

# ADVANCING EQUALITY

A young Black girl in a school uniform is smiling and leaning on a stack of books. She is in a classroom, with other students visible in the background. The lighting is warm and focused on her.

**How Constitutional  
Rights Can Make  
a Difference  
Worldwide**

Foreword by Dikgang Moseneke,  
former Deputy Chief Justice of South Africa

**JODY HEYMANN  
ALETA SPRAGUE  
AMY RAUB**

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*How Constitutional Rights Can Make  
a Difference Worldwide*



Jody Heymann, Aleta Sprague, and Amy Raub

*Foreword by Dikgang Moseneke*



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*To our children and yours*





*“Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”*

—UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), PREAMBLE



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## FOREWORD

In great part the history of humanity has been about wars for scarce resources and kindred struggles for human freedom and equality within societies. Most domestic struggles were no more than peaceful protests and demands, whilst others were civil wars, violent revolts, or bloody revolutions. Even so, after millennia the world remains a place of startling contrasts and unevenness of a wide variety both within and between countries of the world. The material and social divide between the Global North and Global South requires no further description. Much of the economic contrast and relative underdevelopment is attributable to a prolonged colonial and imperialist project. Within countries too, inequality and exclusion on the grounds of race, gender, religion, disability, sexual orientation, migration, and above all class or socioeconomic status is prevalent.

The vexed question that *Advancing Equality* must and does ask is: Has the advent of constitutionalism, particularly since the 1948 Universal Declaration of Human Rights, made the world a better place to live? Are the markers of exclusion and discrimination like gender, race, religion, sexual orientation, and socioeconomic status and disability any more mitigated than before many of the constitutions of the world proclaimed fundamental rights and freedoms due to everyone?

South Africa's 1996 constitution—which enshrined both comprehensive protections against discrimination and a wide range of social and economic rights—offers insights. It was Arthur Chaskalson, the first President of the Constitutional Court and later the Chief Justice of post-apartheid South Africa, who warned against the effusive optimism that our brand-new aspirational democratic constitution would firmly shut the door on the inhumanity and toxic inequality of our apartheid past. Chaskalson was counseling against my more youthful revolutionary zeal, that the

constitution and other related new law could and must be harnessed to erase the past and immediately install equality and justice. It is indeed so that we may not hang all our quests for advancing equality in the world on one peg. Some deep causes of inequality are embedded in history or are structural or systemic. The inequality may well be the product of inflexible power relations within a society that would rather increase than arrest, say, racial or gender or socioeconomic inequality. At the same time, strong constitutional protections can provide a foundation for addressing many of inequality's core contributors.

*Advancing Equality* does not stumble into the pitfall of arguing constitutions are the sole solutions but rather demonstrates the powerful role they can play in addressing inequality. This remarkable evidence-based study readily identifies the important uses of written constitutions around the world. Expectedly some constitutions are older and sparse or at best only implicit in recognizing the equal worth of all people. Other constitutions are newer and more open in their commitment to secure the equal worth of human beings. These constitutions have drawn from global notions of human decency that have firmed up into international humanitarian law.

This work reminds us that the achievement of equality in any society or in the world is a work in progress and certainly not an event. To that end a domestic constitution is a covenant between the people and their state. It serves as a minimum set of protections below which no state or its people may drop. It is a preexisting and collective agreement by all within a society that certain safeguards and entitlements may not be violated, and that if they were to be limited in their scope of protection it would be by a law of general application which must be reasonable, the least invasive and justifiable in order to achieve one or other public purpose. Put more simply, a protection or right may not be taken away arbitrarily, and if its enjoyment is reduced, the curtailment of it must be clearly justified.

Constitutions and other laws have an important aspirational role. This is particularly so in post-conflict societies. The aftermath of a social upheaval or a war presents the real possibility of revisiting myriad entrenched power relations in a society. Constitutions of that kind are not written to record the existing societal patterns and arrangements but rather to end or to alter them radically and lift the nation's eyes toward renewal. The inequalities of the past cannot in theory escape full scrutiny and radical adaptation. This explains in great part the replete and explicit constitutional guarantees against historical and irrational exclusions and prejudices. Newer constitutions tend to place fundamental rights and freedoms at the center of their democratic governance and social enterprise. Then the obsession is rightly to alter society irreversibly.

Clearly not all constitutions bear the same backdrop or mission. Others merely record preexisting arrangements and conventions. What matters is whether on a proper reading the constitutions of that kind provide sufficient precepts that embrace the democratic enterprise of an open and just society

that cares for all human beings and their equal worth and opportunity to realize their full potential.

*Advancing Equality* reminds us with remarkable clarity, chapter after chapter, of the historic and persisting inequality in the world, and the critical need to address its causes and consequences. The book opens with the history of entrenched legal inequality predicated on race and ethnicity. Discrimination of this kind and indeed of any kind stubbornly persists long after its formal end and leaves its victims with deep scars and social disability. Long and calculated impoverishment of people on account of race and ethnicity is likely to leave them hurt, broken, undervalued, and poor.

Astute constitutional change should acknowledge such a horrific past and provide for appropriate relief such as reparation, restitution, and other remedial interventions. Constitutional protections for core social and economic rights can also accelerate progress: quality, useful, and accessible education and training comes to mind as the single most potent catalyst toward equality and self-worth and escape from poverty. Much the same must be said about the right of access to health care. Study after study has shown that ill health is closely allied to inadequate education and challenged socioeconomic conditions. Lack of adequate access to healthcare can only deepen and reinforce poverty and inequality. *Advancing Equality* powerfully addresses each of these in turn.

*Advancing Equality* correctly points to the foundational nature of gender equality. It is indeed so that addressing gender is a core, if not the most vital, component of equalizing society. This work reminds us of the profound impacts of gender inequality that stem from a simple observation: that the largest group facing inequalities in the world are women and girls, a group that has historically been denied the right to vote, and continues in some settings to be excluded from workplaces and schools, facing frequent violence, and in many countries is still prevented from full participation in the economy. We are all the poorer for it. What is more, gender inequality tends to be intersectional because it is reinforced by other exclusion grounds such as race, pregnancy, marital status, and cultural or religious exclusions. This means in most societies women have to endure multiple jeopardies.

This systematic exclusion of half the global population is intolerable and must stop. Most world constitutions say so and yet so much more has to be done in the ordinary lives of most women and girls. Most men worldwide are indeed the biggest culprits in demeaning the equal dignity and respect women and girls are plainly entitled to. Strong and effective legislation must be used to combat patriarchy and push back against toxic masculinity.

It is indeed instructive to learn from this work that in 1991 there were 100 million migrants worldwide, and by 2017 that number had increased to nearly 258 million migrants. It is plain, despite the narrow, homegrown chauvinism and nationalism rearing its head around the world, that we may not talk about human

dignity and equal worth of all people to the exclusion of the world's migrants. In smaller oases of democracy and constitutionalism such as where I come from, there is a considerable inflow of migrants from diverse parts of the world. Ours was a long struggle to restore inclusion and advance equal worth of all and yet there are occasional outbursts against or hatred of migrants. Migrants are sometimes viewed as unwelcome competitors for scarce resources. Even so, world constitutions and progressive world activists must remain steadfast in recognizing the inevitability, value, and human dignity of migrants and extending them equal protection under the law.

I welcome the affirmation of the need for explicit protection of sexual and gender minorities, including those who identify as lesbian, gay, bisexual, or transgender. I agree entirely that "achieving equality for the LGBT+ community is no less urgent and no less fundamental." Constitutional guarantees of fundamental rights regardless of sexual orientation and gender identity are rightful human dignity and equality claims that are worthy of assertion and protection. In South Africa we did the right thing. In our supreme law we prohibited unjustified discrimination on the ground of sexual orientation as a legitimate part of our equality protection. Our courts rightly enforced these protections and construed them to embrace same-sex marital unions. A variety of courts and law-making chambers around the world are properly, albeit slowly, recognizing equal rights on the basis of sexual orientation and gender identity as worthy of protection.

As I conclude I make a few observations about class inequality. Arguably this is the most vexed and contested part of the equality discourse. This work opts for the tag socioeconomic status (SES), which it defines as "an individual's social and economic position relative to others. Income and wealth, educational attainment, occupation, and inherited statuses are all aspects of SES. Like disability status, SES can be lifelong, and it can change over the life course. National economic troubles can push increasing numbers into poverty."

Of course, one's class is an aggregate of the identified attributes. Clearly, some attributes are within the grasp and control of the individual. They can be ameliorated by personal agency, which may enhance the opportunities of access to quality education, training, and experience. The rest of the attributes of SES are embedded in a history of past privilege such as inherited status and wealth, which often is an outcome of prolonged accumulation. The national economy too is usually beyond the individual's influence and is a function of the development and ownership of the means of production peculiar to that economy.

All of these intricacies tend to pose the difficult question: When, for historical and other structural reasons, socioeconomic inequality persists within a national economy, can equality promises in a constitution and other laws help bridge the gap? Several radical scholars think not. They argue that only fundamental economic changes may reduce socioeconomic inequality.

Whilst I recognize the force of that contention in relation to socioeconomic inequality, I think it lacks nuance. It ignores the potential for equalizing society by way of shifts in laws, their implementation, and social norms—a process that requires the engagement of the state, citizens, civil society, and all concerned. Also equality rights properly asserted may serve as a catalyst for economic growth and in turn socioeconomic upward mobility.

The better approach is to be found in *Advancing Equality*, which opts for an evidence-based approach that asks how far has the world come, under the influence of equality protections in world constitutions. This work argues that while protections have strengthened in many areas, significant gaps remain. With the support of data the work provides a comprehensive analysis of these trends over time, paired with a deep discussion of key cross-cutting questions and ongoing challenges that policymakers, civil society organizations, engaged citizens, and researchers must take up to fully protect and fulfill equal rights in all our countries.

The abiding task to provide for and advance equality under world constitutions and the law is worthy and must continue. While substantial work remains, South Africa's experience over the past two decades offers examples of the types of constitutional action that can lead to meaningful change. Our decision in a 2002 case on the constitutional right to health, spearheaded by a movement of citizens and civil society organizations, brought life-saving treatment to expecting mothers living with HIV across the country. In a 2004 decision, we upheld a law designed to advance racial equality by temporarily providing increased pension contributions to parliamentarians elected after apartheid, illustrating how constitutional equality provisions can provide a foundation for restorative justice. Two years later, our decision in *Home Affairs v. Fourie* made South Africa the first country on the continent—and just the fifth in the world—to legalize same-sex marriage, building on a precedent ending discrimination against same-sex couples in immigration law from a few years prior. And in 2009, we cited the right to education to successfully urge a school district to abandon its Afrikaans-only language policy, which for 93 years had served as a tool of racial exclusion. Constitutions, together with communities and courts working to fulfill the constitutions' promises, have great power to shift the trajectories of individual lives and countries.

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April 26, 2019



# The Urgency of Advancing Equality

Over the past several years, grave threats to equal rights, both new and long-standing, have come into sharp relief. Against the backdrop of persisting gaps in women's representation in government and equal participation in the economy, a global movement has exposed the prevalence of sexual harassment in our workplaces, schools, streets, and even legislatures. Violence and natural disasters have created unprecedented numbers of refugees, who face not only significant barriers to accessing jobs and education upon resettling in new countries, but also discrimination due to their race/ethnicity, religion, and national origin. Meanwhile, in a range of countries, extremist movements and politicians have capitalized on the public's fears, insecurities, and misperceptions to call for the expulsion of immigrants and ethnic, racial, and religious minorities, using dehumanizing rhetoric hearkening back to the rise of the Nazis.

At the same time, the beginning of the twenty-first century has witnessed the culmination of decades of dramatic progress in addressing many of the greatest barriers to equality—from discriminatory laws to the inaccessibility of basic services and institutions. Just in the two years prior to this writing, 65 countries reformed laws that limited women's ability to participate and succeed in the economy, building on hundreds of reforms adopted since the 1960s.<sup>1</sup> Globally, the number of people living in extreme poverty fell by half between 1990 and 2015, while that of people accessing basic education rose by over 40 million.<sup>2</sup>



Groundbreaking national laws, as well as an international treaty, have accelerated progress toward the full inclusion of people with disabilities in education and employment.

This is a book about how far we've come on equal rights—and how far we have to go. This is also a book about what we all can do to advance equality in the urgency of this moment, both as individuals and as countries. And this is a book about how nations set the ground rules and whether those ground rules are designed to ensure that you, your children, and your grandchildren—whoever they become, wherever they live, and whomever they love—will have a fair chance.

### CHANGES IN LEGAL RIGHTS IN OUR LIFETIME

Over the past 60 years, countries around the world have witnessed revolutions in equal rights. In the United States and South Africa, the overdue demise of Jim Crow and apartheid, two legal regimes premised on racial hierarchy, inaugurated a new era for equality and civil rights. In the Middle East and North Africa, women's rights movements have made steady gains over the past decade for gender equality in the law, including with respect to violence, freedom of movement, and the right to participate in politics;<sup>3</sup> similar regional and national movements dating back to the nineteenth century have brought a wave of social, economic, and political "firsts" for women around the world. Across low- and middle-income countries, the right to education has flourished, as governments have increasingly eliminated tuition fees that once put public school out of reach for girls and students from poor families. And across every region, countries have begun recognizing equal human rights regardless of sexual orientation and gender identity.

This progress is remarkable and worth celebrating. Yet we know that exclusion persists, and that countless daily experiences of discrimination and bias contribute to devastating disparities in education, health, and work.

### THE DIGNITY OF EVERY HUMAN BEING

In recent years, the troubling and vocal resurgence of overt discrimination has called into question whether equality truly is a shared value. As hate rallies and ethnic, racial, and religious slurs have dominated the headlines, it is reasonable to wonder whether there was ever genuine consensus about our universal dignity and humanity.

Numerous historical examples show how perceived physical or economic vulnerability—whether based in evidence or stoked by opportunistic leaders and politicians—can inspire distrust, division, and, in the worst cases, gross human rights abuses. In some countries, these conditions have resulted in atrocities committed by governments; other countries have endured sharp escalations in interpersonal hostilities and violence.

While we must recognize these dynamics and dangers, we must also firmly reject the idea that hateful views are representative in any of our countries. The data convincingly tell us otherwise. The World Values Survey asks people about their core beliefs in the privacy of their homes in over 100 countries, representing 90% of the global population. These surveys reveal that the view that every human being deserves dignity is both widespread and not unique to any country. For example, when asked which qualities it was especially important for children to learn at home, 86% of respondents in Australia, 86% in Colombia, 89% in India, and 80% in Libya indicated “tolerance and respect for other people.”<sup>4</sup>

One critical development over the past 75 years has been the formalization of these values in international treaties and agreements. In 1948, the newly formed United Nations adopted the Universal Declaration of Human Rights (UDHR), which unequivocally affirmed that “[a]ll human beings are born free and equal in dignity and rights,” and prohibited discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The UDHR also guaranteed the rights to education, health, and a wide range of other social, economic, civil, and political rights. In 1966, the U.N. built on these commitments with two additional treaties, the International Covenant on Civil and Political Rights<sup>5</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>6</sup> Together, these three instruments are known as the “International Bill of Rights.”

Additionally, throughout the decades, the U.N. has adopted treaties specifically and comprehensively addressing the equal rights of historically marginalized or vulnerable groups, including refugees,<sup>7</sup> racial/ethnic minorities,<sup>8</sup> women,<sup>9</sup> children,<sup>10</sup> migrant workers and their families,<sup>11</sup> and people with disabilities.<sup>12</sup>

These international commitments have had important normative impacts, and many have been widely or nearly universally ratified. Even more recently, in 2015, all 193 U.N. countries adopted the Sustainable Development Goals, pledging to end poverty, reduce inequality, ensure access to healthcare and education, and achieve a range of other human rights objectives by 2030.<sup>13</sup> The question, then, is not whether human dignity and equality are overarching, widely shared values—but whether these values and commitments have been translated into enforceable national rights.

## WHY CONSTITUTIONS

In many ways, constitutions provide ideal vehicles for doing so. As we explore throughout this book, constitutions’ pathways to impact vary across countries with different legal traditions, levels of civil society engagement, and avenues to justice. At the same time, constitutions provide the foundation of almost every nation’s legal system, and many of their core functions are largely consistent across countries.

### *A Statement of Values*

To start, constitutions both express values and embody contracts between governments and their people to realize those values. Through the principles it protects, a constitution can importantly shape national discourse, in turn influencing social norms. New constitutions can also serve to inaugurate a new era for equal rights that sharply diverges from the past. For example, upon signing South Africa's post-apartheid constitution in 1996, President Nelson Mandela remarked: "In centuries of struggle against racial domination, South Africans of all colours and backgrounds proclaimed freedom and justice as their unquenchable aspiration. They pledged loyalty to a country which belongs to all who live in it. . . . Out of such experience was born the understanding that there could be no lasting peace, no lasting security, no prosperity in this land unless all enjoyed freedom and justice as equals."<sup>14</sup>

Through a new constitution grounded in principles including equality, diversity, freedom, and reconciliation, South Africa created a new statement of values to guide its transition into democracy.

### *Dismantling Discriminatory Laws*

Second, in the vast majority of countries, constitutions trump other sources of law—making them critical tools for overturning discriminatory legislation, including both newly enacted and decades-old laws. In India, the Supreme Court ruled in 2017 that the traditional practice of "instant divorce" in Islamic marriages, which allowed men to legally divorce their wives simply by saying the Arabic word for divorce three times, violated the constitution's protection of gender equality, in a landmark ruling strengthening women's economic security and access to justice.<sup>15</sup> In Tunisia and Morocco, women's rights groups are leading advocacy campaigns to overturn discriminatory inheritance laws, based on their new constitutions' guarantees of women's equal rights.<sup>16</sup>

### *Domesticating Global Treaty Commitments*

Third, constitutions often directly determine the status of international treaties—including whether ratified treaties have the force of law, take precedence over conflicting legislation, or can be directly invoked in court. As explored in the following chapters, in countries ranging from Mexico to the Czech Republic, these constitutional provisions have helped ensure that national courts interpret domestic laws to protect and advance human rights.

### *Protecting against Backsliding*

Fourth, constitutions can offer protection against policy and legal changes that would undermine equal rights. However, when constitutions lack clear protections for groups that are vulnerable to discrimination, these groups' rights may face threats during political shifts or budgetary cutbacks.

For example, for decades, the United States has had excellent laws ensuring that children with disabilities have equal access to quality education, and that adults with disabilities can contribute fully at work. However, the U.S. Constitution has no foundational guarantee of equal rights for people with disabilities—and strong as they are, these laws would be far easier to dismantle or outright repeal than a constitutional protection against discrimination. This vulnerability has intensified under the Donald Trump administration, which has targeted both laws. In the absence of a stronger constitutional foundation for equal rights on the basis of disability in work and education, these attacks threaten to unravel the gains of the past three decades.

The same potential for retrenchment exists in the courts. When rights are not clearly protected in the constitutional text, a court's interpretations of who deserves equal treatment may expand and contract over time, especially as the court's composition evolves. Similarly, even when courts rule in favor of equality, the legislature may enact discriminatory laws in response, unless the constitution prevents them from doing so.

For example, in Bermuda, the Supreme Court's landmark 2017 decision legalizing same-sex marriage came under threat when Parliament passed a law the following year banning same-sex marriage—making Bermuda the first country to grant and then revoke equal marriage rights. Like most countries, Bermuda has yet to specifically prohibit discrimination on the basis of sexual orientation in its constitution. However, the Court applied another constitutional right—freedom of religion—to overturn the discriminatory law, which the justices deemed an imposition of specific religious views.<sup>17</sup> Yet as this book will explore, such favorable outcomes are far from guaranteed when constitutions are ambiguous about whose equal rights are recognized.

### *Setting the Terms of the Debate*

Fifth, constitutions matter because of how they shape decision-making *outside* the courts—including by other branches of government. For example, between 2015 and 2017, the constitution was a topic of discussion and debate in 87% of parliamentary sessions in India.<sup>18</sup> These conversations covered wide-ranging topics central to equality, including the equal rights of members of lower castes, religious minorities, and transgender people.

Similarly, over the same period, the constitution arose in 88% of parliamentary sessions in Canada, 97% of those in Brazil, and 99% of those in Kenya.<sup>19</sup> In Canada, the constitution was cited in support of bills aiming to protect against gender discrimination, expunge unjust convictions targeting the LGBT+ community, and ensure equal pay for work of equal value for women in the Canadian Public Service. Likewise, in Brazil, the constitution came up in legislators' discussions about the rights to healthcare, nondiscrimination, and access to water, while in Kenya, legislators referenced the constitution when discussing education, healthcare, and gender equality in politics.

*A Tool for Civic Engagement*

Finally, constitutions provide tools for civic engagement, education, and activism. In India, activists undertook a 115-day march to establish a constitutional right to education.<sup>20</sup> In Kenya, civil society groups are publishing copies of the constitution in Braille, and handing out pocket-size text versions nationwide.<sup>21</sup> In Germany, newly arriving refugees receive copies of the bill of rights in Arabic.<sup>22</sup>

Yet even as constitutions articulate fundamental values and provide legal bases for decisions that affect millions of lives, few people know exactly which rights their constitution protects, or how their constitution's protections compare to others'. In an era of increased popular engagement in constitution drafting and amending, addressing these information gaps is crucial.

## DO OUR CONSTITUTIONS VALUE EVERY PERSON?

In recent years, countries have increasingly convened widely representative constitutional congresses to draft their constitutions. In these processes, the chance that the constitution equally values every person has increased.

Many of us live in countries, however, whose constitutions were written centuries ago or have not been amended in decades. Early constitutions were often written by small, nonrepresentative groups. Many later constitutions used these documents as models. And because of their foundational role in defining how a government works, identifying whether our countries' constitutions establish a framework providing for equal and full opportunities for everyone is essential.

In this book, we report on over a decade of research. We have led and been part of a large, international, multilingual, multidisciplinary team that has reviewed constitutions in each one of the 193 U.N. countries. At least two team members have read every constitution and examined where each comes down in terms of guaranteeing equal rights to us all, regardless of gender, socioeconomic status, race/ethnicity, or religion, belief, or nonbelief. We have also looked at whether equal rights are guaranteed regardless of our sexual orientation or gender identity, whether we have a disability, and whether we are a refugee or a migrant. Finally, we have examined whether every person is guaranteed an equal opportunity for an education and access to the healthcare they need to survive and thrive.

Throughout this book, we present data on constitutions produced through this initiative at the WORLD Policy Analysis Center.<sup>23</sup> In each chapter, you will learn what percentage of the world's countries has adopted fundamental constitutional protections. We have also included global maps in many core areas so you can easily see how your country's constitution compares to others. To illustrate the impact of these choices in practice, we searched over 16,000 court cases from around the world. Throughout the chapters, we present examples of case law from over 40 countries representing diverse regions and legal traditions. More details on the data and our approach to case law are available in the Appendix. Interactive policy

maps, data tools, and further information on WORLD are available on our website: [worldpolicycenter.org](http://worldpolicycenter.org).

## THE CHAPTERS

### *Chapter 2: Historic Exclusion and Persisting Inequalities: Advancing Equal Rights on the Basis of Race and Ethnicity*

In numerous countries throughout history, racial/ethnic discrimination has played a foundational role in structuring economies and legal systems, leading to physical segregation, denials of economic rights, and, in the worst cases, enslavement. In the United States, even after a constitutional amendment prohibited slavery, Jim Crow laws systematically excluded African American citizens from political power and economic opportunities for decades. In South Africa, apartheid prohibited the black population from owning land and relegated black families to substandard housing in designated neighborhoods.

Jim Crow fell in 1965 and apartheid followed in 1991—but the impacts of these systems continue to reverberate. What’s more, even as legal discrimination on the basis of race/ethnicity fades, discriminatory practices persist, with consequences for health, justice, and economic security. Globally, how many countries guarantee equal rights across race/ethnicity and prohibit all direct discrimination? Without being explicitly discriminatory, policies and practices can still disproportionately disadvantage certain racial/ethnic groups; how often do constitutions address “indirect discrimination” and have these protections had impact in court? How are constitutions addressing segregation, which persists in many countries despite guarantees of racial/ethnic equality and case law striking down “separate but equal”? And for countries with long histories of racial/ethnic oppression and exclusion, are constitutions and courts providing a foundation for efforts to dismantle the persisting impacts of past discriminatory laws and practices?

### *Chapter 3: Why Addressing Gender Is Foundational*

Women and girls are the largest global population to have been systematically excluded from enjoying basic rights in constitutional texts and by other laws. One of every two people, women and girls have been denied the right to vote, excluded from workplaces and schools, and prevented from full participation in the economy.

For millennia, women have also been leaders in governments, commerce, and civil society. But in most societies, they were the exceptions. Most women were not allowed to fully participate. Chapter 3 examines whether the world’s constitutions have dismantled gender inequality in the law. Do all constitutions guarantee women and girls equal rights? If so, do these protections support equal opportunities and pathways to advancement by covering discrimination by both public and private employers and schools? Women also disproportionately face

discrimination based on their expected roles within families. Do any constitutions successfully address discrimination on the basis of pregnancy, child-bearing, marital, or family status? How are civil society groups, lawyers, and courts using prohibitions on sex discrimination to address these intersectional issues? And finally, how can constitutions best address not only sex discrimination, but also gender discrimination against anyone who does not conform to cultural expectations about what it means to be a man or a woman?

*Chapter 4: One in Thirty: Protecting Fundamental Rights for the  
World's Migrants and Refugees*

Ensuring all human beings have equal rights is impossible without protecting the rights of migrants and refugees. In a room of 30 people, one, on average, will be a migrant.<sup>24</sup> If you live in Montreal, Paris, or Frankfurt, around one in four of your neighbors was born in another country, while more than four of five people in Dubai migrated from elsewhere.<sup>25</sup> Worldwide, there were nearly 258 million migrants in 2017—an increase of over 100 million since 1990.<sup>26</sup>

In short, one of the most striking transformations of the past half century has been the freedom of movement. This is in part due to the globalization of the economy. But even without trade agreements, the feasibility and accessibility of all forms of transportation have improved. Buses now provide dramatically expanded service to many rural areas, while air travel has become increasingly affordable. The types of transportation accessible to different individuals varies. Still, with this greater overall mobility, borders inevitably mean something different. A century ago, when it invariably took months to travel between countries and enormous resources to cross an ocean, mobility was limited. Now, and into the future, if you or your children are hungry or fleeing war, being drawn to another country is inevitable.

Global treaties recognize much of this. Around the world, 145 countries have agreed to a refugee convention that guarantees the right to education and wage-earning employment. But have countries' constitutions caught up? And what do countries do about economic migrants, for whom there is less international agreement? Chapter 4 will examine the approaches countries' courts and constitutions have taken to supporting newcomers to both meet their basic needs and contribute to their full potential. How many constitutions protect the rights to education, health, work, and non-discrimination for migrants and refugees? Does it make a difference in practice when a constitution refers to "people" rather than "citizens"? And what protections can constitutions provide to the 10 million people around the world who are not officially citizens of any country?

*Chapter 5: Negotiating the Balance of Religious Freedom  
and Equal Rights*

The history of religious discrimination is long and pervasive. People were denied the ability to work in trades based on their religion. People were segregated into

ghettos based on religion.<sup>27</sup> And some countries had important pieces of their origins in fleeing religious persecution or founding safe havens for religious practice. It was this history that inspired the separation of religion and state in the U.S. Constitution, in contrast to England's official state religion. Yet history has also left discriminatory imprints. In Latin America, indigenous religions faced widespread persecution during Spanish colonialism, which established Catholicism as the governing faith and led to the continuing influence of the Catholic Church—including in constitutions—long after independence.<sup>28</sup>

Indeed, many of the worst forms of discrimination were state-sponsored or state-supported. State laws set up the ghettos. State rules prohibited people of certain religions from working in specific professions. Government rulers led many of the religious crusades and much of the persecution.

In chapter 5, we strive to answer a fundamental question: how can governments ensure that all religions can thrive while protecting all people's fundamental rights? Due to a history of killings and restrictions on movement, residence, and work, there is clearly a profound need to ensure safety, full equal opportunities, and equal rights before the law regardless of religion. At the same time, given the history of discriminatory abuses and denial of basic human rights by governments in the name of religion, achieving freedom of religion and belief, and equal rights and dignity for all, requires that the role of the state in prioritizing one religion be curtailed.

To understand the full range of current approaches, we examine the details of how all the world's constitutions negotiate this balance. We identify how many of the world's constitutions protect against religious discrimination and ensure that all people regardless of religious belief or nonbelief enjoy equal rights. We also address the relationship between religion and the state, examining how a role for religious bodies in governments may contribute to inequalities. Particularly important, we examine whether religious law, when it does coexist with secular law, is governed by constitutional rights, and whether equal rights take precedence when the two conflict. Finally, we examine the wide variation among constitutions that describe their government as "secular," illustrating how countries often subtly privilege one belief system over others.

*Chapter 6: Moving Forward in the Face of Backlash: Equal Rights  
Regardless of Sexual Orientation and Gender Identity*

Both within individual countries and globally, equal rights have often moved forward erratically—not for everyone together. In eighteenth-century France, revolutionaries fought for the Declaration of the Rights of the Man and of the Citizen—a widely celebrated document that nevertheless completely ignored the rights of women and citizens of the French colonies, who were deemed "passive citizens." In Peru, the 1823 constitution not only limited the right to vote to men but also imposed a literacy requirement, at a time when formal education was far from



universal.<sup>29</sup> In what is now the United States, soon-to-be Americans fought for a democracy that extended full citizenship only to white, male property owners. Native Americans, African Americans, and those without property were explicitly excluded. Women were not even considered.

On a global scale, countries adopted equal rights conventions one at a time for refugees (1951), racial/ethnic minorities (1965), women (1979), migrant workers (1990), and people with disabilities (2006). The one group treated in this book for whom there is still neither a specific international convention nor explicit protections in any international human rights treaty is sexual and gender minorities, including those who identify as lesbian, gay, bisexual, or transgender. The lack of a global agreement makes achieving equality for the LGBT+ community no less urgent and no less fundamental. If anything, the lack of agreement and the fact that there are currently 68 countries that criminalize the humanity and love of their LGBT+ residents make it all the more urgent.<sup>30</sup>

Chapter 6 examines how far equal rights on the basis of sexual orientation and gender identity have come in constitutions. Are they ahead of global agreements? While some countries strongly deny basic human rights, do others clearly protect equality? And what works to advance further reforms? In the absence of explicit constitutional protections, what strategies have advocates successfully used to move equal rights forward for the LGBT+ population using their constitution? Do social norms need to change first, or can legal change spur greater public support for equal rights?

*Chapter 7: From Nondiscrimination to Full Inclusion: Guaranteeing  
the Equal Rights of People with Disabilities*

One of the few groups for whom overt discrimination remains widespread is people with disabilities. Companies still post job ads specifying that people with disabilities need not apply. The overt discrimination continues both because it is perceived as socially acceptable and because so many people believe that having a disability equates to being unable to learn in school or perform at work as well as another. Children who are blind, are deaf, use a wheelchair, or have some mobility limitation are excluded from schools when a disability or difference in no way inherently limits what they can accomplish with their minds. Children with learning disabilities and differences are assumed—even more than those with physical limitations—to be unable to learn as much as others, in spite of clear evidence that they have the same distribution of intellectual abilities as other children.

Implicit bias measures how each of us thinks about another group even if we are unaware of it. Implicit bias tests examine whether an individual automatically views another group as less smart, less able, more violent, more likely to commit a crime, more likely to achieve great things. The level of implicit bias against people with disabilities is higher than against all other groups tested. In other words, tests reveal more unconscious discrimination based on disability than on

the basis of race/ethnicity, religion, sexual orientation or gender identity, or nearly any other category.

The scope and costs of the resulting exclusion of people with disabilities are staggering. Children with disabilities in low- and middle-income countries are 30–50 percentage points less likely than children without disabilities to even enroll in school.<sup>31</sup> These gaps persist in high-income countries. Nearly one-third of youth with disabilities in the European Union do not finish secondary school, compared to only 12% of youth without disabilities.<sup>32</sup> The ripple effect means that adults with disabilities, lacking equal chances at education and even the simplest and lowest-cost accommodations at work, are less likely to have full-time work, and less likely to exit poverty. The loss to society is massive. Nearly one in six people have a disability.<sup>33</sup> This is an enormous share of any country's population to underutilize.

The U.N. Convention on the Rights of Persons with Disabilities (CRPD) was one of the most rapidly adopted human rights treaties in history. Between its adoption in December 2006 and September 2014, 150 countries agreed to be legally bound by the CRPD's commitments;<sup>34</sup> as of this writing, the list has grown to 177.<sup>35</sup> Integral to the convention is the recognition that children and adults with disabilities have the same human rights as people without disabilities, and realizing these rights is as important as realizing the rights of other groups.

In chapter 7, we examine the extent to which constitutions have incorporated these views. How many prohibit discrimination on the basis of disability? Are all people with disabilities guaranteed the rights to education, healthcare, and work? Equal opportunity at work requires reasonable accommodation—antidiscrimination alone without reasonable accommodation leaves workplaces and opportunities entirely inaccessible. How well are constitutions addressing accommodation? Likewise, the odds of children receiving a poorer quality education and both children and adults facing stigma and societal discrimination greatly increase when students with disabilities are completely segregated from other children. How well are countries meeting their commitments to full inclusion in education?

#### *Chapter 8: Ensuring Rights and Full Participation Regardless of Social and Economic Position*

Socioeconomic status (SES) is generally understood as an individual's social and economic position relative to others. Income and wealth, educational attainment, occupation, and inherited statuses are all aspects of SES. Like disability status, SES can be lifelong, and it can change over the life course. National economic troubles can push increasing numbers into poverty. For example, the share identifying as lower SES in Egypt increased from 34% in 2001 to 50% in 2012.<sup>36</sup> Meanwhile, even when countries as a whole have strong economies, a major personal illness or job loss can cause individuals and their families to move from being middle class to poor. In the United States, it is estimated that nearly 40% of 25–60-year-olds will fall below the poverty line for at least one year of their adult lives.<sup>37</sup>

Discrimination on the basis of SES takes many forms. For example, in a range of countries, researchers have shown that employers discriminate against candidates with names, accents, appearance, or residency associated with lower-class status. Rights are also unequal across SES when accessing essential public goods or services is contingent on income. For example, when a public hospital refuses a patient for lack of funds, or a public school turns away a child because of inability to pay tuition, SES barriers create inequalities, with consequences for the fulfillment of fundamental rights.

These examples help illustrate why nondiscrimination alone is not enough to achieve equality—a topic explored in more detail in chapters 9 and 10. Without access to the basics, including healthcare and education, a child will not have an equal opportunity to survive and succeed. Further, rights are insufficient if people with low incomes are unable to claim them because of the costs of going to court or hiring a lawyer. Chapter 8 examines whether countries' constitutions explicitly prohibit discrimination on the basis of SES, as well as whether they guarantee that income is no barrier to education, healthcare, or political participation. The chapter further explores how constitutions and courts can ensure that SES does not determine access to justice. The chapters that follow examine in greater depth how constitutions can support access to health and education, while ensuring that people across SES can effectively fulfill their rights.

*Chapter 9: The Right to Education: A Foundation  
for Equal Opportunities*

Throughout history, governments have denied groups access to education because they knew of its fundamental role in empowering people to fight for their equal rights, and because the contributions of diverse groups within a country were not equally valued. Over time, social movements succeeded in dismantling many formal barriers to schooling through courts and legislatures, and today, more children than ever are getting an education—but important gaps remain.

Girls, students from poor families, and children with disabilities remain more likely to be out of school, especially in lower-income countries where resources are scarce. Even in countries where enrollment rates are relatively high, school quality often varies markedly, partly because of inequitable or inadequate funding. Consequently, millions of children worldwide are missing out on the widely recognized social, economic, and health benefits of education, and the persisting disparities in who gets to attend school perpetuate inequality later in life.

When education is a right for everyone, families and advocates are better equipped to ensure all children have the opportunity to fulfill their potential. What is the role for constitutions in improving educational access, quality, and attainment for all students? While fully realizing education rights takes investment, are there aspects of the right to education that all countries can and should immediately fulfill? And as economies grow, how can constitutional rights

to education be designed to meet both the country's ability to provide more education for all and residents' need to complete higher education for better work opportunities?

*Chapter 10: The Right to Health: From Treatment and Care to  
Creating the Conditions for a Healthy Life*

Health is foundational to whether we all have an equal opportunity to succeed and participate fully in society. Our access to clean water and sanitation, adequate nutrition, preventive care and immunizations, and treatment and care for illness and injury all critically shape both our individual health and our communities' well-being.

In recent years, more and more constitutions have enshrined a right to health. In some countries, constitutional health rights have expanded access to lifesaving medicines, led to improvements in the water supply for entire neighborhoods, and spurred free immunization campaigns for low-income children. In others, the right to health has given rise to thousands of individual lawsuits that benefit only one person at a time.

In chapter 10, we explore countries' different approaches to constitutionally protecting the right to health, including whether they focus just on medical care and treatment or also promote health, prevent illness, and protect against injury—in short, address public health. Drawing on the experiences of courts and countries around the world, this chapter examines which factors shape whether the right to health improves conditions on a broad scale or benefits only a few. What types of health cases have had the greatest impact for communities and countries? How can courts effectively realize the right to health while keeping the court system from becoming overburdened by individual cases? For countries with limited resources, what constitutional and judicial approaches have ensured that the right to health is enforceable nevertheless?

*Chapter 11: How Far Has the World Come?*

In chapter 11, we examine the findings across all types of discrimination to understand to what extent the world's constitutions comprehensively address equal rights—and how the prevalence of these fundamental guarantees has evolved over time. While protections have strengthened in many areas, significant gaps remain. In addition to providing a comprehensive summary of findings, this chapter dives into multiple cross-cutting questions and ongoing challenges that policymakers, civil society organizations, engaged citizens, and researchers must address to effectively realize equal rights in all our countries. For example, while the oldest constitutions were generally understood to only prohibit discrimination by governments, how have newer constitutions and the courts that interpret them addressed discrimination in the private sphere? How can constitutions and courts identify and effectively respond to discrimination based on multiple or intersecting

characteristics? And how can constitutions best support efforts to address the consequences of historic discrimination and exclusion?

*Chapter 12: Each of Us, All of Us: Taking Action to  
Strengthen Rights Globally*

Finally, chapter 12 focuses on moving from evidence to action. In this chapter, we explore what is needed beyond strong constitutional texts for advancing equality, including shifts in norms, access to justice, adequate resources and attention dedicated to implementation, and meaningful commitments to advancing change. Chapter 12 also discusses examples and strategies of successful action taken by citizens and civil society, offering practical lessons for realizing change across contexts. Around the world, activists, community leaders, and others seeking to address inequalities have led successful campaigns to strengthen constitutional protections against discrimination and for basic social and economic rights by organizing campaigns, working in coalitions, and drawing on the successful approaches of other countries. Likewise, lawyers, civil society groups, and concerned residents and citizens have used their constitutions to speak out against discriminatory rhetoric and practices, empower people to know and claim their rights, and bring court cases that have transformative nationwide impacts. This concluding chapter explores these and other ways—large and small—that people can shape and use their constitutions to make a difference.

A FEW WORDS ABOUT THIS BOOK

*Our Approach to Case Law*

Throughout this book, we attempt to draw lessons about the impact of constitutional rights from a wide range of countries. We do this by pairing globally comparative data on 193 countries' constitutions with court cases from 45 countries that mattered for equality. In some cases, countries offered as examples may have much in common. In other cases, they may represent largely distinct social, economic, and political contexts. And ultimately, every country is different, and shaped by a unique set of cultural and historical influences.

Countries vary importantly when it comes to certain procedural aspects of their legal systems that can significantly shape constitutional rights' accessibility and impact, as we explore throughout the chapters. For example, the difficulty of amending the constitution differs around the world. In addition, the role of case law in constitutional jurisprudence largely depends on whether the country has a "common law" system, which relies heavily on past court interpretations, or a "civil law" system, which relies primarily on the text of the law. Different countries also provide different levels of access to justice.

Wherever possible, we bring attention to these differences and their implications. At the same time, we aim to highlight above all the impacts of constitutional

drafting choices and identify lessons and insights that are relevant to groups writing and amending constitutions.

Finally, while most cases included in this book have reached the final stage of the judicial process, we occasionally include cases decided by lower courts, which may be subject to appeal. It is possible that the outcomes of these cases may change after publication. Likewise, even those decided by the highest courts may later be overturned.

#### *Our Approach to Legal Terminology*

Although this book engages in depth with some aspects of constitutional law, our aim is accessibility to lawyers and readers from nonlegal backgrounds alike. To that end, wherever we introduce a technical legal term, such as *public interest litigation* or *standing*, we have provided a simple definition. For easy access, these terms are also included in a glossary at the back of the book.

#### *How We Hope You Will Use This Book*

We hope this book will provide you with information on whether your country, compared to others, has laid the groundwork for ensuring that governments, companies, institutions, and individuals recognize the value of every human being in every city, town, and rural community. We hope the book will offer a sense of what your and other countries are doing to ensure that every person has the education to support reaching their full potential and the health to thrive.

We also hope it will give you the tools to create opportunities for every one of us. The book is for you, your children, and your grandchildren. None of us know who our children and grandchildren will become or how life's twists and turns will affect whether each of us will have a fair chance—unless we together create the ground rules to guarantee that all of us do.



PART ONE

# Equal Rights and Nondiscrimination





# Historic Exclusion and Persisting Inequalities

## *Advancing Equal Rights on the Basis of Race and Ethnicity*

The history of international human rights as we know it today is deeply intertwined with national and global efforts to end violence and discrimination based on religion, race, and ethnicity. When world leaders gathered in 1945 to form the United Nations, discrimination and violence were central concerns; the minister for foreign affairs of Uruguay, for example, argued in his opening speech that the “repudiation of doctrines of racial division and discrimination” was a prerequisite for lasting global peace, a sentiment shared by delegates from a wide range of countries.<sup>1</sup> At the same time, colonial powers and countries that still had systems of *de jure* discrimination expressed concern about their national sovereignty.<sup>2</sup> The compromise was a U.N. Charter that expressly affirmed “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”—but also clarified that the U.N. would not “intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>3</sup>

Over the following few years, however, the U.N. built on these commitments in drafting the Universal Declaration of Human Rights (UDHR). These international-level developments coincided with country-level movements to advance racial and ethnic equality, and the two came to inform one another. The UDHR Drafting

Committee consulted national constitutions submitted by over 50 countries,<sup>4</sup> and drew inspiration from equal rights provisions that explicitly addressed race from countries spanning different regions.<sup>5</sup> In 1948, the U.N. adopted the UDHR, which proclaimed that “All human beings are born free and equal in dignity and rights,” and entitled to fundamental rights and freedoms “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>6</sup>

Yet even as some countries’ laws served as models, these international commitments to equal rights regardless of race/ethnicity were clearly ahead of other countries’ policies and practices: the UDHR preceded the Civil Rights Act in the United States by over 15 years, and the fall of apartheid in South Africa by over four decades. In a 1944 report, the Commission to Study the Organization of Peace, a U.S.-based organization founded in 1939 to promote the establishment of the U.N., acknowledged this tension, arguing: “We cannot postpone international leadership until our own house is completely in order . . . Through revulsion against Nazi doctrines, we may, however, hope to speed up the process of bringing our own practices in each nation more in conformity with our professed ideals.”<sup>7</sup>

In some cases, the U.N.’s new commitments to equality enabled activists and governments to bring national-level struggles against racism to the global stage. For example, in 1946, India filed a complaint with the U.N. about discrimination against its citizens living in South Africa, citing the charter. While the South African government protested that it was an issue of domestic jurisdiction, this complaint triggered the U.N. system’s first examination of apartheid, laying the foundation for a global campaign that supported national movements in bringing about apartheid’s downfall.<sup>8</sup>

Likewise, in 1947, U.S. civil rights leader W.E.B. Du Bois submitted a report to the U.N. on behalf of the National Association for the Advancement of Colored People (NAACP), calling attention to how racial discrimination within the United States not only hurt its own people but also undermined the U.N.’s potential, especially given the establishment of U.N. headquarters in New York. Citing one recent example of discrimination against a high-profile foreign visitor—an Illinois restaurant’s refusal to serve Mahatma Gandhi’s personal physician, whom they perceived as black—Du Bois urged that “a discrimination practiced in the United States against her own citizens . . . cannot be persisted in, without infringing upon the rights of the peoples of the world.”<sup>9</sup>

Further, the UDHR’s approach to race/ethnicity established a critical precedent that would influence subsequent international agreements and national laws. In 1965, the U.N. Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which as of February 2019 had 179 states parties, established detailed commitments to eliminating racial discrimination, segregation, and violence.<sup>10</sup> Likewise, international human rights treaties targeting other groups—including children, women, refugees, and people with disabilities—all explicitly prohibit

racial discrimination.<sup>11</sup> In its preamble, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) calls for “the eradication of apartheid, all forms of racism, [and] racial discrimination,”<sup>12</sup> while the Convention on the Rights of the Child (CRC) guarantees fundamental rights “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour . . . or . . . ethnic [origin].”<sup>13</sup> Similarly, key international treaties and agreements on civil, political, social, and economic rights make clear that their protections must apply regardless of race/ethnicity.<sup>14</sup>

### THE PERSISTENCE OF RACIAL DISCRIMINATION IN PRACTICE

Seventy years since the UDHR’s adoption, the world has achieved substantial progress on some measures of social and economic inclusion, but racism continues to shape health and opportunity in nearly every society. Surveys reveal the persistence of discrimination and bias: in the United States, for example, 84% of black adults report that black people are treated less fairly by the police than white people, a perception shared by 50% of white respondents.<sup>15</sup> In a nationally representative survey in Brazil, 37% of self-identified black respondents reported experiencing racial discrimination, compared to 6.7% of white respondents.<sup>16</sup> In Japan, a 2017 survey of 18,500 foreign-born residents found that nearly 30% frequently or occasionally heard racial insults directed toward them.<sup>17</sup>

Individual-level experiences of racial discrimination have been linked with increased risk of anxiety and depression, higher blood pressure, and lower overall ratings of health and well-being.<sup>18</sup> Meanwhile, population-level discrimination on the basis of race/ethnicity, including discrimination embedded in the law, has contributed to marked disparities in access to education,<sup>19</sup> health,<sup>20</sup> income<sup>21</sup> and employment,<sup>22</sup> and wealth.<sup>23</sup> Spanning 18 countries from 2005 to 2016, a review of research on racial discrimination in hiring found that in 34 of 37 studies, discrimination had a negative effect on the callback rates of racial and ethnic minorities.<sup>24</sup>

Finally, more blatant racism has reemerged in the context of recent political campaigns and the rhetoric of elected leaders, especially as race/ethnicity intersects with migration status. While experiences of racism and even definitions of race/ethnicity vary across regional and historical contexts, the impacts of racial/ethnic discrimination are global.<sup>25</sup>

In addition to the human rights necessity of guaranteeing equal rights and opportunities regardless of race/ethnicity, a growing body of evidence demonstrates why doing so is core to creating sustainable and thriving societies. More diverse groups, across a range of characteristics including race/ethnicity, take more information into account when making decisions.<sup>26</sup> This can lead to more effective problem-solving<sup>27</sup> as well as greater creativity<sup>28</sup> and cooperation.<sup>29</sup> The benefits of

diversity for decision-making may also help explain why companies with more diverse governance structures tend to perform better; a 2017 study found that those with the most racially and ethnically diverse executive teams were 33% more likely to outperform their peers on profitability.<sup>30</sup> These economic benefits extend across low- and high-income countries alike. In a 2018 study spanning 492 firms across 23 countries in sub-Saharan Africa, researchers found that ethnic and linguistic diversity had a strong positive effect on revenue and productivity.<sup>31</sup> Similarly, a study of the executive boards of 127 large companies in the United States found that those with higher numbers of women and racial/ethnic minorities were associated with better financial performance.<sup>32</sup>

The benefits of diversity and integration also extend to improved individual outcomes. College students who have more interactions with peers of other racial backgrounds, whether as roommates or classmates, demonstrate improved leadership skills, higher intellectual engagement,<sup>33</sup> greater self-confidence and cognitive development,<sup>34</sup> and increases in civic attitudes, such as the belief that individuals can make a difference in solving community problems.<sup>35</sup>

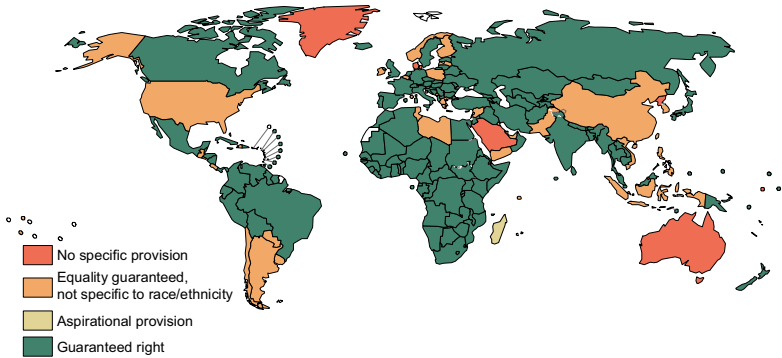
In short, while ensuring equal rights and opportunities regardless of race/ethnicity is of profound importance for historically marginalized groups, the benefits ultimately extend to everyone. Advancing racial equality is therefore both a human rights imperative and a prerequisite for countries and institutions to realize their full potential.

## CURRENT CONSTITUTIONAL PROTECTIONS

National constitutions hold power not only as instruments for protecting and enforcing equal rights, but also as mechanisms for shaping norms and communicating values on behalf of the state. To ensure that they fully recognize every person's human rights and provide the foundation for responsive governance, constitutions should explicitly include unequivocal protections for the full equality and inclusion of all racial and ethnic groups. But how many do so—and how can these provisions be further strengthened?

### *Equal Rights on the Basis of Race and Ethnicity*

As of 2017, 76% of countries explicitly protect against discrimination on the basis of race/ethnicity in their constitutions (see Map 1). For example, the Constitution of Colombia provides that “All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of . . . race.”<sup>36</sup> Likewise, Andorra's constitution states that “1. All persons are equal before the law. No one may be discriminated against on grounds of . . . race . . . 2. Public authorities shall create the conditions such that the equality and the liberty of the individuals may be real and effective.”<sup>37</sup>



MAP 1. Does the constitution explicitly guarantee equality or nondiscrimination across race/ethnicity?

Another 20% of countries protect against discrimination generally, without explicitly mentioning race/ethnicity. Paraguay's constitution, for instance, provides that "All residents of the Republic are equal as far as dignity and rights are concerned. No discrimination is permitted. The State will remove all obstacles and prevent those factors that support or promote discrimination."<sup>38</sup> An additional two countries use aspirational language. For example, Madagascar's constitution commits to "privileging a framework of life allowing for living together without distinction of region, of origin, of ethnicity, of religion, of political opinion, or of gender."<sup>39</sup>

*Hungary: Using Constitutional Protections against Racial/Ethnic Discrimination to Challenge Separate (and Unequal) Education*

At the Ferenc Pethe School in Tiszavasvari, a small town in northeast Hungary, 250 of 531 students were Roma, Europe's largest ethnic minority.<sup>40</sup> All but five of the Roma students were assigned to Roma-only classes or classes for students with disabilities. These classes were held in a separate, auxiliary building that was in disrepair, and for over a decade, the vast majority of Roma students had not been allowed to access the cafeteria or gymnasium in the main building.<sup>41</sup> The school kept records for the Roma-only classes marked with a "C" for "Cigany," the Hungarian word for "Gypsy"—long considered a derogatory term for the Roma. According to a Hungarian newspaper, the separate and decidedly unequal facilities had been established at the request of non-Roma parents.<sup>42</sup>

The school also held separate graduation ceremonies for each group. In 1997, after media coverage of the separate ceremonies got the public's attention, 14 Roma students, together with the Foundation for Romani Civil Rights, brought a lawsuit alleging violations of their rights to equality and education,<sup>43</sup> which eventually reached the Supreme Court. In 2002, the Court ruled that the school's

practice of segregation violated the constitution's protections against discrimination, as well as the Civil Code, the public education law, and the Law on Rights of National and Ethnic Minorities.<sup>44</sup> The constitution in place at the time prohibited discrimination "on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."<sup>45</sup>

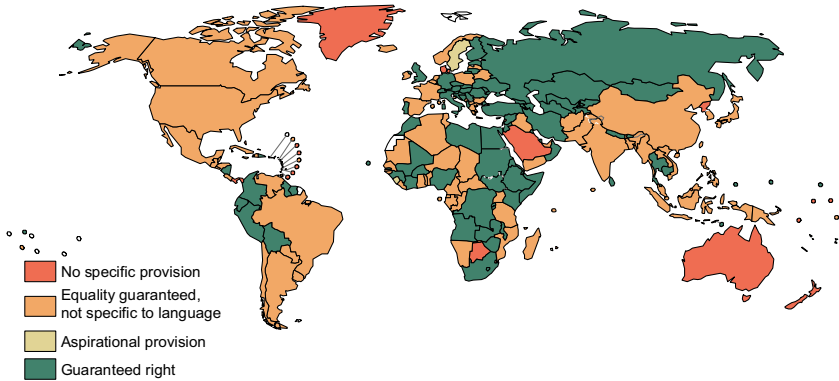
In 2002, the government adopted a National Integration Program, which pledged to desegregate all schools by the year 2008.<sup>46</sup> While challenges remain for achieving *de facto* integration in Hungary,<sup>47</sup> the Ferenc Pethe case was the first legal challenge to racial/ethnic segregation in schools in Central and Eastern Europe, and helped stimulate a wave of litigation throughout the region.<sup>48</sup> Legal action at the national level has also inspired stronger regional rulings and commitments.<sup>49</sup>

### *France: Why Addressing Racism Requires Acknowledging Race*

Protections of equal rights have made a difference in addressing racial discrimination in many areas of public life. For example, France's Constitutional Council ruled in 2017 that police cannot stop someone for questioning or ask them to show their immigration documents simply because they do not look "French."<sup>50</sup> The case was targeting a widespread problem: according to a 2009 report analyzing 500 police stops in Paris, "blacks were between 3.3 and 11.5 times more likely than whites to be stopped; while Arabs were stopped between 1.8 and 14.8 more times than whites."<sup>51</sup> While the Constitutional Council stopped short of invalidating the law that gave police wide latitude to conduct stops, it cited the principle of equality before the law in cautioning against discriminatory implementation.<sup>52</sup>

Interestingly, though, the Constitutional Council relied on the broad guarantee of equality before the law found in the 1789 Declaration of the Rights of Man and the Citizen, rather than the guarantee that explicitly protects equal rights regardless of race in Article 1 of France's constitution. The constitution's preamble establishes that the declaration's principles have constitutional status. This example thus illustrates how even general guarantees of equality can provide an important foundation for protecting against racial discrimination.

However, using these broad guarantees to protect against racial discrimination may become much harder if "race" itself is no longer legally recognized—a shift increasingly embraced by French policymakers. In 2018, the National Assembly voted to remove the word "race" from the constitution's equal rights guarantee. The stated intent of the proposed amendment is to move away from treating race as a scientific fact, rather than a social and legal construct. Yet critics of the proposal argue that erasing "race" will not reduce racism, and in fact will eliminate one of the most important tools to fight it. In the words of one opponent, "Race may not exist, but racism still does, and it kills."<sup>53</sup>



MAP 2. Does the constitution explicitly guarantee equality or nondiscrimination across language?

More concretely, a potential consequence of the amendment is that rulings broadly prohibiting “discriminatory” treatment, such as the 2017 decision on police searches, might not clearly extend to discrimination on the basis of race/ethnicity, since such discrimination will no longer be constitutionally recognized. In other words, while broad guarantees of equality before the law are important, their impact will be limited if governments adopt a “colorblind” approach and refuse to acknowledge how perceived race/ethnicity can lead to unequal treatment. This possibility is illustrated by a 2007 U.S. Supreme Court decision that used the idea of a “colorblind Constitution” to dismantle a voluntary public school desegregation program, reasoning that its mere consideration of race was unconstitutional.<sup>54</sup> In the years since, the decision has chilled efforts to desegregate schools throughout the country.<sup>55</sup>

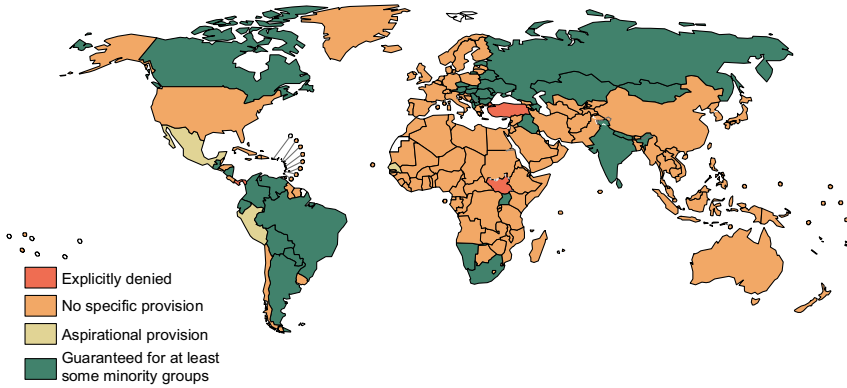
### *Equal Rights on the Basis of Language*

In addition to race/ethnicity, some constitutions address equal rights on the basis of language. Discrimination on the basis of language often acts as a proxy for discrimination on the basis of race/ethnicity, making explicit protections in this area important for a comprehensive commitment to equality.

In total, 44% of constitutions explicitly protect against language discrimination, while an additional two countries include aspirational provisions (Map 2).

In addition, 19% of countries guarantee students who are linguistic minorities the right to learn in their own language, while three countries have aspirational provisions (Map 3). For example, Ukraine’s constitution establishes that “Citizens who belong to national minorities are guaranteed in accordance with the law the right to receive instruction in their native language, or to study their native





MAP 3. Does the constitution explicitly provide for the right to education in their own language for linguistic minorities?

language in state and communal educational establishment and through national cultural societies.”<sup>56</sup> However, another three countries have restrictions on the provision of education in foreign languages. Panama’s constitution, for example, provides that “Education shall be imparted in the official language. Only in specially qualified cases of public interest can an educational establishment be permitted by law to teach in a foreign language.”<sup>57</sup>

#### *South Africa: Dismantling Language Discrimination, a Relic of Apartheid*

South Africa’s constitution establishes 11 national languages, including nine indigenous languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu, the most commonly spoken language at home.<sup>58</sup> Afrikaans derived from the language of the Dutch settlers who arrived in the 1600s, and although many black South Africans now speak Afrikaans, among other languages, it remains the primary language of the country’s white Afrikaner minority. Afrikaans is also often associated with racial oppression due to an apartheid-era requirement that black students learn in Afrikaans, which spurred the Soweto student uprising in 1976—an event that catalyzed broader resistance to the apartheid regime.<sup>59</sup> Meanwhile, English, initially the language of the British colonizers, became the main language of the post-apartheid government, making it one of the country’s most widely spoken languages.<sup>60</sup>

In 2007, South Africa’s Mpumalanga Department of Education determined that a public school’s Afrikaans-only policy violated English-speaking students’ right to an education and perpetuated apartheid-era inequalities, and ordered the school to begin providing instruction in both languages. Because of its Afrikaans-only policy, which had been in place for 93 years, the school maintained a remarkably

low student-to-teacher ratio compared to other local schools, even as neighboring English-language schools were so overcapacity that some students were being taught in old laundry facilities rather than classrooms.<sup>61</sup>

After the school challenged the order, the case eventually reached the Constitutional Court. In 2007, the Court found that the Department of Education could not force the school to make the change, given the authority of individual schools to determine their languages of instruction under the Schools Act, but also ordered the school's governing body to reconsider its language policy in light of constitutional mandates, including the right to education and the prohibition of discrimination on the basis of language, race, and social origin.<sup>62</sup> In addition, Section 29(2) of the South African Constitution provides for education in the language of one's choice where feasible taking into account "(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices."<sup>63</sup> The school was required to report back to the Court within 90 days, by which point it had changed its policy to begin instruction in both languages.

*Mexico: Addressing the Impact of Language Discrimination on Indigenous Peoples*

A recent court case in Mexico illustrates how discrimination on the basis of language can also intersect with discrimination on the basis of indigenous status. In a range of countries, particularly in Latin America, constitutions explicitly protect the rights of indigenous groups—often focusing on the right to be consulted on development projects and other initiatives that will affect indigenous communities and lands, as is consistent with international agreements.<sup>64</sup> Some of these constitutions also establish individual or collective protections from discrimination based on indigenous group membership. For example, Ecuador's constitution provides that "Indigenous communes, communities, peoples and nations are recognized and guaranteed . . . the following collective rights: . . . (2) To not be the target of racism or any form of discrimination based on their origin or ethnic or cultural identity."<sup>65</sup>

The Mexico case focused on a 2014 telecommunications law that required all radio and television broadcasts to be in Spanish, with the exception of broadcasts produced under "social licenses" specifically granted to indigenous groups. The plaintiff, Mardonio Carballo, was a poet and journalist who worked in both Spanish and náhuatl, an indigenous language.<sup>66</sup> Deeming the law a "totally discriminatory" barrier to his livelihood, Carballo initiated a constitutional challenge that reached the Supreme Court the following year.<sup>67</sup>

In its decision, the Supreme Court cited Mexico's constitutional provisions on indigenous groups, which include commitments to "promote equal opportunities for indigenous people and to eliminate discriminatory practices" and protect the rights of indigenous peoples to "preserve and enrich their languages" and "acquire, operate and manage media."<sup>68</sup> In addition, the Court cited Articles 26 and 27 of the

International Covenant on Civil and Political Rights (ICCPR). Article 26 prohibits discrimination on any grounds, including language, while Article 27 protects the rights of ethnic and linguistic minorities to use their own language. Under a 2011 amendment to the Mexican constitution, these provisions are directly applicable in court.<sup>69</sup> After taking all these national and international laws into account, the Court declared the law unconstitutional.<sup>70</sup>

Because Mexico has a civil law system and Carballo's challenge was filed as an *amparo*, or individual action, the Court's decision was initially applicable only to him; it did not change the law for others. However, a few months after the decision, the challenged law was amended to allow for broadcasts in any national language. Based on the list of national languages established by the General Law for Linguistic Rights of Indigenous Peoples in 2003, this meant that journalists, artists, and others could freely use both Spanish and indigenous languages.

