorans and montubios as particularly recognized communities with internal self-determination rights.

Article 1 of Brazil’s Constitution establishes that “All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution.”

Likewise, Article 3 of the Colombian Constitution establishes that “Sovereignty resides exclusively in the people from whom public power emanates. The people exercise it in direct form or through their representatives within the limits established by the Constitution.”
Nondiscrimination

The Founding Provisions of the South African Constitution establish that the Republic of South Africa is one, sovereign, democratic state founded on, among others, the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms; and non-racialism and non-sexism.”

Likewise, Colombia’s Constitution (Article 13) follows closely the language of UDHR and also provides for positive discrimination toward historic victims of discrimination.1

In its Article 7 on “Equality,” South Africa’s Constitution is more explicit, and guarantees:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Subsequent articles balance freedom of expression with the rights of others, excluding “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm” (Article 16.1), including in the media (Article 46.7).

In its “Chapter one: Principles for the Enforcement of Rights, the Ecuadoran Constitution’s Article 11.2. guarantees that:

“All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law.”

Article 5 of the Brazilian Constitution determines that:

“All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property…”

Brazil’s constitutional provisions establish principles of nondiscrimination and special efforts to integrate person with handicaps in nine separate articles.2
In similar fashion, Article 9 of Ecuador’s Constitution provides that “Foreign persons in Ecuadorian territory shall have the same rights and duties as those of Ecuadorians, in accordance with the Constitution.”

Relevant to need to address past geographical discrimination in Tunisia, an example from Kenya’s Constitution could provide a model of affirmative action. That country’s constitution embodies 15 articles that address measures required to ensure policies that favor “marginalized” communities.3

**Gender equality**

Brazilian Constitution’s Article 5 also stipulates that “men and women have equal rights and duties under the terms of this Constitution” (1). Social rights defined in Article 7 also provide special incentives to protect women in the labor market, as well as provide for maternity leave (7.18 and 201.3), as well as paternity leave (7.19) for workers in Brazil.

The new Kenya Constitution’s Article 60 (f) mandates the elimination of gender discrimination in law, customs and practices related to land and property in land. In another practical measure, Kenya’s Constitution specifies that one of the principal functions of the Kenyan National Human Rights and Equality Commission “promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development” (Article 59(2)(b)).

The Colombian Constitution’s Article 43 affirms that “Women and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination.” The same Article recognizes special needs and institutionalizes corresponding affirmative action for women.4 Article 40 also mandates that: “The authorities will guarantee the adequate and effective participation of women in the decision making ranks of the public administration” as a fundamental right.

In addition to the standard gender equality provisions, Ecuador’s Constitution, in Article 27, mandates that education “shall promote gender equity”; and, as in other sectors, constitutional provisions on the right to health requires that bioethics and health services take a “gender and generational approach” (Article 27). Article 70 mandates policies to achieve equality between women and men, through the specialized mechanism set up by law, and to mainstream the gender approach in plans and programs and by providing technical assistance for its mandatory enforcement in the public sector.

In a related provision, Article 68 defines “family” as:

“The stable and monogamous union between two persons without any other marriage ties who have a common-law home, for the lapse of time and under the conditions and circumstances provided for by law, shall enjoy the same rights and obligations of those families bound by formal marriage ties.”
Therefore, the Ecuador recognizes same-sex couples as constitutional families, but limits adoption to different-gender couples.

**Rule of law**

The Kenyan Constitution’s Article 22 (1) states that “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

The South African Bill of Rights, Article 38, provides for the enforcement of the enshrined rights as follows:

Anyone 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 rights. The persons who may approach a court are:

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

Both the South African and Kenyan constitutions have enabled jurisprudence that has emerged as models of judiciability of ESCR.5

**Progressive realization (constant improvement of living conditions)**

South Africa’s constitution (1996) provides that the "state must take reasonable and legislative measures within available resources to achieve the progressive realisation of these rights" (Article 27.2). So, too, does Kenya’s constitution oblige the State to “take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43”Article 21.2).