### *Expansion of Equal Rights over Time*

Importantly, protections of equal rights on the basis of race, ethnicity, and language are all on the rise. While fewer than half of constitutions adopted before 1970 include race/ethnicity-specific guarantees, 89% of those adopted between 2000 and 2009 and 79% of those adopted between 2010 and 2017 do so (see Figure 1).

Likewise, while just 20% of constitutions adopted before 1970 prohibit discrimination on the basis of language, 75% of those adopted between 2010 and 2017 include these guarantees (see Figure 2).

Still, for the quarter of countries that have yet to enact a race/ethnicity-specific equality guarantee, the widespread persistence of racial discrimination underscores the urgency of doing so. Further, to address discrimination and exclusion in all its forms, countries may need to take more targeted approaches in key areas, as discussed in the following section.

## BEYOND DIRECT DISCRIMINATION: ADDRESSING SPECIFIC CHALLENGES

### *Addressing Segregation*

While the increase in race/ethnicity-specific constitutional provisions is encouraging, even with broad nondiscrimination provisions, racial segregation may persist. Segregation imposed by law has a long global history, and intensified during colonialism, when colonial officials would often reserve certain parts of cities in Asia and Africa for Europeans. South Africa was far from alone in the segregation of populations. An 1811 map of Madras, India, reveals a government-segregated "Black town" and "White town."<sup>71</sup> In early twentieth-century West Africa, colonial officials established separate residential areas for Europeans and Africans, arguing

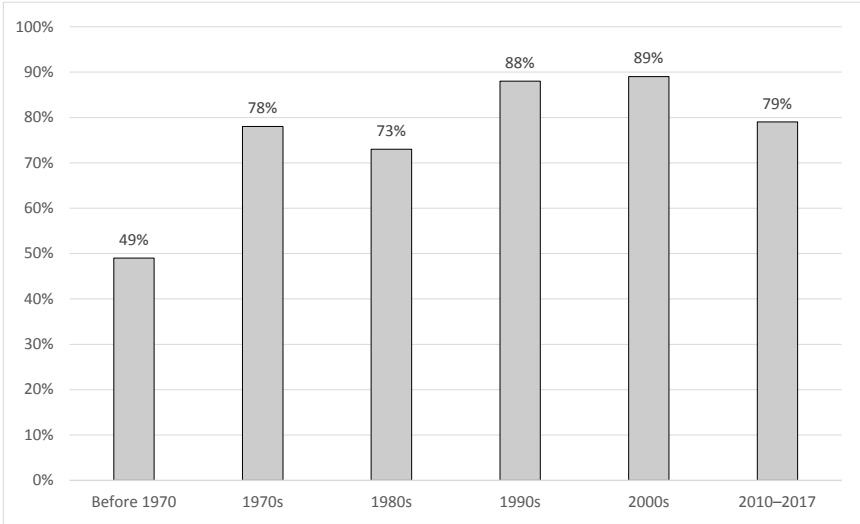


FIGURE 1. Explicit constitutional guarantee of equality or nondiscrimination across race/ethnicity by year of constitutional adoption

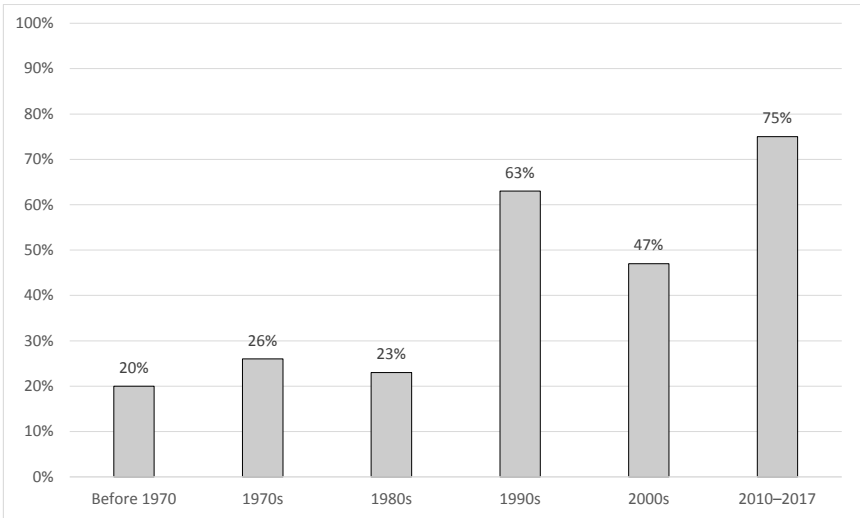


FIGURE 2. Explicit constitutional guarantee of equality or nondiscrimination across language by year of constitutional adoption

that segregation was necessary for preventing the Europeans' exposure to malaria and the plague.<sup>72</sup>

Devastating segregation persists across countries, as illustrated by “spatial segregation indices.”<sup>73</sup> These indices, which usually range from zero (indicating a particular group's complete integration into the population at large) to one (indicating complete segregation), have found extremely high levels of segregation—0.75 and above—in multiple African countries,<sup>74</sup> as well as in major urban areas in the United Kingdom.<sup>75</sup> In the United States, African Americans remain the most segregated racial group, though even higher levels of segregation persist among South Asian populations in cities like London and Birmingham.<sup>76</sup>

Segregation often perpetuates racial disparities and discriminatory attitudes. In Europe, ethnic groups segregated into poorer neighborhoods are more likely to be unemployed.<sup>77</sup> A 2016 study of 16 African countries found that ethnic segregation was clearly correlated with mistrust among ethnic groups.<sup>78</sup> In the United States, residential segregation has been identified as a “fundamental cause” of racial health disparities, and a primary cause of disparities in socioeconomic status and education.<sup>79</sup>

Meanwhile, a growing body of evidence finds that school desegregation both improves outcomes for students who are members of disadvantaged racial or ethnic groups and decreases societal racism.<sup>80</sup> This may be explained by research showing that increased contact with other racial groups reduces prejudice.<sup>81</sup> Likewise, living in close proximity to families from other racial, ethnic, or cultural backgrounds has been found to reduce stereotyping.<sup>82</sup>

#### *United States: The Promise—and Pitfalls—of Brown v. Board of Education*

Constitutions have been demonstrated tools for dismantling segregation. In 1954, the U.S. Supreme Court famously ruled in *Brown v. Board of Education* that “separate but equal” racially segregated schools violated the Fourteenth Amendment, which broadly guarantees “equal protection of the laws.” In the decades since, *Brown* has become perhaps the most celebrated decision of the U.S. Supreme Court, garnering numerous citations even in foreign courts.<sup>83</sup>

Yet despite its tremendous symbolic value and initial impacts, *Brown's* promise has gone unfulfilled. While modest integration was achieved in the 1970s and '80s, American schools have been resegregating as court orders are lifted.<sup>84</sup> From 1988 to 2014, the percentage of “hyper-segregated schools,” in which 90% or more of students are minorities, grew from 5.7% to 18.4%.<sup>85</sup>

The barriers to integration are many, and illustrate how exclusion in one setting leads to exclusion in others. Mid-twentieth-century housing policies—including restrictive covenants that limited the neighborhoods in which black families could live, as well as banks' “redlining” practices that prevented black families from accessing loans—gave rise to the housing segregation that has persisted to this day in the United States. When black families did move into white neighborhoods,

once their numbers reached a “tipping point,” white families moved out, in a phenomenon famously dubbed “white flight” by economist Thomas Schelling.<sup>86</sup> Meanwhile, a significant portion of funding for public education has historically come from local property taxes, leading to inadequate investment in the schools that need it most (where average incomes are lower) and perpetuating racial disparities in access to quality education, given the association of race/ethnicity and class in the context of a history of discriminatory barriers.<sup>87</sup>

But the persistence of segregation also has to do with the constitution. To start, the U.S. lacks a race-specific equality provision—and it is noteworthy that numerous decisions upholding segregation predated *Brown* but were based on the exact same constitutional language. Most notoriously, in 1896, the Supreme Court ruled in *Plessy v. Ferguson* that the establishment of separate train cars for white and “colored” passengers did not amount to unconstitutional discrimination. The *Plessy* decision also pointed to the existence of segregated schools, and state courts’ approval of them, as justification for its conclusion.<sup>88</sup> Similarly, in a lesser-known case from 1924, just three decades before *Brown*, the Supreme Court ruled against a nine-year-old Chinese American student in Mississippi who had enrolled at a white school when no “colored” school was available, finding that school segregation “does not conflict with the Fourteenth Amendment.”<sup>89</sup>

For the U.S., a first clear priority is enacting a race-specific constitutional equality provision. But given the courts’ narrow interpretation of equality—and insistence that the “enforced separation of the two races” was not intended to be discriminatory<sup>90</sup>—even this may not have been enough to yield a different outcome during the eras these cases were decided. Meanwhile, in modern times, the constitution’s silence on desegregation, racial equality, and the right to education leaves advocates for equal educational rights with limited tools to correct course.

#### *Namibia, Sierra Leone, and New Zealand: Divergent Approaches to Segregation*

Several countries provide examples of more explicit constitutional language committing to the eradication of segregation and promotion of integration. For example, Namibia’s constitution provides that “The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited.”<sup>91</sup> In Sierra Leone, the constitution’s chapter on “fundamental principles” proclaims that “the State shall promote national integration and unity and discourage discrimination on the grounds of place of origin, circumstance of birth, sex, religion, status, ethnic or linguistic association or ties.”<sup>92</sup>

Globally, however, few constitutions explicitly address segregation. Further, those that do may address only a fraction of the segregation that persists in schools and workplaces. Unless constitutional provisions are clearly applicable to both public and private institutions, exceptions will undercut the intent of desegregation

efforts. Meanwhile, a few countries still explicitly allow for separate education. New Zealand's constitution, for instance, declares: "An educational establishment maintained wholly or principally for students of one sex, race, or religious belief, or for students with a particular disability, or for students in a particular age group, or the authority responsible for the control of any such establishment, does not commit a breach of section 57 [nondiscrimination in education] by refusing to admit students of a different sex, race, or religious belief, or students not having that disability or not being in that age group."<sup>93</sup> Although in a minority of cases separate education for marginalized groups has been designed to address historical disparities, establishing in the constitution that schools can exclude students on any of these grounds opens the door for widespread discrimination and puts at risk all the benefits of integration.

While "separate but equal" is now widely understood as inherently unequal—an interpretation underscored by international human rights bodies<sup>94</sup>—language that more thoroughly articulates this principle can provide a stronger foundation for reducing the salience of race/ethnicity in shaping opportunity.

#### *Addressing Indirect Discrimination*

Beyond direct discrimination and segregation, a third key area constitutions can address is indirect discrimination—policies or practices that are "race-neutral" on their face but disproportionately harm particular racial/ethnic groups.

Indirect discrimination is also known as "disparate impact" discrimination, which speaks to its focus on the outcomes of a particular policy or practice rather than its stated intention. Indirect discrimination can take several forms. In some cases, indirect discrimination intentionally targets a racial/ethnic group through a seemingly race-neutral policy. An example of this is the use of literacy tests as a requirement for voting across the Jim Crow-era American South, which did not explicitly prohibit voting on the basis of race but was clearly intended to disenfranchise black Americans who had been denied a formal education.

In other cases, criteria that have disparate impacts may be necessary to achieve an important purpose, and are generally not viewed as legally discriminatory. For example, a fire department's requirement that applicants be able to carry 100 pounds up a flight of stairs may disproportionately exclude women, but tests an ability that is essential for fulfilling a firefighter's duties.

Finally, in some cases, disparate impact may be unintentional but is also unnecessary. The use of certain tests and hiring practices that disproportionately disadvantage certain groups, but have not been shown to closely relate to the actual duties of the job they are applying for, generally fall into this category.

Protections against indirect discrimination are intended to advance more equitable outcomes, and to root out more "invisible" forms of bias that lead to disproportionate exclusion on the basis of race/ethnicity or another characteristic. Rather than just limiting the judicial analysis to whether all people are subject

to identical rules, by looking at the goal and impact of rules, protections against indirect discrimination can help advance substantive equality. Court rulings have shown that it is feasible to parse out the different types of indirect discrimination, and to distinguish between genuinely needed policies or practices that have a disparate impact and those that derive from or perpetuate bias without demonstrating their necessity. Cases from a range of countries illustrate how courts have dealt with indirect discrimination across various constitutional contexts.

*South Africa: Indirect Discrimination Is Unconstitutional*

In a 2011 case from South Africa, the plaintiffs were three women who had been badly injured in traffic accidents. Two of them had been riding in minibus taxis, and one had been a passenger in her employer's car. Their injuries were severe and interfered with their ability to work: two of the plaintiffs had been hospitalized for two months, and one underwent a foot amputation.<sup>95</sup>

South Africa had established a Road Accident Fund to provide compensation to individuals who were injured by others' negligent or illegal driving. However, the legislation establishing the fund capped compensation for victims who were injured while riding public transportation or while being transported by their employer. While other third parties could receive full compensation from the fund, those who fell into these exceptions were only eligible to receive a maximum of 25,000 rand (a little more than 2,000 USD), regardless of the extent of their injuries or the accident's impact on their livelihood.

In a challenge to the relevant section of the Road Accident Fund Act, the plaintiffs argued that the cap on reimbursement indirectly discriminated against black South Africans, who, because they were more likely to be poor, were significantly more likely than white South Africans to take public transportation. The Constitutional Court agreed, finding that because the "impugned provisions . . . overwhelmingly affect black people, they create indirect discrimination that is presumptively unfair," in violation of Section 9(3) of the Constitution.<sup>96</sup> Moreover, while the Court acknowledged that the government could legitimately limit the compensation available to accident victims, it could not "singl[e] out" one group of South Africans for a reduced benefit under a piece of social security legislation.<sup>97</sup>

*United Kingdom: Measures Have to Be Justified*

A case from the United Kingdom found against indirect discrimination in a different context. In *Essop v. Home Office*, an experienced immigration officer challenged the use of a Core Skills Assessment (CSA) exam as the basis for promotions. The CSA was a generic exam administered to all employees of the Home Office, the U.K.'s national security and immigration agency, who were seeking promotion to a certain level. In 2010, a Home Office-commissioned study of the CSA found that "black and minority ethnic" employees passed the test only 40% as often as



white employees. The report estimated that there was only a 0.1% probability that this disparity was by chance.<sup>98</sup>

The U.K. has no codified constitution, but a collection of parliamentary acts regarded as having constitutional status.<sup>99</sup> While there is some debate about precisely which acts rise to the level of constitutional law, a range of sources attribute this status to the Equality Act, a comprehensive piece of legislation that expressly prohibits indirect discrimination.<sup>100</sup>

In an important ruling, the Supreme Court found that individuals claiming indirect discrimination were not required to explain *why* an “apparently neutral provision, criterion or practice” had a disproportionate impact on a particular group; it sufficed to show that it did. At the same time, the Court noted that no finding of discrimination would result if the employer could show that the CSA was a justified condition for promotions, though the opinion suggested that a reasonable employer who became aware of a policy’s disparate impact would “try and see what can be modified to remove that impact while achieving the desired result.”<sup>101</sup> Moreover, the Court explained that the person alleging discrimination did not need to prove they personally experienced the “same disadvantage” shared by the group, though the employer would also have the opportunity to show that “the particular claimant was not put at a disadvantage by the requirement”—maybe he just didn’t study, or went to the wrong test center. Having provided this analysis, the Court granted Essop’s appeal and remanded the case to the Employment Tribunal.

#### *United States: The Constitution Prohibits Only “Intentional” Discrimination*

In the absence of a constitutional protection against indirect discrimination, courts have ruled differently on testing requirements in the United States.<sup>102</sup> In 1970, two black police officers who had applied for positions in the District of Columbia Police Department challenged the constitutionality of a written exam used throughout the civil service that was “designed to test verbal ability, vocabulary, reading and comprehension.”<sup>103</sup> The two plaintiffs argued that the test had not been shown to predict job performance as a police officer, and had the effect of disproportionately excluding black applicants: between 1968 and 1971, 57% of black applicants failed the test, compared to just 13% of whites.

The sources of bias in testing, which have been long studied, include racially and culturally biased content, methodological bias, and the psychological effect of “stereotype threats.”<sup>104</sup> As just one example, studies have found that the election of Barack Obama as the first black president of the United States had a positive effect on the test scores of black Americans, which researchers suggest is due to the reduction of stereotype threat; President Obama’s high-profile disruption of black stereotypes had a psychological effect on test-takers.<sup>105</sup> Similarly, the subject matter of standardized tests often advantages test takers with higher socioeconomic status,

measuring not just relevant knowledge but also what they have been exposed to outside the classroom.<sup>106</sup>

However, in *Washington v. Davis*, the Supreme Court ruled that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, [is not] unconstitutional solely because it has a racially disproportionate impact.”<sup>107</sup> In so doing, the Court emphasized that the racial trends in the test outcomes were irrelevant to the test’s constitutionality; the black plaintiffs “could no more successfully claim that the test denied them equal protection than could white applicants who also failed.”<sup>108</sup> As a consequence of this ruling, the Court has consistently held since 1976 that the constitution protects against racial discrimination only where the plaintiff can prove it was “intentional”—a high burden of proof that has significantly limited the potential of the Equal Protection Clause.<sup>109</sup>

The consequences of this ruling were especially apparent in the 1987 case of *McCleskey v. Kemp*, in which attorneys representing a black man on death row presented a significant body of statistical evidence showing that prosecutors were more likely to pursue capital punishment when there was a white victim and a black defendant (as in McCleskey’s case), and that juries were 4.3 times more likely to impose the death penalty when crime victims were white than when they were black.<sup>110</sup> However, the Court held that this statistical evidence was insufficient to prove intent to discriminate, and that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”<sup>111</sup> Through these rulings, the Court effectively rendered the constitution powerless to address indirect racial discrimination.

### *Lessons for Protecting against Indirect Discrimination across Contexts*

The U.K. and South Africa cases illustrate that courts have the capacity to address indirect discrimination in nuanced ways—but as the U.S. case reveals, they may be unlikely to address it at all without a foundation in the constitutional text. In the U.K., the Court emphasized that if the employer could show the test was necessary for the job, it would still be constitutionally valid. In South Africa, the Court clarified that the government was within its rights to limit compensation to accident victims; it just could not do so in a discriminatory manner. But in the U.S., the Court simply refused to acknowledge indirect discrimination *as* discrimination, without reaching the more nuanced question of whether the test at issue was an essential and effective means of achieving its stated objective.

Altogether, only 5% of countries prohibit indirect discrimination. Serbia’s constitution, for example, states: “All direct or indirect discrimination based on any grounds, particularly on race . . . shall be prohibited.”<sup>112</sup> Similarly, Zambia’s constitution defines discrimination as “directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status.”<sup>113</sup>

*Advancing Equality through Affirmative Measures*

In many parts of the world, contemporary racial inequalities are shaped by long histories of slavery, colonialism, discriminatory laws, or other systematic racial oppression. Guaranteeing equal rights regardless of race/ethnicity is a first and essential step toward creating a level playing field. Yet in many countries, this is insufficient to undo the material and expressive harms caused by centuries of state-sanctioned discrimination, particularly given the persistence of segregation and concentrated disadvantage.

To accelerate progress toward racial equality and mitigate the impact of historic injustices, some countries have enacted affirmative measures, which may permit schools, employers, and other institutions to take race/ethnicity and the impacts of past discrimination into account when making decisions about admissions, hiring, or other areas that shape representation and access to resources. While their design raises complex questions, as discussed in more detail below, affirmative measures provide one of the most promising mechanisms for accounting for cumulative disadvantage, implicit bias, and ongoing and historic discrimination.<sup>114</sup> Moreover, when well-designed and implemented, affirmative measures can advance at least three goals: restorative justice, human rights, and diversity and inclusion.

*The Case for Affirmative Measures—and Its Implications for Human Rights*

The restorative justice case for affirmative measures focuses on the responsibility of governments to enact remedies for harms done in their name. This rationale acknowledges that past injustices often have enduring consequences and that true equality will not immediately flow from the removal of formal barriers. In the words of former U.S. president Lyndon Johnson, “You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please . . . We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.”<sup>115</sup> Likewise, as observed by Dikgang Moseneke, former deputy chief justice of the Constitutional Court of South Africa: “Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.”<sup>116</sup>

Today, the impact of past racial discrimination on persisting socioeconomic inequalities remains profound, providing a powerful example of why a restorative justice approach is important for advancing equality in practice. In South Africa, 25 years since apartheid ended, black South Africans still own only 4% of the land, while white South Africans own 72%.<sup>117</sup> In Brazil, poverty rates among Afro-Brazilians are twice those of white Brazilians.<sup>118</sup> In the United States, the median black family earned \$39,490 in 2016, compared to \$65,041 for the median white family.

The wealth gap is even wider: median net worth for black families in the U.S. is \$17,600, or around 10% of the median net worth of white families (\$171,000).<sup>119</sup> The greater disparities in wealth compared to income arise because wealth gets passed down intergenerationally—and even long after slavery’s abolition, black Americans were routinely excluded from the laws and policies that helped white Americans buy homes, attend college, and build assets to pass on to their children.<sup>120</sup> And crucially, access to resources—whether it is just money to pay for a car repair or a college savings account—can shape whether someone can access opportunities and social networks, and withstand periods of unemployment or other hardship. These foundations provide a crucial complement to protections against discrimination.

Accordingly, a restorative justice framework seeks to both redress past injustices and build a foundation for the full exercise of human rights and capabilities in the present. This explains the strong commitment to affirmative steps in the ICERD: “States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”<sup>121</sup>

A second rationale for affirmative measures is that by increasing diversity in schools, workplaces, and other institutions, they benefit everyone. Indeed, representation helps to ensure a diversity of views, advance innovation, and facilitate effective decision-making that addresses the needs and experiences of all people. Diversity in the classroom has been shown to benefit all students, and workplaces report similar results.<sup>122</sup> Evidence also shows that leaders and role models matter to the aspirations of the next generation.<sup>123</sup> Well-designed affirmative measures have been effective at more rapidly changing representation in universities, workplaces, and positions of power and leadership.

### *Questions That Arise in the Design of Affirmative Measures*

Across countries, affirmative measures are undeniably controversial, and raise legitimately complex questions—some pragmatic, others more philosophical. While the issues that follow are not comprehensive, they reflect some considerations that commonly arise in discussions of affirmative measures across a wide range of settings.

*Duration:* The ultimate goal for affirmative measures is to create a society that genuinely provides for equal opportunities, both by removing material barriers and by dismantling stereotypes that fuel discrimination. Yet even if everyone agrees that past discrimination has shaped present inequalities, how can policymakers anticipate how long change will take, or establish when affirmative measures have succeeded? While affirmative measures are generally agreed to be temporary rather than permanent fixes for inequality, deciding upon the time horizon is a recurring challenge.

*Which Groups Are Included:* Another question is how to design affirmative measures to address residual discrimination as well as ongoing bias and discrimination. Many groups have faced and continue to face different types and degrees of discrimination and bias, and identifying the appropriate remedies in the present is rarely straightforward. Further, even within these groups, not everyone has experienced the same consequences of past and ongoing discrimination that affirmative measures seek to remedy. Ensuring that affirmative measures are fair and effective requires taking these considerations into account.

*Targeting Benefits:* Similarly, there are valid reasons to believe that affirmative measures in some countries disproportionately benefit the most advantaged members of the targeted group (such as those with the highest incomes), leaving those facing the greatest marginalization behind; the intersection of socioeconomic status (SES) and race/ethnicity is a persistent subject of debate when it comes to affirmative measures.

In countries where race/ethnicity and SES are highly correlated, some have argued that affirmative measures based on SES would more effectively benefit individuals from marginalized racial/ethnic groups who are also economically disadvantaged. Moreover, this approach could also potentially meet with a lower level of discriminatory political or popular backlash. At the same time, targeting SES alone, even when strongly associated with marginalized racial/ethnic groups, will not fully address the racial/ethnic discrimination and exclusion that often occurs across social class.

*How to Address Disparities:* Countries have taken various approaches not only to *whether* but to *how* schools and employers can take race/ethnicity into account. With regard to “how,” successful approaches include focusing on ensuring a richly diverse applicant pool; valuing diversity, all else being equal; and explicitly recognizing the value of a diversity of experiences and perspectives at each step of the selection process.

While perhaps no existing national policy is without its shortcomings, a range of countries offer insights into how to craft affirmative policies in nuanced and effective ways. Sample cases illustrate how considerations about remedies, evaluation criteria, and time horizons have played out in the courts in countries that have taken different constitutional approaches and prioritized different goals.

#### *South Africa: Targeted and Time-Bound Action to Address Economic Inequalities*

In South Africa, the post-apartheid government has focused over the past two decades on increasing the representation of black South Africans who were long excluded from educational opportunities, access to resources, and positions of power in government and the economy. These efforts have had tangible impacts,

although South Africa's commitment to remedying long-standing injustices and inequalities within a short time frame has also presented challenges and generated controversy.<sup>124</sup> Yet even as debates about the most effective ways to accelerate progress toward equity continue to unfold, South Africa has demonstrated the feasibility of addressing some of the economic impacts of past discrimination through restitution, as illustrated by a 2004 case.

In *Minister of Finance v. Van Heerden*, the Constitutional Court addressed whether a new pension fund that temporarily provided for higher state contributions to members of Parliament first elected in 1994, relative to those who had been members since the apartheid era, violated the constitution's equality provision.<sup>125</sup> The new pension was established as a restitutionary measure to account for economic inequality created by apartheid. Between 1994 and 1999, new members of Parliament would receive pension contributions equaling 17% (for those under age 49) or 20% (for those 49 and over) of their annual salary, while those who had been members prior to 1994 would receive only 10%. After that period, everyone would receive 17%. The group temporarily receiving lower pension contributions under the new scheme included 105 white members (including the plaintiff), two black members, 11 Indian members, and 28 "colored" members (the South African term for mixed-race people).

In evaluating whether the differential treatment was nevertheless consistent with equal rights, the Court based its judgment on Section 9, the constitution's equality provision. Section 9(1) provides that everyone is equal before the law, while 9(2) allows for "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" to "promote the achievement of equality." The Court explained that these two sections were complementary, and that in order to be valid under 9(2), an affirmative measure had to satisfy three criteria: it had to (1) "target persons or categories of persons who have been disadvantaged by unfair discrimination," (2) be designed to protect or advance those persons, and (3) promote the achievement of equality.

Addressing these requirements one by one, the Court found that the new pension satisfied the first criterion, since "an overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief." The Court also found that the higher pension contributions were designed to benefit this group, and that the government was not required to show that there was no less onerous way to accomplish their objective (in other words, the government did not have to prove that the 10% threshold for the apartheid-era members of Parliament was the maximum they could afford while providing the 17% and 20% benefits to the new members). Finally, the Court found that the new pension scheme was a reasonable and time-bound effort to "distribute pension benefits on an equitable basis with

the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians.”

The powerful judgment, written by then-Deputy Chief Justice Moseneke, explained how affirmative measures were not only constitutional but also critical to achieving the constitution’s transformative aims:

[O]ur Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework . . . [O]ur constitutional understanding of equality includes . . . “remedial or restitutionary equality.” Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not “reverse discrimination” or “positive discrimination” as argued by the claimant in this case. They are integral to the reach of our equality protection.<sup>126</sup>

In addition to applying a clear restorative justice frame, by providing a discrete and time-bound remedy, the ruling made clear its goal was equality. However, as the next cases will underscore, when it comes to reducing barriers to employment and education, rather than more equitably compensating those already in leadership positions, designing affirmative measures is rarely as straightforward.

#### *United States: Advancing Diversity through Holistic Evaluations*

In the United States, many universities have enacted policies that emphasize the holistic evaluation of applicants’ experiences, skills, and qualifications and take into account the value of a diverse student body. While the constitution’s lack of clear language permitting affirmative measures has left these programs vulnerable (as will be detailed later), the Supreme Court has historically found these policies to be constitutional. They offer one approach to diversifying student bodies.

In *Grutter v. Bollinger*, the Supreme Court affirmed the constitutionality of an admissions policy at the University of Michigan Law School that considered race/ethnicity as “one factor among many” in its process for selecting among the top candidates in its applicant pool. The law school had implemented the policy in 1992 to ensure that the student body included a “critical mass” of underrepresented minority students, in an effort to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”<sup>127</sup>

In a 5–4 decision in 2003, the Court found that the law school used race/ethnicity as a “plus” factor in the context of a comprehensive, individualized review, and that race/ethnicity was not the “defining feature” of any prospective student’s application.<sup>128</sup> Second, although achieving a “critical mass” of underrepresented students required “some attention to numbers,” Justice O’Connor acknowledged that the proportion of minority applicants enrolled each year varied significantly, indicating that the school’s policy was not equivalent to a quota.<sup>129</sup>

The *Grutter* decision was a landmark for affirmative measures, and Michigan Law School's holistic approach became a model for other universities across the country seeking to ensure diverse student bodies without triggering constitutional claims. Nevertheless, without constitutional text permitting affirmative measures, the decision rested on somewhat shaky ground, and the wave of affirmative action challenges since the ruling indicates that the debate is far from over.<sup>130</sup>

In addition, whereas the U.S. Supreme Court once considered equal rights and remedying past discrimination to be the core justifications for efforts to integrate schools at all levels, more recently, the Court has generally viewed the broad-based benefits of diversity as the sole constitutional rationale.<sup>131</sup> In so doing, the Court has diminished the potential of the Equal Protection Clause to address historic disparities.<sup>132</sup> Moreover, cases challenging affirmative measures typically invoke the Equal Protection Clause, arguing that any policies that take race/ethnicity into account are inherently discriminatory. This trend illustrates how neglecting to specify that affirmative measures are consistent with equality can undermine a constitution's potential to advance equal rights in practice.

*Rwanda and Brazil: The Rapid Change Associated with Quotas—but Not without Risks*

The question of how rigid or flexible affirmative measures should be, whether for race/ethnicity or for other categories, is a challenge that emerges across countries. Rigid approaches like quotas may quickly change representation of marginalized groups and increase the diversity of historically exclusive institutions. Rwanda, for example, introduced a legislative quota in its 2003 constitution that reserved 30% of government seats for women, and quickly became the world's first country with a female majority in parliament, compared to a global average of only around 20%.<sup>133</sup>

However, quotas may not fundamentally change power dynamics. In some countries, for example, researchers have raised concerns that male party leaders select women to fill quota seats based on their loyalty; in others, male relatives of elected women may have undue influence on their decisions in office.<sup>134</sup> Similarly, some quotas have functionally established ceilings, rather than floors, for representation. Further, depending on prevailing attitudes in institutions where they are enacted, quotas may stigmatize beneficiaries and do not always provide opportunities to fully consider other aspects of a person's background or experience that may be relevant. Finally, while the specifics of their design vary,<sup>135</sup> quotas and other mechanical measures that make certain demographic characteristics central to decision-making may reinforce stereotypes.

A recent example comes from Brazil. Although Brazil did not enforce racial segregation in the same way as the United States or South Africa, its own legacy of slavery and legal discrimination has created deep disparities in resources and



economic opportunities. Seeking to remedy this inequality, after the Supreme Court ruled that affirmative action was constitutional in 2012, the government enacted a quota system targeting public school students who were low-income and/or identified as black, indigenous, or mixed-race.

The effort has successfully increased the representation of marginalized groups in higher education. However, its race-based allocation of a specific number of seats has also inadvertently reinforced racial classifications, in a country where citizens have historically provided as many as 136 different descriptions of their race in the census.<sup>136</sup> More broadly, quotas present the risk of reifying stereotypes about a group's characteristics, both during the process of determining who belongs to the group, and through reactions to and assumptions about those who benefit.

### *India: A Commitment to Periodic Evaluation of Progress*

Whatever approach is taken, countries benefit from building in periodic reviews of affirmative measures. In India, recognizing how the caste system's rigid hierarchy of inherited social status had excluded a large segment of the population from political representation for centuries, the independence constitution reserved legislative seats for members of designated castes and tribes, proportional to their share of the population.<sup>137</sup> According to the provision's "sunset clause," the reservation policy would apply to elections for the next ten years. However, the political reservations have been extended via constitutional amendment six times, with the most recent reform extending them through 2020.<sup>138</sup> In effect, ten-year windows have become a mechanism for periodic reevaluation of whether the quotas remain needed.

Courts from Washington to Johannesburg have debated how long affirmative measures should be in place. In *Grutter*, Justice O'Connor predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." In South Africa, the Labour Court issued two conflicting opinions about whether employers could continue to consider race and gender in their hiring decisions even after legislative quotas were met, evaluating the duration of affirmative measures not just in policy but in practice.<sup>139</sup> In a 2006 decision, the Court found that continuing to consider race and gender after quotas were filled would be "unfair"; in a 2007 ruling, it questioned whether setting aside these considerations "advances the spirit and purpose of employment equity and the notion of substantive equality."<sup>140</sup>

As these examples suggest, committing to periodically evaluating the efficacy of affirmative measures is a practice that has potential to facilitate the identification of successful approaches and the monitoring of government actions to ensure policies are working as intended. Establishing specific benchmarks and the evidence of impact may provide a valuable strategy for accelerating progress and identifying persisting barriers.



MAP 4. Does the constitution explicitly allow for affirmative measures to advance equal opportunities across race/ethnicity?

Constitutions can provide frameworks for affirmative measures by including language that allows countries to take steps designed to both address past inequality and advance future equality without violating their guarantee of equal treatment under the law. While a range of countries have adopted affirmative measures without clear support in the constitutional text, these policies are subject to persistent constitutional challenges and political vulnerability.

In total, 17% of countries permit affirmative measures on the basis of race/ethnicity (Map 4), and 5% allow for affirmative measures to promote linguistic equality.

## CONCLUSION

As a modern ideal, democracy rests on the premise of equal voice and representation in governance. A true democracy is a system in which human rights are universally respected, all people have an equal opportunity to participate fully, and elected leaders are accountable to all of their constituents.

The history of democracies, however, is one of exclusion, with broad classes of people barred from full participation or citizenship on the basis of race/ethnicity, gender, socioeconomic status, and other characteristics. In ancient Greece, often hailed as the world's first democracy, only free men could vote; women, slaves, and foreigners, who were not considered citizens, were denied the franchise. In the United States, the 1789 constitution defined African slaves as less than human through the Three-Fifths Compromise, while permitting states to restrict voting rights to white, male property owners.<sup>141</sup> In France, the Declaration of the Rights of Man and of the Citizen, a precursor to the constitution that proclaimed “liberté, égalité, fraternité,” banned slavery in France—but did not explicitly extend its commitments to France’s colonies, laying the groundwork for the Haitian revolution.<sup>142</sup>

And throughout Latin America, during the nineteenth-century independence movements, women and slaves were excluded from political citizenship.<sup>143</sup>

Since the mid-twentieth century, the world has made remarkable progress on addressing racial discrimination through constitutions and courts. Constitutional reforms catalyzed progress on racial justice in many nations, and often served as a point of transition for countries seeking to inaugurate a new era of civil rights. In many of these, including South Africa, Brazil, and Colombia, inclusive drafting processes that involved historically marginalized racial and ethnic groups were critical to establishing and leveraging new guarantees of racial equality to have broader impacts.<sup>144</sup> While transformative constitutional protections were also introduced in landmark court rulings, these were more vulnerable to regress.

Still, nearly a quarter of constitutions include no explicit protections against discrimination on the basis of race/ethnicity. Many more are silent on indirect discrimination, which can shape racial disparities in outcomes even in the absence of conscious discriminatory intent. Fewer than one in five explicitly allow the government to take affirmative steps to advance equality, while only a handful of constitutions specifically address segregation, despite growing research evidence that living, learning, and working alongside members of other racial or ethnic groups helps reduce bias.<sup>145</sup> Given the overwhelming evidence that racism continues to harm individuals, families, and societies all over the world, it is clear that more concerted efforts are needed.

Yet although discrimination persists and even the most celebrated rulings face implementation challenges, it is important to note that norm shifts related to racial/ethnic equality have happened, both at the global level and in individual countries. As in other areas, cases and constitutional reforms sometimes change before norms, rather than after. Even when popular opinion narrowly supports a court finding, the constitutional case and changes it leads to may contribute to further reductions in bias.

Over the past few years, we have witnessed the troubling resurgence of more overt racism across countries, as well as the demonstrated vulnerability of democracies. Against this backdrop, the foundational role of constitutions in protecting rights for everyone is all the more important. In the decades to come, continuing to develop more representative schools, workplaces, and societies—and eliminating discrimination in all its forms—will be key to moving toward a world where race and ethnicity genuinely have no bearing on health, opportunity, resources, or full social, economic, and political participation.

## Why Addressing Gender Is Foundational

Legally perpetuated gender inequality has been pervasive globally for millennia. Women have been excluded by law from property ownership, professions, and political participation. Only for slightly over a century have women been allowed to vote—finally gaining this fundamental right first in 1893 in New Zealand and only in 2011 in Saudi Arabia.<sup>1</sup> Women’s social and economic rights, and their full realization, lag far behind men’s. In all countries but one, the average woman still earns less than the average man,<sup>2</sup> 104 countries have legal barriers to women’s employment in specific jobs,<sup>3</sup> and one-third of the world’s countries lack laws against workplace sexual harassment.<sup>4</sup> In every society, gender-based violence continues to inhibit women’s ability to move freely through the world and exercise other fundamental rights and devastating loopholes undermine rape prosecutions in far too many nations.<sup>5</sup>

Gender-based discrimination remains the form of discrimination that affects the most individuals globally, impacting nearly every household. Gender discrimination cuts across social class, race/ethnicity, and religion; leaves marginalized groups of women further behind; and leaves women in nearly all groups less likely to have an equal voice, decision-making roles, or opportunities for equal resources.

To address inequality, we must first understand where and how discrimination occurs, as well as the extent to which constitutions and laws can address each type of discrimination. In the case of gender, inequality is fueled by

- *Discrimination embedded in laws and government policies.* Examples include laws that historically prohibited women from voting, continue to bar women from certain professions, or limit women's freedom of movement. Laws that differentiate on the basis of sex, in ways that perpetuate inequity rather than redress past inequality, embody and further discrimination. In 80% of countries, inequalities in labor/social security laws limit whether all people regardless of sex or gender have equal opportunities to perform the same jobs, work under the same conditions, take paid leave for infant care, or retire at the same age.<sup>6</sup>
- *Governments' failure to prohibit common discriminatory practices.* For example, when governments neglect to legally prohibit workplace sexual harassment or gender discrimination in employment, they facilitate abuse, unequal pay, and disparities in hiring and firing. One-quarter of countries do not explicitly prohibit gender discrimination in either hiring or terminations, and nearly half fail to explicitly guarantee women equal pay for work of equal value.<sup>7</sup> Similarly, nearly half fail to prohibit discrimination in decisions regarding promotion or advancement.<sup>8</sup>
- *Policies and rules of private institutions that create unequal opportunities in education, civic participation, and other spheres.* Private institutions that exclude individuals based on gender, including some schools and social/political organizations, are engaging in direct discrimination. Such private policies' impact is magnified when these institutions provide entry points for opportunities to participate or assume leadership roles in education, the economy, government, or politics.
- *Individual actions, taken on behalf of institutions, that are systematically discriminatory—even when policies are not.* Extensive evidence has demonstrated that individual action can increase disparities. For example, studies in which prospective employers receive resumes that are identical aside from applicants' names have revealed systematic gender discrimination; men receive more interview invitations than women.<sup>9</sup> While institutions' advertisements may not specify that jobs are restricted on the basis of gender, individuals' implementation of searches can be heavily biased.
- *Laws that regulate interpersonal relations in ways that limit equal rights and shared decision-making.* Examples include laws that treat men and women differently with respect to rights in marriage or divorce, the ability to make decisions on their children's behalf, or the ability to confer citizenship to family members.<sup>10</sup>

Sustainable change requires challenging inequalities in constitutional rights, laws and policies, programs and services, and norms. While change at every level of government is greatly needed, constitutions often provide the strongest foundation for countering discrimination and unequal treatment of men and women by governments, public institutions, and laws governing civic space. Depending on the details of their provisions and implementation, constitutions can also reduce discrimination in private institutions and advance equality in private relations.

## CONSTITUTIONS' ABILITY TO ADDRESS LAWS AND POLICIES FUELING GENDER INEQUALITY

Around the world, both individual women and civil society groups have employed their constitutions' equal rights protections to challenge the types of discrimination described above. These efforts have yielded remarkable victories, including court decisions affirming women's right to confer citizenship in Botswana, ending a prohibition on married women's property ownership in Swaziland, and invalidating the exclusion of female applicants for a position in Kuwait's Justice Ministry.<sup>11</sup>

In Zimbabwe and Nepal, women have leveraged their constitutions over the past two decades to challenge some of the discrimination women face at the intersection of their public and private lives. From laws permitting girls to be married as children to legal exceptions for marital rape, these cases reveal the consequences of unequal treatment by governments for both public opportunities and relationships within families. Further, the courts' demonstrated capacity to address these different types of discrimination underscores the role constitutions can play in dismantling gender inequality in all spheres, provided they are well designed.

### *Zimbabwe: Addressing Gender Discrimination Embedded in Child Marriage Legislation*

In 2013, 95% of Zimbabwean voters approved a new constitution containing strengthened provisions on gender equality, including overall equal rights guarantees, specific protections of women's social and economic rights, and recognition of "gender equality" as a founding principle.<sup>12</sup> A recent case on child marriage illustrates how these provisions have provided tools for changing laws and challenging private decisions that have discriminatory impacts.

As of 2014, the rate of child marriage among girls in Zimbabwe was 34%.<sup>13</sup> That year, two of these girls, Loveness Mudzuru and Ruvimbo Tsopodzi, now young women, challenged Zimbabwe's minimum marriage age law, which permitted girls to be married at 16—two years earlier than boys. The disparity, the women argued, amounted to discrimination violating Article 81 of the constitution, which established that "every boy and girl under the age of eighteen years, has the right to equal treatment before the law."

The Constitutional Court agreed, citing both Article 81 and Zimbabwe's commitments to gender equality under the U.N. Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and the U.N. Convention on the Rights of the Child. Tendai Biti, the young women's lawyer, remarked on the victory's significance: "Parliament should have done this many years ago. They had over 36 years to do it; they did not do it. So it has taken a bold decision from a bold court to do this."<sup>14</sup>

While changing laws is only the first step in eliminating child marriage—and while the age of marriage law has yet to be amended as of this writing—Zimbabwe’s example shows how establishing gender equality as a fundamental constitutional principle can provide the foundation for ending discriminatory legislation, even when the legislature has been slow to act. Since the Zimbabwe case, a Tanzanian high court delivered a similar ruling declaring its child marriage legislation, and specifically legal disparities in the minimum age, unconstitutional.<sup>15</sup>

*Nepal: Reforming Laws to Support Greater Equality in  
Private Relationships*

As illustrated by Zimbabwe, constitutions have proven to be critical tools in countering discriminatory legislation, including unequal child marriage laws, which undermine girls’ opportunities and facilitate relationships that are often marked by abuse.<sup>16</sup> Yet legal inequalities can persist even when both partners enter into marriage as fully consenting adults.

Although legislation prohibiting sexual violence has strengthened in recent decades, many countries’ laws provide inadequate protection against rape by people known to the victims, in general, and marital rape in particular. A 2017 Equality Now report found that marital rape was expressly legal in 12% of the countries studied.<sup>17</sup> Starkly underreported and rarely prosecuted, marital rape remains a form of domestic violence that has too long left women with little legal recourse.

In Nepal, the Forum for Women in Law and Development (FWLD), a national NGO, challenged the exception for marital rape on the basis of women’s equal rights in the constitution. In its decision, Nepal’s Supreme Court cited not only the constitution’s equality guarantee but also Nepal’s CEDAW commitments, specifically referencing CEDAW’s expansive definition of sex discrimination: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, culture, civil or any other field.” Moreover, the Court refuted the state’s claim that a consent requirement in marriage was incompatible with Hinduism, or that “marriage is a permanent consent expressed to have sexual relations.”<sup>18</sup> Drawing on both the constitution and Nepal’s international commitments, the Court pronounced that “[t]here is no justification in differentiating between women who are wives and other women,” and called on the legislature to “define marital rape . . . as a criminal offence.”<sup>19</sup>

Advocates recognized the victory’s importance, but acknowledged that it was just one of the steps needed to end violence against women. According to Sapana Pradhan Malla, FWLD president and a lawyer who worked on the case, “[r]ecognizing rape within marriage as a crime is the first step. The second step is to amend the law and to get it passed in parliament. Third, enforcement and

awareness measures have to be put in place to create an environment for victims to come forward.”<sup>20</sup>

The second step was soon realized. In 2006, the Nepalese Parliament passed the Gender Equality Act, which criminalized marital rape. Yet when women began using the law, Pradhan Malla noticed that their husbands received remarkably light sentences compared to others found guilty of rape.<sup>21</sup> Through another case in 2008, she challenged the disparity, which had actually been written into the Gender Equality Act—and won. The Court held that “there is no rationality in differentiating between marital and non-marital rape,” effectively abolishing distinctions in punishment for different types of perpetrators.<sup>22</sup>

While challenges continue in order to ensure that new rape laws are implemented and that women can access the supports needed to leave violent relationships, FWLD’s work in Nepal shows how constitutional equality guarantees can help dismantle discriminatory legislation and support women’s equal rights in both the public and private spheres. More recently, FWLD has taken on gender inequalities in inheritance law.

Yet there have also been setbacks, including a new constitution, enacted in 2015, that prohibits women from passing on citizenship to their children independently of men.<sup>23</sup> Women’s groups throughout Nepal have vowed to continue pushing for change—including a constitutional amendment—to ensure that the principle of gender equality is fully realized.<sup>24</sup>

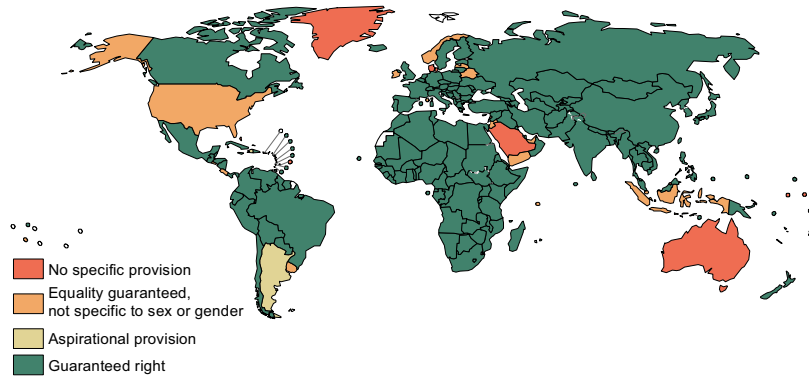
## ADVANCING GENDER EQUALITY IN CONSTITUTIONS

As demonstrated in Nepal, Zimbabwe, and numerous other countries, guaranteeing gender equality in constitutions can have, and has had, significant tangible impacts—from strengthening women’s protection from violence to removing barriers to women’s employment. And importantly, these reforms’ benefits are not limited to women. Removing obstacles to women’s full participation in society creates gains that extend across all people, families, communities, and entire economies. As discussed in depth toward the end of this chapter, using the law to counter gender stereotypes can broaden opportunities for everyone. So how many countries enshrine this value in their fundamental documents? And are equal rights provisions designed such that they can reach gender discrimination in the public sphere, private institutions, and the family alike?

### *Building a Universal Foundation: Gender Equality Provisions Governing State Action*

The overwhelming majority of constitutions (85%) explicitly guarantee gender equality, most often by prohibiting formal discrimination by the state and/or guaranteeing equal rights regardless of sex or gender (see Map 5). For example, Spain’s constitution provides that “Spaniards are equal before the law and may not in any





MAP 5. Does the constitution explicitly guarantee equality or nondiscrimination across sex and/or gender?

way be discriminated against on account of . . . sex.”<sup>25</sup> Similarly, Eritrea’s constitution provides: “1. All persons are equal under the law. 2. No person may be discriminated against on account of . . . gender.”<sup>26</sup>

Additionally, 5% of constitutions address indirect discrimination on the basis of sex, providing a tool for challenging laws and policies that are not explicitly discriminatory but have discriminatory effects. For example, Cyprus’s constitution provides: “Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of . . . sex.”<sup>27</sup>

Gender equality has figured centrally in a range of recent constitutional reform processes. For example, Tunisia’s 2014 constitution, adopted three years post-revolution, guaranteed equal rights for men and women—in a first for both the country and the region. “This article is a revolution in itself,” said Lobna Jeribi, a scientist and member of the constituent assembly created to chart the country’s path forward. “It’s a big, historic step, not only for Tunisian women.”<sup>28</sup>

When the constitution passed, similar reactions reverberated throughout the streets, social media, and the legislature itself, where the gender equality provisions had been hotly debated. For assembly vice president Meherzia Labidi, who had campaigned for the new protection despite resistance in the religious political party she represented, the gender equality provision was “one of the articles in the constitution that I am most proud of.”<sup>29</sup> The gender equality articles also included a requirement to work toward gender parity in elected bodies.<sup>30</sup> In the years since, more equal political representation has followed. Thanks to a 2014 local elections law establishing more specific measures to advance gender parity, Tunisia’s 2018 municipal elections marked the country’s first election with equal numbers of male and female candidates; women ultimately won 47.7% of seats.<sup>31</sup>

All constitutions adopted in 2000–2017, including Tunisia’s, include explicit gender equality guarantees—a notable change from the constitutions of a century

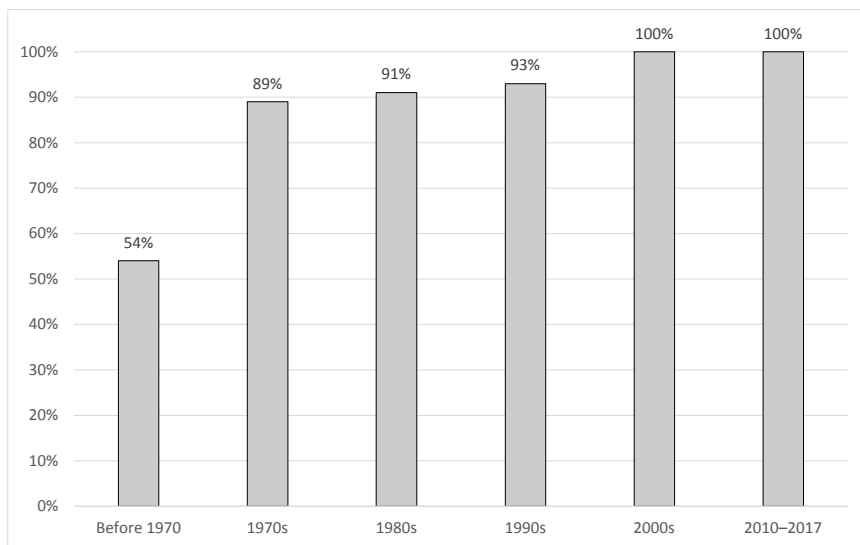


FIGURE 3. Explicit constitutional guarantee of equality or nondiscrimination across sex and/or gender by year of constitutional adoption

ago (see Figure 3). Although only a first step toward realizing gender equality in practice, such guarantees signal a critical commitment to protecting equal rights and provide mechanisms for challenging discriminatory barriers.

#### *Reducing Discrimination in the Private Sector*

Today, private institutions are increasingly playing a role in providing traditionally public services, including healthcare and education, that are essential to the fulfillment of other fundamental human rights.<sup>32</sup> If private institutions providing these services are exempt from constitutional restraints, then “the protective umbrella of the concept of a private sphere prevents them from being held accountable for their action,” drastically weakening guarantees of fundamental rights and nondiscrimination.<sup>33</sup>

Moreover, private institutions play larger roles than ever in countries’ economies, directly impacting the ability of individuals to earn income and meet basic needs. Consequently, private-sector discrimination is a critical concern for the well-being of all groups included in this book. Gender discrimination in private-sector workplaces—whether during hiring processes or in decisions about pay and promotions—can starkly undermine women’s ability to support themselves and exercise other fundamental rights.

While prohibiting direct discrimination by state actors is essential—and the original role of constitutional equal rights clauses—these protections reach only a fraction of the discrimination that affects women and girls, as well as other

marginalized groups, globally. Discrimination in the private sphere, whether by service providers, employers, or landlords, can profoundly affect women's livelihoods and exercise of other rights. Can constitutions effectively address these forms of discrimination?

*Zimbabwe: Pregnancy Discrimination in Private Schools*

In Zimbabwe, a 1999 case illustrates the importance of addressing discrimination by private service providers—as well as the limitations of constitutions that do not clearly articulate their ability to reach these institutions.

Twenty-one-year-old Enita Mandizvidza had just gotten married and was preparing to finish her third and final year at Morgenster Teachers' Training College in Masvingo, Zimbabwe. But when Mandizvidza got pregnant, the school's principal declared that she would be expelled as a consequence.<sup>34</sup> She would no longer be able to take her fall exams and would have to put her career goals on hold.

Mandizvidza's expulsion hinged on a contract that students were required to sign upon enrolling at the college, a private school operated by the Reformed Church.<sup>35</sup> One provision read: "I understand that I will be withdrawn from the course when I fall pregnant or am involved in causing the pregnancy of another student or pupil."<sup>36</sup> Like other new students, Mandizvidza had signed. Yet when it became the basis for her expulsion, she questioned how the contract could be compatible with gender equality.

Shortly after being forced to sign a letter of resignation, Mandizvidza took her case to Zimbabwe's High Court, where she challenged the school's action as unconstitutional gender discrimination—and prevailed.<sup>37</sup> However, the school appealed, arguing that because it was a private institution, the constitution's protections against discrimination did not apply.

In 2002, the Supreme Court ruled on the case. As the Court explained, the constitution then in place explicitly protected only against discrimination by a "public authority." In some cases, the Court noted, this could include private institutions providing traditionally public services like education—but only where the state exercised some control over their operations. However, the Court found that was not the case for Mandizvidza's school: although the government provided some funding, it was "not responsible for, nor d[id] it have control of, the education at the college."

Nevertheless, the Court cited precedents establishing its authority to declare a contract "contrary to public policy." Using this legal basis, the Supreme Court invalidated the contract, finding that its expulsion provision had broad consequences and created double standards for male and female students: "It punishes the married woman who falls pregnant. It does not punish the male student who has extra-marital sex with a non-student, even if she becomes pregnant as a consequence."<sup>38</sup> Through this contract law rationale, Mandizvidza's case was ultimately resolved in her favor. At the same time, the Court noted that its

authority to void contracts could only “be exercised sparingly and only in the clearest of cases.”

Ensuring that constitutional protections can reach discrimination within private education and employment is critical for the full, consistent realization of equal rights. Moreover, cases from other countries indicate that pregnancy discrimination—a form of gender discrimination discussed in more detail toward the end of this chapter—remains common, particularly in schools and workplaces.<sup>39</sup>

### *Across Contexts: Constitutional Approaches to Reaching Private-Sector Gender Discrimination*

The application of constitutional rights to private actors is an emerging issue worldwide. As understandings of constitutions and the “public/private divide” shift, courts are increasingly applying constitutional values to cases between private parties even when constitutional provisions are not directly applicable against private actors.<sup>40</sup>

For example, Colombia’s constitution broadly provides that “[w]omen cannot be subjected to any type of discrimination,” which the Constitutional Court has interpreted to prohibit discrimination by both the state and private employers. This interpretation has yielded rulings expanding protection against private sector pregnancy discrimination and affirming a pilot’s right to health coverage for her miscarriage.<sup>41</sup> The broad scope of Colombia’s gender discrimination provision is further bolstered by the *acción de tutela*, a unique legal mechanism that allows individuals to approach the Constitutional Court with a claim against a private party that is directly threatening their fundamental rights, provided they are in a subordinate position to the defendant and have no other remedies.<sup>42</sup> (We discuss the *tutela* in more detail in later chapters.)

Countries have also already shown that constitutions can more directly prohibit discrimination in private workplaces. For example, Bolivia’s constitution declares: “The State shall promote the incorporation of women into the workforce and shall guarantee them the same remuneration as men for work of equal value, both in the public and private arena.”<sup>43</sup>

In other countries, constitutions have begun to address discrimination by private actors beyond the workplace. For example, Chad’s constitution provides: “The state assures to all equality before the law, without distinction of . . . sex . . . . It has the duty to see to the elimination of all forms of discrimination with regard to women and to assure the protection of their rights in all areas of private and public life.”<sup>44</sup>

Likewise, Equatorial Guinea’s constitution provides that every citizen enjoys equality before the law, further clarifying that “[t]he woman, whatever her civil status may be, has equal rights and opportunities as the man in all the orders of public, private, and family life, [and] in civil, political, economic, social, and cultural [life].”<sup>45</sup>

*Equal Rights within the Family and Reproductive Health*

One area of private life that deserves special attention is the family. As the introductory cases illustrated, laws and policies establish legal rights within marriages and other partnerships. These include the ability to enter and exit marriage and rights within marriage, as individuals and with respect to pregnancy and children. As a matter of justice, these rules must treat all parties equally and fairly. The impacts of unfair rules on individual women, their children, and broader society can be profound.

Constitutional provisions establishing equal rights in the family can provide a foundation for overturning discriminatory family laws and marital practices. For example, Uganda's Supreme Court ruled in 2015 that a customary law requirement that women refund their "bride price" upon divorce was unconstitutional. In Uganda, a bride price, similar to a dowry, is a pre-marriage transfer of livestock or other assets from the groom to the bride's family. In 2007, Mifumi, a Uganda-based international women's rights group, initiated a challenge to the bride price.<sup>46</sup> In addition to arguing that the bride price itself was discriminatory and treated women like property, Mifumi alleged that the requirement that it be refunded upon a marriage's dissolution compelled women to stay in violent relationships—an assertion supported by research and women's personal accounts.<sup>47</sup>

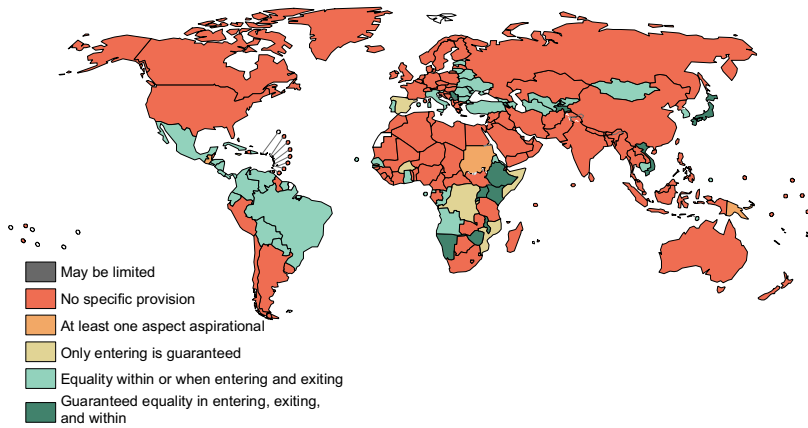
When the case finally reached the Supreme Court in 2015, Justice Jotham Tumwesigye ruled that "the custom and practice of demand for refund of bride price after the break down of a customary marriage is unconstitutional as it violates Article 31(1)(b) of the Constitution,"<sup>48</sup> which provides that men and women "are entitled to equal rights in marriage, during marriage and at its dissolution." While the Court stopped short of declaring the bride price itself unconstitutional, women's rights advocates viewed the ruling on refundability as a major blow against the practice.<sup>49</sup>

*Equal Rights in the Family: Current Constitutional Approaches*

Globally, only one-quarter of constitutions guarantee equal rights within or while entering and exiting marriage (see Map 6). Just 6% comprehensively protect equality at each stage: entering, exiting, and within marriage. Armenia's constitution, for instance, provides that men and women "are entitled to equal rights as to marriage, during marriage and divorce," while Ecuador establishes that marriage is based on "equality of rights, obligations and legal capacity."<sup>50</sup>

*Reproductive Rights in Constitutions*

Finally, constitutional protections for women's reproductive rights both are vital in themselves and can importantly complement protections of women's equal rights as individuals and within relationships, as family planning influences women's broader realization of their rights. Insufficient access to reproductive healthcare



MAP 6. Does the constitution explicitly protect women's right to equality in marriage in all aspects including entering, exiting, and within marriage?

imperils many women's health, autonomy, and educational and economic prospects. Constitutions can provide stronger protections both by explicitly establishing equal rights to health regardless of sex or gender, and by specifically referencing reproductive and maternal health. For example, Nepal's 2015 constitution establishes: "Every woman shall have the right to safe motherhood and reproductive health," and the Supreme Court's interpretation of a similar provision in the 2007 interim constitution encompassed a broad range of reproductive and maternal health rights.<sup>51</sup>

In some countries, these provisions have provided bases for challenging legislation restricting reproductive rights. For example, in 2006, Colombia's Constitutional Court ruled that the country's complete ban on abortion violated women's constitutional right to health, and decriminalized the termination of pregnancies in limited circumstances. In so doing, the Court held that the protection of prenatal life, while a constitutional value, could not take "absolute privilege" over women's fundamental rights to health, dignity, and autonomy.<sup>52</sup> While advocates continue to push for more comprehensive reproductive rights in Colombia and throughout Latin America, the 2006 ruling represented a significant step forward.<sup>53</sup>

The rights to physical health, mental health, and bodily autonomy are fundamental, universal human rights.<sup>54</sup> Ensuring women are the decision-makers when it comes to their own reproductive health is critical to both protecting these rights and laying a foundation for gender equality. While few constitutions currently address reproductive rights in detail, at a time when up to 13.2% of maternal deaths each year are attributable to unsafe abortion,<sup>55</sup> strengthening legal protections for women's decision-making regarding their own medical care should be a priority for equal rights and public health.

ADVANCING GENDER EQUALITY WITHOUT  
CLEAR EQUAL RIGHTS

Progress on women's equal rights in constitutions over the past century has been remarkable—yet 15% of countries, home to 404 million women, have yet to include specific language in their constitutions.<sup>56</sup> In these countries, identifying other strategies to advance women's rights, while continuing to push for clear protections in the text, can be important for accelerating progress. The United States provides an example.

*United States: A Long Road to Women's Equal Rights*

The U.S. guarantees equal rights in broad language, but not explicitly on the basis of sex or gender. According to the Fourteenth Amendment, ratified in 1868, “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” In the absence of explicit text, eliciting constitutional protections of women's rights has been an uphill, decades-long battle premised on incremental victories at the Supreme Court.

While the Nineteenth Amendment extended the right to vote to American women in 1920, it was not until a series of cases in the 1970s, many argued by future Supreme Court Justice Ruth Bader Ginsburg, that the constitution's scope of protection for gender equality more broadly took shape. Some of the first cases strategically approached the subject from the perspective of a disadvantaged man, such as the widowed husband who could not access survivor benefits without proving his financial dependence on his late wife, whereas hers was presumed.<sup>57</sup> In fact, male plaintiffs brought over two-thirds of the gender equality cases argued before the Supreme Court between 1971 and 1984, the key period during which the Court's gender equality jurisprudence developed.<sup>58</sup>

Yet although Justice Ginsburg's focus on male plaintiffs may have been more strategic than ideological, some early discrimination cases following this model clearly illustrated how gender stereotypes can limit opportunities for both men and women. For example, in a 1982 case, a male applicant to a women-only nursing school established in 1884 challenged the admissions criteria as violating the Equal Protection Clause. Although the school claimed that limiting admission to women constituted affirmative action, the Court, in a decision authored by its first female justice, Sandra Day O'Connor, disagreed, especially since the gender restriction “tends to perpetuate the stereotyped view of nursing as an exclusively women's job.”<sup>59</sup> Despite maintaining the name “Mississippi University for Women,” men now comprise nearly 10% of the university's nursing school students.<sup>60</sup>

Over time, these cases emanating from the constitution's general equality provision—the Equal Protection Clause—established a precedent holding that

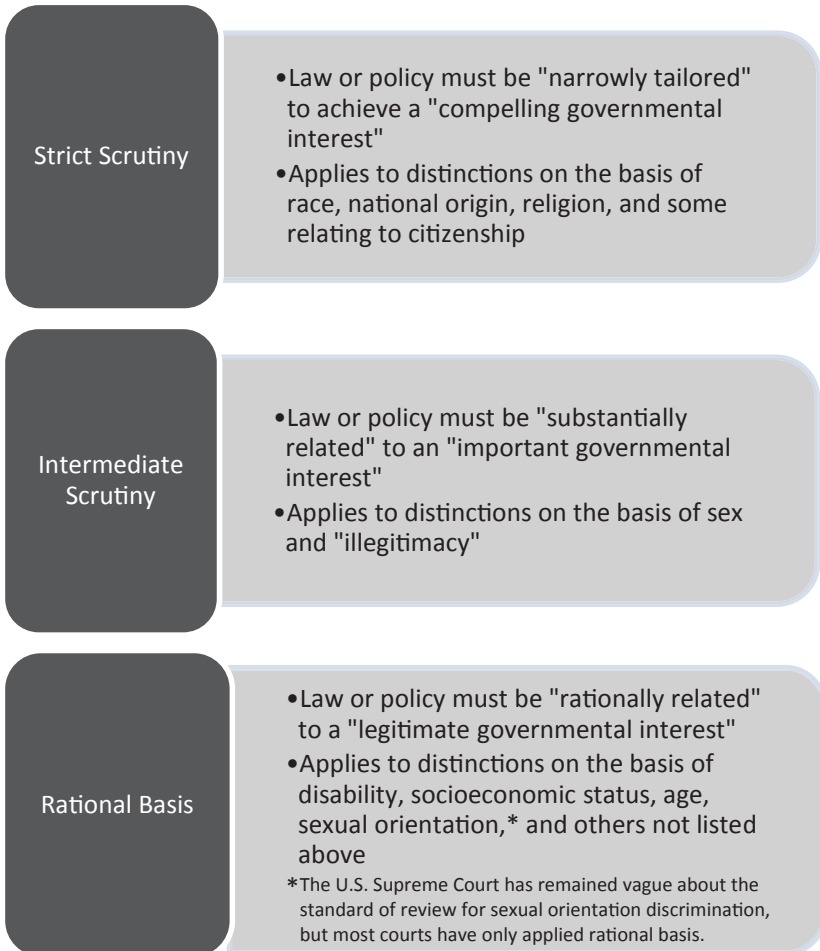


FIGURE 4. Equal Protection Clause of the Fourteenth Amendment: current standards of review.

discrimination against women was unconstitutional unless the government could prove the discriminatory law was “substantially related” to an “important government interest.” This “intermediate scrutiny” assessment of constitutionality would prove unique, falling between the “strict scrutiny” test applied to racial classifications and the “rational basis” test used to assess restrictions on rights for groups that do not currently receive special protection under the law (see Figure 4).

While the victories achieved for women under the Equal Protection Clause have been critical, the path toward their realization has been needlessly tortuous and even controversial.<sup>61</sup>



*Older Constitutions and Newer Rights*

As a practical matter, one reason the U.S. Constitution does not include a gender equality guarantee is that in addition to being one of the world's oldest constitutions, it is particularly difficult to amend; although the U.S. Congress actually voted to adopt an Equal Rights Amendment (ERA) in the early 1970s, by 1982, it had failed to attain the required ratification by at least 38 of the 50 states. Recently, however, a revived movement to ratify the ERA has achieved some important victories: in 2017, Nevada became the 36th state to ratify the ERA, followed by Illinois in 2018. While legal scholars debate the feasibility of enacting the ERA after the initial deadline, some argue that the U.S. is just one state vote away from a constitutional amendment generations in the making.

As this example suggests, while the difficulty of amending most constitutions makes them especially powerful instruments for establishing enduring protections of rights, it also creates hurdles to enacting new equality protections that were not included initially. Still, some countries with older constitutions have successfully adopted amendments to protect women's rights and keep up with global norms. For example, Luxembourg amended its 1868 constitution in 2006 to affirm that "[w]omen and men are equal in rights and duties," and that "[t]he State must actively promote the elimination of any existing obstacles to equality between women and men."<sup>62</sup>

DESIGNING PROTECTIONS FOR WOMEN'S  
EQUAL RIGHTS: IMPORTANT GAPS AND MORE  
DIFFICULT QUESTIONS

The fact that 85% of constitutions now include language specifically protecting women's equal rights attests that striving for gender equality has become a global norm. Nevertheless, the global extent of disparities indicates that existing protections have not sufficed to inaugurate a new era for equal rights and opportunities.

In some countries, courts' narrow interpretations of gender equality provisions have limited their potential for impact. For example, "sex discrimination" has not always been interpreted to fully cover pregnancy discrimination; especially given how few constitutions currently address indirect gender discrimination, these narrow readings have significant potential consequences. Other countries, attempting to recognize the disproportionate role women continue to play in caregiving, have tacitly endorsed unequal gender norms by treating gendered divisions of household labor as natural.

Further, historically, both constitutional texts and case law have often taken narrow, binary approaches to sex and gender, or have framed gender equality solely in terms of women. To advance transformative change, constitutions and the people who enforce them must take a broad view of gender equality that acknowledges

the many ways restrictive gender norms not only limit women's opportunities, but also foster discrimination against men who do not adhere to narrow expectations about masculinity, as well as sex and gender minorities.

The way that constitutions are drafted can help ensure courts and legislatures address gender equality more effectively and comprehensively. Below, we examine a few key choices likely to make a difference.

### *Questions of Language: Sex vs. Gender*

One choice for constitution drafters is whether to prohibit discrimination on the basis of gender or of sex. Put simply, sex refers to biological differences, while gender refers to the roles, responsibilities, and characteristics typically associated with being male or female in a particular cultural context.<sup>63</sup> Gender norms are the unspoken "rules" about what behaviors and attributes are deemed acceptable and valuable for men and women, respectively.<sup>64</sup>

Evidence shows that while sex discrimination remains rampant, discrimination against people who do not align with gender-normative expectations is similarly widespread and damaging. For example, in workplaces, while "assertive" behavior by men is generally viewed favorably, assertive women are viewed as less competent.<sup>65</sup> Meanwhile, men who are perceived as more sensitive or "nurturing"—characteristics aligning with feminine rather than masculine stereotypes—are viewed as lacking leadership skills.<sup>66</sup>

These expectations also shape individuals' access to employment opportunities. Violating unspoken "rules" about gender can lead to backlash and discrimination in hiring.<sup>67</sup> Additionally, widespread perceptions of certain jobs as traditionally "male" or "female" can exacerbate occupational gender segregation, and discourage people from entering fields where they would be a distinct minority. For example, on average, just 6% of the world's early childhood education teachers are male.<sup>68</sup>

Addressing both sex and gender is one way that constitutions can acknowledge how stereotypes and culturally defined expectations about what it means to be a man or a woman can contribute to discrimination, and limit opportunities for all people at home, at work, and within the political sphere.

Among countries guaranteeing equal rights, most list "sex" as the relevant protected category in their equality provisions; a smaller number use "gender." In a few countries, such as Fiji, Guyana, South Africa, and Zimbabwe, both "sex" and "gender" are included as prohibited grounds of discrimination. (In chapter 6, we look separately at protections for "gender identity.")

Countries also vary in whether they use a "symmetrical" approach or specifically frame women's equal rights in relation to men's. Five countries protect gender equality only within the framework of ensuring women's rights. For example, France's constitution provides: "The law guarantees women equal rights to those of

men in all spheres.”<sup>69</sup> Likewise, China’s constitution states: “Women in the People’s Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life.”<sup>70</sup> This “asymmetrical” approach, while importantly protecting women’s basic rights, establishes men’s rights as the baseline, rather than recognizing and guarding against the range of ways that gender stereotypes can hurt women, men, and gender minorities alike.<sup>71</sup>

Ultimately, fulfilling equal rights requires addressing both sex and gender discrimination, and dismantling discriminatory norms that limit opportunities for everyone. However, doing so may require different approaches in different contexts. While a small subset of constitutions now directly address both sex and gender in the text, this strategy may be less straightforward in some countries; in Arabic, the words “sex” and “gender” are typically the same (سِنَج), which helps explain why different English translations of Arabic constitutions sometimes use different terms for the same article.<sup>72</sup> In Bahasa, the national language of Malaysia, there is no word for “gender.”<sup>73</sup> Further, for the many countries whose constitutions prohibit only “sex” discrimination, the odds of passing an amendment to add “gender” may be quite low, given the general procedural barriers to constitutional amendment and the political mobilization required.

Within courts, justices have not consistently held that protections against sex discrimination extend to laws or policies prescribing adherence to gendered expectations, including dress- or appearance-related conventions.<sup>74</sup> For example, in 1977, the U.K. Employment Appeal Tribunal held that a bookshop’s prohibition of female employees wearing pants did not amount to sex discrimination;<sup>75</sup> two decades later, it confirmed this precedent in ruling against a male delicatessen worker who was fired for having a ponytail, when no such restriction applied to female employees.<sup>76</sup> Likewise, in 1991, Germany’s Constitutional Court ruled that an employer’s prohibition on men wearing earrings did not amount to sex discrimination.<sup>77</sup>

Protections against gender discrimination are important for providing legal recourse for discrimination based on gendered expectations not only about appearance, but also about behavior. As noted earlier, studies have shown that women and men are evaluated differently based on the same qualities, depending on whether those qualities align with or diverge from gendered expectations about demeanor. Prohibiting sex discrimination alone may be insufficient to address these forms of conscious and unconscious bias. For example, if a mining company consistently prefers male over female candidates, but refuses to hire more soft-spoken or seemingly “gentle” men who are nevertheless well qualified for the job, then both sex discrimination and gender discrimination are taking place. Wherever possible, enacting more comprehensive provisions would strengthen the protective potential of constitutional text and other laws. Beyond improving constitutions through explicit protections, urging courts to adopt an expansive interpretation of “sex discrimination” encompassing both physical traits

and gendered social expectations is essential to comprehensive protections from discrimination.<sup>78</sup> Ultimately, the more comprehensive the text, the better the odds it will consistently provide protection of equal rights for all people.

*Questions of Impact: Accounting for Real Differences without  
Sanctioning Discrimination*

A critical question is how to design constitutions enabling courts to address discrimination based on genuine intergroup differences, such as women's unique experiences with pregnancy, without opening the door for wider discrimination.

There is great strength in explicitly prohibiting discrimination on the basis of pregnancy and marital or family status, as well as gender. Discrimination on the basis of women's expected roles in families accounts for a significant share of gender discrimination in education, work, the political sphere, and elsewhere. While the share of countries explicitly limiting women's rights once they marry or have children has declined, discriminatory practices continue. For example, in Spain, a top airline came under scrutiny in 2017 for requiring female job applicants to take pregnancy tests;<sup>79</sup> in Honduras, female factory workers have reported similar requirements to obtain or keep their jobs,<sup>80</sup> as have students simply looking to finish their secondary or tertiary education in the Philippines, Tanzania, the U.K., and the U.S.<sup>81</sup> A 2018 survey of U.K. private-sector employers revealed that one-third believed it was reasonable to ask a woman during the hiring process about her plans to have children; 59% thought a female applicant should have to disclose a pregnancy, while 46% thought they should be able to ask whether the woman had young children.<sup>82</sup>

These forms of discrimination remain under-addressed in constitutions. Furthermore, courts have not always found that pregnancy discrimination is fully encompassed by existing protections against sex discrimination.<sup>83</sup> These gaps in protections widen further when taking into account many constitutions' limited application to private employers and schools, as explored earlier in the case of Enita Mandizvidza in Zimbabwe.

Overall, just 6% of constitutions include pregnancy as a prohibited ground for discrimination. For example, Fiji's constitution states: "A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her . . . sex, gender . . . marital status or pregnancy."<sup>84</sup> Bolivia's constitution provides: "The State prohibits and punishes all forms of discrimination based on sex . . . [and] pregnancy."<sup>85</sup> Spain's constitution guarantees that "[t]he public authorities . . . ensure full protection of . . . mothers, whatever their marital status."<sup>86</sup>

Reproductive-age married women are often subject to discrimination because of their anticipated likelihood of pregnancy and caregiving. At least 8% of countries address equality and nondiscrimination based on marital or civil status. For example, Malawi's constitution states: "Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the

basis of their gender or marital status.”<sup>87</sup> In other countries, marital or civil status is commonly included in overall equal rights provisions alongside other prohibited grounds of discrimination.

Finally, some countries include language actively promoting the sharing of responsibilities between parents. Since the presumption that women will be the primary caregivers contributes to discrimination against women in the workplace and men in family roles, this language represents an important step toward shifting norms toward equal opportunities at work and at home for both parents. Ecuador’s constitution, for instance, provides that citizens’ duty “to help feed, educate, and raise one’s children” is a “joint responsibility of mothers and fathers, in equal proportion.”<sup>88</sup> Similarly, Colombia’s constitution provides: “The state shall promote the joint responsibility of both mother and father, and shall monitor fulfillment of the mutual duties and rights between mothers, fathers, and children.”<sup>89</sup>

It is important to recognize that women continue to play disproportionate roles in caregiving globally, and to identify how their greater time investment in caring for children or older family members can lead to direct and indirect discrimination. However, laws reinforcing the idea that caregiving is primarily women’s responsibility only further entrench this inequality, even when targeting women as beneficiaries. Three cases spanning the past 40 years—two from Germany and one from South Africa—illustrate some of the ways that courts have navigated this balance.

### *Germany: Legal Approaches to Advancing Gender Equality at Home*

In Germany, a 1979 case followed a decade of legal reforms and cases designed to shift norms around roles within the family. Most notably, in 1976, the Parliament reformed the Civil Code, eliminating a provision that had clearly delineated men’s responsibility to earn income and women’s responsibility to manage housework.<sup>90</sup> Three years later, the Constitutional Court declared that a law providing women working outside the home with one paid “holiday” each month to do housework was unconstitutional, in that men were not offered the same benefit.<sup>91</sup> In so doing, the Court helped dismantle the expectation that women alone were responsible for household upkeep.

In 2011, the Court heard a challenge to a law relevant to family caregiving. In the intervening years, the constitution’s equality provision had been amended to add language specifically mandating that the government take steps to realize gender equality in practice: “Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”<sup>92</sup> In the case, a woman who had recently given birth contested the structure of Germany’s paid parental leave program, which offered each family 12 months of leave, along with two “bonus” months if the father took at least two months of the total leave available. In other countries that have adopted such incentive structures for their paid leave policies,

the share of men taking leave has increased, an important step toward shifting restrictive gender norms around both work and caregiving.<sup>93</sup> The same was true in Germany: between the adoption of the provision in 2007 and the end of 2009, the share of fathers taking leave grew from 15% to 24%.<sup>94</sup>

However, the woman challenging the policy argued that she was uniquely equipped to provide care for her baby, who had been born prematurely, and that therefore she should be able to take both the 12 months available to her and the two “bonus” months reserved for couples sharing leave.<sup>95</sup> Nevertheless, the Court reasoned that fathers still faced significant stigma in taking leave, and that invalidating the policy would undermine the constitution’s protections of substantive gender equality. Finding that it had a “*constitutional duty . . . to enforce gender equality in social reality and overcome traditional gender roles in the future,*” the Court dismissed the woman’s challenge and maintained the policy’s incentive structure.<sup>96</sup>

#### *South Africa: When a Ruling Benefiting Women Nevertheless Reinforces Stereotypes*

A contrasting decision comes from South Africa. In 1994, President Nelson Mandela issued an order to pardon all incarcerated mothers, but not fathers, with children under 12. In 1996, John Hugo, an incarcerated single father with a 12-year-old son, challenged the order as unconstitutional gender-based discrimination. The lower courts ruled in Hugo’s favor, finding that the “pardon was based on the impermissible stereotype that mothers are the primary caretakers of children.”<sup>97</sup>

However, the Constitutional Court reversed in 1997, finding that the order did not amount to “unfair discrimination,” given that women did in fact typically play a larger role in caregiving than men, and citing the pardon’s widespread benefits for the nation’s children.<sup>98</sup> Consequently, although the decision acknowledged the social reality of women’s disproportionate role in childcare, it also arguably reinforced gender stereotypes that have long inhibited men’s participation at home and women’s participation at work and in the public sphere. In the Court’s view, however, the use of a generalization to benefit a group did not raise the same concerns as a generalization used to harm.<sup>99</sup>

#### *Affirmative Measures and “Unfair” Discrimination in Constitutions*

Designing constitutions to fully protect gender equality will require language enabling governments to undertake positive action to remedy the persisting impacts of past discrimination. In chapter 2, we explored the case for affirmative measures, and the importance of constitutional language ensuring that policies that take into account the impacts of past racial/ethnic discrimination are not automatically considered equal rights violations. Given women’s long-standing exclusion from institutions and positions of power, affirmative measures are also important for gender equality.

Some countries have approached issues of substantive equality through language regarding “fairness.” While potentially allowing for affirmative steps, evaluations of what’s “fair” inevitably raise difficult questions. Prohibiting only “unfair” discrimination, which allows courts to distinguish between actions that unjustly disadvantage a group and actions designed to advance equality in practice, provides one constitutional approach to affirmative measures. Yet it also may open the door to discrimination.

The term “unfair discrimination” appears in several constitutions adopted over the past 25 years. Like South Africa (1996), Zimbabwe (2013) and Fiji (2013) guarantee protection from unfair discrimination, further clarifying that discrimination is presumed “unfair” until established otherwise. Similarly, Albania (1998) prohibits “unjust” discrimination, while Finland (1999) prohibits discrimination “without an acceptable reason.” An additional 8% of countries have provisions explicitly allowing for any “restriction . . . or . . . any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.”

For gender, questions of what’s “unfair” commonly intersect with how countries address pregnancy, newborn care, and other family issues often involving both genuine biological differences and restrictive gender norms and stereotypes.<sup>100</sup> As demonstrated throughout this chapter, many countries maintain laws and policies that reinforce specific gender roles in public and private life—and ultimately, while judges aim for objectivity, they are influenced by their own countries’ norms, as well as their personal beliefs and experiences. Women also remain significantly underrepresented on the highest courts around the world.<sup>101</sup> Against this backdrop, tasking courts with applying a vague, inherently subjective standard of “unfair discrimination” could open the door to laws or decisions that are either directly discriminatory and disadvantage large groups of women or, as demonstrated in *Hugo*, benefit some women, but in a way that undermines gender equality more broadly. This risk is greatest in the absence of explicit prohibitions of discrimination on the basis of pregnancy, marital, and family status.

*Addressing Gender Equality Loopholes: Constitutional Exceptions for  
Religious and Customary Law*

A final way that constitutions can shape equal rights regardless of gender, and specifically equal rights within the family, is their treatment of religious and customary law, which are often invoked to argue against equality in families and reproductive health. Some constitutions explicitly provide that religious and customary laws can take precedence over the constitution with regard to family matters including marriage, divorce, and inheritance. In defending primacy of religious or customary law, proponents cite religious freedom (addressed in chapter 5) and the right of national self-determination.

Yet CEDAW (ratified by 189 countries) and other global treaties and agreements—concluded by leaders from every world region with representation from across religions, belief systems, and nonbeliefs—are clear that the equal rights of women and girls should take legal precedence over discriminatory customary or religious practices.<sup>102</sup> More recently, UNESCO, which has 193 member states, adopted the Universal Declaration on Cultural Diversity, which proclaims: “No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope.”<sup>103</sup>

Regional agreements and courts have similarly concluded that equal rights across sex and gender should take precedence over customary or religious laws. For example, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, commonly known as the Maputo Protocol, provides comprehensive protections for women’s rights in the family, including equal rights in marriage, divorce, and inheritance.<sup>104</sup> As of March 2019, 36 African countries had ratified the protocol, while another 15 had signed; just three had neither signed nor ratified.<sup>105</sup> In 2018, the African Court on Human and Peoples’ Rights (AfCHPR) applied the Maputo Protocol in a case addressing Mali’s Persons and Family Code, which allowed girls to be married at 16 (or 15 with her father’s consent), and established religious and customary law as the default inheritance regime, providing women with only half the inheritance of men.<sup>106</sup> Ruling that both religious and customary provisions directly violated the protocol, the Court ordered the legislature to amend the law.

Similarly, in Europe, regional laws binding all E.U. members—including the Equal Treatment Directive of 2000, the Gender Equality Directive of 2006, and the European Convention on Human Rights (ECHR)—clearly establish that equal rights take precedence over discriminatory religious laws or practices, or discriminatory applications of religious law. This principle has had important implications for gender equality as well as discrimination on other grounds. For example, in 2018, the European Court of Human Rights ruled that a Greek court had violated the ECHR’s protections against discrimination by applying Islamic law to an inheritance case involving Molla Sali, a Muslim widow.<sup>107</sup> Sali’s late husband had written up his will according to Greek civil law; nevertheless, after the man’s sisters challenged the will’s validity, the Greek court applied Islamic law, leaving Sali with a fraction of the inheritance she was entitled to (or intended by her husband).<sup>108</sup>

These global and regional agreements align with the broader principle that the arbitrary circumstances of one’s birth—including gender and geography—should have no bearing on the applicability of universal rights. Yet the realization of this principle, and the global commitments it reflects, requires its enshrinement within enforceable domestic laws. As of this writing, in 8% of countries, including 17% in sub-Saharan Africa, 13% in East Asia and the Pacific, 10% in the Middle East and North Africa, and 12% in South Asia, customary and religious laws are explicitly



permitted to prevail over all or some constitutional equality provisions. What are the impacts of these provisions, and how have courts and activists successfully changed laws permitting discrimination?

*Zimbabwe: Reforming the Constitution to Strengthen Women's Rights*

A 1999 case from Zimbabwe's Supreme Court provides an example of what is at risk when customary or religious practices are constitutionally privileged over women's equal rights—as well as the potential for reform.

When Venia Magaya's father died, a community court ruled that she should inherit, as she was his oldest surviving child. But when her younger half-brother appealed the decision based on customary law, Venia lost her right to the family home where she lived; her brother kicked her out, leaving her to live in a shack. Venia appealed, but the Supreme Court upheld the decision, finding that discrimination against women under customary law was “the nature of African society” and did not violate the constitution.<sup>109</sup> Under Article 23 of the constitution at the time, gender discrimination was prohibited, but the text explicitly provided for exceptions in cases of customary law.<sup>110</sup> Following the Court's ruling, women marched through the streets of Harare, hoisting signs with slogans including “We will not accept customary legalised tyranny” and “Discrimination against women is not compulsory in African society.”<sup>111</sup>

That same year, women's advocacy groups built alliances with civil society organizations nationwide during Zimbabwe's constitution drafting process. Although the draft constitution included a gender equality guarantee, the groups collectively felt the drafting process had not been transparent or inclusive, and consequently campaigned against it in the 2000 constitutional referendum. The new constitution was rejected in a 54% to 46% vote, with a voter turnout rate of 26%.<sup>112</sup> A decade later, however, as another constitution drafting process commenced, the women's groups organized a lobbying group for advancing their rights.<sup>113</sup> Dubbed the “G-20,” the group undertook a “gender audit” of the draft constitution and compiled a list of demands for “the prohibition of unfair discrimination, the recognition of women as equal citizens, a Bill of Rights to supersede the customary law, and the protection of women from all forms of violence.”<sup>114</sup>

The resulting constitution included strong protections of women's rights and called for the establishment of a “Gender Commission” charged with “do[ing] everything necessary to promote gender equality,” including reviewing discriminatory laws and recommending changes.<sup>115</sup> The 2013 constitution also maintained a “right to culture,” which has its own basis in global agreements, and can provide indigenous and marginalized groups an important tool for preserving their languages and traditions.<sup>116</sup> However, as the G-20 had demanded—and as countries have ratified in global treaties—the “right to culture” provision made clear that gender equality would take precedence, by establishing that “no person exercising these rights may do so in a way that is inconsistent with” the constitution's

fundamental rights. As Zimbabwe's example demonstrates, reforming discriminatory customary laws may ultimately require a multipronged strategy that centers on community engagement and leverages the courts, international human rights agreements, and constitutional reform.<sup>117</sup>

*South Africa: Ensuring Gender Equality Takes Precedence over Discriminatory Customary Laws*

In South Africa, the 1996 constitution included strong protections for gender and racial equality; at the same time, the constitution recognized the country's legal pluralism and gave limited constitutional recognition to customary law.<sup>118</sup> The constitution also obliges courts to "promote the spirit, purport and objects of the Bill of Rights" when "interpreting" or "developing" customary law,<sup>119</sup> signaling their capacity to change customary law in conformance with constitutional values through their rulings. In a 2004 case, the Constitutional Court put these provisions into practice to determine whether two customary laws governing inheritance were compatible with the equality guarantee.<sup>120</sup>

Before the Court were two questions: first, the constitutionality of Section 23 of the Black Administration Act, which established that customary law rather than the Intestate Act would apply to black South Africans' estates; and second, the constitutionality of primogeniture in the context of customary law, a principle by which only male descendants qualify as heirs for individuals who die without a will.

Addressing the first question, the Court quickly determined that a separate legal system for black South Africans' estates was inherently discriminatory, thus violating the equality article. Turning to the question of primogeniture, the Court first acknowledged that historically the male heir was expected to live with and financially support the deceased's entire family; thus, the benefits of the inheritance law ostensibly extended to all descendants. However, the Court explained, "customary law has not kept pace" with societal values and circumstances, including nuclear family-centered living arrangements.<sup>121</sup> According to the Court, "[t]rue customary law will be that which recognises and acknowledges the changes which continually take place."<sup>122</sup>

Discussing remedies, the Court acknowledged its constitutional responsibility to consider whether the customary-law rules of succession could be modified to align with the Bill of Rights.<sup>123</sup> However, given its discriminatory effects for women, the Court found that the customary law could not "be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights,"<sup>124</sup> and was therefore invalid. In other words, while the Court carefully considered the customary law and aimed to interpret it as progressively as possible—thus engaging in a sincere effort to reconcile the country's parallel legal traditions—the constitution's strong, superseding protections for equality ultimately prevailed.

*Moving Forward: Women's Role in Reforming Laws*

Women in many countries are directly advocating for clear constitutional protections against religious and cultural practices that harm women and girls, along with strong commitments to implementation and community engagement. Just as the Bill of Rights' supremacy was a core demand of the women's groups that shaped the 2013 Zimbabwe constitution, Somalia's 2012 provisional constitution, in addition to guaranteeing gender equality, explicitly bans female genital mutilation, describing it as "a cruel and degrading customary practice . . . tantamount to torture."<sup>125</sup>

Women have also been directly involved in reforming customary law and practices. As many scholars and activists have emphasized, customary law was historically an unwritten, flexible, and evolving form of law; only when a limited version of customary law was codified following colonialism, often with the input of only a few male elders and colonial officials, did it become static and increasingly antiquated.<sup>126</sup> According to constitutional scholar Muno Ndulo, urging the courts to restore the understanding that customary law is flexible and progressively interpret customary law in accordance with contemporary norms of equality—coupled with the adoption of strong constitutional equality provisions—may be an effective strategy for accelerating change.<sup>127</sup> In Liberia, where the constitution contains an unconditional gender equality guarantee, the legal system has been used to empower individual women to shape and change their communities' customary laws.<sup>128</sup> As these examples indicate, social movements that propel change and constitutional and legal reforms that create the national foundations for gender equality are together yielding transformative advances.

*Text and Interpretation*

Without a doubt, courts should do their best to rule in a way that advances substantive equality for all people regardless of sex or gender. This must mean acknowledging how laws and policies affect different groups differently. It must mean taking an expansive approach to "sex" that encompasses stereotypes and gendered expectations. However, it does not mean basing rulings on preconceived notions about the societal roles of men, women, and gender minorities.

Constitutional language can be improved to provide a strong foundation for addressing these issues. Still, even well-written constitutional provisions can fall short of their drafters' vision depending on courts' interpretations. Ultimately, working to advance both norm change and legal change is essential, and the two will inevitably influence each other.<sup>129</sup>

## UNFINISHED BUSINESS

Remarkable global progress on gender equality in the past century is reflected in constitutional change. Ninety-one percent of constitutions enacted in the 1980s,

93% in the 1990s, and 100% since 2000 explicitly guarantee sex and/or gender equality, compared to only 54% of those enacted before 1970. However, the 15% of constitutions that fail to guarantee either sex or gender equality, and the 8% that allow customary or religious law to take precedence over women's equal rights, signal there is much work left to be done. Further, five constitutions use language articulating women's rights only in relation to men's, and this may not protect men from gender discrimination. Another 14 use binary language that may exclude sex and gender minorities from full constitutional protection.

Globally, one reason for optimism is women's and gender minorities' increasing role in constitutional drafting processes, which in turn is shaping these fundamental documents' approaches to gender equality. For example, 88% of constitutions in sub-Saharan Africa have been rewritten since 1990, with women often playing key roles in shaping constitutional approaches to issues such as land rights, women's political representation, violence against women, and the status of customary law.<sup>130</sup> In Uganda, as the Constitutional Commission prepared to draft a new constitution in the early 1990s, women's groups weighed in more than any other sector of society, despite the fact that women comprised just 19% of the 1993 Ugandan constituent assembly.<sup>131</sup> The resulting document included powerful protections for women's rights, including equal rights in the family, affirmative measures promoting political representation, and the prohibition of harmful religious and customary practices.

Yet there are also cautionary tales. While inviting public feedback and participation in drafting may lead to more inclusive constitutional protections, submitting basic equal rights to a vote undermines the fundamental premise that these rights are already universal. More participatory mechanisms can effectively strengthen rights when they serve to include the voices and perspectives of large groups that have been historically excluded, such as women. However, participatory decision-making does not automatically lead to more expansive rights for groups that have been discriminated against and yet comprise small fractions of the population, which speaks to the broader need for processes that ensure the rights of minorities and subgroups.

Even the rights of large groups do not necessarily pass a vote. The recent example of the Bahamas illustrates this point. In March 2016, the Bahamian parliament's lower house voted to advance four amendments to its 1973 constitution to create stronger protections for women's rights. In addition to adding "sex" to the constitution's antidiscrimination provision, the reforms would establish that women have the same rights as men to confer citizenship. Remarking on the amendments, Prime Minister Perry Christie declared it to be a "moral imperative of the first magnitude that we seize the opportunity to usher in a new era in our civilization—an era that will proceed on the righteous and unassailable premise that we are all equal before the law irrespective of whether we are male or female."<sup>132</sup>

In June 2016, however, when presented to the public in a constitutional referendum, all four amendments failed to pass.<sup>133</sup> According to media coverage, concerns

that the amendment to establish gender equality would open the door to same-sex marriage drove much of the opposition.<sup>134</sup> Prime Minister Christie even addressed these concerns directly by condemning marriage equality and reassuring voters that he “would not be supporting [the amendment] if it would change marriage in The Bahamas.”<sup>135</sup> As this example illustrates, struggles for equality across groups are often connected, and leaving any group’s fundamental rights up to public debate can lead to injustice.

Moving forward across countries will require social movements that seek to both strengthen legal rights and change the restrictive gender norms that limit opportunities for women, men, and gender minorities. In some countries, norms have already shifted significantly toward equality, but the constitution and other laws have not caught up. In others, grassroots movements to change norms and public opinion will likely play pivotal roles in strengthening the prospects for legislative and constitutional reform.

Further, even in countries with relatively strong constitutional provisions, more comprehensive protections addressing discrimination based on pregnancy, marital, and family status would provide stronger foundations for women’s equality. More broadly, addressing indirect gender-based discrimination is crucial. Job requirements like a minimum height often disproportionately exclude women without being essential to effective performance in the position. Similarly, mandatory work meetings unnecessarily scheduled in the evening may contribute to indirect discrimination against women where safety, societal constraints, and/or disproportionate caregiving responsibilities prevent them from attending. Finally, addressing both sex and gender discrimination would more thoroughly guard against the range of ways that bias and stereotypes limit individuals’ potential.

Over the past 50 years, equal rights on the basis of sex and gender have dramatically increased in constitutions. Nevertheless, the extensive inequality that persists in the law, and the well-documented discrimination that continues to obstruct equal rights in education, work, and politics, underscore how far we have to go. In the coming decades, individuals, civil society groups, lawyers, and judges all have critical roles to play in closing gaps in the law, speaking out against gender discrimination wherever it occurs, and fulfilling gender equality not just in theory but in practice.

## One in Thirty

### *Protecting Fundamental Rights for the World's Migrants and Refugees*

According to the United Nations, there were 258 million international migrants worldwide as of 2017—a number that has increased by over 100 million just since 1990.<sup>1</sup> The circumstances that compel migration are diverse. Some individuals and families leave their home countries due to war, violence, or persecution and discrimination. Others flee following natural disasters or because they were unable to obtain enough food or meet their basic needs in the countries where they were living. Some migrate for a chance to access better jobs and educational opportunities. For many, a combination of reasons motivates the weighty decision to leave home and start over in a new place.

Despite the wide-ranging circumstances that bring them to new countries, refugees and migrants share many of the same basic needs upon resettling. Adults need jobs in order to integrate into a new economy and provide for their families. Children need access to schools. All people need access to basic healthcare. These essentials are both core to successful resettlement and to the fulfillment of fundamental human rights. But host countries may face challenges in fully meeting all of these needs for everyone, especially if their economy is already struggling, which often leads them to design policies that ration access to these public goods. Some of these restrictive policies, however, derive more from discrimination than from accurate evaluations of resource constraints.

These issues raise important and complex questions. First, how can constitutions protect fundamental rights for migrants and refugees, while recognizing the practical constraints countries face in the context of large-scale migration? Second, are countries' courts and constitutions addressing the needs of migrants differently based on their status as refugees, asylum seekers, or economic migrants? And finally, how can constitutions address the barriers to starting over in a new country that result from discrimination?

#### MIGRATION IN CONTEXT: WHO MIGRATES AND WHY?

In the twenty-first century, migration touches more lives than ever before. If all the world's migrants lived in a single country, its population would be the fifth largest in the world.<sup>2</sup> Migration is truly a global phenomenon: the 20 countries hosting the largest numbers of immigrants span every region of the world.<sup>3</sup> In 2017, 24.7 million international migrants lived in Africa, 79.6 million in Asia, 77.9 million in Europe, 57.7 million in North America, 9.5 million in Latin America and the Caribbean, and 8.4 million in Oceania.<sup>4</sup> While few people expect to permanently leave their home countries, political, environmental, and economic instability have made migration an often inevitable reality for nearly one in 30 individuals on the planet. The odds that any one person will need to move to a new country, or that their family members or close friends will, have never been higher. Regardless of where migrants and refugees end up, they need access to services and the ability to work, alongside protections against discrimination, to start over in a new country.

Among the world's migrants are 22 million people who meet the formal, narrow definition of a refugee established by the U.N. Convention Relating to the Status of Refugees (the "Refugee Convention") and therefore qualify for international protection. However, tens of millions more who fall outside of the Refugee Convention's scope are nevertheless fleeing desperate circumstances beyond their control, such as natural disasters, war, famine, economic collapse, and widespread violence. Moreover, while migrant workers are often perceived as having migrated voluntarily rather than by necessity, lack of economic opportunities in their home countries can make seeking work elsewhere the only viable option for survival. In almost all cases, refugees and economic migrants alike decide to leave their countries of origin to ensure that they and their families are safe, healthy, and have the opportunity to pursue the same kinds of aspirations that all people share.

Importantly, in addition to the Refugee Convention, international treaties and agreements such as the Universal Declaration of Human Rights (UDHR) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the "Migrant Workers Convention") protect basic rights to education, health, decent working conditions, and nondiscrimination for migrants. Through detailed commitments in each of these areas, these global

agreements affirm the principle that fundamental rights transcend borders and apply regardless of citizenship status. This universality is core to the idea of human rights and their foundations in our common humanity.

In countries with a modest proportion of immigrants, these objectives are readily achieved. In countries with a large proportion of immigrants, fulfilling these goals becomes critically important. The strength of each of our societies depends on the well-being of all members. Children getting a healthy start in life and having access to the education, resources, and family caregiving they need shapes their ability to lead fulfilling lives and contribute to their full potential as adults. In Australia, for example, nearly half of residents are first- or second-generation migrants.<sup>5</sup> In Canada, migrants comprise 22% of the population, representing around 200 different countries of origin; another 17% of people have at least one parent who is a migrant.<sup>6</sup> In Jordan, 41% of the population migrated from elsewhere.<sup>7</sup> In the United States, migrants and their children account for 28% of all residents;<sup>8</sup> in a 2001 survey, 40% of Americans said at least one of their grandparents was born in another country.<sup>9</sup> We cannot afford to leave migrant families behind.

#### CONSTITUTIONAL APPROACHES AND IMPACTS

In practice, constitutions do not draw explicit distinctions between the rights of refugees and those of other migrants. As a result, the data presented in this chapter focus more broadly on whether constitutions guarantee or restrict rights to noncitizens and stateless persons. In addition, we examine whether constitutions prohibit discrimination on the basis of citizenship or place of origin.

However, legislation and policies relevant to education, health, and work often *do* distinguish among economic migrants, refugees, and asylum seekers—and when these laws are challenged as unconstitutional, courts often must make determinations about the scope of constitutional rights that take the realities of different migration statuses into account. What can we learn about how constitutional texts shape interpretations of the rights to education, work, and basic health services for migrants and refugees?

##### *Access to Education*

In the late 1960s and early 1970s, four couples migrated from different parts of Mexico to Tyler, Texas, in search of better economic opportunities. Having found jobs in foundries, meatpacking plants, and pipe factories, the parents sent for their children, who prepared to enroll in the local schools.<sup>10</sup>

In the fall of 1977, when the children headed off to school, they discovered that their first day of classes might be their last. Pursuant to a recent Texas law, the Tyler school district had enacted a new policy requiring students who could not prove they were citizens or documented immigrants to pay tuition to attend public



schools, at a level that was prohibitive for most families. In the following years, the children's parents would risk their own ability to stay in the U.S. to ensure their sons and daughters could have the opportunities they had sacrificed for.

The families who relocated to Tyler in the late 1960s and early 1970s were at the beginning of a new era in U.S. immigration policy. The 1965 Immigration and Nationality Act had ended the U.S.'s long-standing practice of legally favoring immigrants from Northern and Western Europe through a system of quotas, which had allocated nearly 70% of visas to immigrants from the U.K., Germany, and Ireland,<sup>11</sup> and in its place established a system that opened a higher percentage of slots to other countries. While this reform was generally a victory for civil rights and racial equality, the legislation also imposed the first-ever cap on immigration from the Americas; as a result, the number of visas available to migrants from Mexico and other countries in the region dropped by 40%.<sup>12</sup> Meanwhile, a separate reform passed a year earlier had ended the Bracero program, which had been enacted to fill a labor shortage during World War II and had, over the past two decades, legally admitted 4.5 million temporary agricultural workers from Mexico (many of whom faced significant exploitation despite their legal status).<sup>13</sup> Although high demand for the labor of migrants continued, opportunities to enter the U.S. with a work visa from Mexico had been dramatically reduced.

As a result, many more immigrant families were unauthorized to stay in the U.S. In the 1970s, the backlash against undocumented immigrants began to intensify. In 1975, the Texas legislature prohibited public schools from using state money to fund the education of undocumented students. Schools could either refuse admittance to undocumented students or charge tuition to cover their costs. In Tyler, Superintendent James Plyler pursued the latter option, requiring each of the 60 undocumented students enrolled in his district to pay \$1,000 annually—over \$4,400 in today's dollars—to attend public schools.<sup>14</sup> Such a high tuition would prevent many children from attending school; for immigrant families, the jobs most commonly available in agriculture or factory work paid only around \$4,000 per year.<sup>15</sup>

After learning of the situation, a local lawyer teamed up with the Mexican American Legal Defense Education Fund (MALDEF) to challenge the new law in court. The four families who served as plaintiffs risked a great deal by participating in the litigation. Although MALDEF convinced the court that they should be able to use pseudonyms, the parents knew they could be targeted for deportation, despite having children who were American citizens and strong social and financial ties to their communities.<sup>16</sup>

Meanwhile, as the case moved through the courts, many children were kept out of school, while others attended "clandestine night schools" run by volunteer teachers.<sup>17</sup> Finally, in 1982, *Plyler v. Doe* reached the U.S. Supreme Court. In a 5–4 decision written by Justice William Brennan, whose own parents had emigrated from Ireland, the Court struck down the Texas law, finding that it violated the

Equal Protection Clause of the Fourteenth Amendment, which by its own terms applied to “persons” rather than “citizens.”<sup>18</sup> According to the Court, imposing tuition on undocumented children was not a “rational” way to pursue the government’s goal of curbing unauthorized immigration or cutting education costs, and would have long-term consequences for both the child and society at large. As Brennan explained, the “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>19</sup>

In the decades since, the *Plyler* case has had a major impact on the rights of all children to an education, regardless of immigration status. It was the first U.S. Supreme Court decision to clarify that the Equal Protection Clause applies to people who are undocumented.<sup>20</sup> What’s more, the 40-year-old decision has protected against policy retrenchment amidst more recent anti-immigrant backlash. For example, a judge invoked the case in 1997 to strike down significant portions of Proposition 187, a California law adopted by referendum that would have banned undocumented students from attending public schools and required school administrators to report undocumented parents to the authorities.<sup>21</sup> More recently, advocates invoked *Plyler* to fight back against a suggestion from the U.S. Department of Education that schools could choose to report undocumented children to immigration authorities. In response, a spokesperson clarified that Education Secretary Betsy DeVos’s “position is that schools must comply with *Plyler* and all other applicable and relevant law.”<sup>22</sup> Likewise, immigration lawyers have pointed to the case to demand that unaccompanied migrant children being held in shelters receive an education.<sup>23</sup> Meanwhile, commenting on the 25th anniversary of the decision in 2007, Superintendent Plyler described his own change of heart: “It would have been one of the worst things to happen in education” had the courts not overturned the policy.<sup>24</sup>

### *Strong Protections for Universal Education in International Law*

International treaties are particularly strong on the universality of the right to education. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), free primary education for all is protected unequivocally, while free secondary education is an obligation of all countries that can afford it—and under the Migrant Workers Convention, countries must ensure that education is available to migrants on an equal basis with citizens.<sup>25</sup> The requirement of equal access also applies to higher education. Similarly, the Refugee Convention guarantees that refugees must be able to access secondary and higher levels of schooling on the same basis as other non-citizens.<sup>26</sup> In 2017, the two U.N. committees responsible for monitoring implementation of the CRC and the Migrant Workers Convention, respectively, published a joint general comment that made countries’ commitments clear: “All children in

the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education and vocational training, on the basis of equality with nationals of the country where those children are living. This obligation implies that States should ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status.<sup>27</sup>

Notably, nearly all U.N. members and other countries worldwide—196 as of 2019—are parties to the CRC, which binds them to uphold these standards (the United States is the only nonratifier among U.N. member states).<sup>28</sup> Overall, these treaties show that countries have no justification in international law to discriminate against migrants and refugees in education.

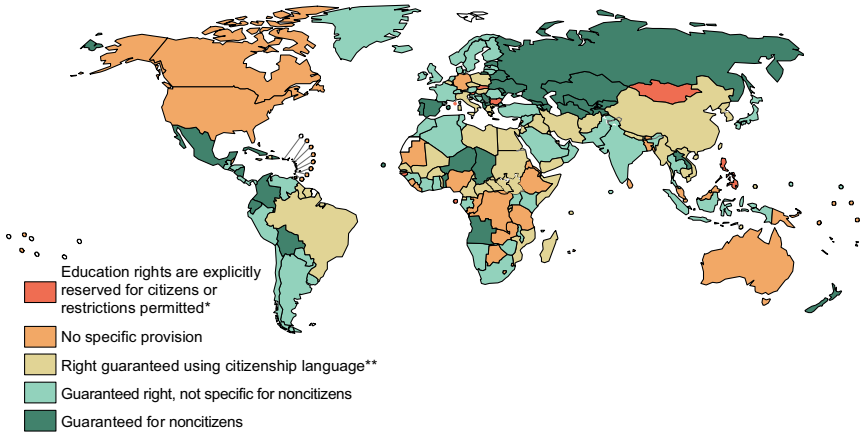
Opposition to migrant students' access to public education is often framed as an issue of resources. For overburdened or underfunded school systems, any increase in class size can feel like a strain on capacity. The question of costs may be especially pressing in countries with the highest percentage of migrants. However, these expenditures are still generally a small fraction of overall education budgets.<sup>29</sup> Further, for countries that are receiving the largest share of refugees, the global community has a role to play in supporting the provision of education for all.

In addition, evidence shows that education is central to children's integration, and that the long-term economic and social benefits far outweigh the costs.<sup>30</sup> According to an Oxford University study, migrants in the U.K. pay more in taxes and social security contributions than they receive in tax credits and other benefits, and migration can reduce government deficits and debt over time.<sup>31</sup> Likewise, by the second generation, immigrant families in the U.S. typically contribute significantly more in taxes than they receive in state expenditures on education and other services.<sup>32</sup> With over half of all refugees globally under the age of 18, ensuring equal access to education regardless of citizenship status presents a huge need and opportunity. Similarly, adult education—such as language training for refugees—may be a prerequisite for getting a job.

### *The Right to Education for Noncitizens in Constitutions*

Overarching nondiscrimination provisions, such as the Equal Protection Clause invoked in *Plyler*, can offer important support for upholding children's education rights, provided rights to equal treatment are not articulated as belonging exclusively to "citizens." Yet more specific guarantees are likely to provide stronger foundations for equal rights to education, especially in the face of opposition based in fiscal arguments. Currently, just 17% of constitutions globally protect the right to education for noncitizens (Map 7).

Five percent of constitutions explicitly restrict some aspect of noncitizens' right to education or reserve education rights for citizens. For example, Slovakia's



\*The Philippines' constitution requires that foreigners comprise less than one-third of enrollment in schools.  
 \*\*Right guaranteed using citizenship language means that the constitution guarantees the general right to education or specific right to primary education, but uses the word "citizens" instead of "everyone" to guarantee the right. This language may be interpreted to exclude noncitizens from the right to education.

MAP 7. Does the constitution explicitly protect noncitizens' general right to education or specific right to primary education?

constitution provides that “foreign nationals enjoy in the Slovak Republic basic human rights and freedoms guaranteed by this Constitution, unless these are expressly granted only to citizens.” While Slovakia guarantees that “[e]veryone has the right to education,” it limits access to education for noncitizens, stating: “Citizens have the right to free education at primary and secondary schools.”<sup>33</sup>

*Access to Employment*

In countries around the world, the issue of migrants’ access to employment in their destination countries has long met with controversy, which often stems from concerns about the jobs and economic security of native-born citizens. These debates can become particularly fraught during economic recessions or periods of higher-than-average unemployment.

It is reasonable for countries to care about ensuring there is decent work for all citizens. This means not only creating enough jobs but also paying and enforcing an adequate wage. Providing decent work for all also addresses one of migration’s root causes—lack of economic opportunity—and allows more people who prefer to stay in their countries of origin to do so, rather than being compelled to leave their friends and family just to be able to make a living.

The particular impacts of immigration on a given economy will vary depending on the size of immigration flow, the size and state of the economy, and the complementarity of skills. For example, in settings of high unemployment, such as South Africa, the evidence is mixed. Some studies suggest migration is linked to

higher unemployment;<sup>34</sup> at the same time, immigration has helped fill skills shortages within the country,<sup>35</sup> and other evidence suggests immigrant entrepreneurs are helping to create jobs for native South Africans.<sup>36</sup> In countries like Switzerland and Luxembourg, the fiscal impact of migration is clearly positive: immigrants are responsible for a 2% boost in GDP each year.<sup>37</sup>

For low- and middle-income countries facing a particularly significant influx of immigrants, global funds could help with transitional times and ease any temporary economic strain. In the long run, however, the economic benefits of migration generally outweigh the costs, especially since immigrants who integrate into the economy end up creating more jobs for everyone. For example, a systematic review of 27 studies conducted over 30 years found that the “short-term wage effects of immigrants are close to zero—and in the long term immigrants can boost productivity and wages.”<sup>38</sup> In one study of 15 European countries from 1996 to 2010, a doubling of the foreign-born population was associated with a 0.7% increase in the wages of native workers.<sup>39</sup> While it is important not to oversimplify, the literature as a whole suggests that popular rhetoric on the possible impact of immigration on jobs and unemployment, especially in higher-income countries, often overstates any potential detriment.

At the same time, there is ample reason to believe that a substantial part of the opposition to immigration on the basis of its potential impacts on employment derives from fears unsubstantiated by the evidence, as well as from bias and discrimination.<sup>40</sup>

The benefit that immigration brings to economies has not prevented a long global history of discrimination toward and stereotyping of immigrants, often on the basis of race/ethnicity, which has frequently been intertwined with economic anxieties.<sup>41</sup> In France, immigrant workers from Italy, who were at the time viewed as comprising a separate ethnic group, were met with hostility in the late nineteenth century, triggering riots in Marseille where a large share of Italian migrants were employed as dock workers.<sup>42</sup> In the U.S., legislators banned immigration from China through the Chinese Exclusion Act in 1882, and placed restrictions on land ownership by Japanese immigrants through “alien land laws” in the early twentieth century.<sup>43</sup> Both measures were framed as protections against immigrants to the West Coast gaining too much economic power. And much more recently, U.K. leaders have advocated for “Brexit” and argued against immigration from other European countries by greatly exaggerating migrants’ use of state benefits; in fact, noncitizens access benefits at far lower rates than U.K. citizens.<sup>44</sup>

Most fundamentally, all people want access to decent work. For citizens of a country, this would ideally mean having access to a range of available jobs that pay adequately and provide safe working conditions. For migrants and refugees, this would mean the legal ability to work and access to employment that meets the same standards as the jobs available to native workers. Moreover, these principles are embedded in international agreements. The Migrant Workers Convention

guarantees conditions of work for migrants, including pay and safety, that are “no less favorable” than those for citizens.<sup>45</sup> The Refugee Convention guarantees refugees the right to “engage in wage-earning employment” under the most favorable terms provided to other noncitizens, as well as the rights to remuneration, working conditions, and social security on the same basis as citizens.<sup>46</sup> How do countries’ constitutions align?

### *Rights to Work and Nondiscrimination*

Constitutions and courts can shape access to employment for migrants and refugees by how they define the right to work and whether they broadly protect the equal rights of noncitizens. Cases from two European countries provide examples of these provisions in action.

In 2008, a Burmese man entered Ireland seeking asylum, and filed his application for refugee status the day after he arrived. At the time, human rights violations and state violence against minority ethnic groups were widespread across Burma.<sup>47</sup> However, the man’s application for refugee status was denied, and he appealed. As his application continued to move through the system, according to Ireland’s Refugee Act, the man had no legal right to work. Instead, he lived in rudimentary government housing, as required by law, and subsisted on the €19 weekly allowance the state provided to asylum seekers.<sup>48</sup>

This holding pattern stretched on for years. In 2013, the man was actually offered a job within the housing facility where he lived, but the minister of justice informed him he could not accept the offer because of the Refugee Act.<sup>49</sup> In response, the man challenged the prohibition in court, arguing that the complete ban on his ability to seek employment violated the Charter of the European Union, the European Convention on Human Rights, and the Irish Constitution.<sup>50</sup> In his pleadings, the man described suffering from depression and a loss of autonomy, and argued that being allowed to work was critical to his “sense of self worth.”<sup>51</sup>

Finally, in 2017, the Supreme Court ruled on his case. In a significant decision for asylum seekers throughout Ireland, the Court held that the right to work, which it derived from the constitution’s provision on liberty and equality, “cannot be withheld absolutely from non-citizens.” Although the government could impose some limits on work rights before a person obtained refugee status, the Court acknowledged, an “absolute prohibition on employment, no matter how long a person was within the system,” exceeded the scope of the constitution. Further, while the Irish Constitution’s equality provision itself makes reference to “citizens,” the Court focused on the clarifying language that follows—“as human persons”—to adopt a more expansive interpretation of its application. The Court further explained that, for someone like the petitioner who by then had been moving through the asylum system for eight years, “The point has been reached when it cannot be said the legitimate differences between an asylum seeker and a citizen can continue to justify the exclusion of an asylum seeker from the possibility of

employment . . . This damage to the individual's self worth and sense of themselves, is exactly the damage which the constitutional right [to seek employment] seeks to guard against."<sup>52</sup> As a remedy, the Court ordered the Parliament to make submissions to the court about how to amend the Refugee Act and other relevant laws within six months. As a result of the decision, up to 3,000 asylum seekers across the country may become eligible to seek work.<sup>53</sup> In addition, Ireland will no longer be an outlier in the region; according to the Immigrant Council of Ireland, among EU countries, only Ireland and Lithuania completely prohibited asylum seekers from seeking employment.<sup>54</sup> Contrary to the fears leading to bans on work, the facts are that more rapid integration of immigrants, a critical element of which is employment, has been found to support their success and reduce fiscal costs.<sup>55</sup>

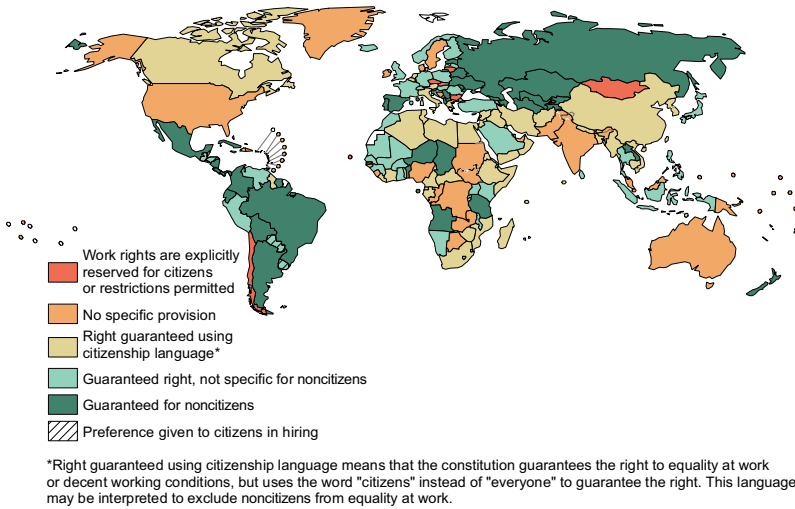
For many migrants, exposure to discrimination may continue even after citizenship has been gained. For example, in Greece, a draft presidential decree proposed in 2016 sought to prohibit naturalized citizens from enrolling in the Warrant Officers' School of the Fire Brigade Academy until at least a year after obtaining citizenship.<sup>56</sup> In other words, the decree proposed to give preferential treatment to citizens born in Greece, while treating citizens who had been born elsewhere as, quite literally, second-class citizens. However, the Supreme Administrative Court of Greece found that the distinction violated the country's constitution, which provides that "All Greeks are equal before the law."

As these cases suggest, the rights to both work and nondiscrimination can significantly affect whether migrants can support themselves and their families at all stages of resettlement. However, while some constitutions explicitly protect noncitizens' equal treatment in employment, others broadly exclude noncitizens from work opportunities. Further, some constitutions, like that of Ireland, are silent on both the right to work and noncitizens' rights, leaving courts to determine the scope of their protections.

Altogether, 21% of constitutions protect some aspect of equality and nondiscrimination in working life for noncitizens (see Map 8). Consistent with international conventions, some of these provisions focus on pay and working conditions, which can protect against the exploitation of migrant labor. For example, Portugal's constitution provides that "[r]egardless of age, sex, race, [or] citizenship . . . every worker shall possess the right . . . [t]o the remuneration of his work in accordance with its volume, nature and quality, with respect for the principle of equal pay for equal work and in such a way as to guarantee a proper living."<sup>57</sup> In addition, one-third of countries protect nondiscrimination and decent work based on national origin.

At the same time, five percent of countries reserve fundamental work rights for citizens or have exceptions to work rights for noncitizens. Mongolia's constitution, for instance, provides:

Art. 16: . . . The citizens of Mongolia are guaranteed . . . (4) the right to free choice of employment, favorable conditions of work, remuneration, rest and private enterprise. No one shall be subjected to forced labour.



MAP 8. Does the constitution take an explicit approach to protecting noncitizens' right to equality at work or decent working conditions?

Art. 18: . . . (5) In allowing foreign citizens and stateless persons under the jurisdiction of Mongolia to exercise the basic rights and freedoms provided for in Article 16 of this Constitution, the State may establish by law relevant restrictions upon the rights other than the inalienable rights spelt out in international instruments to which Mongolia is a Party, out of the consideration of ensuring national security, the security of the population and public order.<sup>58</sup>

Notably, Mongolia is party to neither the Refugee Convention nor the Migrant Workers Convention, suggesting that these provisions leave the door open to discrimination.

Other countries have provisions focused on protecting decent work for native workers, rather than restricting the rights of migrant workers. For example, Guatemala's constitution states, "In comparable circumstances, no Guatemalan worker can earn a lesser wage than a foreigner, be subjected to inferior conditions of employment, or obtain lesser economic benefits or other services."<sup>59</sup>

Three percent of countries explicitly prioritize citizens in hiring. Again, while these provisions may be intended to offer protection, in some cases, they may limit employers' ability to hire the people best suited for positions, such as when global experience is central to an organization's work or when specific skills are scarce locally. Honduras's constitution outlines specific quotas for foreigners versus citizens: "It is prohibited for employers to hire less than 90 percent of Honduran workers and to pay them less than 85 percent of the total amount of the salaries paid in the respective enterprise. Those percentages may be modified in exceptional cases specified by the Law."<sup>60</sup>



Finally, in two countries, preferences for citizens in hiring occur alongside guarantees of nondiscrimination in working conditions for noncitizens. For example, Costa Rica's constitution states, "No discrimination shall be made with regard to wages, advantages, or working conditions between Costa Ricans and foreigners, or with respect to any group of workers. Under equal conditions, Costa Rican workers shall receive preference."<sup>61</sup>

### *Rights to Employment Benefits*

Importantly, employment-related issues matter not just for jobs but also for access to benefits linked to labor market participation, such as unemployment insurance and old-age pensions. Regional and international agreements have established that refugees and migrants have a right to fundamental supports, especially in the form of contributory benefits and social insurance programs that are available to the whole population. For example, the UDHR establishes that "everyone" has a right to social security, while the Refugee and Migrant Workers Conventions guarantee equal access to social security as citizens. Similarly, ILO Convention 118 requires ratifiers to provide equal treatment to refugees and stateless persons with respect to social security, which it specifies could encompass everything from paid sick leave to maternity benefits; however, only 38 countries have ratified the convention. More recently, a European Union directive established that "third-country workers"—that is, workers from outside the EU who are legally working in EU countries—should receive equal treatment with respect to the full range of social security benefits.<sup>62</sup>

By contrast, countries have established different standards for whether noncitizens qualify for public assistance and under what terms. For example, Germany's Constitutional Court ruled in 2012 that asylum seekers have a right to benefits sufficient to support both physical existence and minimum participation in social and cultural life, pursuant to the right to dignity.<sup>63</sup> Meanwhile, Denmark's Supreme Court upheld a two-tiered system of cash benefits that provided lower levels of assistance to anyone who had not lived in Denmark for at least seven of the past eight years—a policy that did not directly distinguish on the basis of citizenship, but had the effect of disproportionately relegating immigrants to the lower tier.<sup>64</sup>

Importantly, though, these choices do not obviate countries' responsibilities under the UDHR and international treaties to ensure all people within their borders can meet their fundamental needs. However, across both public assistance and benefits linked to work history, the presence or absence of explicit constitutional language may determine access by migrants and refugees.

One case illustrating the impact of language comes from South Africa. In *Khosa & Others v. Minister of Social Development & Others*, Mozambican refugees who had been living and legally working in South Africa for decades challenged a provision in the Social Assistance Act 59 of 1992, which lists South African citizenship as a necessary criterion for receiving an old-age pension.<sup>65</sup> In ruling in favor of

the refugees, the Constitutional Court relied on Section 27, which proclaims that “[e]veryone has the right to have access to . . . social security.”<sup>66</sup>

The Court held that the use of the term “everyone” in Section 27 clearly supported extending social security to permanent residents like the plaintiffs, especially since Section 27 was not one of the provisions in the constitution that explicitly referred to “citizens.”

The Constitution vests the right to social security in “everyone”. By excluding permanent residents from the scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in material respects. Dignity and equality are founding values of the Constitution and lie at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution.<sup>67</sup>

In addition, the Court found that the citizenship requirement amounted to “unfair”—and therefore unconstitutional—discrimination under Section 9, which prohibits discrimination on a range of grounds the Court deemed “analogous” to citizenship, which is a “personal attribute which is difficult to change.”<sup>68</sup>

Widely ratified globally, the ICESCR, like South Africa’s constitution, protects the right of “everyone” to social security.<sup>69</sup> The treaty also establishes that countries have an immediate obligation to ensure nondiscrimination in their implementation of economic and social rights. At the same time, consistent with the principle of progressive realization, the ICESCR clarifies: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”<sup>70</sup> Through *Khosa*, South Africa’s Constitutional Court demonstrated the feasibility of extending social protection to noncitizens even in lower-resource settings, even though it would be reasonable for some courts in low- and middle-income countries to reach a different decision. In many settings, however, the inclusion of noncitizens is already realizable.