“Chapter One: Principles for the enforcement of rights,” in Ecuador’s Constitution ensures “The contents of rights shall be developed progressively by means of standards, case law, and public policies. The State shall generate and guarantee the conditions needed for their full recognition and exercise” (Article 11.8). State obligations corresponding to some specific ESCRs are also recognized to ensure progressive realization, such as social security (Article 333) and the inclusion of minority languages in education curriculum (Article 347.10). Brazil’s constitution sets out that obligation also for progressive universalization of free secondary education (Article 208.2 and Amendment 14).

**Maximum of available resources**

Measuring and ensuring the state’s application of the maximum of available resources for the implementation of rights remains one of the principal methodological challenges to monitoring and proving state compliance.
Brazil’s Constitution comes close to enshrining this principle with regard to rights to land, housing and health (24, 25 and 26, respectively). However Kenya’s Constitution provides a method for ensuring this principle of implementation in its Bill of Rights (Chapter Four), which places the burden on the state, when challenged, to prove that it did not have the resources available to implement a particular right (Article 19(5)).

**International cooperation**

The ICESCR principle of international cooperation implies a right of states to seek technical and economic cooperation and assistance (Articles 2.1 and 22) to fulfill human rights. It also imposes an extraterritorial dimension to state behavior and oversight consistent with the rights and corresponding obligations enshrined in the Covenant.

In that spirit, the Kenyan Constitution’s Article 21(4) establishes that “The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.”

Under “Title 1: Fundamental Principles,” Article 4 of Brazil’s Constitution establishes that “The international relations of the Federative Republic of Brazil are governed by a set of ten principles, including “cooperation among peoples for the progress of mankind.”

The Colombian Constitution also includes no fewer than 12 articles affirming adherence to international treaties and engaging in international cooperation toward the fulfillment of human rights.

**Specific ESCRs: Property, Housing, Land, Water and Environment**

A review of the constitutions of these transitional situations provides lessons as to how drafters have positioned and articulated specific ESCRs within the principled implementation framework. For such a review, we will explore how transitional states have treated a bundled of conceptually inter-related rights having largely material and habitat consequences for people. Thus, this exercise focuses on the human rights dimensions of property, adequate housing, land water and environment.

**Property**

In recent history, with the resurgence of absolutist private property rights, property has often been “disembedded” from its social and cultural context. The provisions of recently reformed constitutions have attempted to provide for the “social function of property,” and ensure that this function is carried out. However, the constitutions largely defer to legislation and policy making to give specific meaning to this function and ensure that it is implemented.
A key consideration is the function of property, both public and private, as a value having a social function. Notably, constitutional provisions recognizing that property must fulfill its social function are found in numerous constitutions. This establishes the rights and obligations of possessors of property, including owners, to ensure that property is managed in the context of the wider community needs. The objective is such that the social function should strike a balance between acquired private property rights and the rights of all to housing, livelihood and essential public goods such as water, environment and land as habitat. Enshrining the social function of property also would harmonize with the deepest ethical traditions of the region, including Islamic and pre-Islamic ethical systems.

Constitutions of other newly reformed states provide valuable examples as to how this could be done. The social function of property is already recognized in the constitutions of Brazil, Columbia, Ecuador, Kenya and South African.

Notably, the social function of property is enshrined in the Egyptian Constitution (Articles 30 and 32), despite the stripping of socially relevant provisions led by former President Muhammad Husni Mubarak. For certain historical reasons, the social function of property is absent from the Tunisian Constitution, and the subject remains controversial.

The Columbian Constitution (1991) obliges governments to “promote” many positive state obligations, as well as embodies the negative provisions to protect human rights, such as prohibiting the arbitrary confiscation of property. Article 58 states explicitly that property has an inherent social and ecological function that implies corresponding state obligations. Concerning public interest, Article 58 states that this value always precedes (trumps) private interests.

It provides, in Article 58, that

“Private property and the other rights acquired in accordance with civil laws may not be ignored or infringed upon by subsequent laws. When, in the application of a law passed on account of public necessity or social interest and recognized as essential, a conflict should occur about the rights of individuals, the private interest will yield to the public or social interest. Property has a social function that implies obligations. As such, an ecological function is inherent in it.”

“The state will protect and promote associational and collective forms of property.”

Brazil’s 1988 Constitution also asserts the social function of property eight times. For instance, “Chapter I - Individual and Collective Rights and Duties” stipulates that “property shall observe its social function.” Article 156 recognizes that municipal taxes may be progressive, under the terms of a municipal law, in order to ensure achievement of the social function of the property.
Brazil’s constitutional Article 170 stresses that the economic order should treat private property with regard to its social function. The Constitution of Brazil guarantees compensation of loss or damage of property acquired for public purpose and establishes a tax to discourage the retention of unproductive real property, particularly conferring corresponding authority on local municipalities (50% of proceeds from tax on unproductive real estate), which "may be progressive…to ensure achievement of the social function of property."  

A similar principle is adopted in separate legislation in Colombia, as Land Development Law 388 (1997), recovering “socially created” values (plusvalía) to benefit the public and the poor. Such local self-determination with democratic participation would be indeed revolutionary for local governance in the MENA region.

The Brazilian Constitution bears an important chapter on Urban Policy (Chapter II). According to Article 182, urban development policy is carried out by the municipal government, according to general guidelines set forth in the law, and is aimed at “ordaining the full development of the social functions of the city and ensuring the well-being of its inhabitants.” Paragraph 2 stipulates that urban property performs its social function “when it meets the fundamental requirements for the ordainment of the city as set forth in the master plan.”

Chapter III deals with agricultural and land policy and agrarian reform. Article 184 recognizes that “it is within the power of the state to expropriate on account of social interest, for purposes of agrarian reform, the rural property that is not performing its social function.”

According to Article 186, the social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

1. rational and adequate use;
2. adequate use of available natural resources and preservation of the environment;
3. compliance with the provisions that regulate labour relations;
4. exploitation that favours the well-being of the owners [of it] and labourers [on it].

In Ecuador’s constitutions, Article 66 establishes rights and freedoms. Paragraph 26. The right to property in all of its forms, with social and environmental function and responsibility. The right to have access to property shall be enforced by the adoption of public policies, among other measures.

In the urban context, Article 31 provides that:

“Persons have the right to fully enjoy the city and its public spaces, on the basis of principles of sustainability, social justice, respect for different urban cultures and a balance between the urban and rural sectors. Exercising the right to the city is based on the democratic management of the city, with respect to the social and
environmental function of property and the city and with the full exercise of citizenship.”

South Africa’s constitutional provisions on property rights (Article 25) subjects restrictions on property rights (not limited to land) to public interest. (More under Land below.)

The other non-Arab African constitutions cited here make no explicit mention of the “social function of property,” but instead recognize “the right to accessible and adequate housing,” stipulated in both the South African and Kenyan constitutions. (More under Human Right to Adequate Housing below.) Additionally, they prohibit arbitrary deprivation of property. These countries’ strong constitutional provision of ESCRs has enabled progressive jurisprudence to redress and deter forced eviction and uphold victims’ right to reparations.

**Land**

The new Constitution of Ecuador has been heralded by many for its progressive provisions regarding the rights of indigenous peoples, Afro-Ecuadorians, and even of Mother Earth (*Pacha Mama*).

Its Article 64 establishes the State “duty” to promote the “gradual access of agricultural workers to landed property in individual or associational form,” and to related and enabling services with the purpose of improving the incomes and quality of life of the peasants.