#### *Access to Health Systems*

Finally, while education and work are critical to human development, fulfillment, and the ability to make a living, access to basic healthcare is fundamental to survival and the exercise of all human rights. In a range of countries, health systems that differentiate on the basis of citizenship have raised constitutional questions about implementation of the “right to health,” and under what conditions, if any, limitations on public healthcare for noncitizens can be justified.

In Canada, a 2012 reform to the Interim Federal Health Program (IFHP) established a three-tier healthcare system that accorded different standards of care to migrants depending on their status and countries of origin. As a consequence, Hanif Ayubi, who had immigrated to Canada from Afghanistan but was denied formal refugee status for being unable to show he was directly threatened by the

Taliban, suddenly lost access to his diabetes medication and care. As a dishwasher living on a modest income, Ayubi was unable to afford the drugs on his own.

Similarly, Daniel Garcia Rodrigues, who came to Canada after fleeing the FARC in Colombia, was unable to afford surgery when he experienced a detached retina, since his status as a “failed refugee” rendered him ineligible for the IFHP. Fortunately, a generous doctor agreed to perform Rodrigues’s operation at a discount. Yet his and Ayubi’s cases were not outliers: following the reform, a range of migrants who had been denied formal refugee status but were permitted to stay in the country under Canadian policy found themselves without access to basic prenatal, obstetrical, and pediatric care, as well as essential medicines like insulin and cardiac drugs.<sup>71</sup>

When the Ayubi and Rodrigues cases reached the Supreme Court, the justices evaluated the constitutionality of the reform with respect to two different sections in the Canadian Charter of Rights and Freedoms. First, the Court found that because the three-tier structure called for treating refugees from different countries differently, it amounted to national origin discrimination—which is explicitly prohibited by Section 15, the equality provision. Second, the Court discussed whether the system was also unconstitutional discrimination on the basis of citizenship. Although Section 15 does not list citizenship as a prohibited ground, the Court noted that “citizenship has expressly been recognized as an analogous ground for the purposes of section 15,” and that even if there were no national origin discrimination, the system would still be discriminatory.<sup>72</sup> As the Court described, the system’s rules would inevitably lead to inequitable and arbitrary outcomes, even among noncitizens from the same countries and/or facing the same health conditions: “[A] government-assisted refugee from Burma will have insurance coverage for asthma medication, but a refugee claimant from Burma would not. A pregnant refugee claimant from Iran will have insurance coverage for pre-natal and obstetrical care, but a pregnant refugee claimant from Mexico will not.”

Finally, citing its consequences for children who were brought to Canada with no say in the matter, the Court found that the reforms violated Article 12—the prohibition on cruel and unusual punishment. As a result, the Court struck down the 2012 orders that had established the three-tier system, and gave the government four months to pass new legislation before its decision would come into effect (to ensure that the ruling did not create a “policy vacuum”). The Court also ordered the government to ensure Ayubi’s continued health coverage after the four-month period (and noted that Rodrigues had become a permanent resident since the case began and was therefore covered by the Ontario Health Insurance Plan).

### *What Are the Arguments against Health Rights for Migrants and Refugees?*

The clear inequities created by the Canadian IFHP reform provided leverage to those challenging it as discriminatory. Yet tiered systems of healthcare linked to

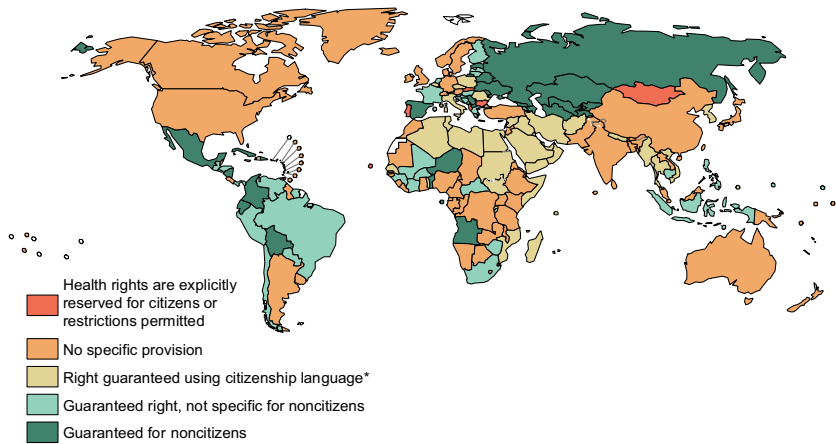
citizenship status are not uncommon, and some have been upheld as constitutional.<sup>73</sup> As discussed in more detail in chapter 10, guaranteeing access to health services requires an outlay of resources typically exceeding that required to protect civil and political rights. As a result, health rights have raised concerns about capacity and resource constraints, and these concerns may become amplified in the context of guaranteeing healthcare to noncitizens. Likewise, the notion that people will migrate to a specific country with the goal of accessing its health services has fueled alarm that immigration will overwhelm health systems in countries that extend the right to health to noncitizens.

However, the evidence to support these arguments is slim.

First, while diverse factors drive migration to specific countries, many studies suggest that economic opportunity is a principal driver of destination choice,<sup>74</sup> while for economic migrants, family and social networks also play an important role.<sup>75</sup> Other factors that shape migrants' choices about where to settle include proximity<sup>76</sup> (especially for South–South migrants),<sup>77</sup> cultural and historical factors (including language barriers),<sup>78</sup> and social and political climates (including whether countries are perceived as welcoming to foreigners, and whether they have multicultural societies).<sup>79</sup> It is also important to note that some migrants make no choice at all about where they end up, especially refugees and asylum seekers, who may be at the whim of smugglers.<sup>80</sup>

There is limited evidence of healthcare accessibility playing a role as one component of the broader social and political climate. For example, a 2013 study of individuals in France, Germany, the U.K., and the U.S. found that good health and education outcomes, as measured by test scores and infant mortality rates, had a positive effect on decisions to migrate.<sup>81</sup> Additionally, one study of the U.S. found that the generosity of states' Medicaid programs, which serve very low-income families as well as the elderly and people with disabilities, play a role in refugees' choice of destination state once they are in the U.S.<sup>82</sup> Taken together, these findings suggest that healthcare matters for some migrants, but it is not one of the most important factors in shaping choices about permanent migration.

Second, in general, the world's economic migrants—who comprise the vast majority of migrants globally—arrive in their destination countries in good health. Studies find evidence of the “healthy immigrant” effect, wherein migrants self-select and tend to be healthier than the nonmigrant population.<sup>83</sup> For example, according to a 2002 study, foreign-born Hispanics had a 45% lower mortality risk and U.S.-born Hispanics had a 26% lower risk than U.S.-born white people with an equivalent socioeconomic and demographic background. Black immigrants had a 48% lower mortality risk. Among Asians and Pacific Islanders (APIs), immigrants' mortality risk was 43% below that of U.S.-born white people, while U.S.-born APIs had a 32% lower risk. Finally, white immigrants' mortality risks were 16% below those of white people born in the U.S.<sup>84</sup>



\*Right guaranteed using citizenship language means that the constitution guarantees an approach to the right to health, but uses the word "citizens" instead of "everyone" to guarantee the right. This language may be interpreted to exclude noncitizens from the right to health.

MAP 9. Does the constitution explicitly guarantee an approach to noncitizens' right to health?

Ultimately, everyone has the right to health, regardless of place of residence or citizenship status. For economic migrants, the evidence suggests the net costs of upholding the right to health are minimal. For both economic migrants and more vulnerable migrants, like refugees and asylum seekers, international conventions reflect widespread global agreement that provision of basic healthcare is a humanitarian duty. Far more needs to be done at the national level.

### *The Right to Health for Migrants and Refugees in Constitutions*

Altogether, 14% of constitutions guarantee some aspect of the right to health to noncitizens, but 3% of constitutions reserve some or all aspects of the right to health for citizens or permit restrictions on the right for noncitizens (Map 9). In some, tiered levels of coverage are built into the constitutional provision; again in Slovakia, for example, the constitution guarantees that “[e]veryone has a right to the protection of health. Based on public insurance, citizens have the right to free health care and to medical supplies.”<sup>85</sup>

Beyond their clear impacts on individuals and families, the denial of social and economic rights on the basis of citizenship has broader social consequences. Health provides a particularly acute example. When migrants and refugees are unable to get the healthcare they need, including preventive services, the risk of communicable diseases may increase—undermining the right to public health for all people.<sup>86</sup>

Likewise, when noncitizen workers are excluded from basic labor protections, employers are less likely to be held accountable for unsafe working conditions,

below-minimum wages, or other violations of the law. Depriving refugee and migrant workers of these fundamental rights therefore has consequences for everyone by contributing to the establishment of unsafe and coercive work environments that affect citizens and noncitizens alike, and creating an exploited underclass of laborers who work on different terms than citizens do.<sup>87</sup> While migrants' rights should be protected for their own sake, citizens also fare better when migrants' rights are realized.

#### LANGUAGE MATTERS: RIGHTS GRANTED TO ALL PERSONS VS. CITIZENS

In the U.S. Constitution, only one right appears twice: the right to due process. Put simply, due process means that the government cannot arbitrarily detain someone or take away their rights or property. The Fifth Amendment guarantees due process with respect to the federal government, while the Fourteenth Amendment extends the same protection against the states.

And critically, both amendments guarantee these rights to “persons”—not “citizens.”

In January 2017, this distinction proved critical in the courts following President Trump's executive order to ban all refugees as well as citizens from seven Muslim-majority countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—from entering the country, even if they were lawful permanent residents of the United States. Within a week, the U.S. Court of Appeals for the Ninth Circuit had blocked the order nationwide, ruling that the revocation of visas and refusal to recognize individuals' lawful immigration status would likely violate the Fifth Amendment's guarantee of due process, and affirming that due process rights “are not limited to citizens.”<sup>88</sup>

Troublingly, the Supreme Court ultimately upheld a pared-down version of the so-called “travel ban” in June 2018, determining that the president had broad power to exclude classes of people from entering the country under the Immigration and Nationality Act. The Court further ruled that the reformulated ban, which encompassed five of the original seven Muslim-majority countries—Iran, Libya, Somalia, Syria, and Yemen—but also Venezuela and North Korea, no longer evidenced religious discrimination.<sup>89</sup> Although it no longer extends to lawful permanent residents, the policy will undoubtedly harm millions of individuals and families, and despite how the policy has evolved, its discriminatory intent seems undeniable.

This example underscores two key points. First, the use of words like “citizen” versus “person” throughout constitutions can have far-reaching implications, including denials of fundamental rights, even where not explicitly stated. Globally, around one-third of constitutions that guarantee a right to education, health, or labor use “citizenship” language to describe that right without further

addressing whether rights using citizenship language are reserved only for citizens. The importance of this language choice is increasingly capturing the attention of constitutional drafters. For example, South Korea's National Human Rights Commission proposed in June 2017 to replace the word "citizens" with "people" in the constitution's basic rights provisions, to ensure that all individuals within the country would benefit from the same fundamental legal protections.<sup>90</sup>

Second, discrimination on the basis of migration status, either on a broad scale or by individual employers or institutions, affects migrants' abilities to fulfill their fundamental rights. How can constitutions address these forms of discrimination—and in what areas are they exacerbating discrimination?

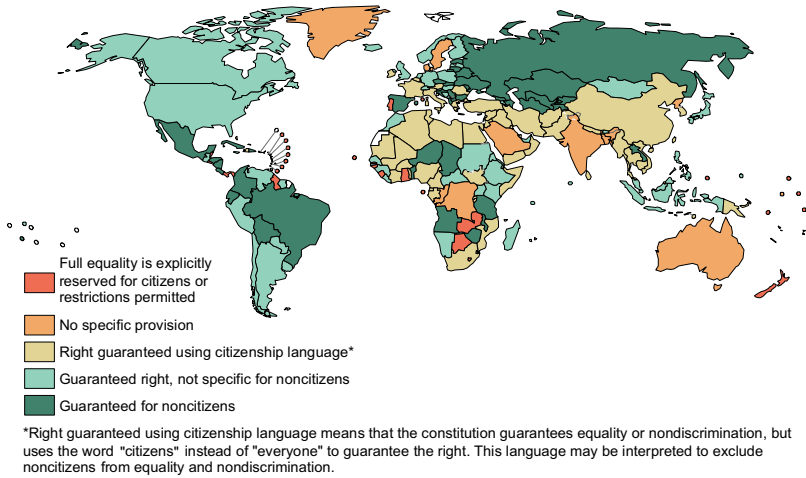
### *Nondiscrimination on the Basis of Citizenship*

In November 2016, an asylum seeker in Belgrade tried to buy a train ticket to Sid, Serbia, a city near the Croatian border where there was a reception center for asylum seekers. But at the ticket counter, she was refused. Ten minutes later, however, a nonmigrant traveler made the same request—and walked away with a ticket.

This did not come as a surprise to CKPR, a Serbian organization working on behalf of refugees and asylum seekers. Having suspected that the train station was discriminating against migrants, CKPR sent in testers to confirm the practice. After the asylum seeker was refused, CKPR filed a lawsuit against Serbian Railways.

When the case reached the Commissioner for the Protection of Equality, a state authority charged with enforcing equal rights, she found that the train company could reduce service to a border city if the refugee reception center temporarily lacked capacity. This had been a genuine problem for the reception center in Sid, which had reported nearly 200 men sleeping in and around the center around the time CKPR's complaint was filed.<sup>91</sup> However, the company could not restrict access solely by migrants, especially since asylum seekers had just 72 hours to report to an asylum/reception center after entering Serbia before their presence would be considered illegal. Distinguishing between migrants and other customers who wished to purchase a ticket, the commissioner held, violated the constitution's guarantee of equality based on nationality, as well as the constitutional right to asylum.<sup>92</sup>

Against the backdrop of globalization and recent large-scale migration across Europe, fundamental protections against discrimination on the basis of citizenship or place of origin have become all the more important. These protections also align with international commitments. For example, the U.N. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) explicitly prohibits discrimination on the basis of national origin. While the ICERD allows for some distinctions between the rights of citizens and noncitizens, the Committee on the Elimination of Racial Discrimination has clarified: "The possibility of differentiating between citizens and non-citizens . . . must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should



MAP 10. Does the constitution explicitly guarantee equality or nondiscrimination for noncitizens?

not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>93</sup> In effect, this means that only those narrow exceptions permitted by these other agreements, such as limits on certain political rights, are acceptable forms of differentiation.

Globally, nearly a quarter of constitutions explicitly protect noncitizens from discrimination (Map 10). Further, 60% guarantee equal rights on the basis of foreign national origin. In Serbia, the equality provision takes the latter approach: “All direct or indirect discrimination based on any grounds, particularly on . . . national origin . . . shall be prohibited.”<sup>94</sup> Across the border, Croatia’s constitution addresses foreign citizenship directly, providing that “[c]itizens of the Republic of Croatia and aliens shall be equal before the courts, government bodies and other bodies vested with public authority.”<sup>95</sup>

However, 77% of countries that are parties to the ICERD have yet to guarantee nondiscrimination without exceptions on the basis of foreign citizenship. Fourteen percent of parties explicitly allow for restrictions on equal rights for foreigners. For example, under Panama’s constitution, “[a]ll Panamanians and aliens are equal before the Law, but the Law, for reasons of labor, health, morality, public security and national economy, may subject to special conditions, or may deny the exercise of specific activities to aliens in general.”<sup>96</sup> While narrow exceptions on certain rights are permissible under international law, broadly or ambiguously worded limitations may open the door to discrimination. Likewise, 41% of countries that have ratified the ICERD have not enacted a guarantee of nondiscrimination on the basis of foreign national origin.



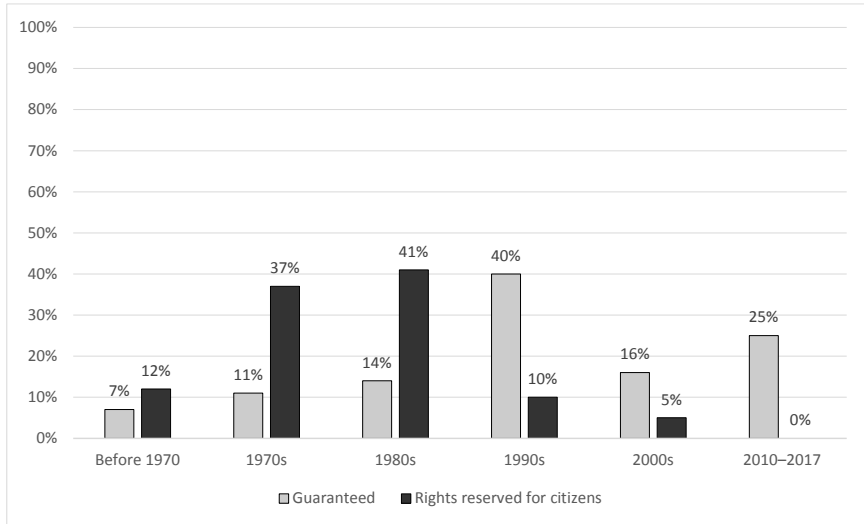


FIGURE 5. Explicit constitutional protection of equality or nondiscrimination for noncitizens by year of constitutional adoption

The number of new constitutions with restrictions has been declining since the 1980s (Figure 5). None of the constitutions enacted since 2010 include explicit restrictions on the rights of noncitizens.

Still, there seems to be little momentum toward a widespread guarantee of equal rights for noncitizens. Whereas protections for these groups peaked among constitutions adopted in the 1990s, coinciding with the breakup of the Soviet Union, Yugoslavia, and Czechoslovakia, levels of protection have been only slightly higher among constitutions adopted since 2000 than among those adopted in the 1970s and 1980s.

### *Restrictions on Other Rights*

Under the International Covenant on Civil and Political Rights (ICCPR), countries are permitted to reserve certain political rights for citizens, such as the right to vote or run for office. However, some countries also restrict noncitizens’ rights in other areas, which can have far-reaching implications that limit the ability to meet basic needs. Two particularly important and common areas where restrictions occur are freedom of movement and due process. Under the ICCPR, due process is guaranteed to everyone, while freedom of movement is guaranteed to everyone lawfully within the country.<sup>97</sup>

### *Freedom of Movement*

As the Serbian case suggests, formal and informal restrictions on the free movement of migrants and refugees are not uncommon, especially in countries experiencing a

significant increase in migration. Some countries' constitutions, however, explicitly allow for restrictions on noncitizens' freedom of movement, with very real consequences for migrants and refugees attempting to access basic institutions.

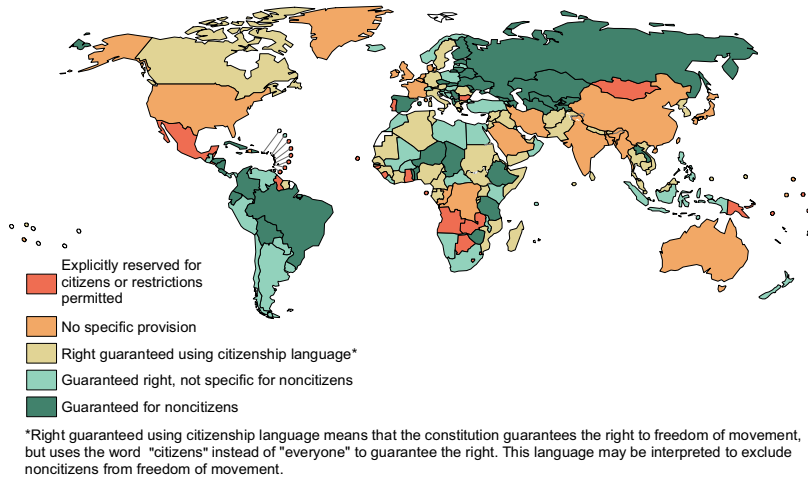
For example, Zambia's constitution broadly guarantees equal rights for all by using the term "every person in Zambia" in its provision on fundamental rights and freedoms.<sup>98</sup> However, its provision on nondiscrimination stipulates that the prohibition of discrimination does not apply "with respect to persons who are not citizens of Zambia."<sup>99</sup> Another provision within the same article establishes that the rights of noncitizens can be restricted in areas including the right to privacy, freedom of conscience, freedom of expression, freedom of assembly and association, and freedom of movement.<sup>100</sup>

Under the Refugee Convention, lawfully present refugees have the right "to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."<sup>101</sup> The U.N. Human Rights Committee has further clarified that asylum seekers

may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>102</sup>

Likewise, the UNHCR has made clear that "[a]sylum-seekers should be guaranteed freedom of movement wherever possible."<sup>103</sup> In other words, although receiving countries can briefly detain newly arriving refugees, broader and ongoing restrictions on the freedom of movement exceed the scope of international law.

Yet although Zambia has ratified all the major human rights treaties, its broad constitutional restrictions on freedom of movement are further reinforced through legislation including the Refugees (Control) Act, which requires all refugees to live in a designated settlement, and have also been upheld by the High Court.<sup>104</sup> Notably, while Zambia became a party to the Refugee Convention in 1969, it did so subject to a "reservation" on the article protecting freedom of movement. Within the international treaty system, a reservation is a stipulation that the country may not give legal effect to a specific treaty provision, even while adopting the treaty as a whole. Under the Vienna Convention on the Law of Treaties, reservations must not be "incompatible with the object and the purpose of the treaty."<sup>105</sup> In practice, however, determining incompatibility is a gray area, and reservations have the potential to significantly undermine a treaty's effect. In its reservation on freedom



MAP 11. Does the constitution explicitly guarantee noncitizens' right to freedom of movement?

of movement, Zambia specified that the government “reserves the right to designate a place or places of residence for refugees.”<sup>106</sup>

Zambia’s restrictions have wide-ranging consequences for refugees seeking to integrate and pursue basic opportunities. According to the UNHCR, “[t]he restriction on the freedom of movement is one of the primary sources of discontent among the refugees’ communities, as it limits their access to essential goods, sources of income and education opportunities.”<sup>107</sup> The effects are especially notable for youth, “who are keen to advance their human capital credentials through tertiary and vocational training that is often located in urban areas” where they are not permitted to live.<sup>108</sup> Among both urban and rurally based refugees in Zambia, restrictions on freedom of movement rank third among their top five livelihood challenges.<sup>109</sup>

This example underscores the potential consequences of constitutional language that allows for the broad-based denial of noncitizens’ rights, which has actually become more common in some civil rights areas over the past several decades.<sup>110</sup> Globally, 16% of constitutions reserve the right to freedom of movement for citizens or permit exceptions to the right for noncitizens (Map 11).

### *Rights to Due Process*

Around the world, migrants commonly face violations of their right to due process, which sharply undermines protections in international law. The principle of *non-refoulement*, which forbids countries from sending asylum seekers back to countries where they are likely to face persecution, is central to the Refugee Convention, which also guarantees access to the courts for all refugees. Under the UDHR, all people are entitled to a public hearing about violations of their rights

and protections against arbitrary detention. Nevertheless, lengthy detentions of migrants and mass deportations that can endanger lives remain far too common.

In some countries, these rights are explicitly restricted—but they have also been successfully challenged in court. For example, in a unanimous decision in 2017, the Constitutional Court of South Africa invalidated provisions within the Immigration Act of 2002 that allowed “illegal foreigners” to be detained for up to 30 days without a warrant, and an additional 90 days once a warrant was secured. Citing Section 35 of the constitution, which requires that anyone who is arrested be brought before a judge within 48 hours, the Court ruled that immigrants are entitled to the same protections.<sup>111</sup> Effective institutions and supportive mechanisms for the implementation of the constitutional rights of refugees and migrants are central to their impact, and ensuring there are no exceptions to the fundamental right to due process is core to this commitment.<sup>112</sup>

#### ADDRESSING STATELESSNESS

While addressing the rights of noncitizens has critical implications, so too does specifically articulating the rights of stateless persons. Stateless persons—i.e., individuals who are not recognized as citizens by any state, including many refugees—are especially vulnerable to arbitrary detention and other denials of fundamental rights and freedoms. People can become stateless at birth if they do not meet the requirements for citizenship in the country where they are born—for example, if the country does not recognize birthright citizenship, or if the person is born in a refugee camp.<sup>113</sup> Later in life, people can become stateless if their country of origin ceases to exist; the dissolution of the Soviet Union, for instance, resulted in widespread statelessness.<sup>114</sup> Today, with more than 10 million stateless persons worldwide, addressing the gaps in legal protections can be highly consequential for migrants.<sup>115</sup>

Issues of statelessness also intersect with constitutional gender equality provisions, and specifically whether women have the same rights to acquire, change, retain, and pass down citizenship.<sup>116</sup> When women do not have the same rights as men to confer nationality to their children, their children are at risk of statelessness, which often creates barriers to public education, healthcare, and, later, employment and political participation.<sup>117</sup> Among its list of ten priorities for ending statelessness by 2024, the UNHCR’s Global Action Plan to End Statelessness includes removing gender discrimination from nationality laws.<sup>118</sup>

#### *The Practical Consequences of Statelessness*

In recent years, the consequences of constitutional provisions around statelessness have been devastating to hundreds of thousands of individuals and their families in the Dominican Republic. In 2013, the Constitutional Court ruled that anyone born in the country to undocumented parents since 1929 was not automatically a

Dominican citizen—a ruling that disproportionately affected the country’s substantial Haitian population, and resulted in the retroactive stripping of citizenship.<sup>119</sup> According to the conservative estimates of government officials, around 138,000 people were rendered newly stateless by the change, many of whom were subsequently targeted for deportation.<sup>120</sup> This ruling resulted from a challenge to a 2010 constitutional amendment establishing that the Dominican-born children of undocumented residents would not receive citizenship by nature of their birth: “Art. 18. The following are Dominicans: . . . (3) People born in the national territory, with the exception of the sons and daughters of foreign members of diplomatic and consular legations, of foreigners that find themselves in transit or reside illegally in Dominican territory. All foreigners are considered people in transit as defined in Dominican laws.”<sup>121</sup>

The woman who brought the case, Juliana Deguis Pierre, had been issued a Dominican birth certificate when she was born to Haitian immigrant parents in 1984, and had never left the country since. Yet when she went to get a national ID card in 2008—by then a mother of four children of her own—her birth certificate was confiscated due to her Haitian last names. In 2013, the Constitutional Court determined that she had been wrongly registered at birth.<sup>122</sup>

The consequences of the constitutional reform and subsequent Constitutional Court decision have been profound, especially for stateless children who have been unable to enroll in primary or secondary school due to lack of documentation.<sup>123</sup> Without access to education, these children are more vulnerable to child labor, such as the fifth grader who became a bricklayer’s assistant after he was removed from school.<sup>124</sup> Children forced to withdraw from school due to the reform also face the prospect of reduced opportunities in the formal labor market as adults. Meanwhile, adults without identity cards have encountered barriers to realizing their rights to work and health. According to one Dominican-born man, whose ID card was initially revoked in 2008: “You need your identity card in order to do absolutely everything . . . You could be somebody with a lot of experience in a specific area, but without an identity card you can’t be contracted. You can do absolutely nothing.”<sup>125</sup>

While the situation in the Dominican Republic has received global attention, the enshrinement of the exclusionary citizenship provision within its constitution has been retained, even following a second series of reforms in 2015. Interestingly, the constitution does guarantee that foreigners have “the same rights and duties as nationals” within the Dominican Republic, subject to certain exceptions<sup>126</sup>—but the lack of an explicit protection on the base of statelessness has left thousands of residents’ futures uncertain.

Globally, 8% of constitutions explicitly prohibit discrimination on the basis of statelessness, while 15% limit full equal rights solely to citizens or permit exceptions for equal rights for stateless persons. Guarantees for stateless persons peaked among constitutions adopted in the 1990s (see Figure 6).

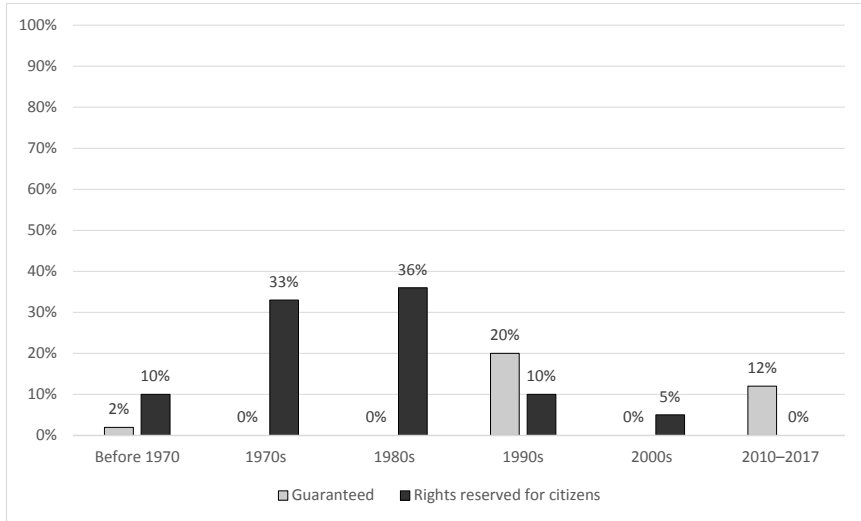


FIGURE 6. Explicit constitutional protection of equality or nondiscrimination for stateless persons by year of constitutional adoption

### THE ABILITY TO EXERCISE RIGHTS

Finally, while the existence of rights is an essential precondition for their realization, claiming rights often poses additional hurdles, particularly for those whose very presence in the country may put them at risk. For undocumented immigrants, access to legal assistance and the ability to engage with the legal system without fear of retribution are common obstacles to obtaining justice.

In some countries, these barriers are compounded by codified restrictions on undocumented immigrants' access to legal services. In Italy, for example, although the constitution guarantees the right to legal aid for the poor, free representation for civil matters is restricted by law to citizens and migrants with legal status.<sup>127</sup> Likewise, in Mongolia, Nigeria, Sierra Leone, and Turkmenistan, the constitution protects the right to legal aid but uses “citizenship” language to articulate the right.<sup>128</sup> In the United States, Congress banned legal aid providers from representing undocumented immigrants, bringing class actions, or representing clients in a range of specific types of claims.<sup>129</sup> Although policymakers have justified the restrictions on the basis of limited resources, the role of employers that rely heavily on undocumented labor in advocating for the restrictions suggests there are other interests at stake.<sup>130</sup> Indeed, it was only after migrant workers began suing for unpaid wages that the agricultural industry began advocating for limitations on their access to free legal representation.<sup>131</sup>

By contrast, some countries explicitly guarantee the right to legal assistance for noncitizens, at least in criminal cases, while many others use broad language—such

as “everyone”—in either their constitutions or relevant legal aid statutes.<sup>132</sup> Without the ability to exercise rights, they remain empty guarantees. Reducing both the formal and informal barriers to justice commonly facing migrants and refugees must be a priority for ensuring these rights have meaning in practice.

## CONCLUSION

In an era of globalization and instability, anyone may become a migrant or have family members who immigrate. Just since 2000, the number of migrants worldwide has increased by 41%, and migrants now comprise 3.3% of the global population—or one in every 30 people.<sup>133</sup>

Yet despite the large size of this population, migrants and refugees worldwide face marginalization and discrimination. According to a report jointly authored by the International Organization on Migration, the ILO, the U.N. High Commissioner for Human Rights, and UNHCR, “violations of human rights of migrants, refugees and other non-nationals are so generalized, widespread and commonplace that they are a defining feature of international migration today.”<sup>134</sup> These findings mirror key concerns voiced in the 2001 Durban Declaration on Racism, Racial Discrimination, Xenophobia and Related Intolerance, which broadly proclaimed: “We recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.”

While the dynamics of large-scale migration present challenges for destination countries, it is important to reach consensus on key areas that are critical to the preservation of fundamental rights. At a minimum, a fundamental commitment to nondiscrimination, children’s access to education, universal access to emergency healthcare and preventive services, and refugees’ and asylum seekers’ right to seek work have emerged as core elements that all countries should be able to provide. Providing access to social insurance based on contributions may require the development of new transferable or transnational systems that recognize the frequency of migration.

The desire of countries to ensure the continued economic well-being, education, and health of all people already within their borders is understandable. Yet the obstacles to extending these basic rights to noncitizens are often rooted in fear and stereotypes rather than evidence about actual impacts and capacity. Immigration far more often boosts countries’ economies in the long run than threatens them. Supporting refugees and asylum seekers in getting a fresh start is essential not only for meeting humanitarian needs but also for enabling them to integrate and contribute to their new community. It is essential to not repeat errors that have characterized responses to migration for centuries, and to recognize and reject pernicious justifications for exclusion when they reemerge.

## Negotiating the Balance of Religious Freedom and Equal Rights

On a cold December night in Brockton, Massachusetts, nine-year-old Betty Simmons stood alone on a street corner. In a canvas bag over her shoulder, she carried magazines published by the Jehovah's Witnesses containing teachings on biblical prophecies and religious history. Betty held copies to display to passersby, and her bag advertised that the magazines were for sale.<sup>1</sup>

About 20 feet away, Betty's aunt and legal guardian, Sarah Prince, stood engaging in her own street preaching work, as she did regularly. Around 8:45 p.m., a school attendance officer approached Sarah and asked for Betty's name and where she went to school. Sarah refused to provide her niece's name, but admitted she had provided Betty with the magazines to sell. The officer advised her to go home within five minutes, citing previous warnings he had given. Although Sarah complied, she vigorously objected, "This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands."<sup>2</sup>

Under a Massachusetts statute, however, children were forbidden from selling merchandise in public places, and adults who provided children with goods to sell or permitted them to work in violation of the law could be charged with a misdemeanor. Because of Betty's repeated appearances selling religious literature on the streets of Brockton, and Sarah's acknowledgment that it was at her behest, Sarah was convicted and fined for violating the state's child labor laws.



Over the next three years, Sarah challenged the decision through the courts, arguing that the child labor provision violated Betty's right to religious freedom, Sarah's right to raise her child within her own faith, and both of their rights to freedom from discrimination. Since street preaching and distributing literature were critical aspects of Jehovah's Witnesses's religious practice, she argued, the restriction on children selling goods in the street amounted to discrimination against members of the faith. During trial, Betty testified that she believed failing to spread Jehovah's Witnesses's teachings would condemn her "to everlasting destruction at Armageddon."<sup>3</sup>

When the case reached the Supreme Court, however, Justice Wiley Rutledge clarified that freedom of religion, although central to the constitution's First Amendment, is not absolute. In particular, he argued, "The right to practice religion freely does not include the right to expose the community or the child to communicable disease or the latter to ill-health or death."<sup>4</sup> Further, although Betty had a right to religious freedom, different standards could validly apply to children and adults, given the "interests of society to protect the welfare of children," and democracy's reliance upon "the healthy, well rounded growth of young people into full maturity as citizens."<sup>5</sup> While adults were free to sell religious materials in the streets, even during severe cold weather, the child labor law was a valid exercise of Massachusetts's authority to protect against the "crippling effects of child employment."<sup>6</sup>

Turning to Sarah's argument about her right to raise her child in her faith, the Court reasoned that despite the government's obligation to respect private family life, "the family itself is not beyond regulation in the public interest."<sup>7</sup> Notably, the Court did not argue that Sarah could not provide Betty with the religious education of her choosing; she simply could not compel Betty to engage in religious practices that violated the law. Finally, addressing Sarah's equal protection claim, the Court concluded that as a generally applicable law that treated children of all faiths the same, the child labor legislation was not discriminatory against Jehovah's Witnesses.

#### PERSISTING QUESTIONS—AND MOVES TOWARD GLOBAL CONSENSUS

*Prince v. Massachusetts* was decided 75 years ago, but its most fundamental issues remain relevant across countries. In the United States, the decision continues to serve as a critical precedent in cases where religious freedom is pitted against public health or children's safety.<sup>8</sup> Globally, *Prince* exemplifies some common questions that emerge when tensions arise between the exercise of religion and other fundamental rights and state interests. Under what conditions can the government restrict religious practice?

In the decades since *Prince*, heated debates about religion's ideal role in society—and in constitutions—have persisted, though important moves toward consensus have occurred in key areas.

International agreements have addressed rights to equality across religions. Beginning with the Universal Declaration of Human Rights (UDHR), countries from all regions collectively established a comprehensive set of principles articulating important protections for equal rights on the basis of religion. The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, and the Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted in 1981, further clarified these goals and responsibilities.

These agreements also express the global consensus that, while important and widely valued across societies, the ability to practice one's religion is not unqualified: it can be curtailed in some circumstances, such as for public health and the protection of others' fundamental rights and freedoms, including their rights to equality. At the same time, individuals of all religions, beliefs, and nonbeliefs must be protected from discrimination and persecution, whether in countries with religious governments, secular governments, or increasing religious diversity.

Achieving broad global agreement on key principles has been a remarkable step. But to what extent have they translated into practice?

#### EQUAL RIGHTS ON THE BASIS OF RELIGION: WHAT IS THE CHALLENGE?

In some ways, protecting against religious discrimination is similar to protecting against discrimination on the basis of race/ethnicity, gender, or other aspects of identity. Constitutional nondiscrimination clauses that include religion can ensure that members of religious minorities have the same rights to access education, work, participate in government, and lead full lives as members of the majority.

Yet a more challenging issue for national constitutions is that, more than other aspects of identity, an individual's religion may prescribe a set of rules to live by. Religious laws and practices related to family, marriage, child-bearing, death, property, and other realms of life may intersect with areas covered by the state.

Moreover, historical traditions of a wide range of religions have come into conflict with the equal rights of groups both within and outside these religions. Inequalities remain embedded in some religious legal systems; disparities in property rights<sup>9</sup> and the criminalization of groups<sup>10</sup> present just two examples. Yet, for most religions, there are also adherents who believe the religion can be practiced while respecting the equal rights of all.

#### *International Agreements on Respecting Religious Freedom While Guaranteeing Human Rights to All*

While freedom of religion and separation of religion and state are ideas that have a long global history, dating back at least to ancient Greece, much of the progress is centuries old.<sup>11</sup> In 1598, the Edict of Nantes newly granted rights to Protestants in

predominantly Catholic France, opening the door to religious tolerance and secularism. In the United States, religious freedom was foundational to the American Revolution, and as Virginia's governor, Thomas Jefferson drafted a bill to grant "legal equality for citizens of all religions—including those of no religion" within the state.<sup>12</sup> In the early twentieth century, Kemal Atatürk's deep commitment to secular government marked the end of the Ottoman Empire, and the beginning of a staunchly secular Turkey.<sup>13</sup>

Yet these developments coincided with a long history of religious persecution by leaders and states. In ancient Rome, Christians suffered several centuries of persecution until the emperor Constantine converted to Christianity in 312 AD; after his infamous vision of the cross with the words "In this sign you will conquer," Constantine went on to subject pagans to the same relentless treatment, partly through discriminatory laws.<sup>14</sup> Beginning in the fifteenth century, Spain's monarchy expelled hundreds of thousands of Jews from the country, and persecuted thousands of "New Christians" suspected of continuing to practice Judaism despite being forced to convert.<sup>15</sup> Throughout the nineteenth century, national struggles against the Ottoman Empire led to large-scale violence against Muslims in Greece,<sup>16</sup> Serbia,<sup>17</sup> and elsewhere. Numerous other countries offer similar examples. It was religious persecution at its worst—genocide of Jews by the Germans in World War II—that led to global commitments to protect all human rights.

Both the UDHR and the ICCPR, as well as subsequent agreements, guarantee freedom of religion. Specifically, the UDHR prohibits discrimination on the basis of religion, and further proclaims: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." These agreements also establish that "freedom of religion" applies equally to the freedom to believe and the freedom to *not* believe. According to Article 18 of the ICCPR, "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." The U.N. Human Rights Committee has clarified that Article 18 "protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief;" and that "[t]he terms 'belief' and 'religion' are to be broadly construed."<sup>18</sup> In practice, this means that "freedom of religion" encompasses not only the right to hold and observe beliefs of one's choice, but also the rights to freely change or denounce one's religion or beliefs.

At the same time, these documents protect the equal rights of all. The UDHR designated equal rights as the highest priority, even in cases of conflict with other rights, by clearly stating that "[r]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Similarly, the U.N. has specified that the ICCPR, an enforceable treaty, cannot be used to "sanction discrimination

against any group of persons,”<sup>19</sup> and that Article 18 in particular “may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion.”<sup>20</sup>

The international agreements embodying these values have been widely signed and ratified by countries around the world. The 171 U.N. member states that have ratified the ICCPR comprise all countries in Europe and Central Asia, 96% of those in sub-Saharan Africa, 89% of those in the Americas, 88% of those in South Asia, 84% of those in the Middle East and North Africa, and 60% of those in East Asia and the Pacific.

Freedom of religion is divided into beliefs and practices. There are no restrictions on beliefs. More complex questions emerge around religiously motivated actions. Practices can be subject to limitations that are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others,” including their fundamental rights to equality.<sup>21</sup>

Historically and still today, religion has been invoked or interpreted by some in ways to rationalize and excuse unequal treatment. For example, colonialism and slavery, among other large-scale denials of fundamental human rights, have been justified on religious grounds at various points in history. So, too, have mass killings.

Like the UDHR, ICCPR, and International Covenant on Economic, Social and Cultural Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities protects equal human rights. The declaration makes the state responsible for ensuring that while groups covered by the declaration can make decisions relevant to the group, those groups cannot “discriminate in any way against any person on the basis of his/her group identity and must take action to secure their equal treatment by and before the law.” The declaration then proceeds to discuss with clarity how actions related to the group identity must accord with international standards of treating all people equally.<sup>22</sup>

Regional bodies have independently developed principles that likewise honor equal treatment of all religions while simultaneously requiring that religious practice respects all people’s equal rights. For example, the African Charter on Human and Peoples’ Rights, ratified by all the continent’s countries but one,<sup>23</sup> protects freedom of religious practice while explicitly prohibiting discrimination on the basis of sex, race, social origin, and other characteristics. Further, the Maputo Protocol, an add-on to the charter addressing women’s rights that has been ratified by 36 African countries and signed by another 15,<sup>24</sup> specifically calls for all countries to “include in their national constitutions and other legislative instruments . . . the principle of equality between women and men and ensure its effective application.”<sup>25</sup> In guidance detailing the protocol’s commitments, the African Commission made clear that countries had a duty to ensure religious beliefs did not undermine women’s right to health.<sup>26</sup>

*The State of the World's Constitutions*

Three core principles, grounded in international agreements, can help ensure that governments equally support the dignity and fundamental rights of all, regardless of religion, belief, or nonbelief. The first is to ensure that the government does not privilege one religion over other religions or beliefs. The most straightforward approach to doing so is a commitment to secular government. Second, countries must ensure that there is no religious discrimination by public or private institutions, to the extent the constitution covers the private sector. Third, governments must protect freedom of belief for all in their borders, and protect freedom of practice up to the point where it infringes on the fundamental rights of others.

Like equal rights, freedom of religion and separation of religion and state are principles that societies around the world have long deemed valuable, including within their constitutional documents. The Constitution of Medina, believed to have been drafted by the Islamic prophet Mohammad in the early seventh century, explicitly protected freedom of religion for all within the city walls.<sup>27</sup> The Magna Carta, drafted in 1215, declared “that the English church shall be free,” interpreted by some to provide an early guarantee of separation between religion and state.<sup>28</sup> The Great Law of Peace, considered the oral constitution of the Iroquois confederacy that predated European colonization of North America, included freedom of religion as a fundamental principle.<sup>29</sup> In the United States, freedom of religion and separation of religion and state were understood to be so foundational that these principles were enshrined in the constitution’s first amendment in 1789. Yet in the modern human rights era, how do constitutions protect religious freedom while ensuring equality?

In this chapter, we seek to understand how constitutions address equality across people with different beliefs, ensure equality between believers and nonbelievers, and protect religious freedom without allowing infringements of other rights. To identify the full range of approaches, we comprehensively examined references to religion and belief throughout each constitution’s text. As we will explore, constitutions often contain conflicting provisions with regard to religion. For example, some guarantee equal rights regardless of religion, but nevertheless prioritize a single religion elsewhere in the text. Others proclaim their countries secular, but give special recognition to a particular religion legally or symbolically.

Our analysis proceeds in three in-depth sections. In the first, we look at the constitutions that come closest to guaranteeing equal rights regardless of religion or belief by fully enshrining the principles outlined above. In the second, we examine those constitutions with provisions explicitly limiting rights based on religion or establishing a role for religion in governance. Third, we analyze those constitutions that do not formally treat religion as a source of law, but do recognize a particular religious heritage or tradition, or favor religion generally, thus failing to

treat all religions and beliefs equally. Within each section, we explore the diversity of constitutional choices countries have made, while drawing on case studies to understand how these choices may matter.

By contrast to constitutional protections of equality on other grounds, equal rights on the basis of religion cannot be largely measured by examining nondiscrimination provisions alone. Our goal in this chapter is instead to provide an overview of the wide-ranging constitutional approaches to this important issue, and to highlight the contradictions within constitutional texts that preclude their straightforward categorization.

#### HOW CONSTITUTIONS CAN GUARANTEE EQUAL RIGHTS AND EQUAL TREATMENT ACROSS RELIGIONS

Generally, provisions governing religious life fall into those addressing the rights of the individual, and those addressing religion's role in the public sphere. Fully protecting equality requires addressing both elements.

Various pathways allow for fully protecting equal rights, regardless of religion, belief, or nonbelief, while simultaneously upholding other fundamental rights. For example, a country could adopt a "multidenominational" or "multicultural" approach that supports all religions equally. This approach typically welcomes religious expression in the public sphere by people of all faiths, and may provide tax exemptions or other financial support to religious groups. At the same time, to adequately protect equality and dignity for all and avoid privileging religiosity over nonbelief, this country would protect the rights of nonreligious people and ensure that nonreligious organizations with similar civic, educational, or charitable purposes are eligible for all the same benefits as the religious groups. Finally, this country would ensure that the public or private exercise of religious beliefs does not violate the rights of others.

A second possible approach is to completely separate religion and state. Under this approach, religious groups receive no privileges or special recognition from the government, and religious practice is largely confined to the private sphere rather than supported by public resources or institutions. This country would also clearly protect freedom of religion, limiting religious practice only where it affects others' fundamental rights. Finally, this country would guarantee nondiscrimination and equal rights regardless of whether people have any belief in religion.

Currently, just 7% of constitutions cover all elements described above: nondiscrimination; freedom of religion, including freedom to not believe; limitations on religious practice to protect people's rights; and no implicit or explicit state privileging of religion (Table 1). For example, Slovenia's constitution provides:

TABLE 1: How countries constitutionally ensure equal rights and equal treatment across religion

Pillar 1: Equality and Nondiscrimination Based on Religion or Belief	Pillar 2: State Secularism or Separation of Religion and State	Pillar 3: Freedom of Religion and Freedom to Not Believe	Pillar 4: Religious Freedom Cannot Infringe on the Rights of Others
<b><i>Any approach to equal rights and nondiscrimination across religion</i></b>	<b><i>Relationship between religion and state</i></b>	<b><i>Any approach to protecting freedom of religion</i></b>	<b><i>Protection from freedom of religion infringing on the rights of others</i></b>
No relevant protection	3% Not secular	59% Denied in full or part	3% Religious freedom not guaranteed
Generally guaranteed, not specific to religion	18% Secular, but religious references	20% Not mentioned	1.5% Religious freedom; no relevant restrictions
Aspirational protection from discrimination for religion	1% Secular, no religious references	22% Guaranteed, but strong state religion	9% Religious freedom; limited by not infringing religious beliefs of others
Guaranteed protection from discrimination for religion	78%	Guaranteed, but affiliated with religion	18% Religious freedom; limitation from inciting hatred
		Guaranteed and no state religion	68% Religious freedom; limitation is protection of rights of others
		<b><i>Any approach to the freedom to not believe</i></b>	
	<b><i>Constitutional supremacy compared to religious law</i></b>	Denied in full or part	3%
	Role for religious law over constitutions	No relevant provision	72%
	No relevant provision	Guaranteed, but strong state religion	0.5%
	Constitution is supreme, religion not addressed	Guaranteed, but state affiliated with specific religion	4%
	Religious law is explicitly subordinate	Guaranteed and no state religion	21%

***Only 7% of countries comprehensively protect across all four pillars.***

- Article 7: “The state and religious communities shall be separate. Religious communities shall enjoy equal rights; they shall pursue their activities freely.”
- Article 14: “In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of . . . religion, political or other conviction.”
- Article 15: “Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution.”
- Article 41: “Religious and other beliefs may be freely professed in private and public life.”<sup>30</sup>

Likewise, Nicaragua covers these elements through four separate articles:

- Article 14: “The State has no official religion.”
- Article 27: “There shall be no discrimination based on birth, nationality, political belief, race, gender, language, religion, opinion, origin, economic position or social condition.”
- Article 28: “Everyone has the right to freedom of conscience and thought and to profess or not profess a religion.”
- Article 69: “All persons, either individually or in a group, have the right to manifest their religious beliefs in public or private, through worship, practices and teachings. No one may evade obedience to the law or impede others from exercising their rights and fulfilling their duties by invoking religious beliefs or dispositions.”<sup>31</sup>

Burkina Faso’s constitution addresses each element as follows:

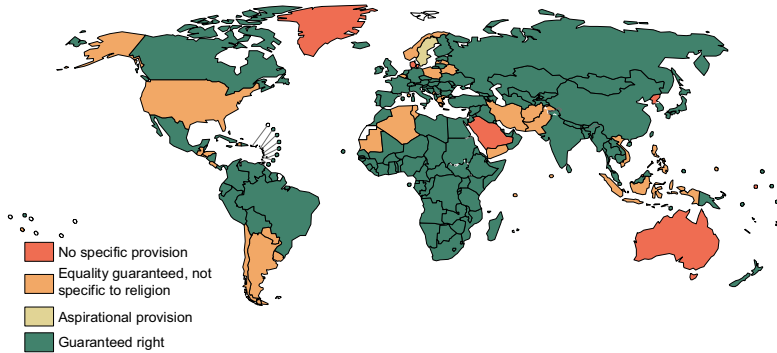
- Article 1: “Discrimination of all sorts, notably those founded on race, ethnicity, region, color, sex, language, religion, caste, political opinions, wealth and birth, are prohibited.”
- Article 7: “The freedom of belief, of non-belief, of conscience, of religious opinion, [of] philosophy, of exercise of belief . . . are guaranteed by this Constitution, under reserve of respect for the law, for public order, for good morals and for the human person.”
- Article 31: “Burkina Faso is a democratic, unitary and secular State.”<sup>32</sup>

As Table 1 illustrates, some types of provisions, such as nondiscrimination on the basis of religion, are widespread; protections for the right to nonbelief are less common. Examining each element individually provides further insights into why these provisions matter and where there are opportunities for strengthening protections for equality.

### *Nondiscrimination on the Basis of Religion*

As with other areas of equal rights, ensuring nondiscrimination on the basis of religion is foundational. Evidence shows that religious discrimination continues to limit access to basic opportunities and institutions, while having wide-ranging health impacts. For example, in Denmark, which lacks any protections against discrimination in its constitution, a 2017 survey found that over one in five Muslims





MAP 12. Does the constitution explicitly guarantee equality or nondiscrimination across religion?

had experienced discrimination in the preceding five years in employment, education (as a parent/guardian), or housing.<sup>33</sup> In Greece, where the constitution recognizes the Greek Orthodox Church as the “prevailing religion” and the vast majority of citizens identify as Orthodox, research has shown that members of minority faiths, such as Pentecostals and Jehovah’s Witnesses, consistently receive fewer callbacks and lower initial salary offers.<sup>34</sup> In many countries, discrimination on the basis of religion (or perceived religion) intersects with discrimination on the basis of race/ethnicity and nationality.<sup>35</sup>

Similarly, violence targeting members of particular religious groups, or those perceived to be members of those groups, remains commonplace. In 2017, 1,749 people were victims of antireligious hate crimes in the United States; over half were targeted for being Jewish, and nearly one-fifth for being Muslim.<sup>36</sup> Moreover, these figures likely underestimate the scope of the problem. In a 2013 survey spanning Europe, 64% of respondents who reported having experienced anti-Semitic physical violence or threats of violence said they had not contacted the police about the most serious incident.<sup>37</sup>

Globally, 78% of constitutions explicitly guarantee equality and nondiscrimination based on religion or belief (Map 12). For example, Peru’s constitution states: “Every person has the right . . . [t]o equality before the law. No person shall be discriminated against on the basis of . . . religion, opinion, . . . or any other distinguishing feature.”<sup>38</sup>

These provisions appear more frequently in more recently enacted constitutions: half (56%) of those adopted before 1970 explicitly guarantee equal rights regardless of religion, compared to 92% of those adopted in 2010–17 (see Figure 7).

As with provisions banning discrimination on other grounds, constitutional protections against religious discrimination can play a critical role in ensuring a given policy or practice does not target a specific group. A recent case from Germany provides one example.

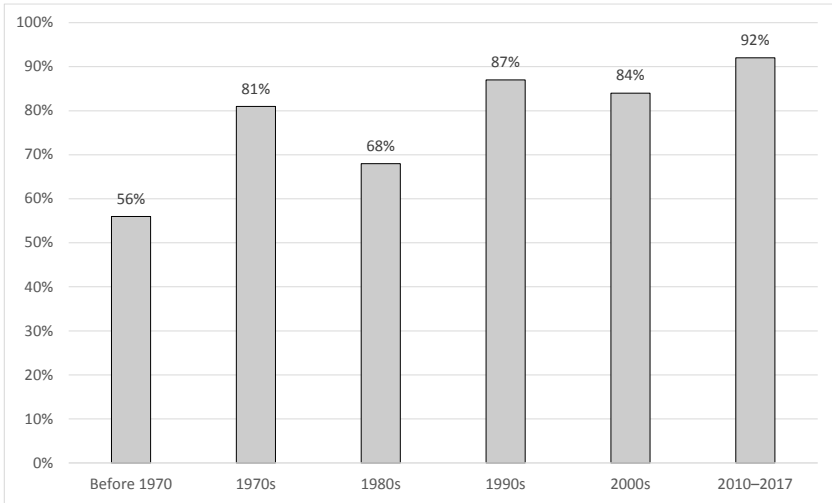


FIGURE 7. Explicit constitutional guarantee of equality or nondiscrimination across religion by year of constitutional adoption

In 2015, two teachers in North Rhine-Westphalia suddenly found themselves facing unemployment—not because of their performance or budget issues, but because of their attire. Both teachers were Muslim women who wore the Islamic headscarf, which they understood as a requirement of their faith. Yet under a new state law, “political, religious, or other ideological expressions by public school teachers” were prohibited if they had “the potential to endanger or disturb state neutrality or the peace at school.”<sup>39</sup>

The law made an explicit exception for the expression of Christian traditions. However, the Islamic headscarf was quickly deemed a violation. Both teachers received warnings from their employers after the law went into effect. One of them, a social science teacher, offered to instead wear a cap and matching turtle-neck, but school authorities found that this substitute could still be perceived as a “manifestation of Islamic faith,” and was thus prohibited. The second, a Turkish language teacher who simply refused to comply with the ban, was fired.

In an effort to keep their jobs, the women took their case to court. In a 6–2 decision, the German Constitutional Court upheld the law, but found that it had been incorrectly applied. As long as teachers’ visible expressions of their faith were not accompanied by proselytizing, the Court found, they did not undermine the state’s religious neutrality or infringe upon students’ right to education free from religious indoctrination.<sup>40</sup> Additionally, the Court ruled that the law’s exemption for Christian symbols and traditions was discriminatory and consequently invalid.<sup>41</sup> Finally, the Court noted that since women alone wore the headscarf for religious reasons, its prohibition would in practice discriminate against women in the workplace.<sup>42</sup>

The issue of restrictions on religious apparel has raised constitutional questions in many countries, and courts have reached different conclusions sometimes because of different decision makers and at other times because the questions relating to equal treatment and impact on both religious practice and other human rights differ.<sup>43</sup> A full review of these cases is beyond the scope of this chapter, and the topic as a whole raises many complex considerations. Sometimes, however, the matter before the court is relatively straightforward. The law in Germany, which banned teachers from wearing attire associated with a minority religion while specifically allowing teachers to wear Christian symbols, provides a clear-cut example of religious discrimination, which the constitution, and specifically its guarantee that “no one may be placed at a disadvantage or favoured because of his or her faith or religious views,” was well positioned to address.<sup>44</sup>

#### *No Role for Religion in Governance or Support for Particular Faiths*

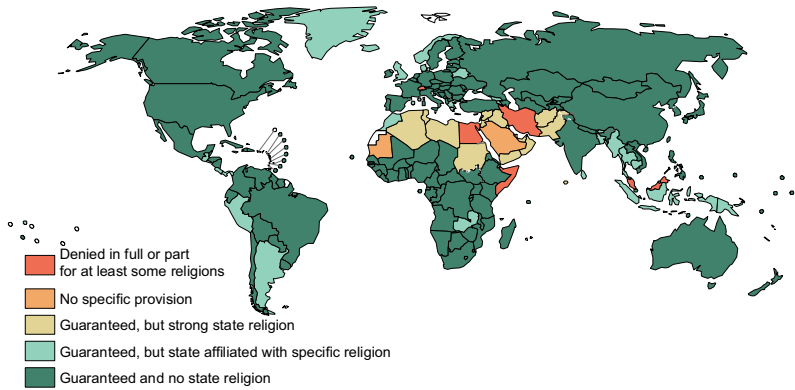
As the German Constitutional Court’s reasoning suggests, one important component of equality across religions is ensuring that the government does not implicitly or explicitly support one religion over others, or over nonbelief. The same principles and concerns apply to constitutional texts themselves. In some countries, the constitution explicitly supports a specific religion, which may also be a source of law. In others, the constitution articulates a commitment to religious neutrality, but also contains religious references indicating a preference for a specific set of beliefs. In either case, the constitutional language is at odds with full equal rights and treatment of people of all religions and beliefs.

In total, 41% of constitutions establish state secularism or separation of religion and state. For example, France’s constitution provides: “France shall be an indivisible, secular, democratic and social Republic.”<sup>45</sup> However, nearly half of these constitutions nevertheless include religious references or specify a role for religion.

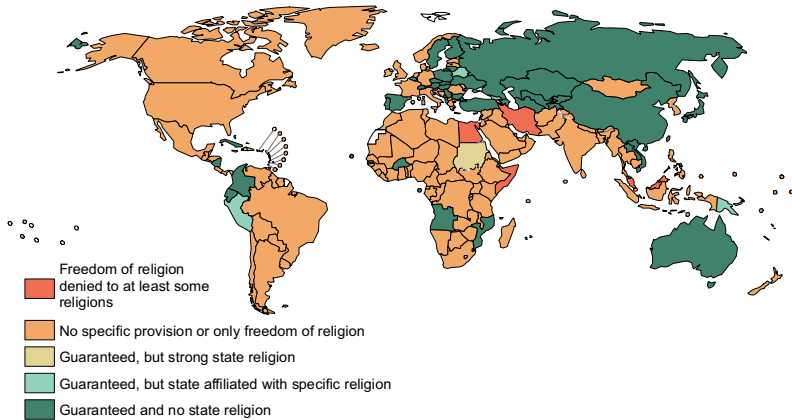
Among the 22% of constitutions that include an unconditional commitment to secularism, a handful explicitly place limitations on the relationship between government and religion. For example, Japan’s constitution states that “[n]o religious organization shall receive any privileges from the State, nor exercise any political authority. . . . The State and its organs shall refrain from religious education or any other religious activity;” and further clarifies that “[n]o public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association.”<sup>46</sup>

#### *Freedom of Religion—and Freedom to Not Believe*

Despite some overlap with protections against religious discrimination, freedom of religion more specifically guarantees that the state will not interfere with individuals’ beliefs. The freedom to hold beliefs of one’s choosing, or to hold no religious beliefs, is central to broader protections for civil and political rights, and to building societies that allow for diversity of thought and opinion. Freedom of religion should



MAP 13. Does the constitution take an explicit approach to protecting freedom of religion?



MAP 14. Does the constitution explicitly protect freedom to not believe in religion?

also include the freedom to change or denounce a religion. These protections are critical everywhere, but especially in countries that maintain an official state religion or where minority religions or the nonreligious have historically faced persecution.

Today, the vast majority of national constitutions—95%—take some approach to protecting freedom of religion or belief (Map 13). However, 18% of constitutions state that they guarantee freedom of religion, but are affiliated with a specific religion. Similarly, 9% of constitutions have language guaranteeing freedom of religion, but have a strong state religion that governs public and/or private life, which may directly limit full expression of freedom of religion for religious minorities.

Further, only 25% of constitutions explicitly protect the freedom to *not* believe, practice, or disclose one's religion (Map 14). For example, Russia's constitution provides: "Everyone shall be guaranteed freedom of conscience and religion,

including the right to profess individually or collectively any religion or not to profess any religion, and freely to choose, possess and disseminate religious and other convictions and act in accordance with them.”<sup>47</sup> Similarly, Japan’s constitution establishes that “[n]o person shall be compelled to take part in any religious act, celebration, rite or practice.”<sup>48</sup>

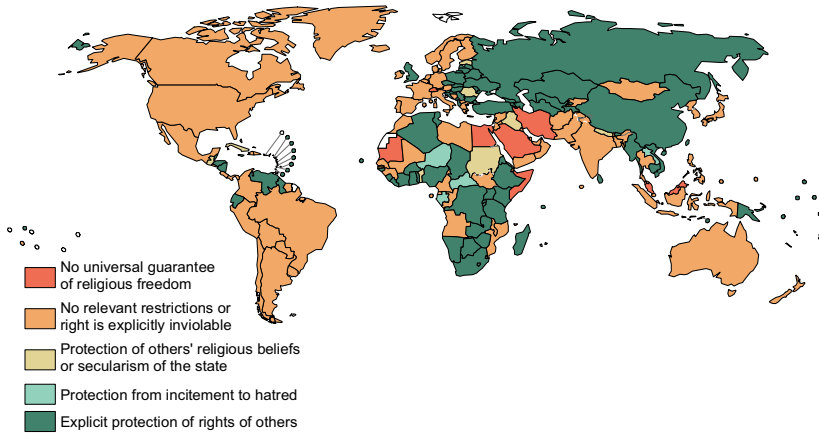
Only 23% of constitutions protect the right to change religion.

*Protections for the Rights of Others*

Constitutional provisions on freedom of religion take a range of approaches to distinguishing between belief and practice, and particularly whether restrictions on religious practice to protect others’ fundamental human rights are permissible. Religious conduct is protected from government interference, but subject to limitations: again, as the ICCPR establishes, countries can limit religiously motivated actions where such restrictions are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>49</sup> These limitations are designed to provide protection against religious practices that have discriminatory impacts or jeopardize equal access to education, healthcare, employment, and other universal human rights. Restrictions intended to protect the fundamental rights of others are both consistent with the ICCPR and essential to maintaining the balance between freedom of religion and equality.

Some constitutions make clear that religious conduct can be limited, even if belief is unqualified. For example, Greece’s constitution states: “Freedom of religious conscience is inviolable. . . . All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages.”<sup>50</sup> However, others leave this distinction more open-ended, which may engender case law challenging what “freedom of religion” truly encompasses. The United States, for instance, simply provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>51</sup> In one of its earliest “free exercise” cases, the U.S. Supreme Court upheld a federal law banning polygamy, finding that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”<sup>52</sup>

Only 46% of constitutions explicitly prevent freedom of religion from infringing on the rights and freedoms of others, including their right to equality (Map 15). For example, Antigua and Barbuda’s constitution states that like other rights, freedom of religion is “subject to such limitations . . . to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”<sup>53</sup> Much smaller numbers include language specifically prohibiting the use of religion to incite hatred or create social divisions, or allowing limitations on freedom of religion only to protect others’ religious beliefs.



MAP 15. Does the constitution explicitly protect freedom of religion from infringing on the rights of others?

While important restrictions, these narrowly worded provisions offer little protection against religious acts that violate fundamental rights more broadly.

#### HOW COUNTRIES CAN BE REPRESSIVE OF RELIGIOUS PRACTICE AND EQUAL RIGHTS

By contrast to the approaches above, some countries' constitutions clearly privilege one religion, or fail to provide essential safeguards for equality and dignity across religions. In these countries, the presence of even one provision explored in this section creates a significant barrier to full equality. At the same time, the severity of the risk to rights varies markedly: a number of countries include a range of elements that restrict freedom of religion simultaneously.

Altogether, 16% of constitutions include provisions limiting rights for minority religions. In some countries, freedom of religion is protected for the majority religion, but minority faiths and nonbelievers face restrictions. Countries' approaches to religion can also be discriminatory if they impose a specific set of religious beliefs on the population. Some countries apply the law of a designated religion directly through their constitutions; others require the top positions in government to be held by adherents of a specific religion. Similarly, some constitutions require that any laws passed in the country be consistent with religious law or principles—essentially elevating the religion to constitutional status. Finally, some constitutions allow religious law to supersede constitutional provisions either overall or in areas with clear implications for equality, such as family law.

Importantly, even if countries clearly privilege a specific religion in the law, this does not mean that other protections of individual rights are unimportant.

Explicit protections of the equal rights of women and other groups, for example, can provide tools for challenging discriminatory interpretations of religious law. Further, as demonstrated by a case from Malaysia detailed later in this chapter, protections for freedom of religion have made a difference even in countries with a religious government. However, this case also underscores the limits of freedom of religion alone, and the challenges to effectively practicing one's faith within a broader legal context that privileges a single religion.

*Constitutions That Allow Religion to Govern or  
Take Precedence over Equal Rights*

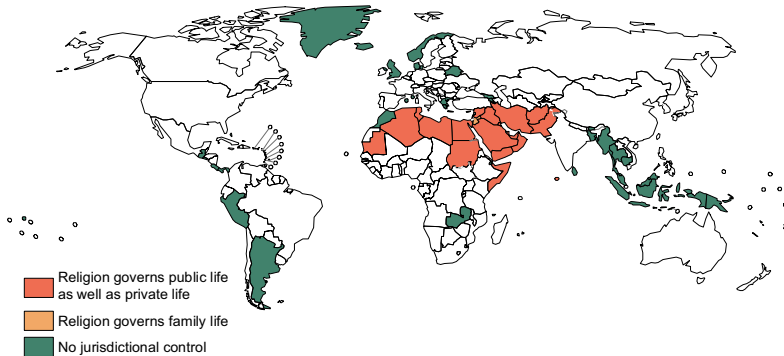
One way that countries express a clear preference for one religion over others is by designating a state religion. Some countries' constitutions specify that religious law governs public or private life, while others designate a particular religion as historically or culturally significant. While this latter approach may not carry explicit legal implications, it normatively privileges one religion in a way that would be unimaginable in application to race/ethnicity in the twenty-first century. Both of these approaches are inconsistent with a full commitment to equality. However, those countries where religion is the basis of governance, or is allowed to take precedence over constitutional equal rights, pose the graver threat to equality both for people of different faiths and for groups the religion discriminates against.

*Religion Governs Public Life*

Altogether, in 10% of countries, religion governs public life by requiring the executive to be a member of a specific religion and/or having religious law govern public as well as family life (see Map 16). In the Middle East and North Africa, 74% of countries provide a role for religious law in governance, more than any other region. For example, Kuwait's constitution provides: "The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation."<sup>54</sup> Further, many of these countries lack full protections for equal rights on the basis of gender, sexual orientation, and gender identity, which are common bases of discrimination in religious law. The combination of elevating religion to have legal authority and failing to protect all core aspects of equality poses significant risks to the rights of large populations.

*Religion Governs Family Life*

Religion governs family but not public life in an additional two constitutions that are affiliated with, or under the jurisdiction of, a specific religion. These include countries that establish religious family law courts. For example, Jordan's constitution establishes that "Islam is the religion of the state" and stipulates that Sharia Courts have exclusive jurisdiction in "matters of personal status of Muslims."<sup>55</sup> This approach differs from that of countries that have no state religion but are willing



MAP 16. What is the constitutional role of religion in countries where the state is affiliated or under the jurisdictional control of a specific religion?

to recognize religious law in family matters, while requiring conformance with the constitution; the example of South Africa's approach is discussed toward the end of this chapter. By contrast, in countries where religious law governs family life automatically, many people have no say in whether they are bound by religious law with respect to marriage, inheritance, and other issues.

#### *Religious Law Can Supersede Constitution, or Laws Cannot Contradict Religion*

Third, 4% of countries specify that religious law can prevail over some or all constitutional provisions. In Iran, Saudi Arabia, and Somalia, religious law can supersede the constitution in its entirety. For example, Saudi Arabia's constitution states: "The authority of the regime is derived from the holy qur'an and the prophet's sunnah which rule over this [the constitution] and all other state laws."<sup>56</sup>

In Ethiopia, Kenya, Malaysia, and the Maldives, religious law may prevail over constitutional provisions related to personal law, discrimination, or fundamental rights and freedoms. For example, Ethiopia's constitution states: "This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws."<sup>57</sup> In the Gambia, religious law is generally subordinate to the constitution, but can prevail over discrimination and personal law.

Finally, 5% of constitutions state that legislation cannot contradict religious law. For example, Afghanistan's constitution states: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."<sup>58</sup>

#### *The Risks for Equality of Making Religious Law Supreme*

Notably, even newer constitutions have tended to retain provisions making religious law supreme. Some scholars argue that this trend is not greatly concerning because constitutions with "Islamic supremacy clauses," such as that of Afghanistan, often also



include relatively substantial protections for civil or political rights, possibly reflecting the role of political coalitions and compromises in their drafting.<sup>59</sup> However, under Islamic supremacy clauses, these broader rights may fully extend only to a minority of the population. For example, if courts interpret these clauses to allow prohibitions on same-sex relationships and restrictions on women's movement, general constitutional guarantees of freedom of association do not truly apply to all. Likewise, if courts decide that Islamic supremacy clauses allow for preferential treatment of men in inheritance, constitutional guarantees of gender equality are incomplete.

These are not just hypothetical situations. For example, the Maldives's 2008 constitution includes extensive protections of fundamental rights, equality, and the right to privacy, but the country's 2014 penal code nevertheless criminalized homosexuality.<sup>60</sup> The legislation's stated purpose was "to establish a system of prohibitions and penalties to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests entitled to legal protection, including Islam." This justification aligns with the constitution's state religion provision, which establishes that Islam is a basis of law and that "[n]o law contrary to any tenet of Islam shall be enacted in the Maldives."<sup>61</sup>

Importantly, religion is not inherently at odds with equal rights, which arose in many different belief systems, philosophies, and religions around the world.<sup>62</sup> In fact, many cases of advocacy for greater equality have been partly based on religious beliefs. In Morocco, Muslim women's groups have led efforts to reform discriminatory laws by invoking Islamic principles.<sup>63</sup> In Southeast Asia, Buddhists led movements for democracy and equal human rights beginning in the 1980s.<sup>64</sup> And the U.S. civil rights movement was deeply informed by the faith-infused rhetoric of Dr. Martin Luther King, Jr., an ordained minister, and supported by Christians, Jews, and humanists, among others.<sup>65</sup> Yet, given the wide-ranging interpretations of doctrine and the history of discrimination, constitutional protections are essential to ensure every person's equal rights are respected.

#### *Constitutions That Limit Freedom of Religion for Specific Groups*

A fourth way that constitutions infringe on equality is by establishing discriminatory standards for religious expression. Some constitutions explicitly limit freedom of religion for particular groups. These provisions range in severity from those completely limiting certain groups' free exercise of religion to those sending exclusionary messages by targeting aspects of religious exercise.

#### *Broad Restrictions on Practice by Religious Minorities*

In some countries, discriminatory limits on freedom of religion take form as broad prohibitions on religious practice. For example, Iran's constitution provides: "Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal

affairs and religious education.”<sup>66</sup> All unnamed religious groups, such as Iran’s 300,000 Baha’is, have no constitutional right to practice their religion.<sup>67</sup> Moreover, the constitution accords “full respect” and “official status” only to followers of six specified schools of Islam.<sup>68</sup> Reports indicate widespread harassment, discrimination, and state violence against unprotected religious minorities in Iran,<sup>69</sup> while Muslims from other branches of Islam, including many Sunnis, face significant discrimination and marginalization in employment and political representation.<sup>70</sup> Evidence suggests even the named minority groups face discriminatory treatment, reflecting the impacts of the constitution’s clear privileging of a single belief system. These constitutional provisions limiting religious freedom are buttressed by laws criminalizing “enmity against God.”<sup>71</sup>

An example of differential treatment of groups comes from Liechtenstein. While not explicitly limiting the right to practice to specific religious minorities, the constitution draws a distinction in rights between adherents of the state religion and members of other faiths: “The Roman Catholic Church is the State Church and as such enjoys the full protection of the State; other confessions shall be entitled to practise their creeds and to hold religious services to the extent consistent with morality and public order.”<sup>72</sup> While Liechtenstein’s provision may embody a lesser degree of repression, evidence suggests that the country’s minority religions struggle for equality. For example, although 5.9% of Liechtenstein’s 39,000 residents are Muslims, there are no mosques in the country, and Muslims have faced difficulty in seeking to rent rooms for prayer.<sup>73</sup>

### *Targeting Proselytism*

A few countries’ constitutions ban proselytizing by specific religious groups. For example, Somalia’s constitution proclaims: “No religion other than Islam can be propagated in the Federal Republic of Somalia.”<sup>74</sup> While blanket limits on coercive forms of proselytizing have been deemed justified by regional and international tribunals,<sup>75</sup> selective limits that target only particular religions and ban noncoercive proselytizing are discriminatory.

### *Exclusionary Provisions*

Finally, some constitutions include provisions that do not target religious practice as directly, but send a message of exclusion of particular religions (Table 2). For example, under Switzerland’s constitution, freedom of belief is guaranteed, but “the construction of minarets [the mosque towers from which Muslims are called to prayer] is prohibited.”<sup>76</sup> This provision resulted from a 2009 referendum in which 57.5% of voters supported the amendment. At the time, there were only four minarets across the country. Responding to the vote, Farhad Afshar, director of the Coordination of Islamic Organizations in Switzerland, remarked: “Most painful for us is not the minaret ban, but the symbol sent by this vote. Muslims do not feel accepted as a religious community.”<sup>77</sup>

TABLE 2: How countries can be repressive of religious practice and equal rights

Approach 1: Religion Governs or Takes Precedence over Equal Rights	Approach 2: Religious Law Can Supersede Constitution	Approach 3: Laws Cannot Contradict Religion	Approach 4: Constitutions Limit Freedom of Religion for Specific Groups				
<b>Role of religion in countries where state is affiliated or under the jurisdictional control of a specific religion</b>	<b>Status of religious law compared to the constitution</b>	<b>Status of religious law compared to legislation</b>	<b>Limitations on freedom of religion for specific groups</b>				
Religion governs public life	10%	1.5%	Religious law is a normative source	Broad restrictions on minority religions	1.5%		
Religion governs family life	1%	2%	Generally not explicit, but can supersede some constitutional provisions	Legislation cannot contradict religious law	5%	Proselytizing banned for specific religions	1%
No jurisdictional control	20%	0.5%	Generally subordinate, but can supersede some constitutional provisions			Exclusion of particular religions	0.5%
No established state religion	69%						
<b>Of the 20 countries that give religion a role in governance</b>							
No guarantee of gender equality	3						
Religious law supreme	4						
No protection of sexual orientation and gender identity	20						

31 (16%) countries include provisions that limit rights for minority religions.

*The Importance of Other Constitutional Protections in the Context of Religious Government*

While giving one religion a role in governance inherently conflicts with full equality across religions and beliefs, other provisions within a constitution can nevertheless provide important and impactful safeguards for the equal rights of all. Specifically, protections for freedom of religion and comprehensive guarantees of nondiscrimination in countries with state religions can provide important foundations for ensuring the rights of religious minorities and challenging discrimination that affects other groups.

As explored in the preceding section, the establishment of a state religion doubtless creates a significant threat to freedom of religion. Moreover, the greater the role of a state religion as a source of both norms and law, the greater the likelihood that religious minorities will face barriers to observing their faiths, and that people without religious beliefs will face pressure to adhere to religious doctrine.

Still, even as full religious freedom may be unattainable in countries with a state religion, guarantees of freedom of religion remain essential in these contexts. International treaties uphold this view by clearly establishing that governments must protect religious minorities' rights and religious freedom regardless of the state-religion relationship. For example, as affirmed by the U.N. Human Rights Committee in a comment on the ICCPR: "The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 [freedom of religion] and 27 [rights of religious minorities], nor in any discrimination against adherents of other religions or non-believers."<sup>78</sup>

Malaysia provides one example of these practical implications. Under Article 3 of Malaysia's constitution, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."<sup>79</sup> Article 11 further provides: "Every person has the right to profess and practise his religion."<sup>80</sup> According to census figures, 61% of Malaysians identify as Muslims, while 20% are Buddhists and 9% are Christians.<sup>81</sup>

Malaysia is also one of a few countries that include religion on national ID cards. In 2015, Azmi Mohamad Azam Shah, who as an eight-year-old converted to Islam with his family, sought to renounce Islam, convert to Christianity, and change his name and religious affiliation on his ID card accordingly. Shah, who now goes by the name Roneey Anak Rebit, was told by the National Registration Department that he would need to bring a letter of release from Islam from the Syariah Court, which administers Islamic law. However, the Syariah Court refused to provide the letter, claiming lack of jurisdiction since Rebit was no longer a Muslim.

Rebit then challenged the National Registration Department's requirements within the civil legal system. Before the Kuching High Court, Rebit argued that

he should be able to change his name and religion without the Syariah Court's approval, by nature of his constitutional right to freedom of religion. In a landmark 2016 decision, High Court judge Datuk Yew Jen Kie agreed, citing the constitution's protections in Article 11. She commented on the decision to the press: "He does not need a Syariah Court order to release him from Islam because freedom of religion is his constitutional right and only he can exercise that right."<sup>82</sup> In November 2016, Rebit received his new ID card.<sup>83</sup>

A range of religious groups welcomed the decision. The Association of Churches in Sarawak urged the government to "uphold the constitutional rights and fundamental liberties accorded by the federal constitution to all citizens of Malaysia," while Sisters in Islam noted approvingly that "[t]his judgment reaffirms the supremacy of the Federal Constitution, which under Article 11 defends every Malaysian citizen's right to freedom of religion."<sup>84</sup>

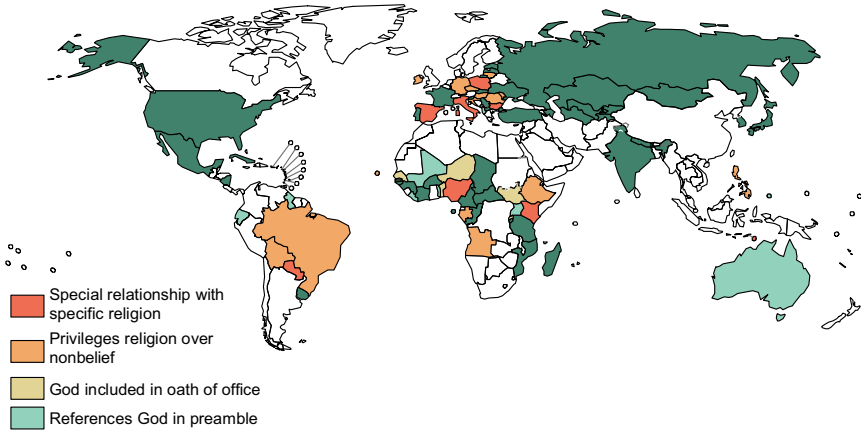
Strong protections against discrimination on other grounds can also make a difference in countries with a state religion. One example comes from Tunisia.

In 2014, Tunisia adopted a new constitution, drafted by a constituent assembly that included both secular groups and members of the country's religious political party. The constitution establishes that Tunisia's "religion is Islam" and restricts eligibility for the presidency to Muslims (though not elevating religious law above the constitution); however, it also guarantees freedom of religion and creates strong protections for gender equality. Beyond explicitly committing to equal rights for men and women, the Tunisian Constitution "unequivocally affirms gender equality in the workplace, the right to adequate working conditions, and a fair wage for both sexes," and obliges the state to promote women's equal political representation and work toward eradicating violence against women.<sup>85</sup> Responding to input from civil society organizations, the final draft omitted earlier-proposed references to men and women as "complementary" rather than equal.<sup>86</sup>

Since its enactment, the constitution has provided a foundation for further change: in 2017, President Beji Caid Essebsi launched the Individual Freedoms and Equality Committee (COLIBE), tasked with ensuring consistency between Tunisia's laws and new constitution.<sup>87</sup> Also in 2017, citing the constitution's equal rights provision, Essebsi called for gender equality in the inheritance law and lifted a 44-year ban on Muslim Tunisian women marrying men from other religions, which had imposed no equivalent restrictions on Muslim men.<sup>88</sup> More recently, COLIBE issued a report recommending gender equality in inheritance, the right to confer citizenship, and the right to pass on one's last name to children.<sup>89</sup>

#### HOW CONSTITUTIONS CAN SET UNEQUAL NORMS

The third broad group of constitutions includes those referenced throughout the preceding sections, which do not go so far as to make religion the source of



MAP 17. How do countries that identify in their constitution as secular treat religion?

law, but do give some special recognition to a particular religion or religious views. These types of provisions may be historical holdovers or recently negotiated compromises. However, especially in an era of increased migration and growing religious diversity, recognizing ways that constitutions subtly privilege a particular set of religious beliefs over others is important for identifying the full scope of barriers to equal treatment (Table 3). These provisions may affect not only the exercise of rights, but also the cultural norms shaping whether religious minorities are welcomed and accepted. Already, 27% of people live in countries where they are religious minorities, and this figure will likely increase in the coming decades.<sup>90</sup>

Altogether, 57% of constitutions include provisions communicating a preference for one religion over others, or for religion generally over nonbelief. In some of these countries, the constitution designates a “state religion” but does not endow that religion with legal authority, or acknowledges a history or special relationship with a specific religion. For example, the preamble of the Bahamas’ constitution references “an abiding respect for Christian values and the Rule of Law.”<sup>91</sup>

Self-identified secular countries also commonly include a role for religion. Indeed, only around half of the constitutions that establish state secularism or separation of religion and state fully reflect those very principles in their text (Map 17). In the remainder, the constitution outlines a special relationship with a specific religion, privileges religion over nonbelief, requires leaders to swear on God’s name in the oath of office, or references God in the preamble. This also includes one country (Kenya) that provides for Islamic courts.

For example, Bulgaria’s constitution states: “Religious institutions shall be separate from the state. . . . Eastern Orthodox Christianity shall be considered the

TABLE 3: How countries can set unequal norms among religions or between religion and nonbelief

Approach 1: State Religion without Legal Authority	Approach 2: "Secular" Constitutions with a Role for Religion	Approach 3: Broadly Support Religious Practice with No Commitment to Secularism	
<b>Role of religion in countries where state is affiliated with or under the jurisdictional control of a specific religion</b>	<b>Constitutional treatment of religion in countries that constitutionally identify as "secular"</b>	<b>Constitutional treatment of relationship between state and religion</b>	
Religion governs public life	20 (10%) Not explicitly secular	113 (59%) Affiliated with or under the jurisdictional control of a specific religion	60 (31%)
Religion governs family life	2 (1%) Special relationship with a specific religion	8 (4%) Broadly supports religious practice	34 (18%)
No jurisdictional control	38 (20%) Privileges religion over nonbelief	15 (8%) Silent on religion	19 (10%)
No established state religion	133 (69%) God included in oath of office References God in preamble No role for religion	5 (3%) 10 (5%) 42 (22%) Explicitly secular	80 (41%)

**110 (57%) countries include provisions that set unequal norms.**

traditional religion in the Republic of Bulgaria.” Croatia’s constitution commits to supporting religious groups without specifying equal support for non-religious groups with similar goals:

All religious communities shall be equal before the law and clearly separate from the state.

Religious communities shall be free, in compliance with law, to publicly conduct religious services, open schools, academies or other institutions, and welfare and charitable organizations and to manage them, and they shall enjoy the protection and assistance of the state in their activities.<sup>92</sup>

Finally, 18% of constitutions include provisions or language that support religious practice, but do not specify a particular religion. In most cases, the preamble includes references to God and the constitution does not explicitly address the relationship between the state and religion. This includes one country (Switzerland) that leaves the question of separation between state and religion to subnational units.

#### THE COMPLEXITY AND IMPORTANCE OF ADDRESSING RELIGION AROUND THE WORLD

As this analysis reveals, few countries have constitutional provisions that comprehensively protect: (1) freedom of religion, belief, and nonbelief, with a safeguard for the rights of others; (2) nondiscrimination on the basis of religion or belief; and (3) the separation of religion and government. Many of the most significant constitutional restrictions on equality are found in the Middle East and North Africa, a region including 14 of the world’s 20 countries with a state religion governing public and private life. Nonetheless, discriminatory restrictions on religious freedom cut across countries in Europe and elsewhere, including Switzerland and Liechtenstein.

Furthermore, while a substantial number of countries identify as “secular,” this designation belies notable variation in national approaches. Nearly half of these countries include references to either a specific religion or God, which implicitly endorses monotheistic faiths. Consequently, even among constitutions that include commitments to secularism, many cannot assert “neutrality” on religion’s role in society. Additionally, this variation in how countries define “secular” in the text is mirrored by variation in courts’ application of the concept.<sup>93</sup>

As countries revise existing constitutions or draft new ones, their treatment of equal rights across religion and belief is an important area for continued review and advancement. While there are various constitutional approaches to protecting equality across religions, guaranteeing freedom of religion and the separation of religion and government are two foundational elements.

Further, there is ample reason to believe this approach works, if we measure effectiveness by the lack of religious discrimination and the presence of



flourishing religious practice. A series of studies across the world's constitutions provide interesting insights into how religion provisions shape exclusionary practice and equality for people of all faiths and beliefs. They first examine countries' religious legislation, including whether they impose restrictions on interfaith marriages, fund religion or require religious education in schools, or have religious appointments to government offices. They then assess the relationship between constitutional provisions concerning religion and the existence of these types of religious laws.

In short, when constitutions guarantee freedom of religion, there is less religious discrimination by the government in the form of religious legislation. Similarly, when constitutions guarantee separation of religion and state or prohibit religious discrimination, countries are less likely to legally privilege or burden specific religions.<sup>94</sup> Meanwhile, countries with an official religion are much likelier to have religious discrimination in the law. This is true overall. However, the countries where this most commonly occurs, likely because of the larger role given to religious law, are Muslim-majority countries.<sup>95</sup>

Most interestingly, religious practice flourishes in countries with more religious freedom. Both restrictions on religious freedom *and* state religions negatively impact the percent of the population that is regularly practicing their religion. Those countries that guarantee freedom of religion and have no state religion saw religious practice grow in the years following their constitutions' passage.<sup>96</sup>

#### IMPLEMENTING RELIGIOUS FREEDOMS IN THE COURTS

As explored previously, constitutional text can provide a starting point for guaranteeing that all people have an equal right to practice their religion, while ensuring that religious practices do not undermine others' fundamental rights. However, even compared to other complex topics explored in this book, freedom of religion presents unique challenges with respect to ensuring consistent rulings across courts. Courts are tasked with continually defining and redefining the line between freedom *of* religion and freedom *from* religion. Is allowing an Amish family to homeschool their 14-year-old child protecting their freedom of religion—or infringing on the child's right to education?<sup>97</sup> Can a private business choose to serve only those clients whose views and relationships align with the owner's religious beliefs?<sup>98</sup> Does a statute prohibiting stores from selling goods on Sundays infringe business owners' religious freedom?<sup>99</sup> Can someone be convicted for refusing military service based on their religious beliefs?<sup>100</sup>

These are among the many questions about religious freedom that have reached countries' highest courts. Yet although constitutional texts rarely provide crystal-clear answers to cases presenting nuanced sets of facts, two factors that may influence decision-making are the extent to which constitutions protect other

fundamental rights, and whether constitutions clearly state that equal rights take precedence. Specifically, the strength of other equality provisions in a country's constitution—such as whether it unequivocally protects equal rights regardless of sexual orientation—may affect how courts interpret religious freedom in a given set of circumstances. Similarly, the strength of protections of other groups' equal rights, including those of women, can influence how judges rule when religious practices conflict with equality.

These relationships among rights are explored further below, through cases from the United States and South Africa. As emphasized throughout this chapter, international law is clear that the exercise of religion, while an important freedom, should not infringe on others' rights. Yet to fully understand this principle's implications—and identify strategies to support its realization—it is important to examine some common manifestations of this conflict in practice. At the national level, there are two common and significant ways religion can threaten others' fundamental equal rights: first, through the invocation of freedom of religion as a justification to discriminate, including by private businesses and employers; and, second, through constitutions that allow religious law to supersede equal rights provisions.

#### *Freedom of Religion, not Freedom to Discriminate*

As previously noted, nearly half of countries (46%) explicitly acknowledge that some restrictions may be placed on religious conduct to protect people's fundamental rights and freedoms; other countries apply similar analyses through the courts. However, the extent to which equal rights take precedence over religiously motivated discrimination often hinges on several factors and aspects of the country's constitutional system. These include whether the discrimination occurred in a public or private setting, who engaged in discrimination, and whether the constitution explicitly protects against discrimination for the affected group.

In recent years, this tension has emerged with respect to sexual orientation in a number of countries. A range of courts have evaluated constitutional challenges involving businesses or service providers that decline to serve lesbian or gay clients, arguing that doing so would conflict with their religious freedom. An example from the United States highlights the impact of lacking clear constitutional protections for marginalized groups and shifting norms on how courts negotiate the balance between religious freedom and equal rights.

In Colorado, an antidiscrimination law prohibited businesses serving the public from discriminating on the basis of sexual orientation. However, citing his Christian beliefs, a bakery owner refused to make a cake for a same-sex couple's wedding. According to the baker, being compelled to make the cake would require him to express support for gay marriage, violating his First Amendment rights of freedom of religion and expression.

In 2018, the Supreme Court ruled 7–2 in favor of the baker in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>101</sup> The legal basis of the decision was narrow: rather than establishing a new constitutional precedent on freedom of religion versus equal rights, the Court’s decision rested on its finding that the Colorado Civil Rights Commission, which had ruled against the baker after the couple filed a complaint, had not acted with “religious neutrality” in assessing the baker’s objections.

Perhaps more remarkable, however, was the amicus brief submitted by the U.S. Department of Justice (DOJ), which underscored how explicit protections against discrimination in constitutional texts and jurisprudence may influence whether freedom of religion takes precedence over equal rights. In urging the Court to decide in favor of the baker, the DOJ drew a distinction between discrimination by businesses based on race and discrimination based on sexual orientation. The brief argued that racial discrimination carries greater weight against the First Amendment than sexual orientation discrimination, partly because racial discrimination is subject to “strict scrutiny” constitutional review while sexual orientation discrimination is not. The government further claimed that private racial discrimination “violates deeply and widely accepted views of elementary justice,” whereas “opposition to same-sex marriage has ‘long been held—and continues to be held—in good faith by reasonable and sincere people.’”<sup>102</sup> In other words, the government’s top lawyers invoked both inadequate protections in constitutional law and discriminatory social norms to justify continued discrimination against same-sex couples.

This argument aligns with past cases that have excused sexual orientation discrimination on the basis of First Amendment rights, but have not accepted the same rationale for racial discrimination.<sup>103</sup> Given these precedents, it seems reasonable to infer that the stronger the Court’s rulings have been historically against a particular type of discrimination, the likelier it is the Court will find that equal rights prevail over religiously motivated exclusion. Constitutionally speaking, LGBT+ rights are a relatively new topic, at least in comparison to racial discrimination—and as the DOJ itself noted, there remains less nationwide consensus about full equality. It is for this reason that explicit protections against discrimination on the basis of sexual orientation and gender identity (SOGI), as discussed in chapter 6, are so essential.

### *Pluralistic Legal Systems*

Pluralistic legal systems are those that recognize the authority of more than one type of law.<sup>104</sup> Two major types of pluralistic legal systems are those recognizing customary law, and those recognizing religious law. Some countries fall within both categories. Generally, however, most countries that recognize customary law are former British and French colonies in Africa and Asia;<sup>105</sup> in many of these countries, customary law was unwritten before colonialism, but certain aspects became codified by colonial officials, who often consulted with just a

small number of male elders.<sup>106</sup> Nearly all countries that recognize religious law are Muslim-majority.<sup>107</sup>

As discussed earlier, international law indicates that any pluralistic system should still honor fundamental human rights. There is no reason to believe that countries cannot guarantee equality while simultaneously enabling the full exercise of religious freedoms. In 2017, a group of religious leaders from around the world, representing various faiths, convened to issue a declaration affirming their “deep conviction that our respective religions and beliefs share a common commitment to upholding the dignity and the equal worth of all human beings,” which included references to all the foundational religious texts.<sup>108</sup> Among the declaration’s 18 commitments are pledges to “promote constructive engagement on the understanding of religious texts,” “ensure non-discrimination and gender equality,” “stand up for the rights of all persons belonging to minorities,” and “monitor interpretations, determinations or other religious views that manifestly conflict with universal human rights norms and standards.”<sup>109</sup>

Approaches vary among countries with constitutionally established pluralistic systems. In two such countries, South Africa and Cyprus, religious law is explicitly subordinate to the constitution. South Africa’s constitution provides that legislation may recognize “marriages concluded under any tradition, or a system of religious, personal or family law [and] systems of personal and family law under any tradition, or adhered to by persons professing a particular religion,” but that this recognition “must be consistent with . . . the Constitution.”<sup>110</sup> In Cyprus, family law is “subject to the provisions of this Constitution.”<sup>111</sup> However, in 13% of countries, religious laws can take precedence over the constitution and/or laws cannot be enacted if they conflict with religious law or norms, placing equality and other fundamental rights at risk.

A significant case from South Africa’s Constitutional Court illustrates the effect of language guaranteeing that constitutional equal rights take precedence. When Juleiga Daniels’s husband Mogamat died in 1994, the couple had been sharing a small home in a Cape Town suburb for 17 years.<sup>112</sup> Juleiga had lived there even longer, having shared the home with her first husband beginning in 1969. When Mogamat died without a will, a judicial officer was appointed to administer his estate.<sup>113</sup> However, noting that her marriage had been conducted under Muslim rites, the officer told Juleiga she had no entitlement to the property.<sup>114</sup>

Because Juleiga and Mogamat had been married under Islamic law, their union was not formally recognized by the state. Therefore, Juleiga was not covered by the legal benefits and protections established by the country’s Marriage Act. Consequently, after Mogamat’s death, Juleiga suddenly found herself facing eviction, completely excluded from the inheritance rights typically guaranteed to South African wives.

Juleiga’s loss of her property rights resulted from how the law treated both her religion and her gender. When Juleiga and Mogamat married in 1977, they

provided a copy of their marriage certificate to the city, which then transferred the tenancy of Juleiga's home to Mogamat, considering him the "principal breadwinner." In 1990, Mogamat entered into an agreement with the property owner to purchase the home. Although Juleiga contributed to the purchase price and co-signed the deed of sale, after Mogamat died, the property was transferred to his estate—and Juleiga was told she had no claim to it since she was not legally his "surviving spouse."

Juleiga decided to challenge this interpretation, arguing that her exclusion from the laws on inheritance and maintenance was discriminatory on the basis of gender, religion, and marital status. In 2003, her case reached the Constitutional Court, where Justice Albie Sachs walked through a careful analysis of the facts and the applicable law. Justice Sachs first examined the plain meaning of the term "spouse," finding: "The word 'spouse' in its ordinary meaning includes parties to a Muslim marriage. . . . It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word 'spouse' than to include them. . . . Such interpretation owed more to the artifice of prejudice than to the dictates of the English language."<sup>15</sup>

Justice Sachs then turned to the intent of both the law and the constitution. He noted that the constitution aims to achieve "substantive equality between men and women," although "[t]he reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property."<sup>16</sup> Regarding the laws on inheritance and maintenance, Justice Sachs proclaimed: "The central question is not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers." Using this analytical frame, the Court found that the term "spouse" must be interpreted to include a "party to a monogamous Muslim marriage." Juleiga, whose marriage to Mogamat was always monogamous, was thus entitled to stay in her home.<sup>17</sup>

In so doing, the Court affirmed that the constitution's protection of equal rights took precedence over conflicting religious laws. As a concurring opinion from Justice Dikgang Moseneke observed, "[t]he tenets of our Constitution promises religious voluntarism, diversity and independence within the context of the supremacy of the Constitution."<sup>18</sup> Further, the decision made clear that under the constitution's clearly articulated guarantee of gender equality, Muslim women share the same inheritance rights as women who marry according to other religious traditions.

#### CONCLUSION: ACHIEVING THE BALANCE

Guarantees of the right to freedom of religion, broadly defined, are nearly universal across constitutions adopted in the past 60 years, and protections against

religious discrimination have steadily increased. Yet to truly understand religious freedom and equality in a given country, we cannot consider this language alone. Many countries that guarantee freedom of religion also privilege one religion in governance, effectively undermining full equality across religions, beliefs, and nonbeliefs. Likewise, even if they do not specify that religion governs public or private life, a range of countries' constitutions more subtly support one religion over others, potentially impeding the development of norms embracing the full inclusion of all.

Similarly, even countries that identify as “secular” take a range of approaches to religion that do not always treat all religions or beliefs equally. Some of this variation is evident in the constitutional text; other points of divergence emerge in how courts interpret secularism. This complexity illustrates how taking a “neutral” stance to religion—one that is “truly *areligious* and that neither favors nor disadvantages any religion or the non-religious”<sup>119</sup>—is a challenge on its own, and the meaning of “neutrality” will likely remain contentious as religious demographics continue to shift with large-scale migration.

Nevertheless, the principles initially established in international law can provide a valuable framework for resolving even complex cases, and should provide a foundation for further constitutional reform. Global agreements are clear that states cannot discriminate on the basis of religion, nor can religion be invoked as a basis for discrimination on other grounds. Moreover, while freedom of religion is central, so too is the freedom to denounce, change, or forego religion entirely, and international law recognizes that these are fundamentally personal choices. To promote equality, constitution drafters and courts must continue returning to and actively advancing these principles. Further, strengthening other rights in constitutions—such as rights to health, education, substantive gender equality, and nondiscrimination on the basis of SOGI—would provide a stronger constitutional basis for ensuring that freedom of religion does not take precedence over equal rights.

## Moving Forward in the Face of Backlash

### *Equal Rights Regardless of Sexual Orientation and Gender Identity*

The extent of legalized discrimination and violence around the world against lesbian, gay, bisexual, and transgender individuals and other sexual and gender minorities (LGBT+)¹ remains staggering. As of 2019, 68 countries had criminalized consensual sexual activity between adults of the same sex, nearly all of which provide for some length of imprisonment.² In 32 countries, the maximum prison sentence for same-sex relationships ranges from 10 years to life, while the laws of 8 countries allow for the death penalty.³

The treatment of LGBT+ individuals is also one of the few areas in which a significant number of countries are increasing rather than dismantling discrimination in the law. Indeed, while many countries' criminalization laws are historical holdovers, others were enacted much more recently, such as Nigeria's "Same-Sex Marriage Prohibition Act," adopted in 2013, and the Maldives's 2014 Criminal Code.⁴

Discrimination affects the lives of LGBT+ individuals and their families around the world. Across Europe, 13% of LGBT respondents to a 2012 survey reported that they had experienced discrimination when applying for jobs in the previous year, including 30% of transgender respondents; of those who were working, 19% had personally experienced discrimination, while 67% reported witnessing negative

treatment toward a colleague perceived to be LGBT.<sup>5</sup> Similarly, in a survey of the LGBTI population in China, 56% reported experiencing discrimination within their families, as did 40% in education and 21% in the workplace.<sup>6</sup> According to the World Values Survey, which asks respondents across 58 countries for their views on important social issues, 54% of adults in the average country surveyed would not want a gay person as their neighbor.<sup>7</sup> This discrimination—whether by the state, private employers, or others in one’s community—can have devastating effects on home and personal life, educational and career opportunities, and leadership in public and private spheres.

Legal protections from discrimination on the basis of sexual orientation and gender identity (SOGI) lag far behind protections against other common grounds of discrimination, like race and religion. Yet in countries where legal protections are passed and enforced, the impact can be dramatic, even in the face of the backlash that can follow progress.

#### THE PACE AND POSSIBILITY OF CHANGE

In this chapter, we examine what can be done to ensure the removal of discriminatory laws and the enactment of equal rights for those in the LGBT+ community. For effective change to happen, which needs to change first: norms or laws?

We believe the answer is that both need to change, but either can change first.

In every area of profound bias, markedly reducing discrimination requires changes both in legal rights and in people’s beliefs. Without legal protections from discrimination, marginalized populations’ access to education, work, and civic and community life can be impaired. Even when the views of the majority of the population do change, without legal protections, people have few tools to use against institutions that choose to discriminate. But likewise, laws alone are rarely enough. While constitutional equal rights can help protect against discriminatory laws and reduce systematic institutional discrimination, constitutional equal rights are unlikely to effectively change the behavior of a country’s population as a whole unless they contribute to changing people’s beliefs.

While it may be self-evident that both equal legal rights and the public’s beliefs about equality need to change, it has been less clear which has to change first. Some have argued that laws never change before social values change, while others have argued that legal change is a powerful force in itself for changing communities’ beliefs. The evidence is clear and compelling. There are strong examples of countries that enacted laws and expanded constitutional protections—both through new constitutions and through court interpretations—well in advance of popular support for equal rights, but subsequently saw marked shifts in public opinion in favor of equality. There are also examples of countries where social movements led to widespread change in public beliefs and legal rights followed.



*Ireland: Broad Public Support Leads to Stronger Rights*

Ireland provides an example of a country where norms changed first. In 2015, Ireland became the first country in the world to legalize same-sex marriage through a popular vote, when 62% voted in favor of a constitutional amendment via referendum.<sup>8</sup> This broad popular support for marriage equality reflected a remarkable norm shift in a country where 83% of citizens identify as Catholic and where Catholic doctrine had been interpreted as opposing same-sex marriage.<sup>9</sup> Many Catholics who voted in favor of the amendment, including clergy members, described support for marriage equality as a “natural outgrowth of their faith” rather than something that conflicted with it, signaling how even long-standing religious norms and traditions are often less rigid than presumed.<sup>10</sup>

*South Africa: A Transformative Constitution Precedes Shifts in Public Opinion*

The opposite was true in South Africa, which adopted a new constitution guaranteeing equal rights well before the public widely accepted the equality of LGBT+ individuals. The 1996 constitution grew out of widespread movements for equality, dignity, and freedom in post-apartheid South Africa. Following many decades of among the worst subjugation on the basis of race, the post-apartheid constitutional congress displayed a profound commitment to ensuring all people were treated equally.

A wide range of marginalized groups, including LGBT+ advocacy groups, had a voice in the drafting of the 1996 constitution.<sup>11</sup> After a few key activists worked to get an explicit protection of equal rights on the basis of sexual orientation included in the 1993 interim constitution, an umbrella organization of 78 LGBT+ organizations, the National Coalition for Gay and Lesbian Equality (NCGLE), formed to participate in the work of the Constitutional Assembly as a united force and ensure the language was preserved in the final draft.<sup>12</sup> As a result of their organizing, the assembly received 7,032 submissions in favor of retaining the explicit protection, and just 564 opposing it.<sup>13</sup> The NCGLE focused their advocacy on the core principles of equality and nondiscrimination, rather than specific rights like marriage, and drew parallels between racial discrimination and discrimination on the basis of sexual orientation.<sup>14</sup> Their efforts paid off when the new constitution was enacted in 1996, which represented a major victory for both the LGBT+ community in South Africa and LGBT+ movements globally.

Nearly two decades after the post-apartheid constitution prohibited discrimination on the basis of sexual orientation, surveys reveal that only one-third of South Africans believe that society should “accept homosexuality.”<sup>15</sup> However, there has been progress over time. Between 2012 (the first year the question was asked) and 2015, the share of South Africans saying they “strongly agreed” with same-sex marriage increased from 1.5% to 9.9%, while the share saying they “strongly disagreed”

decreased from 48.5% to 23.4%.<sup>16</sup> Moreover, in a survey of 39 countries by the Pew Research Center, acceptance of same-sex relationships in South Africa, the only African nation to explicitly guarantee equal rights on the basis of sexual orientation in its constitution, was 24 to 31 percentage points higher than throughout the five other African countries surveyed.<sup>17</sup>

### *Working in Coalitions to Advance Equal Rights*

In South Africa, one key strategy for advancing the constitutional provision on sexual orientation was working in partnership with other groups seeking to advance equal rights, and identifying both common goals and shared experiences. In addition to inviting LGBT+ groups to directly participate in the constitution's drafting, the South African process recognized the interconnectedness of struggles for equal rights across groups and across history, as emphasized by the country's Constitutional Court itself: "In the judges' conceptualization, the struggle for equality for LGBT persons flowed from the struggle against racism."<sup>18</sup>

Building alliances with other marginalized groups has also been important in countries that enacted equal rights by popular vote. For example, in Ecuador during the early 2000s, LGBT+ rights groups partnered with the country's burgeoning feminist and indigenous movements to advocate for more comprehensive protections of equal rights in the new constitution, including an explicit prohibition of discrimination on the basis of both sexual orientation and gender identity.<sup>19</sup> The 2008 constitution—which, in addition to establishing equal rights across SOGI, strengthened rights to education and pensions for informal sector workers—was approved by popular vote, with 64% voting in favor.<sup>20</sup>

### *The Broader Role of Constitutional Rights and Rulings in Shifting Views on Equality*

LGBT+ individuals are not the only group for whom constitutional change and the recognition of equal legal rights have preceded shifts in popular views of equality. For example, just 20% of Americans approved of interracial marriage the year after its prohibition was found unconstitutional in *Loving v. Virginia*, and this figure did not pass 50% for nearly four decades.<sup>21</sup> In India, the 1950 independence constitution abolished "untouchability" and prohibited caste discrimination at a time when the caste system was still deeply entrenched, as a way to accelerate the shift toward abandoning caste distinctions.<sup>22</sup> And in Tunisia, the 2014 constitution guaranteed women's and men's equal opportunities in all domains, even as women's labor force participation rates remained low and 86% of respondents to a 2012 poll felt that men should have priority access to employment when jobs were scarce.<sup>23</sup> Nevertheless, the inclusion of this language signaled a state commitment to shifting norms to enable all people to have equal chances regardless of gender.

HOW CONSTITUTIONAL EQUAL RIGHTS  
MAKE A DIFFERENCE

As discussed in previous chapters, constitutional equal rights guarantees can have important effects on both public and private life. First, constitutions can be used to ensure that all legislation in a country is consistent with equal rights. Second, they can ensure that the application and implementation of a country's laws is done in a way that upholds equal rights and opportunities. Third, they can ensure individuals are treated equally by the private institutions that shape many aspects of our lives. And fourth, they can ensure the equal application of laws that shape interpersonal relations.

Constitutional equal rights for LGBT+ individuals have played important roles in each area. A case from South Africa illustrates how guaranteeing equal rights in constitutions can ensure that LGBT+ citizens receive equal treatment from the government, as well as equal recognition of private relationships that are shaped by government rules.

*South Africa: Protecting Equal Rights of Same-Sex Couples in  
Immigration Law*

Under the Aliens Control Act, spouses of South Africans were supported in applying for permanent residence in the late 1990s. Same-sex couples, however, were unable to legally marry and received no such benefit. In 1999, six couples, each comprising one South African national and one noncitizen, united to challenge the discriminatory barrier in court. Each pair had been in a committed relationship for at least a year, some for longer than four years. Some owned homes together, while others served as each other's beneficiaries in their wills. One couple had invited friends and family to a gathering to celebrate and formally acknowledge their partnership. However, the law did not allow these couples to marry. Unable to access the support provided to heterosexual spouses who sought to live together in South Africa, at least two of the South African nationals were planning to emigrate if their partners could not get permanent legal residence.

The 12 plaintiffs joined with the National Coalition for Gay and Lesbian Equality and the Commission for Gender Equality to challenge the constitutionality of Section 25(5) of the act, the provision that granted preferential treatment to legal spouses. Their challenge was based on Section 9 of the South African Constitution, which prohibits direct and indirect discrimination on the basis of both sexual orientation and marital status.

In court, the Ministry of Home Affairs argued that it had broad discretion to set immigration policy, and that the distinction made in the Aliens Control Act was based on "non-spousal" grounds, rather than sexual orientation or marital status.<sup>24</sup> Alternatively, they argued, even if it were a marital status distinction, "there was nothing that prevented gays and lesbians from contracting marriages with

persons of the opposite sex, thus becoming and acquiring spouses and accordingly being entitled to the spousal benefits under section 25(5).<sup>25</sup>

The Constitutional Court, however, dismissed this claim, finding: “The respondents’ submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.” Instead, the Court found, the challenged provision amounted to “overlapping or intersecting discrimination on the grounds of sexual orientation and marital status.”<sup>26</sup> Because marriage was a prerequisite for the immigration preference, there was marital status discrimination—and because marriage was only available to heterosexual couples, there was sexual orientation discrimination. Further, the Court found that excluding same-sex couples from the immigration preferences accorded to legal spouses was a violation of their constitutional right to dignity, and noted that “the denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways.”<sup>27</sup>

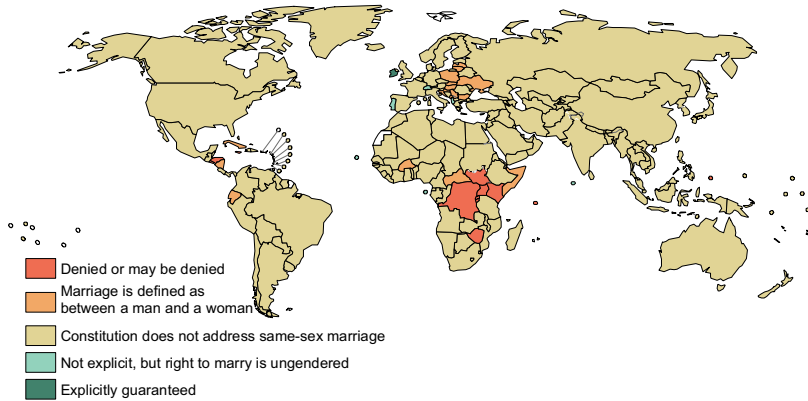
To implement this finding, the Court ordered that the words “or partner, in a permanent same-sex life partnership” be “read in” after the word “spouse” in Section 25(5) of the Aliens Control Act.<sup>28</sup> A few years after the decision, the Immigration Act of 2002, which was enacted to supplant the Aliens Control Act, explicitly specified that the word “spouse” also applied to those in permanent same-sex relationships.<sup>29</sup>

The *Home Affairs* case proved to be an instrumental component of the growing body of case law around sexual orientation discrimination that has emerged in South Africa since the constitution first protected equal rights on the basis of sexual orientation in 1996. Six years later, in *Minister of Home Affairs v. Fourie*, the Constitutional Court addressed the issue of same-sex marriage directly. In a landmark and unanimous ruling, which cited the *Home Affairs* case, the Court found that same-sex couples have a constitutional right to marry, and ordered Parliament to pass legislation to that effect within a year.<sup>30</sup> As a result of the decision, on November 30, 2006, South Africa became the first country in Africa and just the fifth in the world to legalize same-sex marriage.<sup>31</sup>

#### THE STATE OF THE WORLD’S CONSTITUTIONS

Currently, South Africa is among just 6% of constitutions that explicitly protect equal rights on the basis of sexual orientation (Map 18). For example, Portugal’s constitution provides that “[n]o one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of . . . sexual orientation.”<sup>32</sup> In one country, Nepal, “sexual orientation” is not listed as a protected





MAP 19. What is the constitutional status of same-sex marriage?

### *Constitutional Backlash: Denial of Rights and Gendered Language*

Although the recent progress in establishing equal rights on the basis of SOGI across regions is encouraging, these steps forward have also met with backlash, both in countries that have begun enacting reforms to advance equality and in those not yet touched by improved laws. Nowhere in the law is this clearer than in the articulation of marriage rights.

In only one country, Ireland, does the constitution explicitly protect same-sex couples' right to marry (Map 19). Under Article 41(4), as amended by the 2015 referendum, "[m]arriage may be contracted in accordance with law by two persons without distinction as to their sex."<sup>39</sup> However, 6% of countries prohibit the right to marry for same-sex couples or allow legislation to do so. Zimbabwe's 2013 constitution, for example, states clearly that "[p]ersons of the same sex are prohibited from marrying each other."<sup>40</sup>

An additional 8% define marriage as exclusively between a man and a woman, such as that of Slovakia: "Marriage is a unique union between a woman and a man."<sup>41</sup> By contrast, 4% of countries phrase the right to marry in ungendered language. Albania's constitution, for instance, declares that "[e]veryone has the right to get married and have a family."<sup>42</sup> The majority of constitutions (81%) do not address same-sex marriage.

Notably, all of the constitutional bans on same-sex marriage were enacted since 2000, suggesting that they were direct responses to gains for LGBT+ rights (see Figure 8). In some countries, politicians' statements have left no doubt that their efforts to restrict rights were prompted by progress within their own countries or elsewhere. For example, Honduras explicitly restricted equal rights on the basis of sexual orientation in 2005, through the unanimous adoption of a constitutional amendment barring both same-sex marriage and adoption. The amendment

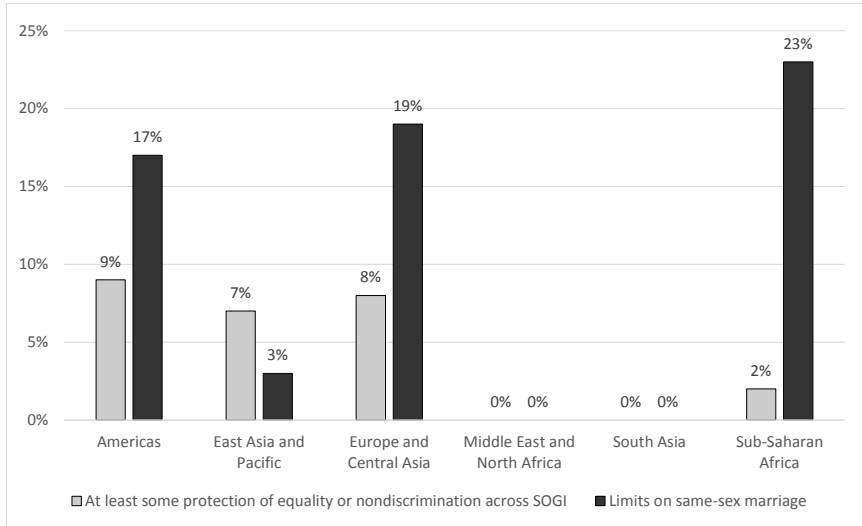


FIGURE 8. Explicit constitutional progress and backlash across sexual orientation and gender identity by region

resulted as part of the backlash to Honduras’s granting of legal status to three LGBT organizations, which 80 evangelical groups started a petition to revoke.<sup>43</sup> The congressman who proposed the bill, Jose Celin Discua, cited developments on equal rights in other countries as threats: “In various countries of the world—Holland, Spain, various states of the United States—there is already [same-sex] marriage. It is already coming, and it is already accepted.”<sup>44</sup>

#### EVALUATING PATHS FORWARD

As detailed in this chapter, progress has been made in passing SOGI equal rights in constitutions when there was wide public support or when participatory processes for constitution drafting supported the broad elimination of all forms of discrimination. But given that few constitutions to date explicitly protect equality on the basis of SOGI, other aspects of constitutions have also been used to advance equality.

##### *Leveraging Broad Equality Clauses*

Broad equality provisions, which do not explicitly mention sexual orientation or gender identity, can provide important tools for reform. As for other forms of discrimination, however, general guarantees of equal rights have yielded mixed results for LGBT+ equality. One example of a positive outcome from this approach comes from Canada’s 1998 case *Vriend v. Alberta*.

*Canada: Strengthening Protections from Employment Discrimination*

Delwin Vriend worked in a laboratory at King's University College, a Christian liberal arts school in Edmonton, Alberta. After he had worked there for several years, consistently receiving positive evaluations, the college president asked Vriend about his sexual orientation, and Vriend confirmed that he was gay. The following year, the college adopted a new policy on sexual orientation and the president requested that Vriend resign. When he refused, he was fired based on his failure to comply with the new policy.<sup>45</sup>

Vriend sought to file a complaint with the Alberta Human Rights Commission, but the commission informed him that he could not file a claim under the Individual's Rights Protection Act (IRPA), a statute banning discrimination by private employers, since it did not explicitly prohibit discrimination on the basis of sexual orientation. As Vriend recalled years later, "[t]o walk out of the human rights office and realize they couldn't do anything, it was such a shock."<sup>46</sup> As a result, he went to court and challenged the constitutionality of the IRPA on the basis of its exclusion of sexual orientation as a protected ground. But though he initially succeeded at trial in 1994, an appeals court overturned the ruling in 1996, finding that the general equality guarantee in the Canadian Charter of Rights and Freedoms "could not force the legislature to enact a provision dealing with a 'divisive' issue if it ha[d] chosen not to do so."<sup>47</sup>

Finally, the case reached the Supreme Court of Canada in 1998, where the key issue was whether the legislative omission of sexual orientation from the IRPA was unconstitutional government action. According to the Court, findings of unconstitutionality were not "restricted to situations where the government actively encroaches on rights," but could also apply in cases where the government failed to act to protect charter rights.<sup>48</sup>

In its reasoning, the Court emphasized the importance of both substantive and formal equality. Since the omission of "sexual orientation" meant that gay and lesbian workers were not specifically protected from discrimination by the act, they were not being treated equally with other marginalized groups that did receive explicit protection—a violation of formal equality. Assessing the effects of this omission, the Court found that:

[T]here is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore the *IRPA* in its underinclusive state denies substantive equality to the former group.<sup>49</sup>

The Court then reasoned that as "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs," sexual



orientation was analogous to the other explicitly protected grounds in Section 15.<sup>50</sup> The Court also explained that the exclusion of sexual orientation from the IRPA had harmful effects by precluding those who had experienced discrimination from pursuing legal recourse, and by subtly sending a message that the government would tolerate discrimination on the basis of sexual orientation.<sup>51</sup> Finally, the Court concluded, “Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination.”<sup>52</sup>

Following this analysis, the Supreme Court ordered that Alberta “read in” the words “sexual orientation” to the prohibition of discrimination in the IRPA, rather than declaring the whole provision unconstitutional and leaving all Albertans unprotected from private-sector discrimination in the interim. Since then, the IRPA, now called the Alberta Human Rights Act, has been amended to explicitly prohibit discrimination on the basis of both sexual orientation and gender identity and expression.<sup>53</sup> The *Vriend* case has also served as a critical precedent in strengthening LGBT+ rights nationwide.<sup>54</sup>

Although it took seven years and a series of appeals to reach a positive outcome, *Vriend v. Alberta* provides a powerful example of how a general equality provision, particularly in a country where the top court applies a doctrine of “analogous grounds” to determine which groups receive protection, can be an important tool for advancing equal rights on the basis of SOGI and amending discriminatory or underprotective laws. Likewise, protections against gender discrimination have been interpreted by some courts and international legal bodies to encompass protections against discrimination on the basis of SOGI.

Other examples can be found around the world.<sup>55</sup> General equality provisions were used to strike down provisions of Colombia’s Standards for the Exercise of the Teaching Profession<sup>56</sup> and Peru’s Military Justice Code that discriminated on the basis of sexual orientation.<sup>57</sup> In Slovenia, general protections against discrimination were leveraged to extend equal inheritance rights to same-sex couples.<sup>58</sup> In India<sup>59</sup> and Pakistan,<sup>60</sup> overall guarantees of equality before the law provided the constitutional foundation to establish that transgender individuals have equal rights. Most recently, in Taiwan, the Supreme Court ruled in May 2017 that banning same-sex marriage was “incompatible with the spirit and meaning of the right to equality” in the constitution, making Taiwan the first in Asia to legalize same-sex marriage.<sup>61</sup> And a few months later, a high court in Botswana ruled that transgender citizens have a constitutional right to change their gender on official documents, even though the country still prohibits homosexual acts.<sup>62</sup>

### *Argentina: Inspiring Regional Progress through a Court Decision on Marriage Equality*

Court cases brought under broad equality clauses can also demonstrably accelerate national and regional change. In Argentina in 2009, Alex Freyre and José María Di Bello became the first same-sex couple to marry in Latin America after a

Buenos Aires judge ruled that it was unconstitutional for civil law to permit marriage only between a man and a woman.<sup>63</sup> While the case was decided just on a general equality clause, the decision accelerated more extensive legal progress on SOGI rights. Within a year, the Senate voted to legalize same-sex marriage nationwide, making Argentina the first country in the region to do so.<sup>64</sup> Over the next four years, nearly 10,000 same-sex couples married in Argentina.<sup>65</sup>

What's more, the successes across Latin America, in terms of both explicit constitutional rights and court victories, further affirm that progress is possible even before public opinion is fully aligned. World Values Surveys document a lack of popular acceptance of same-sex relationships prior to the court case and legislative reform in Argentina, and significant improvements afterward. The surveys similarly show that legal changes preceded widespread recognition of equality in Brazil and Mexico.<sup>66</sup> However, the region has emerged as a recognized leader in advancing equal rights on the basis of SOGI—a process that has been aided by rights-based constitutions, expansive access to the courts,<sup>67</sup> and the region-wide influence of groundbreaking court victories and laws like Argentina's.<sup>68</sup> In the words of Brazilian legislator Jean Wyllyss, “after passing this law, Argentina became a reference for the whole of Latin America.”<sup>69</sup> Argentina itself had learned from Spain's legal reform process,<sup>70</sup> and “in turn sought to create a regional ‘demonstration effect’ and transfer its experience to other countries where debates on the topic were only beginning, such as Brazil, Chile, Colombia, and Uruguay.”<sup>71</sup> Individual activists from other Latin American countries also employed a strategy of marrying in Argentina and then demanding that their own governments recognize their same-sex unions.<sup>72</sup>

Further, the influence of Argentina's marriage decision reflects one example of a larger trend. Even before the push for full marriage rights, Latin American supporters of LGBT+ equality were citing legal progress in other countries on same-sex unions. For example, in 2000, as Uruguay was considering a bill to recognize same-sex civil unions, legislator Daniel Díaz Maynard argued: “Almost all European and Latin American legal systems have contained, for some time now, regulations which recognize civil union between same sex couples who have lived together for many years, some countries even formalizing it in their constitutions.”<sup>73</sup>

Argentina's more recent progress on gender identity has also inspired similar efforts in other countries. In 2012, Argentina enacted legislation allowing people to self-define their gender identity without providing medical documentation.<sup>74</sup> In Colombia, the new law gave “a push among activists,” according to Andrea Parra, director of the Action Program for Equality and Social Inclusion at the University of Los Andes School of Law.<sup>75</sup> Transgender activists in Colombia first pursued a strategy of seeking victories on individual cases in the Constitutional Court. One powerful ruling in favor of a transgender woman who had struggled to get her ID changed “was a green light for the ministry to proceed” with broader legal reform,

according to Parra.<sup>76</sup> In 2015, Colombia issued an executive decree echoing Argentina's law.<sup>77</sup>

While there is far to go on public opinion, these examples illustrate how advancing rights can precede full consensus on equality. Moreover, transnational activism on LGBT+ rights can provide a powerful mechanism for accelerating change.

*United States: The Risks of Failing to Clearly Address LGBT+ Rights*

Still, as in other areas of equal rights, the absence of language specifically prohibiting discrimination against a particular group, in both the constitution and other laws and policies, can allow for regress. For example, in 2014 the U.S. Department of Justice issued guidance stating that laws covering employment discrimination, specifically Title VII of the Civil Rights Act, protect against SOGI discrimination.<sup>78</sup> Three years later, however, after a change in administration, the department issued new guidance reversing this interpretation. According to the 2017 document, since the Civil Rights Act only explicitly prohibits workplace discrimination based on race, color, religion, sex, or national origin, LGBT+ workers are excluded. The memo urged that “[a]ny efforts to amend Title VII’s scope should be directed to Congress rather than the courts.”<sup>79</sup>

Meanwhile, fewer than half of U.S. states prohibit employment discrimination on the basis of sexual orientation,<sup>80</sup> and bills have been introduced across the country to effectively legalize SOGI discrimination claiming a religious freedom basis. Although the U.S. Constitution broadly establishes “equal protection of the laws,” this has been insufficient to fully guarantee the equal rights of the LGBT+ community.

*Ensuring Other Constitutional Guarantees Apply to Everyone  
Regardless of SOGI*

An additional approach that advocates and citizens have taken is going to court to ensure that other guarantees in constitutions—whether to privacy, dignity, liberty or otherwise—apply to all, regardless of sexual orientation or gender identity. As with general equality provisions, this approach has yielded some remarkable successes but provides far less reliable and consistent protections than specific guarantees of equal rights.