The Ecuadoran Constitution provides the ways and means for the state to regulate uses of land. It specifically empowers municipalities to acquire, appropriate, reserve and control land for “development” in accordance with law (Article 376), for example, through the prevention of gain through speculative land practices and changing uses of land from rural to urban, or public to private (Article 376). Similarly, Article 282 “forbids” large estate farming and land concentration.

This measure evokes findings of Tunisia’s post-revolution National Commission to Establish the Facts about Corruption and Embezzlement. The Commission has reported practices of the former government illegally turning over State land for privatization at cheap prices, sometimes for a symbolic one dinar, as has been the case with farms turned over to ministers and others close to the former president. This practice arbitrarily annulled standing contracts between the State and local peasants who had cultivated the land for many years.  

Ecuador’s Constitution recognizes certain inalienable land rights for particular communities in Ecuador. Article 329 establishes that the indigenous peoples’ territories be governed by councils formed and regulated according to the customs of their communities, and simultaneously manage land and natural resources in accordance with a National Development Plan. In order to mitigate
the potential dilemma posed by these two conditions, it also provides that the exploitation of natural resources in the indigenous territories will be done without impairing the cultural, social, and economic integrity of the indigenous communities. In case of acquisition of land, the Constitution follows closely the language of the ILO Convention 169 mandating free, prior and informed consent.

In Provisional Article 55, the Constitution has obliged Ecuador’s Congress to adopt a law that recognizes the right to collective property of the Black (Afrodescendant) communities on uncultivated rural lands adjoining the rivers of the Pacific Basin, in accordance with their traditional cultivation practices.\(^1\)

With regard to land, the South African and Kenyan constitutions have more specific articles. The Kenyan Constitution, like Brazil’s, with its emphasis on state planning, stresses that principles of land management should be compatible with national land policy. The Kenya Constitution’s Article 62.2 provides that:

“Public land shall vest in, and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission.”

The Constitution stipulates also that “Public land shall not be disposed of, or otherwise used except [by] an Act of Parliament specifying the nature and terms of that disposal or use” (Article 62.4).

The Constitution of Kenya devotes an entire chapter (5) to “Land and Environment.” Under Article 61(1), all land in Kenya “belongs to the people of Kenya collectively as a nation, as communities and as individuals.” Article 60 (1) stipulates that:

“Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

(a) equitable access to land;
(b) security of land rights;
(c) sustainable and productive management of land resources;
(d) transparent and cost effective administration of land;
(e) sound conservation and protection of ecologically sensitive areas;
(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

The Kenyan Constitution also establishes the functions of the National Land Commission to include initiating investigations and recommending appropriate redress for “present or historic land injustices” (Article 67.2[e]).

In Article 63 (1) Community land shall vest in, and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held. (Article 63 (3)).

Community land shall not be disposed of, or otherwise used except by legislation specifying the nature and extent of the rights of members of each community individually and collectively (Article 63 (3)).

South Africa’s constitutional provisions on property rights (Article 25) subject restrictions on property rights (not limited to land) to public interest, which includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all of South Africa’s natural resources.

South Africa’s constitution

Article 25: Subject property rights (not limited to land) to the public interest, including the nation’s commitment to land reform, restitution, and equitable access to all natural resources.

This commitment to affirmative action is explicit in Article 25 (5), which obliges the state to “take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.” In particular, this applies to:

“A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure that is legally secure or to comparable redress” (25:6).

The Constitution specifies this governance principle further to mean a person or community dispossessed of property after 19 June 1913 as a result of such past racially discriminatory laws or practices as “entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.”

The section goes on to ensure that “No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination” (Article 24:7). The Constitution followed South Africa’s Restitution of Land Rights Act, 1994 and called for further legislation to implement the remedy guaranteed under Article 25(6).

Right to adequate housing

The Constitution of Ecuador also states in Article 30 that “Persons shall have the right to a safe and healthy habitat and adequate and decent housing, regardless of their social and economic status” This right is also guaranteed in separate articles specifically for elderly and disabled persons.