*India: The Right to Privacy*

For example, in an important case from 2009, the Delhi High Court ruled that the Penal Code’s criminalization of “carnal intercourse against the order of nature” was unconstitutional based on the rights to equality, nondiscrimination, and life and liberty. The decision was widely celebrated as a landmark case for the LGBT+ community.<sup>81</sup> Yet in 2013, after an appeal by religious groups,<sup>82</sup> a two-bench ruling by the Supreme Court, which is a case decided by just two

judges, overturned the decision. According to the Court, Section 377 of the Penal Code “does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”<sup>83</sup> The ruling also admonished the lower court for having “extensively relied upon the judgments of other jurisdictions” to protect the “so-called rights of LGBT persons,” whom they referred to as a “minuscule fraction of the country’s population.”

In 2017, however, the Supreme Court of India issued a lengthy judgment confirming that the constitution guarantees the right to privacy, and directly addressed the implications of this analysis for the 2013 ruling. In so doing, the nine-judge bench noted that “[t]he purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.”<sup>84</sup> And in 2018, the Supreme Court built on this decision in a groundbreaking ruling that overturned Section 377 once again, based on both the right to privacy and the general guarantee of equality in the constitution.<sup>85</sup>

The 2018 decision was a landmark for equality, and a testament to the effectiveness of India’s LGBT+ community in advancing fundamental human rights. Justice Indu Malhotra recognized the judgment’s profound significance after such a long struggle for equality, saying, “History owes an apology to members of the community for the delay in ensuring their rights.”<sup>86</sup> Likewise, Menaka Guruswamy, one of the lawyers challenging the law, commented on the ruling’s powerful message: “This decision . . . is basically saying: ‘You are not alone. The court stands with you. The Constitution stands with you. And therefore your country stands with you.’”<sup>87</sup> Still, the dismissive language of the 2013 ruling, which questioned the very premise that members of the LGBT+ community have constitutional rights, plainly illustrates why explicit constitutional rights matter for protecting against judicial retrenchment.

### *United States: The Right to Liberty*

Another example of successfully—but narrowly—leveraging other rights comes from the United States. In 2015, the Supreme Court made marriage equality the law of the land in *Obergefell v. Hodges*. The momentous ruling was premised on the Court’s finding that “[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right.”<sup>88</sup> While the ruling was a remarkable step forward for LGBT+ rights in the U.S., the Court stopped short of declaring that sexual orientation discrimination receives the same level of constitutional protection as discrimination on the basis of gender, race, religion, or national origin.<sup>89</sup> Although the decision was widely

celebrated, even supporters lamented that its reasoning was “dubious,” and argued that it was a missed opportunity to establish a stronger precedent specifically condemning sexual orientation discrimination.<sup>90</sup>

*Costa Rica, Tunisia, and Turkey: The Right to Freedom of Association*

Beyond individual rights, the rights to free association and freedom of assembly have played an important role in combatting discrimination on the basis of SOGI, and particularly in ensuring that advocacy groups in countries where LGBT+ populations face state oppression can continue operating. For example, in Costa Rica, a gay rights group was shut down in 1995 due to a legal prohibition on groups that “undermine good customs and morality.” In response, the organization contacted the new ombudsman’s office and threatened to sue the Registry of Associations for a violation of the right to free association. The registry backed down, paving the way for the registration of a dozen other gay and lesbian advocacy groups.<sup>91</sup> Likewise, in Tunisia, advocates cited constitutional and international commitments to freedom of association in challenging the government’s suspension of the country’s first official LGBT organization in 2016.<sup>92</sup> Although they continue to face repression, Tunisia’s LGBT+ groups have made important strides in advancing equal rights, and are currently actively involved in a coalition campaign to end the criminalization of homosexuality.<sup>93</sup>

Similarly, in Turkey, the Istanbul offices of Lambda, an international LGBTI rights group, were closed after a complaint that the organization’s activities conflicted with Turkish “moral values and family structure.” However, after a lengthy legal battle, the Supreme Court of Appeals ruled that the closure violated the rights to free association and assembly. The case was not an isolated incident; according to Yasemin Öz, a lawyer who drafted a report on homophobia and transphobia in Turkey for the Danish Institute of Human Rights, “whenever an LGBT organisation has been established in Turkey, the Directory of Associations has requested the closure of the organisations.”<sup>94</sup> As a result, she argues that the constitution’s equality provision, Article 10, must also be “amended to specifically guarantee the equal rights of LGBT persons. . . . Although Article 10 of the Constitution looks like guaranteeing equality among all citizens, since the equality among citizens regardless of sexual orientation and gender identity is not guaranteed explicitly, the LGBT community face discrimination in practice.”<sup>95</sup>

*Across Contexts: Evaluating the Range of Constitutional Approaches*

While all these court victories merit celebration, it is important to note the distinctions in their constitutional justifications and the potential limitations of a more roundabout approach to equality. For example, protecting same-sex relationships solely through the right to “privacy” may reinforce notions that these relationships do not deserve public or state recognition. In presentations to the U.N., for instance, Namibia’s government asserted: “Article 13 of the Constitution protects

the right to privacy. No person is requested to disclose his or her preferred sexual orientation in any official Government form or document and no person can be refused access to public or private services based on their preference. The laws do not make provision for marriage between same sex adults.”<sup>96</sup>

Likewise, the “don’t ask, don’t tell” policy, which prohibited U.S. service members from disclosing that they were gay or engaging in same-sex sexual conduct, was based in part on the concept of “privacy,” further underscoring how this right on its own does not necessarily lead to greater equality or freedom.<sup>97</sup> When a federal court finally deemed the policy unconstitutional after 17 years, it was on the basis not of equality but of free speech.<sup>98</sup>

Similarly, the right to dignity is powerful due to its broad scope. Lawyers and judges have successfully invoked the right to dignity not only to advance rights on behalf of the LGBT+ community but also in a wide range of cases advancing social and economic rights. Yet the concept’s breadth also gives courts substantial discretion to determine in what circumstances it applies.

For these reasons, although creative legal arguments leveraging other fundamental rights can and have yielded transformative victories, there is no substitute for an explicit protection against discrimination on the basis of SOGI in the constitutional text.

### *Building Up from States and Municipalities*

In moving to strengthen LGBT+ rights, some countries with federalist systems, such as the United States and Brazil, have had success with implementing state-level reforms to build momentum for national reforms. For example, after facing roadblocks to enacting national legislation, LGBT+ activists in Brazil began focusing on getting antidiscrimination laws passed by state and municipal governments, with remarkable success: over 80 municipalities had passed antidiscrimination legislation by the early 2010s, while at least two states have prohibited sexual orientation discrimination in their own constitutions.<sup>99</sup> These reforms can also help shift norms and build consensus about LGBT+ rights before broader changes are implemented. In the U.S., 2011 marked the first time more Americans supported rather than opposed gay marriage;<sup>100</sup> at that point, same-sex marriage had been legalized in six states, followed by three more the following year and another seven the next.<sup>101</sup>

Although neither country has yet to enact a national constitutional protection of equal rights on the basis of SOGI, state-level progress on laws and public opinion signals an increasingly favorable climate for national reforms, and may have contributed to changes in case law and constitutional interpretation. Moreover, studies show local laws can have important effects. For example, in a 2013 study of Texas cities with and without legislation prohibiting sexual orientation discrimination, researchers found that gay and lesbian job applicants experienced less discrimination when people believed protective laws were in place.<sup>102</sup>

## IMPORTANT—AND IMPERFECT—PROGRESS

In a range of countries, steps forward on equal rights regardless of SOGI have been followed by steps back. Sometimes a transformative court case is followed by struggles to implement its ruling. Other times, countries miss the opportunity to enact strong constitutional protections when they otherwise have momentum to advance LGBT+ rights. Finally, in some countries, guarantees of equal rights still coexist with other laws denying full equality to same-sex couples. In each circumstance, the successes still matter—yet these cases illustrate the importance of ongoing efforts to advance equality following successes and setbacks alike. A few examples follow.

*Mexico: Major Steps Forward on Marriage Equality,  
but Challenges in Implementation*

In 2011, Mexico amended its constitution to explicitly prohibit discrimination based on “sexual preference” in Article 1.<sup>103</sup> Four years later, the Supreme Court ruled that all state laws banning same-sex marriage were unconstitutional—effectively legalizing same-sex marriage nationwide.<sup>104</sup>

The sweeping and unanimous decision was directly based on Article 1’s new protection of equal rights on the basis of sexual orientation. It also referenced struggles against discrimination in other countries, citing famous case law like *Brown v. Board of Education* and its powerful conclusion that “separate but equal” was unconstitutional. And like the South African Constitutional Court in the *Home Affairs* case, the Mexican Supreme Court noted that discriminatory marriage laws both rested on and tacitly condoned bigotry: “Just as racial segregation was based on the unacceptable idea of white supremacy, the exclusion of gay couples from marriage is also based on prejudices that historically have existed against homosexuals. Their exclusion from the marriage institution perpetuates the notion that same-sex couples are less worthy of recognition than heterosexuals, thus offending their dignity as persons.”<sup>105</sup>

Finally, the Court cited Mexico’s obligations to uphold equal rights under international law, and noted that the Constitution required “adopting the most favorable interpretation of the human right in question.”<sup>106</sup>

In 2010, when same-sex marriage was legal only in Mexico City, 689 same-sex marriages took place, according to government records; in 2016, by which point ten states had legalized same-sex marriage, this number increased to 2,378.<sup>107</sup> Same-sex marriages have by now occurred in every state, enabling couples nationwide to not only make their partnerships official, but also access all the benefits and protections often linked to marriage.

Yet challenges remain for ensuring all people can effectively exercise their right to marry. Under Mexico’s civil law system, court decisions are generally binding only on the parties.<sup>108</sup> With its 2015 ruling, the Supreme Court essentially instructed lower courts how they had to rule, but did not directly invalidate contradictory

state legislation; the process of actually changing laws and enforcing the right to marry will require continued effort.<sup>109</sup> Despite the ruling, as of April 2017 just 12 of Mexico's 32 states had enacted laws to allow same-sex marriage, while others maintain discriminatory laws on the books.<sup>110</sup> Consequently, while same-sex marriage is now a legal right, couples have reported being refused licenses by state registrars, especially in areas where political opposition to same-sex marriage remains significant.<sup>111</sup> One lawyer, Alex Alí Méndez, has been strategically filing cases in every state to strengthen the right around the country; once a court finds the same law unconstitutional in three separate cases, the law is invalidated for all.<sup>112</sup> Following the Supreme Court ruling, Méndez explained: “[D]iscrimination will continue as long as the normative framework around marriage is not changed throughout the country in order to eliminate the obstacles that prevent same-sex couples from marrying.”<sup>113</sup>

To strengthen the right to marry nationwide, on the International Day Against Homophobia and Transphobia in May 2016, President Enrique Peña Nieto sent legislation to Congress to amend Mexico's constitution to “incorporate clearly the judgment of the Supreme Court so that people can marry without discrimination” on the grounds of “gender or sexual preference.”<sup>114</sup>

Public opinion data illustrated growing support for LGBT+ rights in tandem with the 2011 constitutional amendment and the municipal- and national-level marriage decisions. Just 23% thought same-sex marriage should be legal in 2000, increasing to 55% at the time Peña Nieto proposed the constitutional amendment in 2016; over the same period, opposition to same-sex marriage decreased from 62% to 25%.<sup>115</sup> Some of the increase in support clearly corresponded with the court rulings: between November 2009 (the month before same-sex marriage was legalized in Mexico City) and March 2010, the share of people saying they supported full marriage equality increased by five percentage points, while the share saying same-sex marriage should not be legal decreased by 12 percentage points.<sup>116</sup> In another poll, 69% of respondents said they were in favor of the marriage equality amendment.<sup>117</sup>

Nevertheless, the amendment was ultimately defeated in the legislature due to pressure from religious groups.<sup>118</sup> So although same-sex marriage is indeed legal throughout Mexico, and public support has grown significantly over the past two decades, implementation challenges create ongoing barriers to the full realization of marriage equality.

*Nepal: Major Progress on LGBT+ Rights in the Courts,  
but Smaller Gains in the Constitution*

As a second example, in 2007, Nepal's constitutional guarantee of gender equality provided the basis for a landmark case advancing equal rights for the LGBT+ community. The case was initiated by Sunil Pant, a lawyer who had spent years documenting the human rights abuses faced by other LGBT+ people throughout



the country—often at the hands of government security forces. By the time he brought a public interest litigation claim to fight this widespread mistreatment, Pant had piles of photographs and medical reports offering indisputable proof of the systematic discrimination facing LGBT+ people in Nepal.<sup>119</sup> In a far-reaching decision that drew on the constitution’s protection against sex-based discrimination, the Supreme Court not only ordered the state to abandon all laws that discriminated based on sexual orientation or gender identity, but also formally recognized a third gender category. Further, the Court called for the new constitution to explicitly protect against discrimination on the basis of SOGI, using the South African Constitution as a model.<sup>120</sup>

Since then, Pant has become the first openly gay member of Nepal’s Parliament, and Nepal has become the first country to include a third gender category on the census.<sup>121</sup> Still, the fight for full equal rights continues, with the 2015 constitution prohibiting discrimination on “similar grounds” to those explicitly listed and allowing for special measures to protect “gender and sexual minorities,” but not explicitly protecting the equal rights of the LGBT+ community.<sup>122</sup>

*Ecuador: Progress on Equal Rights, but Inconsistent Provisions*

Finally, in Ecuador, the 2008 constitution built on the inclusion of sexual orientation in its 1998 predecessor to specifically prohibit discrimination on the basis of both sexual orientation and gender identity. It also articulated a more expansive definition of family using the term *familia diversa*, now widely understood across Ecuador to encompass same-sex couples, single-parent families, and migrant households.<sup>123</sup> At the same time, the constitution stated that “marriage is the union of man and woman” and that “adoption shall only be permitted for different-gender couples.”<sup>124</sup>

This apparent tension in the constitutional text resulted from a political compromise, with equal rights activists championing the *familia diversa* while religious opponents protested to demand language referencing God and protecting the traditional family.<sup>125</sup> In the end, President Rafael Correa conceded, and reassured the opposition before the 2008 referendum vote that “marriage will continue to be the union of a man and a woman.”<sup>126</sup> In 2013, an activist named Pamela Troya initiated a lawsuit challenging the ban on same-sex marriage as unconstitutional, which worked its way up the courts but stalled at the Constitutional Court for four years.<sup>127</sup> Finally, in June 2019, the Court ruled that the ban on same-sex marriage was discriminatory. The Court left the responsibility for amending the constitution with the National Assembly and did not eliminate the ban on same-sex adoption.<sup>128</sup>

These examples illustrate how progress is often iterative. Countries sometimes move forward quickly, as when Ecuador progressed from decriminalizing same-sex relationships in 1997 to constitutionally prohibiting sexual orientation discrimination in 1998, but then regress in the face of political pushback. Nevertheless, as

the examples from Mexico and Ecuador illustrate most acutely, taking the first strong step of establishing equal rights in the constitution provides a foundation for further advances.

### THE URGENCY OF ACTION

The evidence of ongoing discrimination and violence that LGBT+ people face around the globe speaks to the urgency of action. As observed by the U.N. High Commissioner on Human Rights: “In all regions, people experience violence and discrimination because of their sexual orientation or gender identity. In many cases, even the perception of homosexuality or transgender identity puts people at risk. Violations include—but are not limited to—killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education.”<sup>129</sup>

While global data on violence against LGBT+ individuals is far from comprehensive,<sup>130</sup> statistics from individual countries affirm this account. In the United States, for example, the government recorded 1,470 incidents of violence motivated by SOGI in 2017.<sup>131</sup> Across Europe, over a quarter of respondents to a survey of LGBT citizens reported that they had been victims of violence within the past five years, 59% of whom believed the violence was solely or partly motivated by their sexual orientation or gender identity.<sup>132</sup> Similarly, according to a 2015 U.N. report that cited data from an independent global NGO, over 1,600 transgender people were murdered across 62 countries between 2008 and 2014, or one person every two days.<sup>133</sup> These vulnerabilities are compounded by state-sponsored discrimination and violence in some countries, and the unwillingness of leaders in others to acknowledge LGBT+ residents’ experiences.

#### *Toward a Global Agreement on LGBT+ Rights*

Despite some encouraging national developments, one critical missing piece for equal rights on the basis of SOGI is a binding global agreement. There is no explicit protection of equal rights on the basis of SOGI in the Universal Declaration of Human Rights (UDHR) or any fundamental treaty, although there have been some recent and important international developments. In November 2006, a group of international human rights experts drafted the Yogyakarta Principles, which articulate how existing international human rights law should be applied to SOGI-related issues.<sup>134</sup> A decade later, the U.N. Human Rights Council passed a resolution to appoint an independent expert on “protection against violence and discrimination based on sexual orientation and gender identity.”<sup>135</sup> This development built on a resolution passed in 2011, which called for a study of discriminatory laws on the basis of SOGI, and a second passed in 2014, which requested that the High Commissioner for Human Rights provide best practices for preventing this discrimination.<sup>136</sup> Still, in the absence of a binding global agreement, states

have no obligation to report what steps they are taking to ensure the equality, safety, and full citizenship of their LGBT+ populations.

At the regional and international levels, the question of whether existing treaties fully cover discrimination on the basis of SOGI—which is not explicitly referenced—has been a subject of debate for several decades. In a landmark 1994 case, *Toonen v. Australia*, the U.N. Human Rights Committee determined that the protections against sex discrimination in the International Covenant on Civil and Political Rights (ICCPR) extended to sexual orientation discrimination, finding that the ICCPR was a “living document.”<sup>137</sup> The decision led to the repeal of a provision in Tasmania’s criminal code that prohibited sexual relationships between men, and more recent U.N. guidance has clarified that the ICCPR and other global treaties do indeed prohibit SOGI discrimination under their “other status” category.<sup>138</sup> Similarly, in a 1996 ruling, the European Court of Justice found that the prohibition on sex discrimination in the U.K.’s Sex Discrimination Act, its employment discrimination law in place at the time, extended to gender identity discrimination.<sup>139</sup> A range of countries, however, reject these interpretations, and refuse to acknowledge the application of global or regional human rights treaties to SOGI discrimination without explicit textual protections.<sup>140</sup>

Further, evidence from individual countries shows that the presence—and absence—of international guidance and standards on discrimination can importantly shape national constitutions. For example, during the process of drafting Uganda’s constitutional equality provision, delegates argued that the constitution should prohibit discrimination on the grounds of religion, race/ethnicity, age, color, and birth, because these protections were included in the UDHR and African Charter. Meanwhile, “[i]t was submitted that some forms of discrimination should be permitted in the Constitution because they were also permitted in international law.” Only one delegate suggested prohibiting discrimination on the basis of sexual orientation and was interrupted and dismissed.<sup>141</sup> By contrast, while discussing whether to include sexual orientation in South Africa’s constitutional equality provision, drafters cited four prior determinations by international human rights bodies that sexual orientation was a ground for protection.<sup>142</sup>

Likewise, Mexico’s 2011 constitutional reforms show that international law matters not only in drafting but also in amending constitutions. The addition of sexual orientation to Mexico’s equality provision was part of a series of “human rights amendments” designed to advance the “adoption of . . . international human rights standards.”<sup>143</sup>

In other words, international-level progress on SOGI provided support for reforms in South Africa and Mexico, both of which broadly consulted international law, but the lack of an explicit protection in a binding treaty inhibited progress in Uganda, which more narrowly focused on formal agreements. An international treaty on LGBT+ rights, like those established to advance equal rights on the

basis of gender, race, and disability, would create a stronger basis for advocating for national-level SOGI protections.

*Addressing a History of Deep Discrimination*

In recorded human history, nearly every group treated in this book faced a period of extreme, widespread discrimination. Different racial and ethnic groups were enslaved through the ravages of war and commerce. Religious groups coalesced to segregate, oppress, and kill members of other religious groups who would not convert. Marriage between racial groups and cohabitation across religions were outlawed.

But for the majority of groups discussed in this book, the use of laws to actively segregate, discriminate, and disadvantage has dramatically declined. There are three groups for which this is not yet true across countries. Migrants are treated as having given up their human rights after crossing borders. People with disabilities are treated as if conditions affecting one aspect of their lives somehow affect all aspects—and that the disadvantages they face stem entirely from these conditions, rather than society’s responses. Finally, being a sexual or gender minority is treated as an identity incompatible with full citizenship, and acts of love are treated as actions worthy of punishment. It is long past time to eliminate legal discrimination.

Religious groups have disproportionately been involved in opposing progress to equality and passing laws that add layers of legal discrimination. Yet removing these historic and violent forms of discrimination will no more threaten religion than the removal of past forms of profound discrimination for which religious justifications were used against racial/ethnic groups or women. The significance of religion in people’s lives survived what was perceived as a cataclysmic threat to the church when science determined the world was not flat. Religion will continue to provide meaning and solace in people’s lives long after the removal of discrimination against all groups.

Moreover, some religious groups have actively embraced the equal rights of the LGBT+ community. In 2012, the Union for Reform Judaism issued a resolution “affirm[ing] its commitment to the full equality, inclusion and acceptance of people of all gender identities and gender expressions,” nearly 40 years after adopting a similar statement affirming “the rights of homosexuals.”<sup>144</sup> In 2013, a coalition of religious groups across the United States, including the country’s largest Islamic organization, submitted a letter to Congress supporting a proposed law that would have prohibited SOGI discrimination in employment.<sup>145</sup> And just in 2018, the National Council of Churches, a network of 30 Christian member churches that represents 14 million people across India, issued a statement on the court case addressing the criminalization of same-sex relationships, noting that “our call is to reject all laws that demonize, criminalize, and exclude human beings, and work to facilitate just inclusive and loving communities.”<sup>146</sup>

Neither the absence of an international agreement nor delays in public opinion's recognition of equal rights is reason not to pursue guarantees of equal treatment for all regardless of SOGI. Countries in all regions, and with varying degrees of public consensus, have shown that it is possible and that it makes a difference. Justice Albie Sachs made this case powerfully in the decision that brought marriage equality to South Africa:

[T]he antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights.<sup>147</sup>

## From Nondiscrimination to Full Inclusion

### *Guaranteeing the Equal Rights of People with Disabilities*

In 2007, Mariana Díaz Figueroa, a law student, came across a posting on her university's job board. A large hotel chain in Mexico was seeking a paralegal. The ad specified that applicants for the position should have experience in corporate law.

It also stated that they could not have a disability.

Díaz Figueroa's diagnosis with cerebral palsy in childhood had not deterred her from pursuing two master's degrees and a law degree.<sup>1</sup> Nevertheless, a potential employer had opted to outright exclude her from consideration, and Díaz Figueroa decided to take action against the hotel's flagrant discrimination. In 2009, Díaz Figueroa initiated a civil suit with the Superior Tribunal of Justice, arguing that she was not given the chance to prove she could do the job.

The court, however, dismissed Díaz Figueroa's claim. In the following years, she appealed three times; each time, the courts found for the hotel. Finally, the case reached the Supreme Court of Justice, Mexico's highest court, which ruled in 2014 that the job posting had violated two constitutional rights: the right to equal protection before the law, regardless of disability, and the right to work. Díaz Figueroa was entitled to damages, as the Court ruled that the post's publication was in itself discriminatory and harmful.<sup>2</sup>

Further, the Court clarified that in cases of disability discrimination, the burden falls to the party charged with discrimination—in this case, the hotel—to

prove that its contested action was “objective” and “reasonable.”<sup>3</sup> Because Díaz Figueroa’s disability was irrelevant to her ability to fulfill the duties of the paralegal position, the hotel was unable to do so. Through this standard, the Supreme Court overturned the lower courts’ ruling that it was up to the petitioner to show she was qualified for the position despite her disability.<sup>4</sup> Additionally, the decision affirmed that the equality provision of Mexico’s constitution applied against private employers. The ruling was a landmark for employment discrimination in Mexico, and one of the first cases on disability rights heard by the Supreme Court.<sup>5</sup>

The decision also illustrated how a series of constitutional reforms articulating stronger rights for people with disabilities had laid the foundations for Díaz Figueroa’s successful challenge. First, in 2001, Mexico amended its constitution to broadly prohibit discrimination on the ground of disability. In the following years, 12 of Mexico’s 31 states adopted similar amendments to their state constitutions.<sup>6</sup> Second, in 2011, a constitutional amendment proclaimed that all human rights treaties that Mexico ratified would become immediately enforceable in court—including the U.N. Convention on the Rights of Persons with Disabilities (CRPD).<sup>7</sup>

Ending obstacles to employment for people with disabilities will require action on many fronts, including strong legislation guaranteeing reasonable accommodations in the workplace. Yet constitutional rights on the basis of disability can provide critical foundations for shifting norms, providing recourse against discrimination, and creating more inclusive economies.

#### FROM OVERT DISCRIMINATION TO IMPLICIT BIAS

As Díaz Figueroa’s experience demonstrates, blatant forms of explicit discrimination against people with disabilities persist in some countries. Job ads tell people with disabilities not to bother applying. Individual schools, as well as school systems, exclude children with a wide range of disabilities.

Meanwhile, implicit bias is so widespread as to have equally large, if not larger, impacts. People with movement disorders, often presumed to be cognitively impaired, face discrimination when applying for jobs that utilize intellectual skills and training and impose no physical requirements they cannot meet. People in wheelchairs are presumed to be less able to compete in courtrooms and corporations, though their wheelchairs are irrelevant to their job roles. Even without written prohibitions on their candidacy, people with disabilities who show up for interviews often face immediate discrimination. Likewise, people with intellectual disabilities are often not even considered for job roles they could successfully fulfill.

One study of more than two million tests found that rates of implicit bias were highest against persons with a disability, among all the categories tested.<sup>8</sup> For people with disabilities, stigma and implicit bias have been linked to reduced employment opportunities, housing, and access to healthcare, as well as increased involvement with the criminal justice system.<sup>9</sup> The Americans with Disabilities

Act (ADA), a landmark U.S. law, even acknowledges implicit bias by prohibiting discrimination against people “regarded as” disabled; claims based on this provision account for a significant share of ADA filings with the Equal Employment Opportunities Commission.<sup>10</sup>

Biased institutional rules and practices have further consequences. Discrimination against people with mental health problems provides one example of many. Mental health conditions have long received a fraction of the healthcare coverage offered for physical conditions, and medical care systems often refuse to cover mental health treatment. Treating mental health with the same consideration and urgency as physical health can transform the lives of hundreds of millions.

This bias and discrimination compounds the needless barriers that societies erect to full participation, and the obstacles societies could address simply but often fail to remove. When a school, workplace, or community center entrance has only stairs, it bars access by wheelchair users. When an employer or public institution makes documents available only as hard-copy written texts inaccessible to screen readers, it excludes people with visual impairments from full access and engagement.

Removing obstacles is fundamental to equality and inclusion. Further, doing so benefits not only people with disabilities but also a wide range of others, a principle central to the concept of “universal design.” Sidewalk curb cuts provide a common example: conceived as a way to make sidewalks accessible to wheelchair users, they also improve accessibility for parents with strollers and people making deliveries using carts.<sup>11</sup> Similarly, text-to-speech software ensures full access for people with visual impairments or language-based learning differences, and for adults whose lack of access to formal education in childhood limited their extent and pace of text reading. Put simply, universal design aims to ensure that products and environments are accessible and useable by all people without modification.<sup>12</sup>

## THE LARGEST GROUP LEFT BEHIND

The combined effects of overt discrimination, implicit bias, and failure to take the simple steps that would ensure equal opportunities have made people with disabilities the most disadvantaged minority group around the world. In nearly all countries, adults and children with disabilities have among the lowest access to education, quality work, and incomes.

### *Education*

Equal access to education for children with disabilities is critical to providing a foundation for full participation later in life. Many children with disabilities are excluded from schools entirely or put in separate schools.<sup>13</sup> In low- and middle-income countries (LMICs), enrollment rates for children with disabilities are commonly 30–50 percentage points lower than for their counterparts, while children



with disabilities who enroll often face discrimination or poor-quality education.<sup>14</sup> Even in high-income countries, students with disabilities are less likely to complete primary school and on average receive fewer years of basic education than other students.<sup>15</sup> Across the European Union, 31.5% of young adults with disabilities did not complete secondary school, compared to 12.3% of those without disabilities.<sup>16</sup>

### *Employment*

Similar patterns play out in the workplace. A study of 27 OECD countries found that the employment rate of working-age people with disabilities was just 44%, far below that of working-age people without disabilities (75%).<sup>17</sup> Across 18 countries included in the World Health Survey, the employment ratio of people with disabilities compared to the overall population ranged from 30% in South Africa and 33% in Poland to 92% in Malawi; across all countries studied, people with disabilities were significantly less likely to be employed than people without disabilities.<sup>18</sup>

### *Income*

Exclusion from employment opportunities puts people with disabilities at a disadvantage with respect to income, which is further compounded by discrimination within the workplace after jobs are attained. In the United Kingdom, for instance, a 2017 study found that the average hourly earnings of men with disabilities were 13% below those of their peers without disabilities, while for women the disparity was 7%. For certain types of conditions, the “disability pay gap” grew even wider: men with epilepsy, for example, earned around 40% less than their peers. The gaps also widened further for racial minorities.<sup>19</sup> Consequently, poverty rates are higher. In Australia, Ireland, and South Korea, for example, working-age people with disabilities are more than twice as likely to be in poverty as working-age people without disabilities.<sup>20</sup> Poverty can in turn reduce the odds of accessing care or living in safe, healthy conditions.

## WHY CONSTITUTIONAL RIGHTS ON THE BASIS OF DISABILITY MATTER

Discrimination against people with disabilities is one of the few types of discrimination that is widespread, while addressing it remains normatively contested. Governments are known to target education for children with disabilities for the first cuts when budgets are tight.<sup>21</sup> Employers admit to passing over qualified job applicants with disabilities because they expect accommodations will be costly, when in fact such costs are typically minimal. Moreover, efforts to ensure full inclusion are too often framed as elective, rather than integral to fundamental rights and equality. Meanwhile, explicit discrimination, as in this chapter’s opening example, remains commonplace.

Constitutions are norm-setting documents. In addition to providing tools to challenge discrimination in court, constitutions express values on behalf of the government, which in turn helps shape societal values. Moreover, constitutions can help advance an understanding of equality that goes beyond nondiscrimination, and is truly rooted in enabling all people to fully participate in society. On average, one in six citizens of a given country have some form of disability. Clearly establishing the rights of persons with disabilities is fundamental to ensuring constitutions protect all people's rights.

#### GLOBAL FOUNDATIONS FOR EQUALITY AND INCLUSION

To determine how best to protect the rights of people with disabilities, constitution drafters need not start from scratch.

##### *The U.N. Convention on the Rights of Persons with Disabilities*

The CRPD, adopted in 2006 and drafted with deep engagement of disabled persons' organizations (DPOs), embodies a comprehensive set of commitments to equal rights and full inclusion in areas including education, healthcare, civil and political life, family life, and work, effectively laying out a framework for structuring societies to facilitate the full inclusion and equal opportunities of people with disabilities. The CRPD made history as the treaty with the largest number of signatory countries (82) on its opening day, and became one of the most quickly ratified treaties ever adopted.<sup>22</sup> Further, the CRPD's legally binding nature distinguished it from previous decades' declarations and awareness-building efforts on disability rights. The treaty had, and continues to have, tremendous potential to influence domestic laws and policies around disability, particularly since many countries simply had not enacted any relevant laws before the CRPD's adoption. According to Kanter, "[o]nly 40 of the 191 countries that [were] members of the UN ha[d] enacted domestic disability laws" as of 2003.<sup>23</sup>

The CRPD begins by acknowledging that how societies are constructed shapes whether a given condition is disabling: "[D]isability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others." In the 50 articles that follow, the CRPD thoroughly addresses inclusive education, the right to work, the right to liberty, access to justice, social protection, and a wide range of other fundamental rights and freedoms. For example, its education provision requires countries to ensure that "[p]ersons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live."<sup>24</sup> Similarly, the employment article obliges countries to "[e]nsure that reasonable

accommodation is provided to persons with disabilities in the workplace.”<sup>25</sup> As we will explore, these provisions have set important standards for national-level approaches to disability.

*The Sustainable Development Goals and “Leave No One Behind”*

In 2015, the U.N. General Assembly unanimously adopted the Sustainable Development Goals (SDGs), 17 “Global Goals” and 169 targets in a wide range of areas designed to advance human health, equity, and development by 2030. The SDGs built on the commitments of the Millennium Development Goals (MDGs), which helped accelerate change on health and extreme poverty in 2000–2015. Importantly, the SDGs explicitly addressed the rights and needs of people with disabilities—an area where the MDGs had been silent.

Commitments to advance inclusion are found throughout the Goals.<sup>26</sup> For example, SDG 4 calls on countries to “ensure equal access to all levels of education and vocational training” for persons with disabilities. Likewise, SDG 8 establishes a commitment to “full and productive employment and decent work for all women and men, including for persons with disabilities,” while SDG 10 broadly calls for reducing inequality within countries and “promoting the social, economic and political inclusion of all, including persons with disabilities.” Additionally, the SDGs urge countries to ensure environments are inclusive and accessible. Specifically, SDG 11 calls on governments to provide “access to safe, affordable, accessible and sustainable transport systems for all . . . with special attention to the needs of those in vulnerable situations, such as persons with disabilities.”

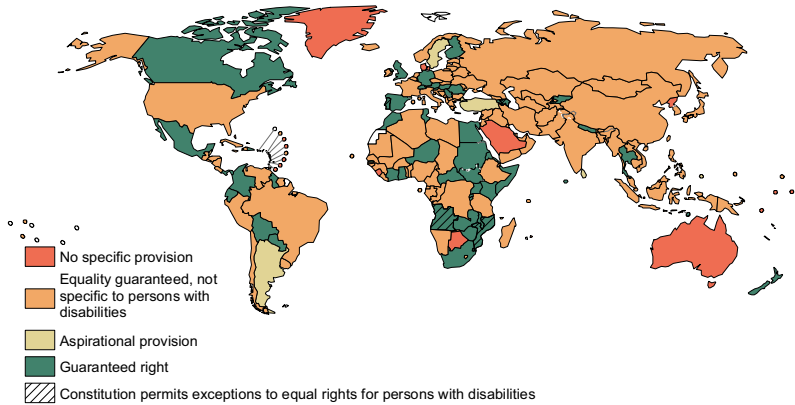
*Translating International Commitments into Domestic Law*

As for the other groups included in this book, an overall constitutional guarantee of nondiscrimination is essential to realizing the rights of people with disabilities. Yet given that people with disabilities remain widely excluded from jobs, education, and opportunities to fully participate in public and private life, specifically addressing each of these aspects is also vital to advancing equality and establishing new baselines of inclusion. To assess the status of rights in 193 countries, we examined the extent to which constitutions guaranteed overall equal rights, equal access to education, equal opportunities at work, and equal access to healthcare to people with disabilities.

EQUAL RIGHTS FOR PEOPLE WITH DISABILITIES IN  
ALL THE WORLD’S CONSTITUTIONS

*An Overall Guarantee of Nondiscrimination*

Around the world, a growing number of constitutions include disability in their overall equality provisions (Map 20). For example, the Maldives’s 2008 constitution provides: “Everyone is entitled to the rights and freedoms included in this Chapter without discrimination of any kind, including . . . mental or physical disability.”<sup>27</sup>



MAP 20. Does the constitution explicitly guarantee equality or nondiscrimination for persons with disabilities?

However, these protections lag far behind those afforded to other groups. Globally, just 27% of constitutions explicitly prohibit discrimination or guarantee equal rights on the basis of disability.

### *The Right to Education*

Designed to ensure children have opportunities to learn and fulfill their potential, the right to education can promote equality far more effectively when combined with a comprehensive commitment to nondiscrimination, which is fundamental to ensuring *all* children can learn. In the case of children with disabilities, constitutions can powerfully advance equal rights by not only explicitly protecting the right to education, but also ensuring that schools and classrooms are inclusive and equipped to accommodate all needs. Inclusive and integrated settings can both strengthen learning outcomes and increase students' exposure to peers with other backgrounds, life experiences, and capabilities.

### *The Importance of Inclusion—Not Mandatory Segregation*

Evidence shows that both children with and without disabilities learn well in inclusive classrooms.<sup>28</sup> Moreover, inclusive classrooms enable interaction between students with and without disabilities and reduce bias.<sup>29</sup> Inclusive education reflects a principle applicable across groups: equality is not achieved with segregation. As for achieving equality across religions or racial/ethnic groups, integration and representation are fundamental for achieving equality for people with disabilities. This begins with children and full inclusion in schools. While government-sanctioned racial/ethnic, religious, and gender segregation in education has declined, segregation of children with disabilities remains too common. Although there may be a case for providing an option for children with disabilities to attend specialized

schools, there is no more case for requiring children with disabilities or differences to attend separate schools than there was for segregating racial/ethnic groups.

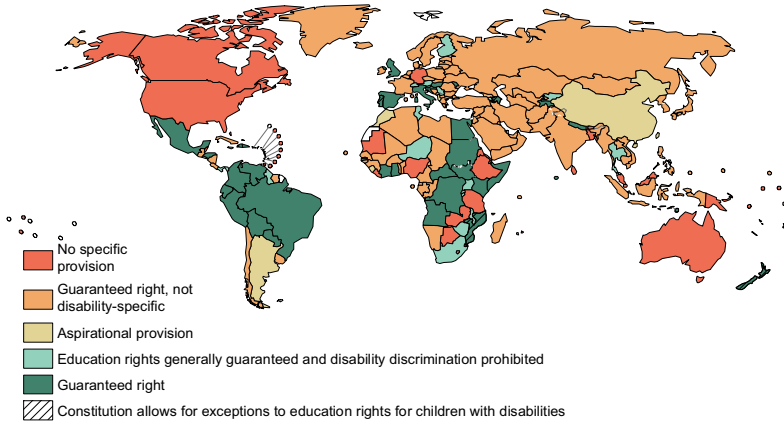
The CRPD Committee makes clear that integration alone, while essential, is not sufficient for inclusive education: “Inclusion involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience. . . . Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organization, curriculum and teaching and learning strategies, does not constitute inclusion. Furthermore, integration does not automatically guarantee the transition from segregation to inclusion.”<sup>30</sup>

Beyond providing integrated settings, to be truly inclusive, schools and classrooms must be equipped to meet the needs of students with disabilities and teachers must be adequately trained, which requires investment. All countries can invest, and not all inclusion is costly: many steps toward providing quality, inclusive education involve planning, community mobilization, and political will, rather than funding alone. Successful projects across a range of LMICs, such as Bangladesh, India, Kenya, Laos, South Africa, Tanzania, Uganda, Vietnam, and Zambia, have shown that inclusive education is achievable.<sup>31</sup> Where costs outstrip resources in low-income settings, international donors can fill gaps to make inclusive education financially feasible.<sup>32</sup>

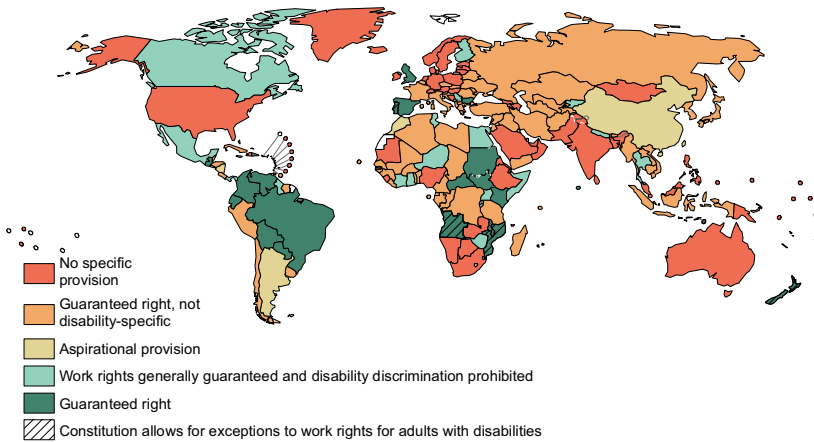
### *Nondiscrimination and Inclusive Education in Constitutions*

Globally, 19% of constitutions explicitly guarantee educational rights for children with disabilities (Map 21). Another 9% protect the right to education generally and broadly prohibit disability discrimination. Fourteen percent of constitutions guarantee specialized education or general educational support to children with disabilities, while 2% specifically require schools to be accessible to children with disabilities. Yet only 4% of constitutions explicitly provide for the integration of children with disabilities within the public school system. For example, Bolivia’s constitution provides: “The State shall promote and guarantee the continuing education of children and adolescents with disabilities . . . under the same structure, principles and values of the educational system, and shall establish a special organization and development curriculum.”<sup>33</sup>

While only seven constitutions explicitly address integrated education and not all of these guarantee full inclusion, these provisions have had impact in both public and private schools. Under the Brazilian Constitution, the government commits to implementing the right to education through “special educational assistance for the handicapped, preferably within the regular school system.”<sup>34</sup> In 2015, a consortium of Brazilian private schools challenged a law requiring schools to provide inclusive education, claiming it was unconstitutional as applied to private schools.<sup>35</sup> Upholding the law, the Court emphasized that inclusion benefits society



MAP 21. Does the constitution explicitly guarantee the right to education for children with disabilities?



MAP 22. Does the constitution explicitly guarantee the right to work for adults with disabilities?

as a whole, and that all schools—public and private alike—had a duty to promote integrated education and advance Brazil’s global commitments.

### *The Right to Work*

Guaranteeing the right to work and preventing workplace discrimination are fundamental to the rights of persons with disabilities, while relationships built at work are fundamental to reducing bias.<sup>36</sup> However, just 12% of constitutions explicitly guarantee the right to work for people with disabilities or prohibit disability discrimination in employment (Map 22). Malawi’s constitution, for example, states: “Every person shall be entitled to fair wages and equal remuneration for work of equal value

without distinction or discrimination of any kind, in particular on basis of gender, disability or race,” and states as a “principle of national policy” that people with disabilities should be ensured “fair opportunities in employment” and “the fullest possible participation in all spheres of Malawian society.”<sup>37</sup> Further, since it adopted its constitution in 1994, Malawi has enacted a series of laws aimed at strengthening opportunities at work regardless of disability, which may help explain the country’s relatively high employment ratio for people with disabilities (as noted earlier in this chapter).<sup>38</sup> An additional 10% of constitutions generally guarantee the right to work or nondiscrimination at work and prohibit disability discrimination broadly.

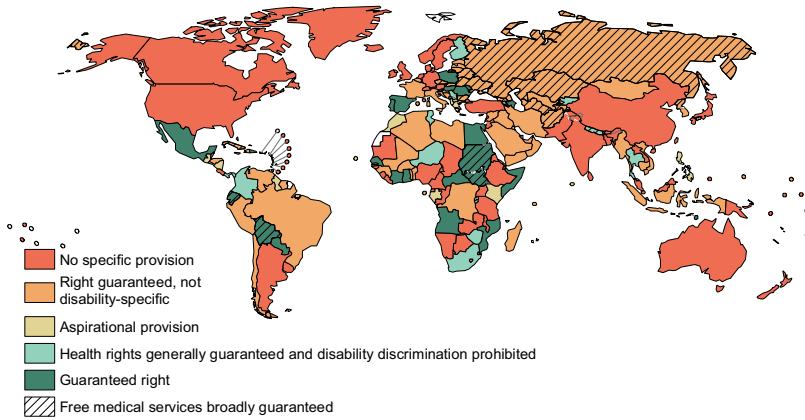
### *Why Constitutions Should Expand Protections of Reasonable Accommodations*

While prohibiting employment discrimination is a crucial start, ensuring that all workplaces also provide reasonable accommodation is essential to equal opportunities. For an employee whose obsessive-compulsive disorder prevents him/her from taking public transportation at its most crowded, accommodations could be as straightforward as providing parking or changing work shifts by an hour. An individual with a visual impairment may succeed at a job when accommodated with a low-cost screen reader and be unable to perform the role without it. Likewise for an individual who is deaf but to whom low-cost automated captioning opens many previously inaccessible positions. Lowering barriers so everyone can perform at their highest level benefits employers and employees alike.

For workplaces, ensuring reasonable accommodations has become the leading legal standard for reducing socially constructed barriers. “Reasonable accommodations” are measures that make employment opportunities equally accessible to individuals with disabilities, such as making workplaces physically accessible, modifying test procedures, and allowing employees to adjust work schedules, without imposing “undue hardship” on employers. Under the CRPD, the right to work “includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities,” and governments are obligated to realize this right through the provision of reasonable accommodations.<sup>39</sup>

Reasonable accommodation is important in civic spaces as well as workplaces, and failure to provide reasonable accommodations to realize fundamental rights has been rightly interpreted by constitutional courts as disability discrimination. For example, in 2008, Slovenia’s Supreme Court found the Civil Procedure Act to be unconstitutional, as it indirectly discriminated on the basis of disability by failing to ensure access to court documents in Braille.<sup>40</sup> Because of the ruling, the government now must provide Slovenians with visual impairments with Braille transcripts and other forms of assistance with nonwritten legal documents (such as court sketches).<sup>41</sup>

Currently, just two of 193 constitutions address reasonable accommodation directly. Incorporating language articulating this principle in the remaining constitutions would strengthen the fulfillment of equal rights at work for adults with



MAP 23. Does the constitution explicitly guarantee the right to health for persons with disabilities?

disabilities and differences.<sup>42</sup> Although legislation may best detail employers' obligations, constitutional provisions provide a strong foundation for advancing reasonable accommodations as fundamental rather than ancillary to equal rights at work. Fiji's constitution provides an example: "A person with any disability has the right to reasonable adaptation of buildings, infrastructure, vehicles, working arrangements, rules, practices or procedures, to enable their full participation in society and the effective realisation of their rights."<sup>43</sup>

While the rights-based argument for reasonable accommodations is strong, so is the evidence of their economic feasibility. Employers have reported that accommodation costs are typically low: according to a survey of 2,387 U.S. employers, only 41% had expenditures associated with hiring someone with a disability. The median cost for a one-time accommodation was \$500, compared to around \$200 for an employee without a disability in the same position.<sup>44</sup> These costs represent just 1.6% of the 2016 individual median personal income.<sup>45</sup> These are affordable for employers not only in high-income countries but also in LMICs, where wages are generally lower but so too are costs of accommodation. Moreover, at a societal level, growing evidence suggests that such accommodations quickly pay for themselves; creating the conditions for more people with disabilities to access health, education, and jobs leads to higher workforce participation, in turn fueling economic growth.<sup>46</sup>

### *The Right to Health*

Globally, 13% of constitutions explicitly guarantee the health rights of persons with disabilities (Map 23). Spain's constitution, for instance, establishes: "The public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally handicapped by giving them the specialized care they require."<sup>47</sup> An additional 8% guarantee an approach to



health generally and prohibit disability discrimination. Seven percent of countries do not explicitly address health rights for persons with disabilities but broadly guarantee that medical services are free, which can be particularly important for persons with disabilities. Finally, 6% of constitutions allow for positive action on health rights for people with disabilities.

Even broad constitutional guarantees of healthcare can guard against threats to access that emerge amid shifts in government or economic downturns, which may disproportionately affect people with disabilities. For example, in Portugal, home to at least one million people with disabilities, the constitution protects the right to free universal healthcare by requiring the government to enact a national program, which became the National Health Service (NHS).<sup>48</sup> When the legislature proposed eliminating the NHS in 1984, the Constitutional Court invoked this provision to strike down the reform, explaining: “The constitutional tasks imposed on the State as a guarantee for fundamental rights, consisting in the creation of certain institutions or services, do not only oblige their creation, but also a duty not to abolish them once created.”<sup>49</sup>

### *Safeguards for Civil and Political Rights*

While this book focuses on overall equality and social and economic rights, it is undeniable that civil and political rights are equally critical to ensuring all people can participate in public and private life and influence their governments’ decisions. These decisions in turn shape the scope of equal rights and whose needs are prioritized. For most groups, explicit restrictions on these rights have been largely eliminated. For people with disabilities, however, many explicit restrictions persist, as detailed in the following section. Additionally, many societal barriers—such as inaccessible voting booths—impede the full exercise of these rights. To ensure people with disabilities can fully engage in civic and political life and have protections against arbitrary infringements of their liberties, constitutions need to take additional steps to protect these rights unambiguously.

### *Protecting the Right to Liberty*

The right to liberty is a fundamental right that undergirds all others. Article 14 of the CRPD protects the right to liberty of people with disabilities, and further clarifies that “the existence of a disability shall in no case justify a deprivation of liberty.” Nevertheless, people with disabilities worldwide face heightened risks of involuntary confinement. According to UNICEF, in Central and Eastern Europe, a child with a disability is nearly 17 times as likely to be institutionalized as a child without a disability.<sup>50</sup> Migrants and refugees with disabilities often encounter unique restrictions and disadvantages, especially within refugee camps.<sup>51</sup>

Countries can take an affirmative step toward reducing these abuses by clearly protecting the right to liberty for people with disabilities in their constitutions. One-quarter of constitutions explicitly do so, either by prohibiting disability

discrimination and guaranteeing the right to liberty generally or by explicitly guaranteeing the right to liberty for persons with disabilities. However, as detailed further in the following section, five countries that guarantee the right to liberty for persons with disabilities also have broad provisions that could be used to restrict rights, while nine of the countries also have specific exceptions for mental health conditions. Just 8% of constitutions guarantee access to medical treatment when liberty is infringed.

### *Facilitating Political Engagement*

Finally, in terms of political participation, constitutions can require specific measures to increase inclusion of people with disabilities. Five constitutions include provisions to facilitate voting for persons with disabilities, though some are phrased more expansively than others. Uganda, for example, provides: “Parliament shall make laws to provide for the facilitation of citizens with disabilities to register and vote.”<sup>52</sup> By contrast, Malta limits its provision to blind voters, providing that if “a person is by reason of blindness unable to mark on his ballot paper, provision may be made by law requiring that . . . adequate and special means are to be provided which will enable that person to mark on his ballot paper independently and without the need of assistance.”<sup>53</sup>

Six percent of constitutions take broader approaches by aspiring to or guaranteeing the right to accessibility of public places for persons with disabilities. Four constitutions include provisions to ensure accessibility of transportation. Three constitutions guarantee the right to use Braille as an alternative form of communication, and five do so for sign language. An additional 4% of constitutions commit to promoting the use of sign language.

## BARRIERS TO EQUALITY WITHIN CONSTITUTIONS: DISCRIMINATORY LANGUAGE AND RESTRICTIONS ON RIGHTS

Despite important advances in prohibiting discrimination and guaranteeing equal rights for persons with disabilities, some constitutions explicitly restrict rights or use vague wording that leaves the door open to discrimination. Meanwhile, other constitutions, particularly older ones, refer to disability using discriminatory or stigmatizing language. While these provisions and language choices may often reflect outdated notions about disability, their retention in constitutional texts poses substantial risks to fundamental rights, and undermines constitutions’ potential to shift norms toward equality. By contrast, strong constitutional protections can do the opposite: in Uganda, for instance, the Centre for Health, Human Rights and Development successfully challenged three laws that referred to people with disabilities as “imbeciles,” “idiots,” and “criminal lunatics,” based on the constitution’s explicit protection of the right to dignity of people with disabilities.<sup>54</sup>

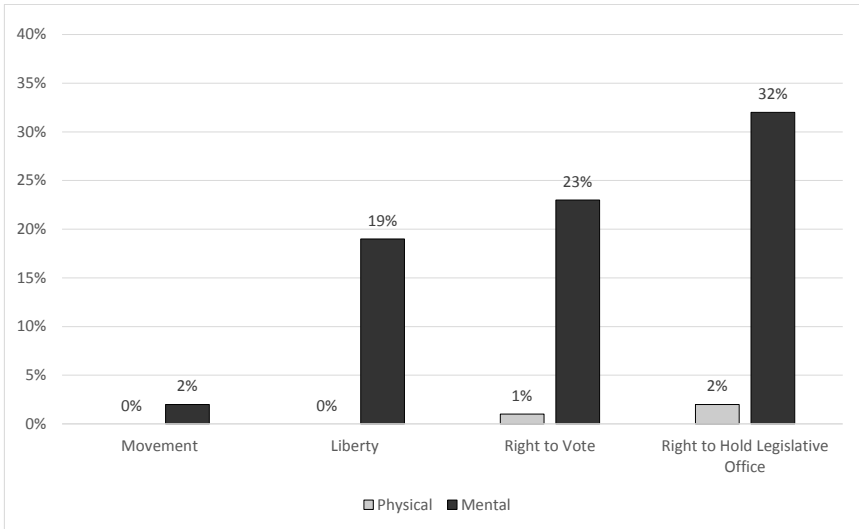


FIGURE 9. Explicit constitutional provisions that allow for civil and political rights to be denied based on health conditions

### *Disability Definitions and Terminology in Constitutions*

Globally, just three constitutions include definitions of disability that reference the impact of social and environmental factors. For example, Zambia’s constitution was amended in 2016 to state: “In this Constitution, unless the context otherwise requires: . . . ‘disability’ means a permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in an activity or perform a function as specified in this Constitution or as prescribed.”

### *Restricting Rights on the Basis of Mental and Physical Health Conditions*

While discriminatory language can be ambiguous, explicit limitations on rights are not. Globally, a significant portion of constitutions, including many of those using discriminatory language, allow for restrictions on the rights of people with disabilities. These restrictions are especially common with respect to certain civil rights and liberties. Twenty-two percent of constitutions specify that persons with mental health conditions can be denied the right to vote, as do 33% for the right to hold legislative office.

Constitutions also commonly restrict the rights to liberty and movement on the basis of mental health (see Figure 9). Specifically, 19% of constitutions specify that the right to liberty can be denied to people with mental health conditions. Of

the 36 constitutions that explicitly allow infringement of the right to liberty for persons with disabilities, 29 require that it be for the protection of the community and treatment of the individual, and three require it to be for the protection of the individual and community. However, three countries place no requirements, and one country protects only the community and not the individual. Finally, four constitutions state that freedom of movement can be denied to “persons of unsound mind.” According to the U.N. Human Rights Committee, while the rights to liberty and movement are linked, deprivations of liberty, which include everything from police custody to involuntary hospitalization, “involv[e] more severe restriction of motion within a narrower space than mere interference with liberty of movement.”<sup>55</sup>

Some constitutions also open the door to limiting rights on the basis of physical health conditions: three constitutions allow for restrictions on the right to vote, as do four for the right to hold legislative office. Namibia’s constitution allows Parliament to restrict individuals’ right to vote and hold office on “grounds of infirmity.”<sup>56</sup> Uruguay’s constitution states that “[c]itizenship is suspended: 1) By physical or mental ineptitude which prevents free and reflective action,”<sup>57</sup> and is silent regarding how physical disabilities would prevent reflective action. Zambia’s constitution does not limit the right to vote, but does provide that “[a] person is disqualified from being elected as a Member of Parliament if that person . . . has a mental or physical disability that would make the person incapable of performing the legislative function.”<sup>58</sup> Beyond these three, others use troubling exclusionary language in describing civil and political rights; Serbia’s constitution, for example, limits the right to vote to those of “working ability.”<sup>59</sup> In addition to opening the door for discrimination against those not working, this language lays a foundation for discriminatory assumptions about “working ability” to determine both who can vote and who can work; for example, as detailed in this chapter, discrimination that includes presumptions of incapacity and lack of reasonable accommodations—rather than lack of “working ability”—often limits full participation in employment by persons with disabilities.

Historic examples of disenfranchisement reveal that restrictions are often imposed as pretexts for discrimination. Literacy tests and poll taxes, for example, were instituted to limit voting by poor and minority voters, rather than out of genuine concern for the integrity of elections. As observed by Fiala-Butora, Stein and Lord,<sup>60</sup> “[N]early every state has at some time in its history restricted the basic human right of voting for women, ethnic and racial minorities, immigrants, persons with low literacy levels, and/or persons with disabilities. Common to these exclusions are justifications that are grounded in deeply embedded but empirically unfounded social constructs as to the lesser ability of the given category of individuals.”<sup>61</sup>

A health history including episodes of depression or anxiety, for example, has nothing to do with voting capacity. According to the World Health Organization

(WHO), around one in four people globally have a history of a mental or emotional health problem,<sup>62</sup> including 300 million who suffer from depression, which WHO ranks as “the single largest contributor to global disability.”<sup>63</sup> Broad mental health-based voting restrictions open the door to abuse and over-exclusion, especially since these assessments may be informed by stigma rather than science, and begin from the assumption of incapacity. In Hungary, for example, voting restrictions resulted in the disenfranchisement of over 70,000 individuals, even as only 8,000–12,000 Hungarians were considered to have “severe” or “profound” disabilities that could plausibly impair voting capacity.<sup>64</sup>

Similarly, there is no case for basing restrictions on freedom of movement or liberty on a specific condition or category of people instead of actual risk. Some countries’ courts have adopted standards for evaluating whether individuals pose imminent threats to themselves or others. Although individual assessments in these cases will likely never be fully accurate evaluations of risk, and some potential for abuse persists, this approach is far more narrowly tailored to the issue of personal and public safety than an exception applying to an entire group based on disability status. Basic due process rights, including the right to a fair hearing and the right to appeal, are essential additional measures to protect against abuse.

It is critical that countries’ foundational texts do not carve out exceptions to fundamental rights for people with disabilities, especially given the long histories of involuntary institutionalization and disenfranchisement experienced by this group, which is not fully behind us: people with disabilities continue to face high rates of institutionalization, often without fair and transparent processes to protect against arbitrary confinement or inhumane conditions. Altogether, these denials and exceptions embody presumptions about all people with disabilities or certain types of disabilities that obscure the diversity of circumstances and experiences, and create significant risks for the protection of individual rights.

*Restricting Rights on the Basis of Ability, Capability, or  
Being “Able-Bodied”*

Finally, constitutional provisions that use language about “able-bodied” people create the potential for employment discrimination against adults with physical disabilities. Two constitutions limit the right to work to “able-bodied” citizens. Denmark’s constitution states: “In order to advance the public weal efforts should be made to afford work to every able-bodied citizen on terms that will secure his existence.”<sup>65</sup> Similarly, Saudi Arabia’s constitution provides: “The State shall provide job opportunities to all able-bodied people and shall enact laws to protect both the employee and the employer.”<sup>66</sup>

Provisions that limit rights based on abilities also have discriminatory potential. Four countries have provisions broadly guaranteeing equal opportunities in education on the basis of ability. One country guarantees the right to secondary education on the basis of intellectual ability; an additional two guarantee on the basis of merit or in “deserving” cases. While these provisions may or may not

be used to discriminate against people with disabilities in practice, their wording undercuts the idea that education is a universal right and may pose risks for children whose abilities are undervalued because of discrimination and bias.

Similarly, even provisions that broadly support equal rights for persons with disabilities may leave room for limitations of those rights. Five countries have provisions guaranteeing equal rights to persons with disabilities, but only to the extent they are able to enjoy them. For example, Timor-Leste's constitution states: "A disabled citizen shall enjoy the same rights and shall be subject to the same duties as all other citizens, except for the rights and duties which he or she is unable to exercise or fulfil due to his or her disability."<sup>67</sup> While these provisions may be intended to recognize constraints faced by persons with disabilities, they also leave room to potentially limit rights for persons with disabilities rather than removing social and environmental barriers to full inclusion.

#### THE CLEAR NEED TO STRENGTHEN CONSTITUTIONAL APPROACHES TO DISABILITY— AND FURTHER STRATEGIES TO ADVANCE EQUALITY

As the preceding sections illustrated, the world's constitutions have far to go on protecting equal rights on the basis of disability. While the increasing share of constitutions that include disability-specific equal rights provisions is encouraging, far too many embed language or restrictions on rights that reflect a historically stigmatizing understanding of disabilities. Failure to accelerate progress on strengthening protections can have profound consequences for the millions of people whose rights remain in limbo.

##### *Advancing Equality with General Equality Clauses*

While constitutions that specifically prohibit disability discrimination likely provide the most powerful guarantees for equal rights, broad constitutional equality guarantees have also provided effective tools for advancing the equal rights of people with disabilities in domestic courts. Although persistent efforts to establish explicit constitutional protections of equality on the basis of disability are critical for ensuring consistent, human rights-based rulings, in the meantime, this strategy may serve as an important approach for accelerating change globally. As in other areas, however, while general equality clauses can facilitate important advances, they often do not provide protections as strong as specific bans on disability discrimination.

##### *India: Using Overall Equality to Challenge Rules Based on Presumptions of Incapacity*

India provides an example of how a broadly worded equal rights guarantee can have impact. In the Delhi High Court, the National Association of the Deaf filed a petition to end the blanket ban on driver's licenses for deaf people, which was based on the presumption that they would endanger the public. The petitioners'

brief noted how deaf drivers were able to obtain licenses in numerous other countries (sometimes with stipulations such as equipping their vehicles with extra-large mirrors).<sup>68</sup> Under an international convention signed by India, deaf drivers could also obtain international licenses enabling them to legally drive in India. In a landmark ruling citing the constitution's general guarantee of equality, the Court held in 2011 that deaf individuals should be eligible to take a driving test.<sup>69</sup>

*Japan: Overall Equal Rights as a Basis for Integrated Education—But Judicial Reasoning That Leaves Full Inclusion in Question*

In Japan, the constitution's overall equality clause and protection of the right to education provided the basis for a decision ensuring that a child with a physical disability could enroll in kindergarten at her local public school. The Board of Education had initially denied the girl admission because of her disability, specifically her inability to walk on her own.<sup>70</sup> However, after the girl's mother sought a court order, citing both the constitution and protections for inclusive education in legislation and the U.N. Convention on the Rights of the Child, the Tokushima District Court ruled that the school had to immediately admit the girl for full-time kindergarten.

Nevertheless, the district court stopped short of mandating fully inclusive education that would accommodate all children's needs. In its reasoning, the court noted that the girl's mother was prepared to accompany her daughter to school every day and attend to her needs in the classroom, ensuring there would be no "undue burden" on the school. However, the principle of inclusive education as defined in the CRPD and elsewhere requires governments to ensure that all children have the support they need to attend and fully participate in school, regardless of disability; fulfillment of this right should not be contingent on parents' availability to provide full-time assistance. Further, Japan's education provision guarantees the right to "an equal education correspondent to [the person's] ability," which could open the door to exclusion. While the Tokushima District Court's ruling yielded a positive outcome, stronger, disability-specific protections in the constitution would provide a sturdier foundation for future cases.

*United States: A Mixed History on Disability with Broad Protections for Equality*

In the U.S., the Fourteenth Amendment's Equal Protection Clause, which broadly guarantees equality before the law, has provided an important tool for advocates seeking to ensure equal rights regardless of disability. Yet historic examples illustrate the serious risks of failing to protect equal rights explicitly.

In 1972, the Equal Protection Clause provided the basis for a strong decision on children's equal rights in education by the U.S. District Court for the District of Columbia. In *Mills v. Board of Education*, seven low-income black boys, ranging from eight to 16 years old, brought a lawsuit to enforce their right to public education after being excluded from public schools. While some of the boys had

been formally diagnosed with disabilities, including epilepsy and hemiplegia, others had been deemed “exceptional” and excluded from school because of “behavioral problems.” In their court filings, the plaintiffs estimated that within D.C., there were “22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children, and perhaps as many as 18,000 of these children are not being furnished with programs of specialized education.”<sup>71</sup> A report from the Department of Education further revealed that at least 12,340 children with disabilities were excluded from D.C. schools in the 1971–72 school year. Many were expelled from school without a hearing, and their families were unable to afford private school.

In a comprehensive order, the court found that the D.C. Board of Education was responsible for providing “publicly supported education suited to each child’s needs, including special education and tuition grants, and also, a constitutionally adequate prior hearing and periodic review public education to all students in the District, including children with disabilities.” Citing *Brown* and the Equal Protection Clause, the court reminded the defendants that “the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>72</sup> Further, the court ordered the school board to produce a list of all other children who had been expelled and why, and to identify and contact all other students in the same position as the plaintiffs. Finally, the court ordered the board to fill all vacant “special education” positions and ensure that the budget allocated for the education of children with disabilities was indeed spent on their education.

Despite being issued by a district-level court, rather than the Supreme Court, *Mills v. Board of Education* had national impacts. Three years after the decision, Congress passed the Education for All Handicapped Children Act, which preceded the Individuals with Disabilities Education Act that remains in place today.<sup>73</sup> Guaranteeing children with physical and mental disabilities equal rights to a “free and appropriate public education,” the legislation became one of the most important legal tools for disability advocates in the following decades. Nevertheless, the case also illustrated intersections between disability discrimination and discrimination on the basis of race and socioeconomic status, which persist today. Research suggests that black children in the U.S. are more likely to be misdiagnosed as having intellectual disabilities by school administrators, which some argue is contributing to resegregation, especially in the American South;<sup>74</sup> additionally, black boys diagnosed with disabilities have the highest rates of corporal punishment in U.S. schools.<sup>75</sup> This trend parallels Roma students’ overrepresentation in schools for students with disabilities in some European countries (discussed in chapter 2 and later in this chapter), and underscores the importance of examining how different forms of discrimination and exclusion intersect.

Finally, the worst-case scenario when constitutional equality provisions do not address disability explicitly is that courts will simply refuse to recognize discrimination against persons with disabilities as unconstitutional, and sanction



policies and practices that are grave violations of human rights. Like a range of other historically marginalized groups, people with disabilities in many countries have faced compulsory sterilization and other threats to bodily integrity, which have often been upheld in court. The most notorious U.S. case on this topic is *Buck v. Bell*.

The case concerned the constitutionality of a 1924 eugenics law allowing for the compulsory sterilization of anyone in a state institution with “hereditary forms of insanity, imbecility.”<sup>76</sup> The plaintiff, 18-year-old Carrie Buck, was a mother of a one-year-old and an inmate at the Virginia State Colony for Epileptics and Feeble-minded. The colony’s superintendent, Dr. Albert Priddy, had urged the state legislature to adopt the sterilization law, arguing that the state could not afford to support “defectives.”<sup>77</sup> After Priddy ordered Buck’s sterilization, she was given a chance to appeal. However, the lawyer she was provided was a former colony director and an old friend of the opposing counsel. At the 1924 trial, eugenicists testified as “experts,” and eight witnesses were called to testify about Buck’s “social inadequacy.”<sup>78</sup>

After the Virginia Supreme Court affirmed the ruling upholding the law, Buck appealed to the U.S. Supreme Court. Supporters of the eugenics law hoped this would be a test case affirming the constitutionality of compulsory sterilization.<sup>79</sup> And in 1927, with barely a mention of the Equal Protection Clause, their wishes were realized: the Court ruled that Buck’s sterilization was in the state’s best interest, asserting that “society can prevent those who are manifestly unfit from continuing their kind.”<sup>80</sup>

Later investigations indicated that Buck did not actually have an intellectual disability and became pregnant after being raped by a relative, leading her foster family to send her to the colony to preserve their reputation.<sup>81</sup> Meanwhile, as a result of the decision, Virginia sterilized more than 8,300 inmates of similar institutions from 1927 to 1972, and paved the way for laws that permitted tens of thousands more forced sterilizations across the country.<sup>82</sup> The impacts were not limited to the U.S.; at the Nuremberg Trials, Nazi doctors cited *Buck v. Bell* in their defense.<sup>83</sup> While broad equal rights provisions have led to transformative victories for people with disabilities, as *Buck v. Bell* reminds us, their lack of specificity also leaves the door open to devastating rights violations.

#### *Advancing Equality with the CRPD*

A second strategy for advancing equal rights in the absence of a disability-specific constitutional provision is invoking the CRPD. The 1948 Universal Declaration of Human Rights (UDHR) represented a profound step forward for protecting human rights. Yet neither the UDHR nor the two documents that comprise the “International Bill of Human Rights”—the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966)—explicitly protected the rights of people with disabilities, even while

establishing protections based on sex, race, religion, and other characteristics. In the 1980s, the U.N. adopted the World Programme on Action Concerning Disabled Persons, which laid out recommendations focused on prevention, rehabilitation, participation of people with disabilities in decision-making, and equalization of opportunities in all aspects of life.<sup>84</sup> The following decade, the U.N. adopted the Standard Rules on Equalization of People with Disabilities, which explicitly recognized that “intensified efforts are needed to achieve the full and equal enjoyment of human rights and participation in society by persons with disabilities.”<sup>85</sup>

But it was not until the twenty-first century that these commitments achieved the force of a global convention. With the leadership of DPOs worldwide, in December 2006, the U.N. finally adopted what many in the disability community had urged for decades: a binding human rights treaty specifically articulating states’ obligations to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>86</sup>

The CRPD’s passage has helped accelerate countries’ adoption of laws and constitutional amendments to guarantee equal rights. Moreover, for constitutions that directly incorporate international treaties into domestic law, CRPD ratification has demonstrably strengthened courts’ interpretations of equal rights guarantees.

#### *India: Recognizing the Right to Reasonable Accommodations*

One important case illustrating the CRPD’s impact comes from India. The petitioner in the case, Ranjit Kumar Rajak, had a renal transplant in 2004. A few years later, Rajak applied for a job as a probationary officer with the State Bank of India. The job posting specifically noted it was open to people with disabilities; however, it also stated that “appointment of selected candidates is subject to his/her being declared medically fit by Medical Officer(s) appointed/approved by the Bank.”<sup>87</sup>

Rajak got the job, but after his required medical examination, the offer was revoked. The bank had determined that, given his medical history, employing Rajak would be too costly, since he would be “in continuous need of quality medical care” and the bank’s rules required the reimbursement of its officers’ medical costs. The bank consequently declared him “unfit” for the job. After being denied the position, however, Rajak secured a job at another bank.

In a powerful order, the Bombay High Court found that the Bank of India’s revocation of Rajak’s job offer violated his constitutional rights to equality and to life, as well as the right to reasonable accommodation under the CRPD. In its first ruling recognizing the reasonable accommodation standard, the Court ruled that the CRPD definition should apply, since domestic laws had not yet provided a definition of the concept.

Applying the “undue burden” test, the Court found no evidence that Rajak’s condition would “cause undue hardship in the content of the size of the organization, the financial implications on the organization and/or on the morale of other

employees.<sup>88</sup> Consequently, the Court ruled in Rajak's favor, in a landmark ruling incorporating the CRPD's commitments to equal rights in employment and clearly illustrating their resonance with established constitutional rights.<sup>89</sup>

*Czech Republic: Leveraging the CRPD to Strengthen Inclusive Education*

A second case showing the CRPD's domestic impacts comes from the Czech Republic. As a preschooler, a young boy from Milešovice, a small village, was diagnosed with autism and a "moderate mental disability."<sup>90</sup> Consequently, he was placed in a "special school" in the city of Brno, though he quickly outpaced his fellow students and was unable to receive a quality education. The Special Educational Centre in Brno recommended that he switch back to a mainstream school, provided he could receive some basic assistance in the classroom.<sup>91</sup>

The boy's mother agreed, and in 2012, sought permission to have him admitted to a mainstream school nearby. However, her request was quickly rejected. School administrators contended that they did not have the capacity to educate her son, and noted that parents of existing students had expressed concerns. Undeterred, she reached out to 11 other mainstream schools in the area. All 11 said no.<sup>92</sup>

As in Hungary, described in chapter 2, in the Czech Republic, discrimination against students with disabilities intersects with discrimination against the Roma, one of Europe's largest, most marginalized ethnic minorities. While the Roma comprise only 3% of the Czech population, one-third of students in the country's so-called "practical schools," or schools designed for children with "mild mental disabilities," are Roma.<sup>93</sup> Nationally, only 2% of all students attend practical schools.<sup>94</sup> Many activists have questioned the validity of the disproportionate number of Romani children diagnosed with "mental disabilities," and decried the limited educational and economic opportunities available to these children after their exclusion from mainstream schools.<sup>95</sup>

Fortunately, the boy was accepted at one mainstream school in a neighboring town, which he began attending in 2012. In 2014, however, his mother initiated an antidiscrimination lawsuit against the first school district, contending that it had violated her child's rights to education and equal treatment under the Charter of Fundamental Rights and Freedoms—the Czech Constitution's bill of rights.

Despite not explicitly guaranteeing equal rights on the basis of disability, the Charter of Fundamental Rights and Freedoms does affirmatively protect the universal right to free education.<sup>96</sup> Additionally, the constitution provides that treaties ratified by the Czech Republic, including the CRPD, "form a part of the legal order" and take precedence over conflicting statutes.<sup>97</sup> Citing these provisions, in 2016, the Vyškov District Court handed down a landmark judgment affirming the mother's allegations and ordering the city to apologize and pay damages.<sup>98</sup> In so doing, the court "confirmed that the child has the right to inclusive education in accordance with Art. 24 of the Convention on the Rights of

Persons with Disabilities and the failure to provide such education can be qualified as discrimination.”<sup>99</sup>

This ruling helped lay the foundation for further action. A few months after the decision, new legislation went into effect strengthening the country’s commitments to inclusive education by increasing funding and urging mainstream inclusion of the students diverted to “practical schools,” with a two-year timeline for implementation.<sup>100</sup> The new law was envisioned as a strategy to both integrate students with disabilities and diminish racial/ethnic segregation in the school system.<sup>101</sup>

Further, the Vyškov ruling and subsequent developments illustrate how constitutional provisions, alongside complementary global treaties, work together to accelerate change. While an explicit constitutional protection of equal rights on the basis of disability would have provided a stronger legal framework, the broad equal rights clause, in conjunction with the right to education and the constitution’s recognition of international treaties’ domestic applicability, enabled the child’s lawyers to build a compelling case for his right to attend school. The new law makes this legal foundation even stronger.

#### *Advancing Equality with “Leave No One Behind”*

Finally, despite carrying less legal weight than a constitutional provision or the CRPD, the SDGs’ overarching principle of “leave no one behind” provides a useful frame for approaching disability rights. While the MDGs helped improve outcomes for many, millions of people who were most marginalized or economically vulnerable experienced no significant changes in their circumstances. With their specific commitments to people with disabilities and guiding value of “leave no one behind,” the SDGs are better positioned to have impact for all. Although the SDGs are not legally binding, countries have committed to providing periodic updates on their progress toward realizing the Goals, and international bodies will monitor progress on a global scale.

Abundant evidence shows that the integration and inclusion of people with disabilities benefit our schools, workplaces, economies, and society as a whole. Yet even if these benefits were not compelling, fundamental rights, such as the rights to nondiscrimination, education, healthcare, and dignity, are nonnegotiable, regardless of the nature or extent of disability. Advancing and protecting the rights of the most vulnerable or marginalized must therefore be core to broader efforts to realize equality.

Case law demonstrates these principles in action. Courts in countries at all income levels have found that equal rights means ensuring access to education for all, irrespective of the nature of disability. For example, in 2010, a consortium of NGOs managing schools for 1,000 children with profound intellectual disabilities in the Western Cape province of South Africa sued the government for providing inadequate subsidy amounts to cover the children’s care and

educational expenses. Additionally, the subsidies provided per child with severe intellectual disabilities were smaller than those provided for children without disabilities, and amounted to less than 20% of those provided for students with mild or moderate disabilities.<sup>102</sup>

The government contended that these funding disparities were justified by limited resources. However, the Western Cape High Court found that the government had failed to explain “why it is reasonable and justifiable that the most vulnerable should pay the price” for the budgetary shortfall, and held that the lack of state support breached the children’s rights to equality, basic education, dignity, and protection from neglect or degradation.<sup>103</sup> Importantly, the decision focused on the children’s fundamental rights. At the same time, the ruling may yield immediate and long-term economic value by enabling parents and caregivers to work while their children with disabilities are at school.

This decision also aligns with international guidance. In a 2016 General Comment, the Committee on the Rights of Persons with Disabilities clarified that “provisions that limit [children’s] inclusion on the basis of their impairment or its ‘degree,’ such as by conditioning their inclusion ‘to the extent of the potential of the individual’” would violate the right to inclusive education.<sup>104</sup> Likewise, the committee made clear that upholding inclusive education requires that “recognition is given to the capacity of every person to learn.”<sup>105</sup>

## MOVING FORWARD

As of 2017, over one billion people—around 15% of the global population—had some form of disability.<sup>106</sup> As many as four of five people with disabilities live in low-income countries, in cities and in rural areas,<sup>107</sup> and worldwide, an increasing number of people develop disabilities throughout the life course.

In almost every society, disability is linked with disadvantage. Children with disabilities are less likely to get an education, while girls with disabilities face even greater odds. In Colombia, for example, only 56% of children with disabilities aged 6–11 attend school, compared to 92% of children without disabilities in the same age group.<sup>108</sup> Beyond denying children a fundamental right, these early inequalities contribute to barriers to work later in life.

Around the world, adults with disabilities remain far less likely to have a job, despite a well-documented desire and capacity to contribute to the workforce—and having a disability increases the risk of poverty where work opportunities and social insurance are inadequate.<sup>109</sup> People in poverty often face heightened risks of developing a disability due to insufficient access to healthcare, unsafe living conditions, and lower resources, and poverty can exacerbate existing disabilities because of unmet needs for care, habilitation, and rehabilitation.

Finally, in many countries, this discrimination is buttressed by discriminatory laws. According to a 2015 report by the U.N. Special Rapporteur for Persons with

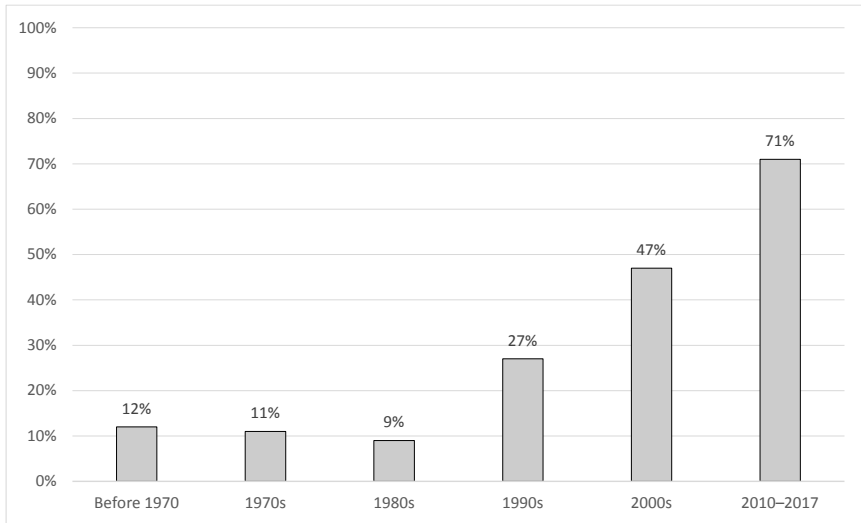


FIGURE 10. Explicit constitutional guarantee of equality or nondiscrimination for persons with disabilities by year of constitutional adoption

Disabilities: “Most legal systems in the world still contain provisions that discriminate against persons with disabilities and violate their human rights, from the denial of legal capacity or the right to vote to education laws that exclude children with disabilities from the general education system. Although efforts have been made to harmonize national legislation with the Convention on the Rights of Persons with Disabilities, much remains to be done.”<sup>110</sup>

#### *Progress in Constitutions*

The persistence of discrimination in laws and practice is not inevitable. The global movement for equal rights for persons with disabilities is the most recent of many equal rights movements, and its success yielded a global treaty that has achieved near-universal ratification. The movement and the CRPD are also leading to powerful changes in national constitutions. Seventy-one percent of constitutions adopted in 2010–17 explicitly guarantee equal rights or nondiscrimination to persons with disabilities, compared to only 11% of constitutions adopted before 1990 (see Figure 10). Likewise, guarantees of equal rights on the basis of disability across health, education, and work have all increased.

#### *The Potential for Impact*

These reforms have had practical impacts for both people born with disabilities and the many individuals who develop disabilities later in life. In Bolivia, a man who had suffered from polio in childhood and continued to experience partial paraplegia as an adult brought a claim to the Constitutional Court in 2000 after being fired

from his municipal job following a change in administration.<sup>111</sup> Citing the constitution's protection of the rights of people with disabilities, alongside an International Labour Organization convention on disabilities and employment, the Court ruled in the man's favor, ordering his reinstatement and payment of damages.<sup>112</sup> When Bolivia adopted a new constitution in 2009, the same year it ratified the CRPD,<sup>113</sup> it strengthened its guarantees of equal rights for people with disabilities, including specific commitments to health, education, work, and integration.<sup>114</sup>

In Canada and Iceland, the top courts ruled in cases in 1997<sup>115</sup> and 2015<sup>116</sup>, respectively, that hospitals should provide interpreters for the deaf. More recently, in 2017, advocates filed a similar petition with the Ugandan Constitutional Court based on the constitution's protection of equal rights for persons with disabilities and the right to health.<sup>117</sup> In Hungary, the constitution's prohibition of disability discrimination and protection of the right to work, alongside the CRPD, provided the foundation in 2018 for reforming a law requiring small businesses to use online cash registers that were inaccessible to visually impaired people.<sup>118</sup>

From Bolivia to Uganda to Hungary and beyond, these cases show that constitutions have the potential to address discrimination, and to help reduce socially constructed barriers to full participation by people with disabilities in both the public and private sectors. Yet despite recent progress and constitutional rights' documented impact, only a minority of national constitutions explicitly prohibit disability discrimination, and a significant minority open the door to discrimination with unexamined historical language, such as provisions limiting rights based on "infirmity" or "unsound mind." What's more, given the high proportion of people globally who have a history of some kind of mental health condition, which often has no bearing on decision-making capacity, these broad limitations create the potential for abuse. Similarly, restrictions based on "infirmity" create an extremely ambiguous and irrational standard for limiting rights.

### *Successful Approaches*

More needs to be done, from strengthening constitutions to increasing the CRPD's incorporation throughout countries' national laws and policies. DPOs' participation in constitution drafting has been one successful path to change. For example, disability rights groups and other civil society organizations played active roles in shaping Egypt's new constitution in 2014. As a result, the adopted draft included a comprehensive article on the "rights of the disabled," while separate articles explicitly outlined the rights of children with disabilities and established the "National Council for Disability Affairs."<sup>119</sup> Through these reforms, Egypt joined several other countries in the Middle East and North Africa that have newly enacted constitutional rights for persons with disabilities following the Arab Spring. Similarly, DPOs were involved in the constitutional reform processes of Uganda and South Africa, both of which adopted strong protections for disability rights.<sup>120</sup>

Yet even before achieving constitutional reforms, citizens can continue pressing for change through advocacy and litigation. In countries that have not yet ratified the CRPD, national movements are calling on their governments to take action.<sup>121</sup> In countries that have ratified the CPRD, advocates can pressure their domestic legal systems to interpret existing laws consistently with the convention's principles.<sup>122</sup> Citizens can also continue leveraging their constitutions' general equality provisions as well as broad rights to education and health in pushing for disability-specific protections. The potential of universal education and health guarantees to advance equality illustrates why social and economic rights, as well as non-discrimination, are critical for creating inclusive societies where everyone has an equal chance to participate, as this book's final chapters discuss in detail.

But enshrining equal rights on the basis of disability in constitutions has both practical and normative value. Around the world, people with disabilities and civil society groups have leveraged these protections to increase the accessibility and inclusiveness of schools, workplaces, legislatures, and public spaces. These tangible impacts flowed from the shift in norms and understanding of disability heralded by the disability rights movement, and the leadership of DPOs. Governments have the opportunity and responsibility to build on this progress by explicitly guaranteeing equality to all people with disabilities within their borders.



## Ensuring Rights and Full Participation Regardless of Social and Economic Position

In the early 1950s, just a few years after India gained independence, Banamali Das was earning his living making shoes in Suri, a town in West Bengal. One day, he visited the local barbershop for a haircut. Yet the barber, Pakhu Bhandari, refused to serve him—or any other member of his caste.<sup>1</sup>

In January 1951, Das filed a complaint against Bhandari, arguing that Bhandari's refusal to cut his hair violated the West Bengal Hindu Social Disabilities Removal Act of 1949. Under the act, no Hindu—a broadly defined designation<sup>2</sup>—could be “denied any service whatsoever” on the ground that he “belongs to a particular caste or class . . . by a Hindu who habitually renders such service in the course of his profession.” Das belonged to a lower caste largely comprising cobblers and leatherworkers, and according to his complaint, Bhandari had categorically declined their business. In his defense, Bhandari claimed the act infringed on his constitutional right to freely practice his profession. Furthermore, he alleged that the act violated his own constitutional right to equality.

When the case reached the High Court of Calcutta, however, the judges quickly dispensed with these arguments. First, as the Court noted, rather than prevent Bhandari from practicing his profession, the act in fact “enlarge[d] the scope of his

services” by compelling him to “serve all alike.”<sup>3</sup> By contrast, the Court explained, if the act had prohibited barbers from providing services to those from lower-caste backgrounds, it clearly would have infringed upon their work rights. Further, restrictions on the right to practice a profession could nevertheless be constitutional if they were reasonable and served a public purpose.<sup>4</sup>

Turning to Bhandari’s claim that the new law violated his right to equality, the Court found that the act in fact had the opposite effect; the equality provision of India’s constitution “is directed against discrimination and what the impugned Act wishes to abolish is discrimination.”<sup>5</sup> Furthermore, the Court clarified that “the general scheme of the Act is to protect the lower castes against being discriminated against by the higher castes and to make all castes or classes of Hindus equal in the social, civic and religious fields.”<sup>6</sup> As a result, rather than infringe upon it, the act would only further the goals of the new constitution, which specifically prohibited caste discrimination. Moreover, the ruling highlighted the importance of ensuring that laws regulating the provision of private services affirm constitutional protections of equality—an issue that continues to be relevant in 2019, especially in the context of LGBT+ discrimination.

The *Banamali Das* case illustrates one way in which discrimination on the basis of socioeconomic status takes place—and how constitutions can address it. Das experienced explicit discrimination based on his social status, which was clearly prohibited by both the national constitution and more targeted legislation. More recent cases from India have made clear that, in addition to the explicit bias on display in *Banamali Das*, financial barriers to key resources like health and education are also rightfully understood as unconstitutional discrimination on the basis of socioeconomic status. For example, in a 1992 case, the Supreme Court held that the exorbitant fees required to attend a private medical school made “the availability of education beyond the reach of the poor,” therefore violating the constitution’s equality provision.<sup>7</sup>

Global human rights agreements prohibit discrimination on the basis of class. The Universal Declaration of Human Rights (UDHR), adopted by the U.N. in 1948, guarantees all rights and freedoms without distinction on the basis of “social origin, property, birth or other status,”<sup>8</sup> as do the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC), among other treaties. These international agreements also make clear that the rights to health services and education should be equally accessible to all. More recently, through the Sustainable Development Goals (SDGs), all 193 U.N. countries agreed to take steps between 2015 and 2030 to “end poverty in all its forms everywhere,” reduce inequality, end hunger, ensure inclusive education, and address other fundamental barriers to the well-being of all people, regardless of socioeconomic status and other factors.<sup>9</sup>

The 1950 Indian Constitution, which abolished “untouchability” and prohibited caste discrimination, was a sharp repudiation of the country’s widely known caste system and a global milestone for equal rights regardless of socioeconomic status. But globally, how many countries have embedded these commitments in their constitutions and explicitly prohibit discrimination on grounds like income, wealth, social origin, or property? And how do broader aspects of countries’ legal systems, including the accessibility of courts, shape rights for people who are economically marginalized?

### SOCIOECONOMIC STATUS AND DISCRIMINATORY BARRIERS

The concept of socioeconomic status (SES) or social position in constitutions and elsewhere is operationalized in a range of ways, including with respect to inherited status, income and wealth, educational attainment, and occupation.<sup>10</sup> Together, these and other factors shape SES, which is generally understood as an individual’s social and economic position relative to others.

Discrimination on the basis of SES manifests in a variety of ways. While explicit class or caste discrimination remains critical to address, subtler forms of SES discrimination also markedly impact opportunities and inclusion, and barriers to the exercise of other rights linked to SES present profound challenges for equity. A brief survey of some of the research and history in these areas offers important context for the potential of constitutional approaches.

#### *Direct Discrimination: Class, Caste, and Property*

Globally, SES discrimination, and particularly discrimination against the poor, has a long history in the law. Under feudalism, which structured European societies throughout the Middle Ages, social status and rights hinged on land ownership. Beginning in the fourteenth century and continuing for nearly 500 years, “poor laws” governed the lives of people in poverty in Elizabethan England, prohibiting alms-giving to the “able-bodied” poor, threatening servants with imprisonment if they quit a job, and creating “poorhouses” to segregate those in poverty from the general population, where they often lived in squalid, unsafe conditions.<sup>11</sup> In other countries, rigid SES-based social hierarchies governed access to jobs and education for centuries.<sup>12</sup>

SES continued to play a definitional role in the first constitutions, some of which made property ownership a prerequisite for full citizenship. Under the 1791 French Constitution, for instance, only “active citizens”—which did not include paid servants—could serve as electors in the National Legislative Assembly, and only if they lived or worked on a property that met a minimum value requirement specified in the constitutional text.<sup>13</sup> Likewise, New York’s first constitution, adopted in 1777, restricted the right to vote to male citizens who possessed a “freehold of

the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shilling.”<sup>14</sup> The U.S. Constitution, adopted 12 years later, left the door open to state-level property restrictions on the right to vote that would persist through the late nineteenth century.

Today, in some communities, landownership continues to dictate who participates in local decision-making processes—a barrier to entry that disproportionately impacts women, partly because of discriminatory inheritance laws.<sup>15</sup> Moreover, more formal class and caste systems, despite having been legally abandoned, continue to structure societies and interpersonal relationships in parts of the world because of their historical entrenchment. Against this backdrop, protections against explicit SES discrimination remain relevant and necessary.

### *Class Discrimination by Proxy: Names, Neighborhoods, and Accents*

Although SES discrimination is generally less explicit or codified than in centuries past, poverty remains stigmatized in many countries, and SES discrimination persists in more invidious ways. Often, this discrimination is based on class signifiers rather than direct assessments of income, property, education, or profession.

For example, in modern-day India, studies have found that employers continue to discriminate on the basis of caste not by posting caste-specific job advertisements but by examining applicants’ names. In 2006, researchers in Chennai submitted over a thousand fictitious resumes for entry-level jobs. While every resume reflected very similar levels of experience and education, there was one critical difference: the researchers used names widely affiliated with higher castes for half the applications, and distinctively low-caste names for the other half. The results clearly indicated that caste still matters: applicants with low-caste names had to send out 20% more resumes just to receive callbacks.<sup>16</sup>

Studies from other parts of the world have documented a similar phenomenon, while further illustrating how SES discrimination and racial/ethnic discrimination are often deeply intertwined. A U.S. field experiment that involved submitting 5,000 fictitious resumes in response to 1,300 job ads found that applicants with “white” names received about 50% more callbacks than those with names perceived as more commonly African American. Yet across the applicant pool, the address listed on the resume—a proxy for the applicant’s neighborhood and social class—had an independent effect, with those living in wealthier areas receiving more favorable treatment.<sup>17</sup>

Aspects of personal appearance or speech suggesting lower SES have also been identified as bases of discrimination. Research has shown that inadequate access to affordable dental care is the primary factor driving inequalities in oral health between the rich and poor.<sup>18</sup> Surveys, however, find that many people attribute “bad teeth” to personal choices and neglect, thereby justifying discriminatory attitudes on the basis of poor dental appearance.<sup>19</sup> Likewise, in many countries, accents and language usage have become class signifiers.<sup>20</sup> In Britain, over a quarter of people

report facing discrimination because of their accents, and surveys of employers have confirmed the accuracy of their perceptions.<sup>21</sup>

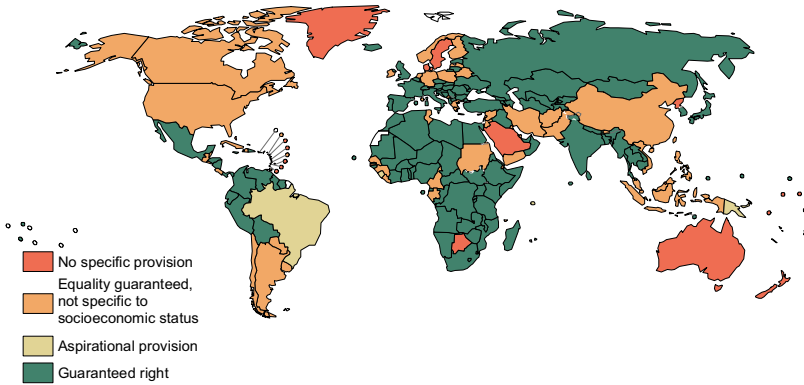
Mounting research shows that experiences of SES discrimination, like racial discrimination, negatively affect physical and mental health.<sup>22</sup> A study of 252 American adolescents, for example, found that perceived SES discrimination accounted for 13% of the negative impacts of poverty on aspects of health like blood pressure and cortisol levels.<sup>23</sup> Moreover, SES discrimination interacts with other forms of discrimination and is worse when combined with other bases of discrimination.<sup>24</sup> The persistence of SES discrimination, alongside the significant body of evidence that experiences of discrimination have profound consequences for health<sup>25</sup> as well as education, work, and income, underscores the urgency of action.

### *Economic Barriers to Health and Education*

Beyond SES discrimination, income barriers affect the ability to realize the fundamental rights to health<sup>26</sup> and education,<sup>27</sup> which in turn affects access to jobs and civic and political participation. Across low- and middle-income countries, the imposition of fees to access public healthcare has been found to widen socioeconomic disparities in access to health services, and increase the risk of preventable diseases and deaths.<sup>28</sup> Likewise, in high-income countries without universal healthcare, such as the United States, the costs of medical treatments and prescriptions have been shown to deter low-income individuals from accessing needed care, while driving others to bankruptcy.<sup>29</sup>

In education, tuition fees for primary and secondary school have been found to keep poor students and girls out of the classroom—while abolishing fees has the opposite effect.<sup>30</sup> Likewise, the high costs of higher education often make it more challenging for lower-SES students to get their degrees, erecting insurmountable barriers to entry for some while driving others to balance multiple jobs with their coursework to make ends meet. Finally, while unequal educational opportunities can translate into unequal work opportunities, SES discrimination can also directly affect success in the labor market. For example, a study of graduates from a large, highly ranked public university in Chile found that those from lower-SES backgrounds went on to earn 35% less than their higher-SES peers, controlling for academic performance, second-language proficiency, postgraduate studies, geographic origin, and other factors.<sup>31</sup>

Addressing disadvantage linked to SES consequently requires addressing all three elements: direct SES discrimination, discrimination on the basis of other characteristics commonly associated with lower SES, and policies and practices that indirectly impede full participation in society and exercise of other rights by people with fewer economic resources. To what extent can constitutions address these barriers, and how have existing constitutional approaches to SES discrimination made a difference?



MAP 24. Does the constitution explicitly guarantee equality or nondiscrimination across socioeconomic status?

### CONSTITUTIONAL APPROACHES AND IMPACTS

Current constitutions shape the impact of SES on the full exercise of rights in several key ways. First, and most directly, some constitutions explicitly prohibit SES discrimination, which can provide a tool for challenging identifiable forms of bias and dismantling the vestiges of discriminatory systems. Meanwhile, in some countries without direct constitutional prohibitions of SES discrimination, individuals and civil society groups have used general guarantees of equal rights before the law for the same purposes, although not all courts have been receptive to this strategy. Second, constitutions continue to shape whether and how SES influences the exercise of civil and political rights, which has broader implications for whether laws and policies address the needs and interests of people at all income levels. For example, under various countries' constitutions, personal debt can jeopardize the ability to exercise political voice. Finally, constitutions can play a role in reducing income barriers to health and education. An overview of where the world stands in each area—and why these choices matter—follows.

#### *Addressing Discrimination with Explicit Protections*

Globally, 59% of constitutions include explicit protections related to some aspect of SES, employing a diversity of terms for addressing SES discrimination (Map 24). For example, Bolivia's constitution provides that "[t]he State prohibits and punishes all forms of discrimination based on . . . economic or social condition, type of occupation, [and] level of education."<sup>32</sup> Malawi's constitution establishes that "[a]ll persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of . . . social origin . . . property . . . or other status or condition."<sup>33</sup>

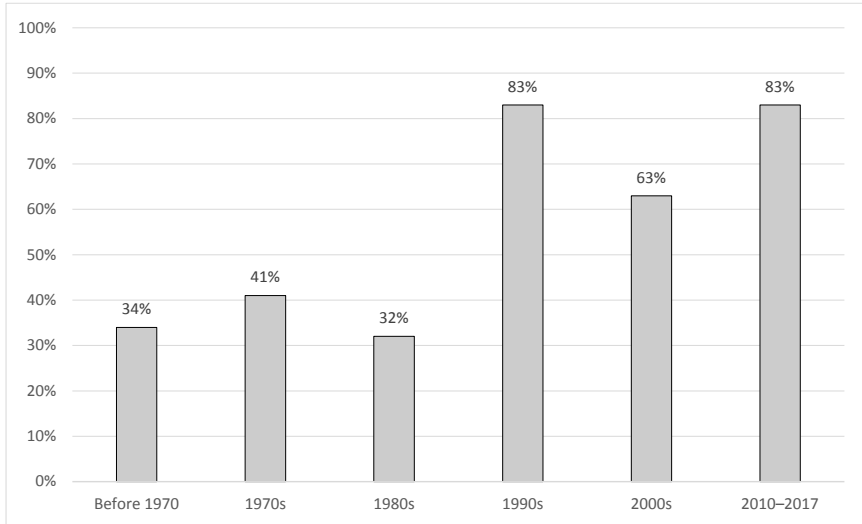


FIGURE 11. Explicit constitutional guarantee of equality or nondiscrimination across socioeconomic status by year of constitutional adoption

More recently adopted constitutions are likelier to explicitly prohibit SES discrimination: only about one-third of constitutions adopted before 1990 include an explicit guarantee, compared to more than three-quarters of those adopted since 1990 (see Figure 11). Still, the prevalence of these provisions falls far short of the share of constitutions that prohibit discrimination on the basis of race/ethnicity (76%), gender (85%), or religion (78%).

#### *Nepal: Impact of Explicit Prohibitions of Caste Discrimination*

Since its founding in 1974, a Sanskrit education school in Kathmandu, Nepal, had admitted only students from the Brahmin caste, a hereditary distinction of high social class. Brahmins, who occupy the highest tier of the traditional Nepalese caste system, have historically received exclusive access to the highest-status jobs, such as priests and educators.

In 1990, however, Nepal's new constitution prohibited caste discrimination (though notably including an exception for "Hindu religious practices"). In 2009, Mohan Sashanker, a local lawyer, brought a public interest litigation challenge against the Kathmandu school, arguing that its admissions policy was discriminatory and unconstitutional.<sup>34</sup> The Supreme Court agreed, finding that the policy violated the constitution's prohibitions on both untouchability and caste discrimination. In its ruling, the Court explained: "Education is to be acquired by human beings, not by a particular caste. The prestige of Sanskrit language does not diminish when acquired by persons of a particular caste and increase when pursued

by persons of another caste . . . [S]uch a distinction only promotes inequality in society.”<sup>35</sup>

In recent years, Nepalese courts have struck down numerous laws and traditions that restricted members of the Dalit caste from accessing temples, public hostels, and schools on an equal basis with others. In September 2015, Nepal adopted a new constitution reaffirming the prohibition on caste discrimination.<sup>36</sup> Although implementation of the law remains a critical challenge,<sup>37</sup> these developments indicate a marked shift from the legalized discrimination that structured society just a few decades ago.

The *Mohan Sashanker* case clearly illustrates how a constitutional prohibition of caste discrimination can provide a legal tool for overturning explicit exclusionary practices. Addressing caste has important implications for SES.

### *Belgium: Impact of Explicit Prohibitions on Class Discrimination*

Like Nepal, Belgium provides an example of a country where explicit protections mattered. Many countries, including Belgium, have long made a distinction in benefits guaranteed in legislation to people engaged in “blue collar” work, including manual labor, and “white collar” work, including office jobs, as well as between domestic service work and other forms of work. These distinctions may manifest in different sets of labor standards or benefits for each type of employment. Is there any legal justification for creating different classes of work, or is this differentiation just a cover for SES discrimination? Whether there is a legal justification may depend on the difference and its rationale. Constitutional guarantees against SES discrimination can help guarantee that these differences are not implemented for arbitrary reasons or based primarily on bias.

In Belgium, this question has worked its way through the courts and legislature for decades. While there are various differences between labor policies governing blue- and white-collar jobs in Belgium, one obvious example is sick leave. Whereas white-collar workers have historically been entitled to paid sick leave from the first day of illness, the first day for blue-collar workers was until recently designated as unpaid, unless their illness lasted for seven workdays or longer. In addition to ensuring workers do not have to sacrifice income to recover from illness or see doctors, providing sick leave from the first day of illness is important for preventing illnesses from spreading in workplaces. In Belgium, however, only white-collar workers have traditionally had access to this full coverage.

In 1993, Belgium’s Constitutional Court held that the distinction between blue-collar and white-collar jobs in allocation of sick days and other benefits violated the constitution’s equality provision, and ordered the legislature to gradually harmonize the policies that applied to both classes of workers. However, Parliament took no action for nearly 20 years. In July 2011, the Court once again pronounced the distinctions unconstitutional, this time focusing specifically on the disparities in sick leave and giving the legislature just two years to comply.<sup>38</sup> Under Article 10



of the Belgian Constitution, “[n]o class distinctions exist in the State,” while Article 11 guarantees nondiscrimination in the enjoyment of rights and freedoms.<sup>39</sup>

Just before the deadline for complying with the 2013 order, Parliament passed a new act to comprehensively merge both systems. In addition to equalizing sick leave, the new law harmonized the rules on dismissals for both classes of workers. Prior to the law, blue-collar workers were entitled to 28–56 calendar days of notice, while white-collar workers were entitled to three months for every five years, or portion thereof, they had worked for the employer.<sup>40</sup> Under the new regime, notice periods are determined strictly on the basis of seniority. With these changes, Belgium is on its way to becoming one of the final OECD countries to harmonize the labor laws applying to its two classes of workers.<sup>41</sup>

In Belgium and elsewhere, distinctions in benefits and labor protections between classes of workers are often premised on cost savings. Employers save money by withholding first-day sick leave benefits and providing shorter notice periods for terminations. Over time, these different standards for different types of jobs have become expected and normalized. However, as the Belgian Constitutional Court noted, this does not mean that the lesser protections provided to blue-collar workers were “based on objective and reasonable criteria.”<sup>42</sup> In other words, cost savings and tradition alone cannot justify discrimination under the constitution. This development provides an important example of how constitutions can provide a mechanism for increasing equality in labor conditions.

#### *Addressing Discrimination with General Equality Guarantees*

As in other areas of discrimination, broadly worded constitutional protections of overall equal rights have yielded inconsistent outcomes with regard to SES discrimination. In the absence of specific language, courts in some countries have been reluctant to recognize SES discrimination as unconstitutional. Finding SES similar to other grounds of discrimination the constitution clearly prohibits, courts in other countries have extended constitutional protection to SES. The United States and Canada provide examples of each possibility.

#### *United States: Poverty Receives Limited Protection*

Under the broadly worded Equal Protection Clause, race and religion have received the greatest protection—that is, the government must meet a higher standard to prove the necessity of any action that distinguishes among people based on these characteristics. Gender has been provided with intermediate protection. By contrast, discrimination on the basis of income, wealth, or social class receives only “rational basis,” the lowest form of review.<sup>43</sup>

Under the rational basis standard, as illustrated in chapter 3, the person challenging the law must show either that the government has no legitimate purpose for the law, or that the law is not “rationally related” to that purpose. As Supreme

Court Justice Potter Stewart explained in a 1980 opinion addressing the limited services covered by Medicaid, the federal healthcare program for very low-income adults, “this Court has held repeatedly that poverty, standing alone, is not a suspect classification.”<sup>44</sup> Consequently, as long as a given policy or practice is rationally connected to a legitimate government interest, it does not unconstitutionally discriminate on the basis of SES.

These low levels of constitutional protection make it hard to successfully oppose in court important forms of legal discrimination. For example, in most U.S. states, it remains legal to discriminate against prospective renters who plan to pay their rent using a federal housing subsidy<sup>45</sup>—even as discrimination in housing on the basis of race, gender, religion, and other constitutionally protected statuses are all prohibited.<sup>46</sup> As of 2018, 15 states had passed laws to prohibit “source of income” discrimination in housing, and studies suggest that these laws can increase the probability of finding housing by 12 percentage points.<sup>47</sup> With such little protection against SES discrimination in federal law, however, low-income renters in most states commonly encounter property listings stating plainly they are ineligible to apply even when they receive adequate income and housing support to cover rent.<sup>48</sup> In addition to the consequences for individuals, this exclusion may lead to further segregation across both SES and race/ethnicity in settings where historical discrimination and barriers have shaped SES disparities.<sup>49</sup>

*Canada: Poverty Is “Analogous” to Prohibited Bases of Discrimination*

By contrast, in 1993, a Canadian court deemed discrimination on the basis of poverty “analogous” to the prohibited grounds of discrimination enumerated in the Charter of Rights and Freedoms. Consequently, providing lower levels of legal protection to public housing renters compared to those living in private housing was found to be discriminatory and unconstitutional.

The appellant in the case was Irma Sparks, a 42-year-old black woman and single parent to two children. Sparks had moved into public housing in 1980 and had a year-to-year lease.<sup>50</sup> On May 1, 1991, she received a notice to vacate within 30 days, in accordance with the requirements of her lease. However, the Residential Tenancies Act required landlords to give tenants in private housing at least three months’ notice for a one-year lease. Additionally, the act provided that landlords could not serve a “notice to quit” on tenants who had lived in an apartment for five years or longer, unless they stopped paying rent. Facing eviction and likely homelessness, Sparks brought a lawsuit challenging the lower levels of protections provided to public housing tenants, and contesting her own notice to vacate as discriminatory on the bases of race, sex, marital status, and poverty.

At trial, the judge dismissed Sparks’s complaint, holding that the differential treatment of public housing residents did not single out women, black people, or single mothers.<sup>51</sup> However, the Nova Scotia Court of Appeal found that the

challenged provision amounted to “adverse effect discrimination,” similar to “disparate impact” discrimination in other jurisdictions, on all four grounds Sparks had argued. As a result, the Court struck down the portions of the Residential Tenancies Act that excluded public housing tenants from the fundamental protections that other renters enjoyed, newly extending these basic safeguards to approximately 10,000 tenants across the province.<sup>52</sup>

Other countries have also overturned SES discrimination based on the association of SES and race/ethnicity. The United Kingdom’s first legal case of caste discrimination was decided on the basis of protections against race discrimination in the country’s Equality Act,<sup>53</sup> prompting the government to begin a consultation on whether “caste” should be specifically protected too.<sup>54</sup>

As these contrasting examples from the U.S. and Canada show, general equality provisions may provide some protection against SES discrimination, but we cannot presume these broadly worded guarantees will be sufficient. According to analysts from the International Network for Economic, Social and Cultural Rights, the finding in the *Irma Sparks* case “that poverty is a prohibited ground of discrimination was ground-breaking,” signaling that such a result is uncommon when SES is not explicitly listed as a prohibited ground of discrimination.<sup>55</sup>

### *Political Rights and Representation*

Ensuring that democracies are accountable to people across the socioeconomic spectrum is fundamental to equality. A foundation of equal political rights is one part of the solution. Joining a union, voting, and running for political office are all important ways that citizens can express their political voice, and these rights and opportunities must be guaranteed to all regardless of income, wealth, property, or occupation. Historically, as mentioned earlier and in prior chapters, governments have employed policies like poll taxes, literacy tests, and property or tax requirements to disenfranchise would-be voters, disproportionately affecting citizens with lower SES in ways that intersect with other forms of marginalization.

These barriers continue.<sup>56</sup> A quarter of countries constitutionally *restrict* the right to hold office based on SES. Although such restrictions have become less common, SES-based limitations on political rights were still included in 13% of the constitutions enacted between 2010 and 2017 (see Figure 12).

The majority of these restrictions are based on personal debt, with prohibitions on legislators having bankruptcies, insolvency, or creditor debt. Antigua and Barbuda’s constitution states: “No person shall be qualified to be elected as a member of the House who: . . . is an undischarged bankrupt, having been declared bankrupt under any law.”<sup>57</sup> Other constitutions go beyond debt. Haiti establishes that any candidate to the lower house of the legislature must “be the owner of real assets in the circumscription or exercise a profession or an industry there.”<sup>58</sup> Denmark’s constitution provides that “[i]t shall be laid down by Statute to what extent conviction and public assistance amounting to poor relief within the meaning of

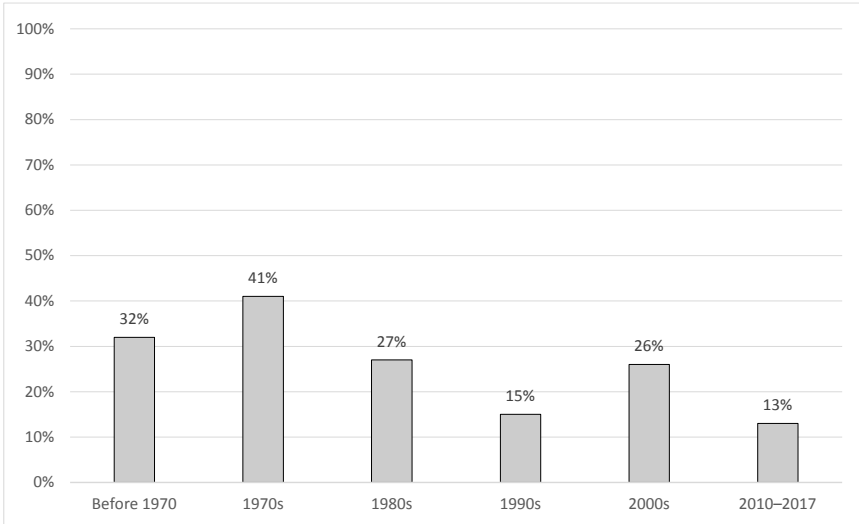


FIGURE 12. Explicit constitutional limits on holding office based on income by year of constitutional adoption

the law shall entail disfranchisement,” and stipulates that only those who have the right to vote can hold office.<sup>59</sup>

Most agree that prohibiting citizens from voting based on their use of public assistance or other SES indicators is discrimination. However, some argue that restrictions on debtors serving as public officials are necessary to prevent corruption and susceptibility to bribes. While supported by some anecdotal evidence,<sup>60</sup> this theory is largely speculative; researchers who study corruption’s causes caution that “[i]t is difficult to know when, or if what factors are responsible for acts of fraud and corruption, as they are multi-layered and complex.”<sup>61</sup> Moreover, the level of documented corruption among wealthy public officials across countries suggests that this justification is merely pretext for SES discrimination.<sup>62</sup>

The practical impacts of limiting rights on the basis of debt can also be severe. In Moldova, the Constitutional Court recently struck down a ban on issuing marriage licenses, divorce papers, driver’s licenses, and passports to individuals with debt, pronouncing the ban an unconstitutional infringement of the rights to privacy and freedom of movement. In particular, the Court found that the constitution required a balancing of interests, and that an interminable ban on fundamental documents was disproportionate to the goal of enforcing a creditor’s rights.<sup>63</sup>

### *Education and Health and Their Foundational Role in Realizing Broader Rights*

Finally, constitutional rights can provide tools for removing barriers linked to SES in key areas that are foundational to health, education, and opportunity. In

addition to providing overall rights to health and education, for example, constitutions can guarantee that schools and healthcare will be free, or at least that cost will not be a barrier to access for those who cannot afford to pay. Cases from Colombia and Kenya illustrate these approaches in action.

*Colombia: Accounting for Costs in School Assignments*

In *Mora v. Bogota District Education Secretary & Ors*,<sup>64</sup> a five-year-old girl was assigned to a school outside her district by local education authorities, who divided students among schools based on capacity. Consequently, her family would have to pay for transportation to the school, which created an insurmountable cost burden.

The girl's mother challenged her daughter's assignment to the school as a violation of her constitutional right to education. Colombia's constitution guarantees that public education is free, and further states that "[i]t is the responsibility of the State to . . . guarantee for minors the conditions necessary for their access to and retention in the educational system."<sup>65</sup> In 2003, Colombia's Constitutional Court agreed, finding that the school district should "take into account social and economic factors" in assigning students to schools, and that the right to education and the safety of the child should prevail over other considerations.<sup>66</sup> As a result, the Court ordered the girl's admittance to one of the three schools within her neighborhood.

*Kenya: Addressing Accessibility of Health Services Regardless of SES*

The fundamental principle underlying the *Mora v. Bogota* decision is that SES should not be a barrier to fundamental public goods and services like education. The same is true for health, as illustrated by a case decided nine years later in Kenya.<sup>67</sup>

The petitioners, Millicent Awuor Omuya and Margaret Anyoso Oliele, were mothers who had just given birth but were detained at the hospital in unsafe and unsanitary conditions because they could not pay their medical bills in full. Omuya had initially gone to give birth at a clinic where she knew she could afford the fee, but when it appeared that her baby was in breech position, she was referred to Pumwani Maternity Hospital, where her costs more than tripled. As it turns out, Omuya gave birth without complications just 15 minutes after arriving at the hospital, but she was still charged the full fee. When she could not pay it, she was detained for 24 days. Oliele, meanwhile, was a 15-year-old girl who delivered by caesarean section and then lost consciousness for 10 days. When she woke, she was detained for another seven days for her inability to pay.<sup>68</sup> Both patients, who had other children to care for at home, were released only when their friends and family helped pay their outstanding bills.<sup>69</sup>

The Kenyan High Court found that the hospital's actions violated the women's rights to liberty, freedom of movement, dignity, and health, and that they had been

unconstitutionally discriminated against “on the basis of their economic status.”<sup>70</sup> Article 43 of the Kenyan Constitution provides that “everyone has . . . the right to health care services, including reproductive health care,” while Article 27 prohibits direct and indirect discrimination on “any ground,” including “social origin.” Additionally, Article 21(3) establishes that the state has “the duty to address the needs of vulnerable groups within society,” which the Court held to clearly include “poor expectant women who are in labour.”<sup>71</sup> In summary, the Court held: “The result is that there was a disproportionate impact on poor women’s ability to access health care, which constitutes discrimination on the basis of social origin, and negates the right of women to enjoy their constitutionally guaranteed rights and freedoms. The consequences of this pervasive discrimination is the inaccessibility of maternal health services overall, which in turn hinders the attainment of the highest attainable standard of health for poor women.”<sup>72</sup>

As a remedy, the Court ordered the Nairobi county government, which funded the hospital, to pay substantial damages to the two women; ordered the eradication of the practice of detaining patients who could not pay their bills; and called on the government for stronger implementation of policies providing for fee waivers in public hospitals for patients in need.

### *Current Constitutional Approaches*

As these cases from Colombia and Kenya show, across both education and health, upholding the fundamental principle of equal access regardless of SES may require governments to remove cost barriers through affirmative steps rather than merely prohibiting discrimination. Currently, over half of constitutions guarantee free primary education, although only one-third extend this same guarantee to secondary school. Only 10% guarantee universally free medical care, although an additional 6% guarantee the right to medical services specifically for low-income adults and children. Through these guarantees, constitutions can play a critical role in reducing disadvantage linked to SES and supporting universal access to two fundamental building blocks of opportunity and well-being.

## IMPLEMENTATION CHALLENGES AND CONSIDERATIONS

SES plays an important role in access not only to public and private sector opportunities, decent working conditions, and basic health and educational services, but also to justice. Lack of resources to hire a lawyer and initiate a lawsuit often makes the enforcement of rights through the courts a practical impossibility for people in poverty. Although these challenges affect all people’s ability to claim their rights, they have a disproportionate impact on the basis of SES. However, there is significant variation in the extent to which countries’ constitutions and legal systems

support equal justice for all. Assessing which strategies are effective and which are likely to further marginalize people in poverty is important for evaluating whether the other rights examined in this chapter will have impact.

### *Cases Brought by and on Behalf of Groups*

Access to the courts is directly shaped by countries' rules on legal standing, which determine who is eligible to bring a claim and under what circumstances. Under most countries' rules, individuals cannot bring claims before the courts unless they have been personally affected, and the right to individually apply to the Supreme or Constitutional Court may be subject to further restrictions. However, many countries allow plaintiffs to bring claims on behalf of a class. Some, such as India, do not require plaintiffs to have been directly affected by the issue at hand if there is evidence that it has had a broad societal impact.

Being able to bring a claim on behalf of a group presents many advantages. First, from an administrative standpoint, courts can achieve greater efficiency when they can address multiple similar claims at once rather than a series of individual claims. Given that many countries' courts systems are overburdened, this is an important consideration for supporting access to justice more broadly. Second, collective claims can ensure that the benefits of litigation reach a much broader population, including those likely lacking the resources to hire a lawyer on their own. Finally, collective claims can expose major gaps or flaws in laws and policies and catalyze structural reforms.

Collective legal actions take different forms in different countries and go by varying names. Across regions, group-based approaches to enforcing fundamental rights have provided a tool for compelling action for large populations, rather than for single individuals. In India and Nepal, "public interest litigation" has become a powerful mechanism for advancing human rights and demanding greater government accountability. In Delhi, for example, a public interest litigation case on poor air quality resulted in new regulations on commercial vehicles, which the World Bank estimated saved over 14,000 lives between 2002 and 2006.<sup>73</sup> In other countries, like the United States, class action lawsuits or so-called "impact litigation" can have similar aims and effects, although they still require a plaintiff or plaintiffs who have been personally harmed. For example, class actions have been used in the U.S. to secure justice for a community whose water was contaminated by a utility company,<sup>74</sup> enforce protections against sexual harassment for female mine workers,<sup>75</sup> and uphold the right to family visits for prisoners.<sup>76</sup> More recently, the former Soviet states of Central and Eastern Europe have embraced variants of public interest litigation, which have been effectively used to challenge discrimination in public services, education, and employment.<sup>77</sup>

### *Access to Legal Representation and Assistance*

The assistance of an attorney is often critical for claiming rights, effectively navigating the legal system, and accessing a fair process. However, many low-income

people cannot afford a lawyer and are not provided one by the state, or are guaranteed legal counsel only in limited circumstances. While class actions can help democratize the benefits of legal representation, access to lawyers is a separate approach to improve the realization of rights across SES. This is important especially for legal issues that are individual by nature.

Around the world, the importance of guaranteeing the right to counsel at key stages of the criminal process is getting closer to global consensus.<sup>78</sup> In 2013, the European Union (EU) enacted a Directive on Access to a Lawyer, which is binding on all EU states and requires that “suspects or accused persons have the right of access to a lawyer without undue delay.”<sup>79</sup> Meanwhile, according to a 2016 study of 125 countries’ legal frameworks by the United Nations Development Program, the majority take some approach to guaranteeing the right to counsel in criminal cases through their constitutions; a small but growing number make clear, primarily through legislation, that free access to a lawyer extends to indigent civil litigants.<sup>80</sup> To ensure access to justice regardless of SES, this will be an important area for further global reform.

### *Social Rights vs. Social Policies?*

Because of the above challenges, some have claimed that putting too much emphasis on a rights-based framework may take the pressure off governments to enact strong social policies that affirmatively provide for the needs of the poor, rather than fulfilling basic needs only upon demand. Likewise, some have argued that social and economic rights in particular disproportionately benefit the rich, who have easier access to courts. However, there is little evidence that governments are making calculated trade-offs between strong constitutional rights and strong social policies; in fact, research has demonstrated that at least in the context of education, the existence of a constitutional right is positively associated with the existence of a national policy.<sup>81</sup> Additionally, neither of these approaches to change acts in isolation. Class actions in particular can lead to the strengthening and expansion of social policies, with benefits for large populations. For example, the “right to food” case in India, which expanded the country’s free school lunch program, improved nutrition for nearly 10 million children and boosted girls’ first-grade enrollment by 10% per year.<sup>82</sup>

Further, recent empirical research has shown that economic and social rights litigation can have benefits that disproportionately affect lower-income communities and extend far beyond the parties in the case, depending on the nature of the claim.<sup>83</sup> For example, in South Africa, a case holding that asylum seekers could not be excluded from receiving public education or seeking work is estimated to have impacted over 50,000 individuals, all of whom were socio-economically disadvantaged.<sup>84</sup> Similarly, in India, litigation to reduce air pollution in Delhi improved health for hundreds of thousands, and disproportionately benefitted people in the two lowest income quintiles, which include 47% of those diagnosed with asthma.<sup>85</sup>



Although improving access to the courts and legal aid is critical for ensuring countries' judicial systems are effective for people across SES, the litigation process itself is not inherently at odds with "pro-poor" aims—and, in fact, can be a powerful tool to support these movements.

### *Participatory Drafting Processes*

Participatory drafting has shown potential for designing constitutions that more comprehensively address the needs and interests of marginalized communities. According to one longitudinal study of 138 constitutions, countries whose constitutions were drafted with more direct citizen participation had higher levels of democratic practices after the constitutions' enactment.<sup>86</sup> Increasing the involvement of people across SES in the constitutional drafting process can strengthen the extent to which constitutions effectively protect rights regardless of SES.

Examples from individual countries illustrate the feasibility of widespread participation. In South Africa, for example, the government undertook a comprehensive process of education and public consultation while drafting its 1996 constitution, which prioritized the input of marginalized communities. The education component, which focused on building general knowledge about the constitution and citizens' right to submit input, reached over 95,000 rural and marginalized people through over 1,000 participatory workshops, while its media campaign reached 73% of adult South Africans through radio broadcasts in eight languages.<sup>87</sup> As part of the consultation component, members of the Constituent Assembly met with 20,500 individuals and 717 organizations over the course of 27 public meetings, all of which took place in rural and disadvantaged areas.<sup>88</sup> Finally, after a draft of the constitution was prepared, the public had another opportunity to submit comments before the final negotiation.<sup>89</sup>

Establishing a responsive, accountable, and inclusive relationship between the government and the people is a key function of constitutions. Creating inclusive and equitable processes for drafting these fundamental documents is a first step toward ensuring that constitutions lay the foundation for more inclusive and equitable laws, policies, and practices.

SES discrimination is often overlooked in constitutions, even as it profoundly shapes health, educational and economic opportunities, and the ability to exercise other fundamental rights. Including more people who have felt the impacts of this type of discrimination firsthand in the process of building constitutions, while deepening our collective understanding of how constitutional protections on the basis of SES have made a difference in people's lives globally, can help ensure constitutions fulfill their potential as powerful instruments of democracy.

## CONCLUSION

Beginning with the UDHR, countries around the world agreed that fundamental rights and freedoms should not be contingent on "social origin, property, birth or

other status.”<sup>90</sup> Likewise, the UDHR and key international treaties adopted during the following decades, including the ICCPR and the ICESCR, embraced a multidimensional approach to poverty alleviation that recognizes the importance of access to education, healthcare, fair labor conditions, and political rights and participation. In 1995, through the Copenhagen Declaration on Social Development, 118 world leaders committed their countries to “create an enabling economic environment aimed at promoting more equitable access for all to income, resources and social services” and to reaffirm and strive to realize the rights embodied in international treaties, “including those relating to education, food, shelter, employment, health and information, particularly in order to assist people living in poverty.”<sup>91</sup> And in 2015, all 193 U.N. member states unanimously committed to ending poverty and reducing inequality by adopting the SDGs.

In theory, then, there is wide global agreement on preventing SES discrimination and ensuring that having a low income does not preclude full participation in society. But in practice, we still have far to go—and addressing the gap between these international commitments and countries’ domestic legal frameworks is an important first step. Globally, nearly half the world’s constitutions fail to prohibit discrimination on any aspect of SES. Even fewer guarantee that the ability to pay will not be an insurmountable obstacle to accessing healthcare and an adequate education. While some forms of SES discrimination may not be immediately apparent, a greater political commitment to identifying and testing for these more invidious forms of bias would go a long way toward realizing equal rights for all. In the context of rising economic inequality globally, strengthening protections on the basis of SES has become all the more critical.