In the Kenyan Constitution’s section on ESCR recognized the right to accessible and adequate housing, and to reasonable standards of sanitation (Article 43(b)).
Although South Africa is not presently a party to ICESCR, its constitution exceeds in some detail the laconic guarantee of HRAH in the Covenant. The South African Constitution’s Article 26 establishes that:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

**Right to water**

Ecuador’s Constitution, in Article 12, “The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life.”

Article 282 forbids “the monopolization or privatization of water and sources thereof.” The article also establishes that the State “shall regulate the use and management of irrigation water for food production, abiding by the principles of equity, efficiency and environmental sustainability.”

Under Article 318, water is defined as “part of the country’s strategic heritage for public use” and is the inalienable property of the State. The same article reiterates the ban on “any form of water privatization.”

As related to Tunisia, its African regional obligations also prohibit typical privatization of such natural resources by transnational corporations, as do Islamic ethical principles of longer standing strictly limit privatization by any party.

These articles guide policy in water management and sanitation, obliging the state to encourage and strengthen community water management initiatives. They provide that water management, whether for human consumption or irrigation, is to guarantee food sovereignty, ecological wealth and productive activities, in that order of priority.

Article 65 establishes that:

“The production of food crops will benefit from the special protection of the state. For that purpose, priority will be given to the integrated development of agriculture, animal husbandry, fishing, forestry and agroindustrial activities, as well as to the building of physical infrastructural projects and to land improvement.”

The Kenyan Constitution, in its Article 43(d), enshrines the right “to clean and safe water in adequate quantities.”

**Right to Environment**
In South Africa’s Constitution, Article 24 enshrines everyone’s right

a. to an environment that is not harmful to their health or well-being; and

b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
   i. prevent pollution and ecological degradation;
   ii. promote conservation; and
   iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The Kenyan Constitution provides, in Article 42, that:

“Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.

Article 69 obliges the state to:

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

Conclusion

The rewriting of the Arab transitional constitutions is currently overshadowed by questions of representation to include all segments of the population. Under that shadow, the present stage foretells little about the consideration for ESCs, the demand for which lie at the heart of the people’s revolution.

The principle difference between those countries and the Arab Spring processes is the depth of civic education preceding their constitutional changes, wherein such concepts as the social function of property, the human right to adequate
housing and land rights already have been long debated with the assertive participation of broad social movements.

When considering the habitat and related ESC rights and the social function of property, their articulation in the constitution and its application, global experience instructs us that certain indispensable tasks for drafters and constituents remain:

(1) To consider the multidimensional use of land, water, environment and housing, and how property should provide a set of social entitlements and corresponding obligations, instead of simply being an economic consideration. This should be done by focusing on how people use the land and other public resources in question, as well as public services, including urban planning, in everyday life and livelihoods.

(2) This determination needs to be carried out by local communities and through intercommunity participation, not solely by engaging with formal centralized or local formal power structures such as centrally controlled governorates and municipalities. Engagement with the community must not simply rest on self-elected representatives or all-too-familiar patriarchy, nepotism and cronyism, but in effective partnership with minorities, women, youth and land-dependent communities as full decision-making partners. Women are particularly important to alternative planning, both as guardians of the home and simultaneously as persons vulnerable to spatial control (in public places and in the home).

Although the state and successive governments have a large role to play in regulation and setting the conditions to ensure the social function of property to be realized (by progressive taxation, regulation, adverse property rights, etc.), the social function ultimately must be realized by the participation of those who will use the property productively for social benefit (e.g., food production for domestic consumption), by actively seeking out disused land and making it more socially productive. This can be achieved, in practice, through techniques of social production of habitat.\(^1\)

(3) Recognize that the issue of land and housing policy inevitably cause conflicts of interest and trade-offs, and are not issues of neutral consensus. Constitutional drafters must be scrupulously honest in disclosing their position and their property holdings. The social function of property as a constitutional provision is potentially a good basis for requiring subsequent governments to formulate more-specific housing and land policies.

(4) Recognize informal human settlements as an integral part of the society, polity and economy, while possessing their own dynamics. The complex interaction between the internal economy of “slums” and the external influence of government policy must be weighed with a bundle of human
rights considerations, such as those touched on here, plus the process rights of participation, information and security of person, etc.

(5) Agricultural land also must be seen as having a social function in the context of the local community, as well as a strategic value for the nation and food sovereignty. Constitutional articles that forbid foreign investors buying land are not enough to prevent land grabbing and deprivation of indigenous small producers who are the principal feeders of the nation’s population. Allowing investors of all categories to lease large plots of land for prolonged periods can have as much a hemorrhaging effect on agricultural and food sovereignty as granting large-scale freehold land tenure to external “owners” or lessees. (The legacy of colonialism and settler colonialism is never sufficiently far away from this consideration in the region’s countries.)

(6) It must be considered that “owners” and “tenure holders” constitute a wide range of actors, from individuals, to collectives, to the state (not to be misconstrued as government, as governments ethically hold no freehold property rights), to corporations, some of which operate extraterritorially. Therefore, to apply the social function of landed property, the complications of dealing with these different actors must be considered in the national interest and the general welfare of the national population, not only as sources of cash.

Most indispensable of all considerations in this unique constitutional-reform process is national consultation on these vital matters in a way that creates a culture of citizenship. No single pundit or patriarchal process confined to the capital city will successfully supplant the true reciprocity and mutuality at the national level that is to be reflected in the new constitution’s text. Consultation on the habitat issues involved and the values at stake among the major constituents of the nation (or nations) within the state will help the countries of the region catch up with the rest of the democratizing world, in particular, the examples mentioned above. The ensuing process promises to develop the participatory democracy concept of common citizenship as the bases for the enjoyment of rights and fulfillment of responsibilities, and of the people as the owners and beneficiaries of the state.
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Endnotes

1 “All individuals are born free and equal before the law and are entitled to equal protection and treatment by the authorities, and to enjoy the same rights, freedoms, and opportunities without discrimination on the basis of gender, race, national or family origin, language, religion, political opinion, or philosophy.

   The state will promote the conditions necessary in order that equality may be real and effective will adopt measures in favor of groups that are discriminated against or marginalized.”

2 In Articles 7.31, 23.2, 24.14, 37.8, 203.4, 203.5, 208.3, 227.2 and 244.

3 Articles 8.3, 15.1(b), 21(3), 56, 58.1(a), 91.1(e), 100(e), 101(4)(b), 174(e), 177(1)(c), 201(b)(iii), 204(2), 204(3)(b), 216(4), 260(b), 260(d)(2).

4 “During their periods of pregnancy and following delivery, women will benefit from the special assistance and protection of the state and will receive from the latter food subsidies if they should thereafter find themselves unemployed or abandoned. The state will support the female head of household in a special way.”


6 The article states: “In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—(a) it is the responsibility of the State to show that the resources are not available; (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

7 Articles 9, 44, 53, 93, 94, 101, 150, 214, 224, 226, 234, Provisional Article 46.


10 The article goes on to provide that “Due to public necessity or social interest as defined by the legislator, expropriation will be possible pursuant to a judicial determination and prior indemnification. The latter will be determined in consultation with the interests of the community and of the affected party. In cases determined by the legislator, such expropriation may occur by administrative means, subject to a subsequent administrative legal challenge, including with respect to price.”

11 Title VII - The Economic and Financial Order, Chapter I - The General Principles of the Economic Activity.


14 Update and citation.

15 This provision alone is not sufficient to effect reparations as defined in *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006.

16 Update and citation.
African Charter on Human and Peoples Rights, Article 21.4.1, obliges: “State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”

See examples of social production of habitat on HIC-HLRN’s Middle East/North Africa website. [Arabic]