PART TWO

Social and Economic Rights That Are  
Fundamental to Equality



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# The Right to Education

## *A Foundation for Equal Opportunities*

### A LONG HISTORY OF EXCLUSION

History is littered with countries actively denying the chance for an education. In the United States, colonies and then states enacted laws that prohibited educating African American slaves in the eighteenth and nineteenth centuries.<sup>1</sup> South Carolina, for example, passed a law in 1740 imposing a £100 fine—equivalent to over \$21,192 in 2019<sup>2</sup>—on anyone who dared to “teach or cause any slave or slaves to be taught to write,”<sup>3</sup> while Virginia’s 1819 Revised Code proclaimed that providing schools for slaves would be considered “unlawful assembly,” punishable by 20 lashes.<sup>4</sup> The result was widespread exclusion, particularly across the American South: according to the 1850 Census, of the 58,558 African Americans in Texas, just 397 were free—of whom 20 were in school.<sup>5</sup>

In South Africa, the Dutch settlers established schools for African slaves in the seventeenth century, but they focused solely on religious instruction, and largely served as tools for social control rather than empowerment.<sup>6</sup> In the mid-nineteenth century, the governor of the Cape of South Africa described the purpose of educating black South Africans as “peaceful subjugation,” while curricula designed for black students focused on the skills required to perform manual labor.<sup>7</sup>

In both countries, segregation of public schools came later, after courts and legislatures had begun ruling against complete exclusion.<sup>8</sup> In 1889, South Africa’s

superintendent general for education argued in Parliament for “a differentiated education thereby ensuring that the Whites maintained their supremacy, while the mass of Africans were confined to a humbler position.”<sup>9</sup> In the post-Civil War U.S., many states’ laws and constitutions mandated public school segregation; in Alabama, the 1901 constitution’s requirement that “[s]eparate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race” remains, despite ballot initiatives in 2004 and 2012 proposing its removal.<sup>10</sup>

Beyond limiting access to education on the basis of race, governments have systematically excluded immigrants, girls, and children with disabilities. In California, which saw an influx of labor migrants from China and Mexico in the late nineteenth century, employers complained that “the schools teach Mexicans to look upon farm labor as menial,”<sup>11</sup> while the state superintendent argued against funding schools for Chinese students given their supposed lack of interest in learning.<sup>12</sup>

In Afghanistan, girls have faced a series of evolving barriers to education for centuries. In 1919, Habibullah Khan, the country’s ruler since 1901, was assassinated after attempting to open a school for girls.<sup>13</sup> In 1923, Habibullah’s son Amanullah drafted Afghanistan’s first constitution, and continued his father’s fight for girls’ education. However, after Amanullah raised the minimum age of marriage to 18 and banned polygamy, a council of tribal leaders and elected officials rebuked his leadership and ordered the closure of the girls’ schools in Kabul and rural areas.<sup>14</sup> In the decades since, girls have faced persistent obstacles to accessing education, most recently resulting from the Taliban’s closure of schools, particularly those for girls, across the country. Today, according to UNICEF, 60% of Afghan girls aged 7–17 are out of school.<sup>15</sup>

## EDUCATION AND THE FIGHT FOR EQUAL RIGHTS

South Africa, the United States, Afghanistan, and other governments denied certain populations access to education because they recognized its fundamental role in empowering people to fight for equality. Education (both informal and formal) provides individuals and communities with knowledge of their civil, political, social, and economic rights, how these compare to the rights of others, avenues for seeking change, and tools for recourse upon experiencing discrimination and rights violations. Therefore, in a book fundamentally about equal rights, we believe it is essential to examine whether everyone has the right to an affordable, accessible, quality public education.

The right to education is also firmly grounded in international human rights agreements including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the U.N. Convention on the Rights of the Child (CRC). What difference have education rights made, and what more must be done to ensure all children have the opportunity to learn?

*India: Marching for a Constitutional Right to Education*

On June 19, 2001, after a 115-day journey, a group of 150 activists, teachers, and citizens reached the Indian capital of Delhi, where temperatures neared 100 degrees Fahrenheit. The group had already traveled over 15,000 kilometers across 20 states, rallying thousands of supporters along the way.<sup>16</sup> Their mission? The enactment of a fundamental right to education.

The *Shiksha Yatra*, or March for Education, was the culmination of over a decade of activism and legal action aimed at strengthening the constitution's protections of education. India's independence constitution, enacted in 1949 following the end of British colonial rule, was among the first to include a comprehensive list of social, economic, and cultural rights, in addition to the civil and political rights that have been common in constitutions for centuries. Yet most of the social and economic rights, including the right to education, were enacted in a separate section of the constitution reserved for "directive principles," whereas the civil and political rights were categorized as fundamental rights. As the constitution explicitly noted, this distinction meant that although it was the "duty of the state to apply" the directive principles, they "shall not be enforced in any court."<sup>17</sup>

In the decades following the constitution's adoption, India's economy grew substantially. Yet the pace of progress in education gradually slowed. By 1990, just seven girls were in primary school for every ten boys, and 90 million children aged 6–14 were out of school in 1991.<sup>18</sup> Literacy rates had improved markedly since the 1950s but remained low when viewed in a global context, with only 64% of men and 39% of women able to read and write in 1991.<sup>19</sup> Advocates and civil society groups began identifying the education provision's nonbinding nature as part of the problem, arguing that over four decades since the constitution's birth, it was time for a stronger legal commitment to free education to accelerate progress toward its full realization.

Two early 1990s Supreme Court cases, *Mohini Jain v. State of Karnataka*<sup>20</sup> and *Unni Krishnan J.P. v. State of Andhra Pradesh*,<sup>21</sup> became the catalysts for change. While both cases actually dealt with fees for *higher* education, the Court took the opportunity to examine the constitutional "right to education" more generally. Article 45 stated: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." Noting that the education provision was the only directive principle that included a time frame for its realization, the Court observed that the drafters clearly understood it to be particularly consequential, and urged that after 44 years, the constitutional aspiration to provide universal education should become a reality. The Court found further support for this interpretation in the ICESCR. Finally, the Court reasoned that Article 21 of the constitution, which guarantees the "right to life" and "right to liberty," is enforceable and justiciable, and basic education provides the foundation for these rights—making education justiciable by implication.



While celebrated by activists, the Court's rulings on free education also stirred controversy about the scope of judicial review; critics questioned whether the Court had overstepped its bounds.<sup>22</sup> To ensure the right to education had a stronger legal basis, the National Alliance on the Fundamental Right to Education, a network of nearly 2,400 civil society groups from around the country, began organizing around a constitutional amendment that would clearly establish education as a fundamental right.<sup>23</sup>

In 1997, a bill was introduced to amend the constitution to create an enforceable right to free education for all children ages 6–14; after a change of government, it was reintroduced in 2001. The civil society movement embarked on the *Shiksha Yatra* that same year, spearheaded by the South Asian Coalition on Child Servitude, a national child rights organization. And in December 2002, after passing both houses of Parliament and attaining presidential assent, the Eighty-sixth Amendment became law.<sup>24</sup>

India's "Right to Education" movement strikingly illustrates a common issue regarding constitutional protections for social and economic rights. While some constitutions guarantee these rights through authoritative language and make clear they can be claimed in court, others describe them in aspirational or conditional terms—for example, by urging states to "endeavor to protect" the right to education or by guaranteeing the right "subject to available resources." Compared to leaving the right to education unaddressed, these aspirational approaches signal that ensuring all children can attend school is a priority. Citizens and civil society can leverage aspirational rights to advocate for more inclusive and progressive educational policies. However, the conditional language implies limits on the extent to which the right can be enforced.

Although the resulting amendment still has its critics—including those who feel it did not go far enough, as it guarantees free education only for ages 6–14—India's right to education movement provides a prime example of how civil society can employ the constitution to meaningfully advance equal rights. Through key court decisions and the engagement of thousands of citizens seeking change, an aspirational constitutional provision transformed into an enforceable right, building a strong legal foundation for millions of children to access basic education. Since 2000, India has reduced the number of out-of-school children by over 90% and closed the gender gap in both primary and lower secondary school enrollment.<sup>25</sup>

*Colombia: Fulfilling the Right to Free Education for  
Internally Displaced Children*

Enshrining educational rights in constitutions, rather than legislation alone, matters—especially against the backdrop of social or political instability. In 2002, the same year India enacted its constitutional amendment, halfway around the world, a record number of Colombians were displaced by civil war, which had embroiled

their country since the 1960s. A ten-year-old at the time, José vividly remembers the day his family was forced to flee their home in Tolima, Colombia: “They said that if we didn’t leave, they would kill us. They gave us half an hour to leave.”<sup>26</sup> On average, every ten minutes, a family was forced to gather their most essential possessions and flee, often under threats of violence or accusations of “collaboration” with the government. José and 13 of his relatives left immediately, migrating over 100 miles to Bogotá.

For children like José, forced displacement was a destabilizing, traumatic experience, with both immediate and long-term impacts. As in many conflict situations, children have faced among the most devastating and enduring consequences of the violence in Colombia. Despite parents’ best efforts to reestablish a sense of normalcy for their kids, financial barriers often put school—central to children’s healthy development, opportunities, and daily life—out of reach. The devastation disproportionately affected families that were already marginalized. For some families in desperate economic circumstances, it can feel like a necessary choice to have children work rather than finish their education. In Colombia in the early 2000s, compounding this issue was the government’s imposition of tuition—even for public primary school.

Numerous personal accounts revealed the burden of tuition on families trying to rebuild their lives. On top of tuition fees, children like Eduardo, an eighth grader, found themselves facing additional \$4 monthly charges just for water, not to mention the costs of uniforms, books, and backpacks.<sup>27</sup>

In the context of Colombia’s economy at the time, these expenses were often debilitating. According to the Colombian Commission of Jurists, as of 2003, the average annual cost of sending a student to school in Bogotá equaled around three months’ work at the minimum wage.<sup>28</sup> For many displaced families in Colombia, the cost burden was untenable. In 2002, fewer than 9% of the displaced children in 21 “receiving communities” were attending school, compared to 93% of all children living there.<sup>29</sup> In a study of why displaced children were leaving school, the Colombian ombudsman’s office found that education costs outweighed almost every other factor.<sup>30</sup> By the early 2000s, it was becoming undeniably clear that the displacement crisis would put its youngest victims at a lifelong disadvantage.

However, the Colombian Coalition for the Right to Education, in partnership with DeJusticia, a Colombian NGO focused on social and economic rights, saw an opportunity to shift the tide for José and his peers—and it started with the constitution. The option to charge primary school tuition had been instituted by a 1994 law that departed from Colombia’s legal tradition, since the 1930s, of guaranteeing free education.<sup>31</sup> Challenging the law, DeJusticia pointed to Article 67 of Colombia’s 1991 constitution, which guaranteed free education. But Article 67 qualified this guarantee with the phrase “without prejudice to charges for the cost of academic rights for those who can afford them,” which some argued allowed for charging tuition or fees if affordable. The DeJusticia lawyers argued that Colombia’s

constitutional history made clear that fees were never permissible at the primary level. Moreover, Colombia's regional and international commitments bound the country to ensure that primary education was compulsory and tuition-free.

The Constitutional Court agreed. International treaties ratified by Colombia, including the ICESCR, unequivocally protected the right to free primary education; under Article 93 of the constitution, these treaties were legally binding and enforceable. Further, the Court affirmed that given how the right to education had developed in Colombia, the 1991 constitution's cost-related provision clearly "was never meant to apply to tuition fees for primary education and therefore not to modify the standard of free education as set forth in the previous Constitution."<sup>32</sup> Accordingly, Judge Luis Ernesto Vargas Silva found that charging tuition for public primary school was unconstitutional.

The Colombian court's decision was a major step forward. Overnight, primary school became free by law, benefiting millions of children nationwide, including the vast numbers affected by displacement.<sup>33</sup> The decision also brought Colombia in line with every other Latin American country, which had already guaranteed free primary education.<sup>34</sup>

Furthermore, the case underscored the power of establishing the right to free education through constitutions rather than statutes or policies. Because Colombia constitutionally guaranteed the right to free education for those who could not afford fees, it provided DeJusticia with the strongest basis for challenging legislation curtailing that right.

### *The Power of Constitutional Education Rights— and Questions for Their Design*

Together, these cases from India and Colombia illustrate that constitutional rights to education have powerfully aided efforts to strengthen children's educational opportunities, with particular benefits for marginalized students. They also demonstrate the feasibility of guaranteeing the right to free education even in lower- and middle-income settings.

However, the differences between these two countries' approaches to the right to education raise key questions, relevant across contexts. For example, is it best to guarantee a broad right to education, or are constitutions most effective when they specifically guarantee primary or secondary education? At each level, what should the guarantees include? In practice, can these provisions advance both access to education and its quality? And finally, how should a constitution negotiate the relationship between these protections and a country's level of economic development?

After diving deeper into the evidence on why education matters for equality—and what barriers remain for achieving universal education—this chapter examines these more pragmatic questions, drawing on further examples from around the world to understand the potential for impact of constitutional education rights.

## THE TRANSFORMATIVE POTENTIAL OF EDUCATION

Leaders around the world have highlighted the transformative power of education, from South African president Nelson Mandela, who in 2003 declared education “the most powerful weapon we can use to change the world,”<sup>35</sup> to Malala Yousafzai, who in advocating for girls’ education urged the U.N. General Assembly: “[L]et us pick up our books and our pens, they are the most powerful weapons. One child, one teacher, one book and one pen can change the world. Education is the only solution.”<sup>36</sup> As both speakers’ words make clear, education is important not just for each child, but for our collective well-being and broader struggles for equality. Innumerable studies back these calls up.

### *Individual Earnings and Employment*

Across high- and low-income countries alike, evidence shows that increased educational attainment leads to higher-paying jobs, lower unemployment rates, and even higher agricultural productivity.<sup>37</sup>

In the United States, adults with a college degree earn about 50% more than those who have completed only high school, and are less than one-third as likely to be unemployed.<sup>38</sup> Similarly, across OECD countries, employment rates for 25- to 34-year-olds with a tertiary education range from 8 to 43 percentage points higher than for those who did not finish high school.<sup>39</sup> Education economically benefits residents of low- and middle-income countries (LMICs) as well as high-income countries, and rural areas as well as urban. In a study of 73 countries, the average rate of return, as measured by earnings per additional year of schooling, is 9.7%, ranging from 7.4% in high-income countries to 10.7% in middle-income countries and 10.9% in low-income countries, with the highest rates of return estimated in Latin America and the Caribbean (12%) and sub-Saharan Africa (11.7%).<sup>40</sup> In Uganda, farmers who have completed four years of primary school are estimated to increase crop production by 7%, while seven years of primary school are associated with a 13% increase; given that the majority of Ugandan families live in rural areas and practice subsistence farming, these findings have tremendous practical import.<sup>41</sup>

While the trends are consistent, increased education does not always lead to markedly improved employment prospects. In some settings where the supply of high-skill jobs is limited, a university degree might not be the primary pathway to economic security. Still, despite varying impacts across settings and from person to person, the evidence is strong that, on the whole, higher educational attainment supports higher earnings and employment rates.

### *Health*

Increased educational attainment is also associated with better health outcomes.<sup>42</sup> For example, a study of 22 European countries found that adults who

had completed upper secondary or higher education were commonly 2–3 times more likely to report being in good health than individuals with less education.<sup>43</sup> A study of 80 LMICs found that increases in women’s educational attainment accounted for 14% of the reductions in under-five mortality, 30% of the reductions in adult female mortality, and 31% of the reductions in adult male mortality from 1970 to 2010.<sup>44</sup> The study further estimated that educational gains saved 7.3 million lives across LMICs from 2010 to 2015.<sup>45</sup> Likewise, a study spanning 95 LMICs found that a one-year increase in girls’ education was associated with a 3.6% decrease in under-five mortality from 1970 to 2004.<sup>46</sup> These benefits are likely explained partly by education’s impact on socioeconomic status, but literacy and formal schooling may also independently affect healthcare practices and behaviors, with benefits for entire families.<sup>47</sup>

### *Gender Equality*

While education benefits all children, expanding girls’ access to education can be especially powerful, both because girls have historically received less formal schooling than boys and because of the multigenerational benefits. Staying in school is associated with lower rates of early marriage, fertility, and maternal mortality, in addition to improved long-term economic opportunities and autonomy.<sup>48</sup> For each additional year a girl stays in school, her wages rise 10–20%.<sup>49</sup> With increased income, women can exercise greater autonomy and assume a greater role in household decision-making, which often leads to higher spending on children’s health and education.<sup>50</sup>

Children whose mothers have had access to education often have lower mortality and malnutrition rates, higher immunization rates, and overall better health.<sup>51</sup> In a study of families in Malawi, Tanzania, and Zimbabwe, when mothers had a least a secondary school education, their children’s odds of stunting (impaired growth) decreased by 44%, 69%, and 49%, respectively, compared to mothers without any formal education.<sup>52</sup> Likewise, a 56-country study concluded that increased maternal education reduced the odds of stunting in both “low-burden” and “high-burden” countries.<sup>53</sup> Husbands’ health benefits as well. In Bangladesh, men with more educated wives face lower mortality risks regardless of their own education or occupation.<sup>54</sup>

### *Benefits for National Economies*

Finally, when more children get an education, countries’ economies do better. A study of the OECD found that greater educational attainment was responsible for around half the economic growth across 30 countries between 1960 and 2008.<sup>55</sup> Meanwhile, discrimination and unequal opportunities in education have the opposite effect; according to the International Labour Organization and the Asian Development Bank, gender disparities in access to education in the Asia and Pacific region diminish overall GDP by up to \$30 billion yearly.<sup>56</sup> Similarly,

across many African countries, girls' high dropout rates dramatically reduce economic growth.<sup>57</sup> According to estimates by Plan International, the collective costs of failing to close the gender gap in education across 65 LMICs amount to \$92 billion annually.<sup>58</sup>

## PERSISTING BARRIERS

### *Poverty*

Although the barriers to equal access to education are wide-ranging, poverty is a common thread. Child labor, driven largely by families' underlying economic circumstances, jeopardizes millions of children's opportunities to stay in school. And both paid child labor and unpaid family labor at high hours impede children's ability to learn even if they can attend school. In addition, the direct costs of attending school, including tuition and fees for books, uniforms, or other materials, put education out of reach for many. These fees also disproportionately affect girls, since investing in boys' education is often viewed as a higher priority due to cultural norms and labor market discrimination that may reduce women's earning potential. Disadvantage due to poverty and gender compound one another. According to UNESCO, "girls from the poorest families in sub-Saharan Africa will only achieve [universal lower secondary school completion] in 2111, 64 years later than the boys from the richest families."<sup>59</sup>

### *Quality and Value*

Second, even where children are in school, ensuring that they receive quality education, particularly in lower-resource areas, remains a key challenge. In at least 26 countries (including 23 in sub-Saharan Africa), the average student-teacher ratio exceeds 40:1 in primary schools.<sup>60</sup> And in some countries, teachers are only required to have a few more years of education than their students.<sup>61</sup> UNESCO reports that just one-third of primary-age children worldwide are achieving basic literacy and numeracy.<sup>62</sup>

These findings are troubling for children who are already in classrooms, but also may lead to more children missing out on education entirely. Concerns about inadequate educational quality may deter some families from sending their children to school, especially if a child's school attendance means reduced household earnings.

### *Discrimination and Exclusion*

Finally, discrimination within classrooms against girls or students from particular racial, linguistic, or economic backgrounds, or disparities in school quality that disproportionately affect particular groups, continue to create barriers to equal chances at education. In many countries, students with disabilities still face widespread exclusion from mainstream schools due to discrimination or inaccessibility, while other students lack access to education in their native language. Meanwhile,

discrimination in education can have profound consequences for societies' overall inclusiveness and equality. Research shows that inclusive and integrated educational settings are best suited to prepare all students to live and learn together.<sup>63</sup> In short, proactive efforts to prevent discrimination in schools are vital to both students' ability to learn and a country's success.

Critically, to ensure the right to education is fully accessible to all, reducing discrimination and promoting integration are equally important in public and private schools. In a substantial number of countries, a significant portion of children attend private schools.<sup>64</sup> In Australia, for example, 41% of secondary students are enrolled in private schools.<sup>65</sup> In Uganda, 27% of primary schools and 66% of secondary schools are private. And globally, private education is on the rise: UNESCO reports that the share of secondary school students enrolled in private institutions worldwide increased from 19% in 1998 to 27% in 2017.<sup>66</sup> These high ratios have triggered equity-related concerns among civil society groups, who suggest that these schools take advantage of inadequate investments in public education to convince lower-income families that private schooling is necessary, even as private educational offerings vary in quality.<sup>67</sup>

#### EDUCATION FOR ALL: ENSHRINING EFFECTIVE APPROACHES IN CONSTITUTIONS

Ensuring that education yields the maximum possible benefits requires addressing equal access to quality education from a young age. While removing barriers to higher education is also essential, investing in schooling from the very beginning is critical for providing all children with opportunities to reap education's benefits for their health, economic mobility, and future careers. It is also clear that addressing education alone is insufficient to create an equal playing field in the labor market—one reason the comprehensive protections of equal rights and non-discrimination discussed in the first half of this book are so critical. Education can indeed be transformative, but every piece of a country's social and legal fabric works together to shape access to opportunities and resources.

While the challenges are complex, some solutions are relatively straightforward, such as reducing educational costs and requiring governments to prevent discrimination and ensure schools are universally available. These approaches also align with countries' commitments under international treaties including the CRC. The CRC recognizes every child's right to an education, requires parties to ensure primary education is free and compulsory, and urges parties to make secondary "available and accessible to every child," including by providing free education. The CRC also commits countries to respect the rights of every child "without discrimination of any kind" including on the basis of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." Importantly, the CRC has been ratified by 196 countries and territories, including all but one country—the United States—worldwide.

The ICESCR embodies the same commitments for education, and also articulates the standard of “progressive realization,” which applies to aspects of education rights as well as other social and economic rights. This standard requires countries to invest greater resources in education as their economies grow, with the goal of expanding the availability of free education at the secondary level and beyond. Eliminating primary-level tuition and ensuring nondiscrimination are immediate obligations. In 1999, the U.N. Committee on Economic, Social and Cultural Rights provided further guidance on the right to education, specifying four elements central to its realization: adaptability, accessibility, availability, and acceptability.<sup>68</sup> How do these commitments align with constitutional approaches, and what is their potential for impact on the key barriers identified?

*Adaptability: Keeping Up with Evolving Educational Standards*

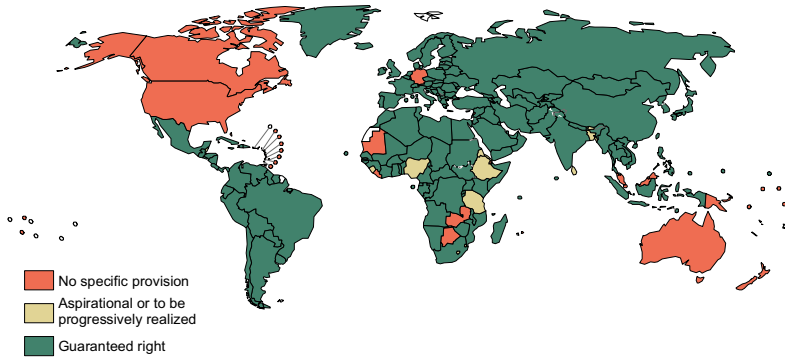
Countries across all regions and income levels have adopted constitutional rights to education, which have become more prevalent over time. As of 2017, 83% of countries take some constitutional approach to protecting the right to education, either protecting education as an individual right or making clear the state’s obligation to provide education for all (Map 25). Less than two-thirds of constitutions adopted before 1970 include a right to education, compared to all constitutions adopted since 2000.

Further, evidence suggests that a constitutional right to education supports enrollment rates. In a 2013 global study of constitutions, those that took some approach to guaranteeing the right to primary-level education reported primary enrollment rates that were, on average, 4.8 percentage points higher than those in countries without a constitutional guarantee. Likewise, looking at constitutional protections for the right to secondary education, the associated net secondary-level enrollment rates were 8.3 percentage points higher than in countries without such a provision.<sup>69</sup>

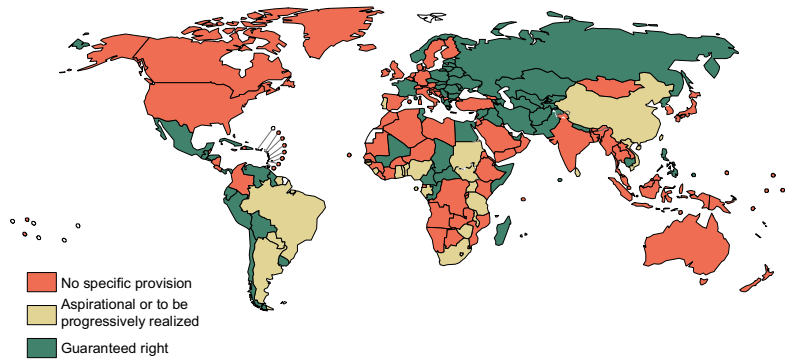
Beyond whether to protect the right to education generally, a key question is what level of schooling this right should include. Globally, 60% of constitutions explicitly guarantee the right to primary education, while 33% explicitly extend this guarantee to secondary education. Just 17% guarantee the right to tertiary education (Map 26). Seventy-seven percent generally guarantee the right to education, either in addition to or without specifying levels (Map 27).

A small number of countries specify age ranges for education rights, typically in designating how long education will be compulsory or free. For example, Lithuania’s constitution provides: “Education shall be compulsory for persons under the age of 16.”<sup>70</sup> Brazil’s constitution establishes a specific age range for free and compulsory education but clarifies that these parameters are not intended to exclude those who missed out on schooling as children: “The National Government’s duty towards education shall be effectuated through the guarantees of: I. free, compulsory elementary education from 4 (four) to 17 (seventeen) years of age, including

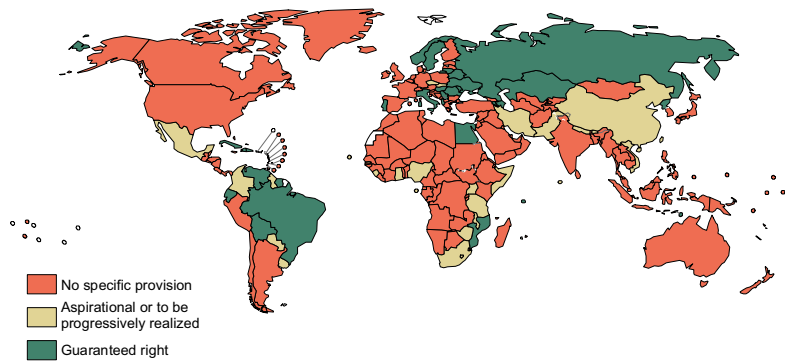




MAP 25. Does the constitution explicitly guarantee some aspect of citizens' right to education?



MAP 26. Does the constitution explicitly guarantee citizens' right to secondary education?



MAP 27. Does the constitution explicitly guarantee citizens' right to higher education?

assurance that it will be offered gratuitously to all who did not have access to it at the proper age.”<sup>71</sup> Six percent of countries establish specific age ranges for which education is compulsory, and two countries do so for free education.

Whether the right addresses a designated age group or schooling level can matter for vulnerable students. In some countries, grade repetition is high. Similarly, students who started school late (whether because of conflict, inaccessibility, costs, or other barriers), as well as students with cognitive disabilities, may be placed below the typical grade for students their age. Limiting education rights to a certain age range may unnecessarily impede the completion of such students’ schooling.

Additionally, 12% of constitutions include explicit provisions addressing adult education, including adult literacy or continuing education programs. For example, Costa Rica’s constitution provides: “The State shall organize and support adult education, designed to combat illiteracy and to provide cultural opportunities for those who wish to improve their intellectual, social, and economic position.”<sup>72</sup>

Adaptability requires that the right to education meet “the needs of changing societies and communities.”<sup>73</sup> To advance adaptability, constitutions can ensure that their protections of education rights keep pace with expanding educational standards.

In considering adaptability, it is worth returning to the primary purpose of a constitutional right to education: to ensure that all children, regardless of other circumstances, have an equal chance to obtain the education level necessary to fully participate in society and lead full lives. Exactly what this means in different contexts will change over time. For example, in most countries, a primary education no longer suffices to secure a job paying a decent wage or participate in all aspects of civil and political life—secondary and higher education have become increasingly critical for competitiveness in the labor market. Yet the economic barriers to secondary-level enrollment and attendance are greater than for primary, and competing economic pressures too often compel students to put work before school as they get older. While overcoming those pressures will require action on many fronts—including ensuring adults can earn wages sufficient to support their families so children need not labor—a constitutional right extending to secondary education can make a difference, especially if it also explicitly guarantees that secondary will be free.

Across countries, given the importance of reaching a certain level of educational attainment for future job prospects, the level of schooling a constitution protects, and whether the right’s scope keeps pace with education requirements for strong employment opportunities, can have real implications for the goal of equal opportunity. While a general “right to education” may suffice to protect equal chances over time if courts and administrators interpret it through an equal opportunity lens, advantages may also lie in using specific language to ensure the right applies at the higher levels that can be most critical for shaping individuals’ futures.

Further, as evidence mounts about pre-primary education's importance for early childhood development,<sup>74</sup> it has become clear that expanding educational guarantees to include earlier education is critical to achieving equality. Yet few constitutions address this right. The core question is how to design a constitutional right to education that provides both strong and specific enough protections and can easily adapt as educational standards rise and new evidence emerges.

In countries where amending constitutions is especially difficult, a broad guarantee of the right to education may be the most adaptable approach to ensuring the right keeps up with evolving educational standards. This can be strengthened by specifying all education levels that should be guaranteed and free at the time of enactment and noting that additional education should be covered if it becomes important to full equality of opportunity at work and in civil life.

However, it is not enough to only specify lower education levels. If the constitution explicitly guarantees the right to primary school but does not mention secondary, courts may interpret the right to education narrowly, thus limiting a constitution's potential to continue supporting equal educational opportunities as minimum standards rise and a country's ability to invest in education increases. By contrast, a broad guarantee of the right to education can provide courts and advocates with a tool to build and expand the right to education as development and educational expectations evolve. So too can specifying levels currently covered and explicitly stating criteria for additional levels of coverage in the future.

#### *Accessibility: Addressing Income Barriers and Discrimination in Education*

While protecting the right to education broadly and at expanded levels is an important first step, accessibility requires that countries also actively reduce the economic and social barriers to schools, and ensure all students have an equal chance to get an education.<sup>75</sup> Two key ways that constitutions can advance these goals are by reducing or eliminating educational costs and by prohibiting discrimination in all forms.

In many countries, making school tuition-free has markedly increased enrollment, especially by girls and other marginalized students. For example, when Ghana first piloted free primary education in 40 districts, overall enrollment increased 14.6%, and gender and economic disparities decreased.<sup>76</sup> Likewise, in Uganda, which introduced free primary throughout the country in 1997, primary school attendance rates increased from 62% in 1992 to 84% in 1999, while inequalities in enrollment across gender and income dropped.<sup>77</sup>

Because the children of mothers who receive an education are healthier, making school tuition-free can also drive important health improvements. A 2014 study of 37 LMICs found that establishing tuition-free primary education was associated with 15 fewer infant deaths per 1,000 live births by young mothers who

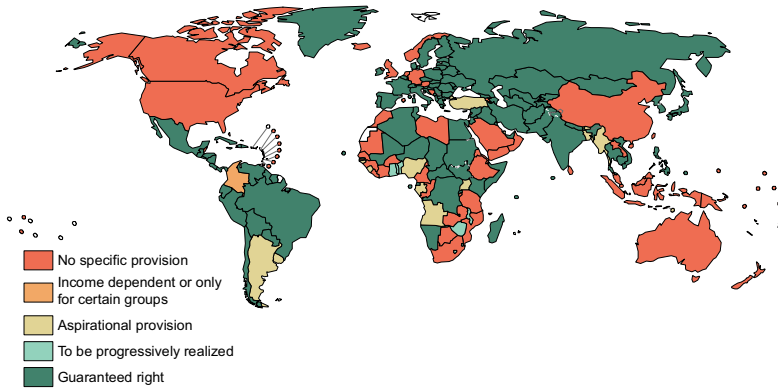
were primary-school-age when it was free, adjusting for household socioeconomic status.<sup>78</sup> As this example suggests, well-designed and implemented legal commitments to education can yield positive impacts for generations.

Enshrining the right to free education in constitutions, rather than laws and policies alone, can provide more powerful and enduring protection, as illustrated by the introductory case from Colombia. A country's constitutional guarantee of tuition-free education safeguards against regression during conflict, economic instability, or political shifts resulting in the imposition of new fees or the repeal of protective policies.

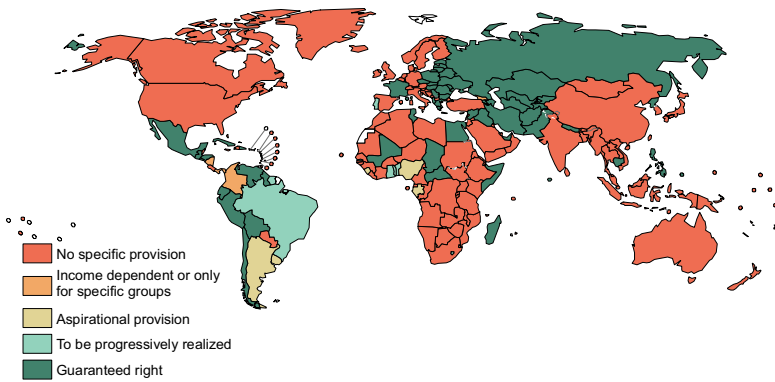
While provision of free basic education requires government investment, numerous lower-income countries have demonstrated its feasibility.<sup>79</sup> As of 2017, 53% of constitutions, spanning all regions and income levels, established that primary school would be free (Map 28).<sup>80</sup> These guarantees are more common among more recently adopted constitutions. Whereas only one-third of constitutions adopted in the 1960s guarantee free primary education, two-thirds of those adopted between 2010 and 2017 do so. However, these guarantees drop off at the secondary level: just 30% of constitutions guarantee free secondary school (Map 29).

Laws and policies also reflect governments' more modest efforts to ensure free secondary education compared to free primary.<sup>81</sup> Yet greater investment is often feasible; policymakers could improve affordability if they prioritized education. As of 2014, among countries that had yet to legally guarantee free secondary school, nearly half were spending less than 4% of their GDP on education.<sup>82</sup> The Education Framework for Action, an agenda for expanding access to education and attainment adopted by UNESCO in 2015, recommended that countries' investments in education equal at least 4–6% of GDP.<sup>83</sup> While national investment is always critical and may suffice in many countries given adequate political will, some of the poorest countries will likely need transitional support from the global community to make quality secondary education free. After investment generates improved educational outcomes and rising GDP, they too will be able to provide free secondary education from their own budgets.

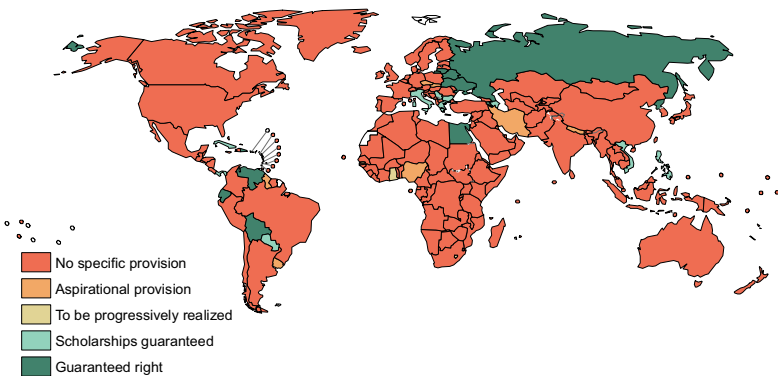
Finally, reducing university tuition barriers can be an important way to strengthen the impact of higher education on social mobility and other economic outcomes (Map 30). While only one factor in social mobility, access to affordable, high-quality higher education is key. Many of the OECD countries that consistently rank highest for social mobility, such as Norway, Finland, and Denmark, are also among those providing free university education.<sup>84</sup> For example, in Finland, students whose parents have a university education are only 1.4 times more likely to attend university themselves, compared to six times as likely in the United Kingdom, which charges tuition; in other words, parental education levels play a smaller role in shaping children's opportunities in Finland.<sup>85</sup> Social mobility in the United States, which charges high university tuition, is low compared to in other high-income countries.<sup>86</sup> Access to lower-cost higher



MAP 28. Does the constitution explicitly guarantee citizens' right to free primary education?



MAP 29. Does the constitution explicitly guarantee citizens' right to free secondary education?



MAP 30. Does the constitution explicitly guarantee citizens' right to free higher education?

education, where it exists, has been shown to raise social mobility. Specifically, lower-cost public universities and community colleges top the list of schools where U.S. students are most likely to ascend from the bottom income quintile to one of the top three.<sup>87</sup>

Still, reducing or eliminating tuition alone may be insufficient to eliminate socioeconomic disparities in higher education, especially when inequities persist at lower levels of schooling. Across Ecuador, Brazil, Argentina, and Mexico, case studies and comparative analyses suggest that the lowest-income students continue facing obstacles to access and completion even when tuition is removed. As in the U.S., in some countries, this results from disparities in primary- and secondary-level educational quality that leave students from poor families less prepared.<sup>88</sup> If these students cannot pass the rigorous entrance exams required for free public universities, their only options are expensive private schools. In Nicaragua, for example, two-thirds of enrolled college students from the lowest income quintile attend private universities, despite the availability of free public tertiary education.<sup>89</sup>

As these examples suggest, making higher education tuition-free or low-cost can significantly broaden access by students from all socioeconomic backgrounds. Six percent of constitutions guarantee the right to free tertiary education, while an additional six percent provide for scholarships to facilitate attendance. Still, while expanding the affordability of tertiary education is critical, taking this step alone will not ensure social mobility. Addressing educational disparities that surface at much younger ages—including by ensuring pre-primary, primary, and secondary education are tuition-free; reducing the social and financial barriers to pursuing post-secondary schooling; and addressing broader labor market discrimination that shapes the value of educational credentials—are all similarly important.<sup>90</sup>

### *Progressive Realization of Higher Levels of Guaranteed Free Education*

As noted earlier, countries are immediately obligated only to make education tuition-free at the primary level. Yet under the ICESCR principle of progressive realization, countries must also take steps “to the maximum of [their] available resources” to eliminate tuition barriers at higher levels.<sup>91</sup> Enshrining commitments to secondary and tertiary schooling is an important step toward broader fulfillment of the right to education.

Some countries’ constitutions specifically invoke the language of progressive realization, consistent with international agreements. For example, Ghana’s constitution provides: “[S]econdary education . . . shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education.”<sup>92</sup>

In addition to the 53% of countries that guarantee the right to free primary education, 4% of countries specify that free primary education will be

progressively realized, and 8% aspire to providing free primary education.<sup>93</sup> Similarly, in addition to the 30% of countries guaranteeing free secondary education, 5% have committed to progressively realizing the right, and five countries aspire to it.<sup>94</sup> Finally, on top of the 6% that include guarantees, 2% of constitutions commit to the progressive realization of free higher education, while 4% include aspirational provisions.

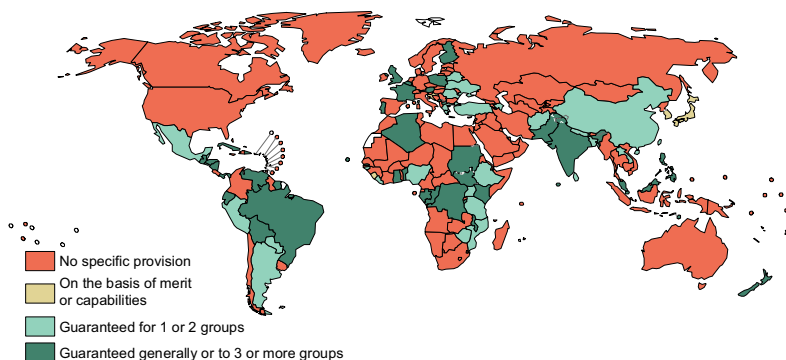
*India and Swaziland: Moving from Aspirational to Firm Commitments*

In two cases where aspirational or progressive realization provisions were especially successful, countries put a time horizon on the right to free education becoming enforceable, providing a tool for advocates as that deadline approached or passed. As discussed earlier, in India, the directive principle on education specifying it would become an enforceable right within ten years provided textual fuel for the movement to pass new legislation and, ultimately, a constitutional amendment. Likewise, in Swaziland, a constitutional deadline for free education gave parents a tool for accountability.

Indeed, in 2009, a group of parents brought a case to enforce Section 29(6) of Swaziland's 2005 constitution, which provides: "Every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade." As the parents argued, free primary education was a right subject to immediate, rather than progressive, realization. In other words, the cost of basic education could not excuse the government from providing it, since free primary school was a "minimum core obligation" of fulfilling the right to education.<sup>95</sup>

However, while the High Court ruled in the parents' favor, in a follow-up to enforce the judgment, it found that although "the Government demonstrated that it had taken steps towards implementation of a program for free education . . . there was no evidence that the Government had resources available at that time to fulfil its constitutional obligation."<sup>96</sup> In other words, the Court accepted the government's rationale that progressive realization was the appropriate standard.<sup>97</sup> The Supreme Court upheld this decision in 2010, dismayed activists who felt it undercut Swaziland's commitments under international law. That same year, however, the legislature passed the Free Primary Education Act of 2010, which rolled out free primary grade by grade from 2010 to 2015.<sup>98</sup>

As this example shows, when constitutions use progressive realization language to describe rights that should be immediately realizable, they risk letting courts define the government's obligation in a way that falls short of global standards. At the same time, including a "deadline" for realizing a right can provide a tool for citizens and activists. Whether a time horizon, as used in India and Swaziland, or an income or GDP horizon that kicks in when additional financial resources are available, specifying when a goal must be achieved can accelerate action.



MAP 31. Does the constitution explicitly guarantee equal opportunities or nondiscrimination in education?

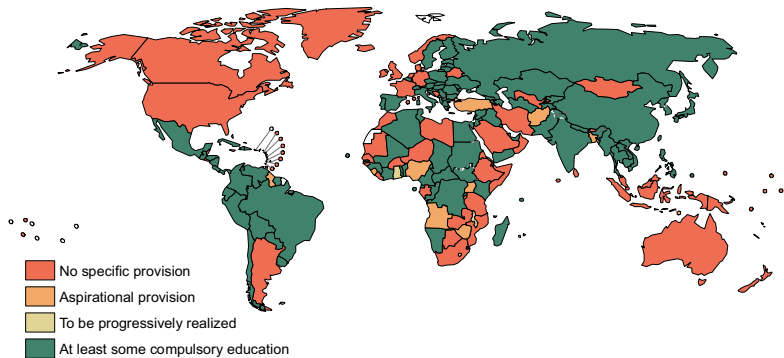
### *Prohibiting Discrimination in Education*

Beyond reducing financial barriers, ensuring equal access to education also requires guaranteeing equal opportunities for all children in education and/or prohibiting discrimination in education on the basis of race/ethnicity, gender, disability, religion, sexual orientation and gender identity, and other characteristics. While substantive rights like the right to free education provide essential building blocks for opportunity, their full effectiveness relies on a critical foundation of nondiscrimination and addressing histories of past discrimination.

Only 22% of constitutions explicitly guarantee nondiscrimination or equal opportunities in education generally or to three or more groups (Map 31). An additional 13% of constitutions provide these guarantees to one or two specific marginalized groups. For example, Peru's constitution states: "It is the duty of the State to insure that no one should be prevented from receiving an adequate education on account of his economic circumstances or his mental or physical disabilities."<sup>99</sup>

Four constitutions contain provisions guaranteeing children equal opportunities in education on the basis of merit or capabilities. Without a nondiscrimination clause, language about "merit" or "capabilities" may open the door to significant discrimination. First, explicit and implicit bias shape perceptions of "merit" and "capability," and studies have shown that children from different marginalized groups are commonly perceived as less "capable" or deserving than other students. Second, for students with disabilities or different abilities, who already face widespread exclusion from education, this language could easily serve as a mechanism for further discrimination. Moreover, under the Convention on the Rights of People with Disabilities, there is no justification for excluding any child from education based on perceived capabilities; states must provide an "inclusive education system at all levels," including the reasonable accommodations that ensure education is universally accessible.<sup>100</sup>





MAP 32. Does the constitution explicitly provide for compulsory education?

*Availability: Ensuring Governments Make Quality Public Schools Available to All*

Ensuring that education is adequately “available” means providing sufficient numbers of functional schools throughout countries. One way that constitutions can support the availability of education is establishing that school is compulsory.<sup>101</sup>

Making school mandatory implicitly commits governments to ensuring that staffed schools are available and accessible to all children, while encouraging parents to send their children to school rather than keeping them home to help with household or other work. Compulsory education can also encourage enrollment and support students to stay in school longer, rather than dropping out to work full-time. For example, after the U.K. extended mandatory education from age 14 to age 15 in 1945, 14-year-olds’ dropout rate fell from 57% to below 10%.<sup>102</sup> In a study across 12 European countries that enacted reforms lengthening compulsory education between 1949 and 1983, researchers found increases in both educational attainment and wages.<sup>103</sup> In China, average years of education increased from fewer than five to over eight from the early 1980s to 2004, corresponding with the introduction of nine years of compulsory education in 1986.<sup>104</sup> However, if school is to be compulsory, it is especially important that it also be free, so as not to saddle the poorest families with mandatory tuition and fees or make them targets for prosecution.

As of 2017, 52% of constitutions explicitly make at least some education compulsory, and an additional 8% either aspire to compulsory education<sup>105</sup> or commit to progressive realization of compulsory education (Map 32). Eighty-nine of these 117 constitutions make specific levels of education compulsory, as opposed to specifying the ages at which children must be in school. Two countries (Colombia and Pakistan) address both the level and ages at which education is compulsory. Colombia’s constitution states: “The State, society, and the family are responsible for education, which will be mandatory between the ages of five (5) and fifteen (15)

years and which will minimally include one (1) year of preschool instruction and nine years of basic instruction.”<sup>106</sup> Seventeen constitutions with compulsory education provisions do not specify the duration of compulsory schooling or the ages at which school attendance is mandatory.

*Acceptability: Improving Education Quality*

Quality of education shapes learning—invaluable for its own sake—and all the outcomes associated with learning, literacy, and numeracy, from health to employment and income. Specific guarantees of factors that affect quality rarely appear in constitutions. Quality can be transformed by teachers and pedagogical approaches and affected by factors including teacher training, student–teacher ratios, the availability of supplies, curriculum strength, and school infrastructure, including transportation and sanitation.

While constitutions are not the location to embody specific approaches to education—an area where best practices may rapidly evolve—constitutional rights to education can provide a basis for advocacy to address quality. For example, several U.S. state constitutions guarantee a right to education and either reference quality or include specific provisions. Florida’s constitution, for instance, provides: “The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.”<sup>107</sup>

In states like Arkansas and Montana, advocacy groups successfully challenged school financing policies based on their state constitutions’ specific commitments to “quality” education.<sup>108</sup>

Similarly, in South Africa, advocates invoked the constitutional right to education in two cases to compel the government to supply desks and chairs for classrooms<sup>109</sup> and updated textbooks corresponding with a new curriculum.<sup>110</sup> The latter case also relied on the constitution’s equal rights guarantee, and interpreted the disparities in quality of materials—which disproportionately affected black students—as discrimination. With a broad guarantee of education rights and quality, and clear language prohibiting discrimination, parents and civil society may have the greatest flexibility to leverage constitutions to achieve these types of improvements, as evidence on which interventions are most effective continues to develop.

*Private Schools: The Last Refuge and the State Escape*

Finally, two aspects of private education should concern any government. The first is ensuring that it is not necessary. For the true fulfillment of children’s right to

education, free, accessible, and available public education must be of sufficient quality that families are not forced to send their children to private school for a good education. Absent this, the right to education is only nominal. In settings where elementary school students find themselves in a classroom of 300–400 other students and a teacher inevitably unable to teach, the education is only nominal. Likewise, in a school setting with neither desks nor books, no right to education is fulfilled.

The second way in which private education must concern governments is the prohibition of discrimination. Discrimination in private schools not only erodes equal access and equal opportunity for students who would but cannot attend, but also trains youth who may be headed for public- or private-sector leadership positions that people are created unequal and segregation is natural.

Importantly, a few constitutions explicitly establish that their protections of equal access to education apply to both public and private schools. For example, Panama's constitution provides: "Educational institutions, whether public or private, are open to all students without distinction of race, social position, political ideology, religion, or the nature of the relationship of the student's parents or guardians."<sup>111</sup> Likewise, Ecuador's constitutional provision on higher education establishes: "Regardless of their public or private character, equality of opportunities with respect to access, permanence, passing and graduation shall be guaranteed, except for the charging of tuition in private education."<sup>112</sup> While courts have also provided important rulings extending protection from discrimination to private institutions, in the context of growing privatization of education, constitutional language which makes it clear that antidiscrimination provisions apply to private schools is likely to become increasingly important.

#### WHEN CONSTITUTIONS ARE SILENT ON EDUCATION

As in other areas, when constitutions' protections for education are not explicit, the extent of their coverage is unpredictable. Two contrasting cases on the right to education, from Israel and the United States, illustrate how constitutional silence can yield strongly contrasting outcomes, with diverging implications for equality.

##### *Israel: Geographic Accessibility of Schools*

In Israel, the High Court of Justice addressed schools' geographic accessibility in an important 2011 ruling. Since 2001, Palestinian families had been filing complaints about the inadequate number of free public schools in their neighborhoods, which had compelled many families to send their children to expensive private schools or "unofficial" schools instead.<sup>113</sup> All told, just over half the children in East Jerusalem who were legally entitled to attend free public schools were in fact attending.<sup>114</sup> The petition before the Court was brought by five students, ranging from second to ninth graders, who had attempted to enroll at nearby public schools but were rejected because of classroom shortages.<sup>115</sup>

In its decision, the Court acknowledged that the constitutional text did not specifically address the right to education. However, education is fundamental to other enumerated rights, justifying its protection. As the Court explained: “The right to education is entwined as a basic element in the entire moral infrastructure of the constitutional system of Israel. . . . The realization of additional basic rights is premised on the right to education, such as the freedom of speech and the ability to obtain information, the freedom to elect and be elected, the freedom of association and freedom of occupation. In the absence of the right to education, such other rights may also be infringed.”<sup>116</sup>

The Court further found that the right to education was a core component of the right to dignity and went “hand in hand with the right to equality, jointly forming a right to equality in education.”<sup>117</sup> As a remedy, the Court ordered the government to “create a gradual physical infrastructure which will enable the integration of all East Jerusalem students who are entitled to free compulsory education and who wish to receive same, into the official education framework in the city” within five years.<sup>118</sup> If it failed to comply, it would be required to pay private-school tuition for the students who could not be accommodated in the public system. By 2015, while the decision had not been fully implemented, 195 new classrooms had been built.<sup>119</sup>

#### *United States: Unequal Funding*

By contrast, in a notorious 1972 case, the U.S. Supreme Court reached a different conclusion about the constitution’s silence on education rights. The case originated at Edgewood High School in San Antonio, Texas, where 400 students walked out of class on May 16, 1968, protesting insufficient supplies and poorly trained teachers.<sup>120</sup> The students’ action prompted their parents to organize and join their calls for change through the newly formed Edgewood District Concerned Parents Association, led by Demetrio Rodríguez, a sheet metal worker.

The group quickly uncovered the critical funding disparities underlying their children’s grievances. In Edgewood, which was at the time 90% Mexican American, educational spending per pupil was only \$356; in Alamo Heights, another San Antonio district that was 80% white, spending was \$594 per pupil.<sup>121</sup> The gap stemmed from Texas’s policies around education financing, which funded public schools partly through local property taxes. Consequently, students in less wealthy districts—who were disproportionately from Mexican American families—had access to lower-quality schools than their more well-off counterparts.

Later that year, Rodríguez and his fellow parents went to court, challenging the education finance policy as discriminatory against low-income families, and an infringement of the fundamental right to education. In 1973, however, the Supreme Court overturned a favorable district court ruling in a 5–4 decision, finding that the constitution does not explicitly establish education as a fundamental right and thus does not compel a “strict scrutiny” review of the policy. Further, building on prior cases, the Court reiterated that discrimination on the basis of wealth does

not require a heightened standard of review, unlike discrimination on the basis of race or gender. In his dissent, Justice Thurgood Marshall, a champion of civil rights, called the decision “a retreat from our historic commitment to equality of educational opportunity.”<sup>122</sup>

Justice Marshall’s critique proved prescient. While the 1954 *Brown v. Board of Education* ruling formally desegregated U.S. public schools, the Supreme Court’s decision in *San Antonio v. Rodriguez* eroded protections and contributed to the *de facto* resegregation, massive disparities in public school quality, and unequal educational opportunities found across the U.S. today. More recently, lawyers brought a class action lawsuit against the State of Michigan on behalf of Detroit public school students, alleging that the failure to provide trained teachers, textbooks, and safe learning conditions violated students’ “fundamental right to literacy,” which they argued was inherent to their constitutional right to liberty. While a lower court ruled in July 2018 that no such right exists, in November 2018, the Detroit students appealed, supported by an amicus brief filed by nearly 70 educators and organizations (and counting).<sup>123</sup> In other words, the fight for education rights continues. However, for now, the ruling in *San Antonio v. Rodriguez* poses a barrier to equal opportunities to education, and powerfully illustrates what is at stake when such foundational rights remain unwritten.

With no national guarantees of educational equality, many states have enshrined the right to education within their own constitutions, which in some jurisdictions have provided tools for reforming school finance and challenging inequity.<sup>124</sup>

*Why Enshrining the Right to Education in the Constitution  
Makes a Difference*

As these examples underscore, while regular legislation and detailed education policies are critical elements of a strong education system, constitutional rights matter to equality and accountability. And although court decisions can advance rights in common law countries, enshrining the right to education in the constitutional text more powerfully and permanently assigns the state responsibility for ensuring schools are widely available and adequately staffed, and provides citizens with a straightforward tool to hold their governments accountable. Moreover, in common law countries like the U.S., once the constitutional court has determined there is *not* a right to education, the challenge of overturning precedent becomes a significant barrier, even as constitutional education rights become more common globally.

BUILDING ON PROGRESS AND ADDRESSING  
PERSISTING GAPS

In recent decades, national and global efforts have been remarkably successful at expanding access to primary and secondary education and reducing gender disparities. Since 2000, the number of out-of-school children globally

has dropped by nearly half, while gender gaps at all levels of education have substantially narrowed.<sup>125</sup>

Still, much work remains to truly achieve education for all. Fifty-seven million children of primary school age remain out of school globally; 55 percent are girls.<sup>126</sup> In nearly one-third of developing countries, girls remain at a disadvantage in accessing both primary and secondary school, perpetuating gender gaps in wages and employment. Although secondary enrollment rates have markedly improved, completion rates have not risen quite in step, while across education levels, upholding quality remains a key challenge. Finally, children with disabilities remain particularly at risk of exclusion: in a study covering 13 LMICs, the gap in school attendance between 6- to 11-year-olds with disabilities and children in the same age group without disabilities ranged from 10 percentage points in India to nearly 60 percentage points in Indonesia, with even greater disparities among older children.<sup>127</sup>

Taking the next step toward education for all will require addressing gaps in laws and implementation, accelerating progress on norms, and ensuring that policies and programs comprehensively support all children's ability to learn and think critically.

#### *Further Constitutional Rights Needed to Make the Right to Education Meaningful*

Fulfilling the right to education requires teaching students how to learn, question, and find solutions—not indoctrinating them. Historically, schools have been used for both. Autocratic regimes have taught their own versions of history. Democracies, too, have often neglected to ensure that education includes the experiences, perspectives, and history of minority populations and those out of power as well as majority populations and those in leadership positions. Yet if education is to enable the exercise of full civil and political rights, and give citizens the chance to learn from history, then we must ensure opportunities for students to wrestle with difficult questions, to hear a multiplicity of viewpoints, to sort through the evidence, to learn how to learn and how to think.

Three other rights make a difference in this process: the right to information, the right to free speech, and freedom of belief. Globally, nearly all constitutions guarantee freedom of expression (96%), which includes the right to free speech, while 74% protect freedom of belief. Meanwhile, a growing global movement has elevated the right to information as a centerpiece of improving government accountability. Continuing to advance these rights and principles will be paramount to ensuring the right to education can be fully realized.

#### *Accelerating Change*

Important progress in constitutions over the past few decades can provide a foundation for further action (see Figure 13). While only 44% of constitutions adopted before 1970 ensured that primary school was free, 67% of those adopted since

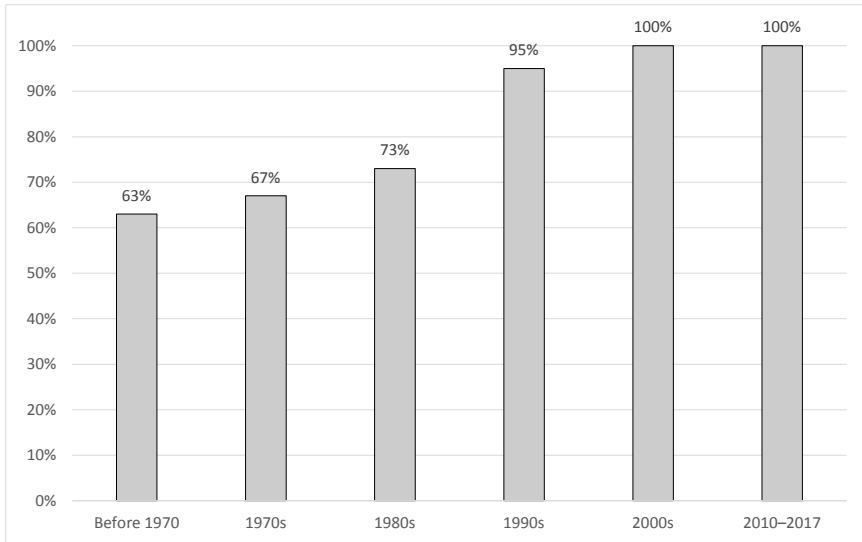


FIGURE 13. Explicit constitutional approach to protecting the right to education by year of constitutional adoption

2010 do so. At the secondary level, only 20% of constitutions adopted before 1970 addressed the right to secondary education through guarantees or aspirational language, compared to approximately 67% of those adopted since 2010. Already, constitutional guarantees have provided important bases for new legislation and judicial decisions that have resulted in increased enrollment, improved accessibility, and better resources for schools. Further, while guarantees are likelier to appear in new constitutions, it is possible to adopt or strengthen right-to-education provisions by amendment. For example, Mexico's 1917 constitution was among the first to guarantee a broad range of social and economic rights, and ensured that basic education would be free and compulsory well before many others. In February 2012, to prepare students to succeed in the twenty-first-century economy, the government extended this guarantee to secondary school.<sup>128</sup>

While the world has achieved remarkable educational gains over the past several decades, the remaining gaps should trouble us all. For society to flourish, all individuals need the opportunity to reach their potential. Today, millions of children are missing out on that chance, often simply because they were born poor, female, or with a disability. By establishing a constitutional right to education, national governments can both symbolically and practically support efforts to ensure all receive a quality education. When people have a legal right to education and the ability to pursue it, case law from around the world demonstrates its power as a tool for tearing down barriers to equal opportunity, increasing the resources devoted to schools, and giving all children a chance to thrive.

## The Right to Health

*From Treatment and Care to  
Creating the Conditions for a Healthy Life*

### SOUTH AFRICA: HOW A CONSTITUTIONAL RIGHT TO HEALTH PREVENTED HUNDREDS OF THOUSANDS OF HIV CASES

At one month old, Busisiwe Maqungo's daughter Nomazizi became seriously ill,<sup>1</sup> suffering from dehydration, diarrhea, and pneumonia. When Busisiwe took her to the hospital, the doctor delivered two potentially life-threatening diagnoses: Busisiwe was HIV-positive, and Nomazizi was too.

Although Busisiwe had been tested for HIV during an antenatal care visit in Cape Town, the nurse who administered the test neither informed her of its purpose nor disclosed the positive result—and certainly did not offer Busisiwe treatment that could avert the transmission of HIV to her unborn child. Busisiwe already knew from television that there were drugs that could prevent mother-to-child transmission of HIV, but had no reason to think this applied to her own pregnancy. After Nomazizi's diagnosis, Busisiwe borrowed money to pay for countless trips to the hospital, where doctors told her there was nothing they could do and that Nomazizi would die. Eight months later, she did.

In the late 1990s, stories like Busisiwe's were far too common in South Africa. By 1998, approximately 70,000 infants across the country were contracting HIV



from their mothers annually.<sup>2</sup> The manufacturer of Nevirapine, a drug found to prevent mother-to-child transmission, offered it for free to South Africa for a five-year period. Nevertheless, although the World Health Organization (WHO) and South Africa's Medicines Control Council deemed Nevirapine safe, the government chose to provide it only at a select number of private-sector pilot sites, making it impossible for public-sector doctors to prescribe it for patients in need.

Nomazizi's death devastated Busisiwe. Yet she realized that numerous women were having similar experiences, which could be prevented by a government commitment to ensuring universal access to anti-retroviral drugs. To help make this a reality, Busisiwe joined the Treatment Action Campaign (TAC), a South African activist organization that had long advocated for people with HIV/AIDS, including by leading a campaign to reduce the price of patented drugs used to treat HIV.

In 2001, following years of advocacy outside the courts, TAC initiated a lawsuit against the South African government, arguing that its failure to provide comprehensive services to prevent mother-to-child HIV transmission violated the right to healthcare services in the 1996 constitution. Along with several other women, Busisiwe told her story in an affidavit, helping TAC build a compelling case grounded in the experiences of South African mothers.

In July 2002, South Africa's Constitutional Court handed down a groundbreaking decision in the TAC case, finding that the constitutional right to health "require[d] the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV."<sup>3</sup> Further, the Court specifically ordered the state to remove restrictions on Nevirapine's availability at public hospitals and clinics.<sup>4</sup>

Since the TAC case, many more women in South Africa have received access to drugs to prevent mother-to-child HIV transmission.<sup>5</sup> While the Court's order has not been perfectly or universally implemented, this litigation ultimately prevented hundreds of thousands of HIV infections.<sup>6</sup> Globally, the case provided one of the most powerful illustrations of how social movements can leverage constitutional health rights to produce meaningful change.

#### INDIA: STRENGTHENING ACCESS TO HEALTHCARE BEFORE AND AFTER BIRTH, REGARDLESS OF INCOME

As the TAC litigation was unfolding, in other parts of the world, a movement was building to apply a human rights approach to mothers' survival.<sup>7</sup> At the international level, a 2009 U.N. Human Rights Council resolution acknowledged that ending preventable maternal mortality would require "the effective promotion and protection of the human rights of women and girls," including the right "to enjoy

the highest attainable standard of physical and mental health, including sexual and reproductive health.”<sup>8</sup> At the national level, lawyers and civil society were increasingly turning to constitutional protections to apply this rights-based approach to protecting women’s health before, during, and after childbirth.

Some of the most groundbreaking cases were taking place in India. Notably, unlike South Africa, India has no explicit “right to health” in its constitution. However, Article 21’s protection of the “right to life” has come to embody an expansive legal protection for medical services, a healthy environment, and access to essentials for a healthy life. Constitutional protections of the “right to life” have advanced the right to health in some countries and created potential threats to individual health and healthcare decision-making in others. In India, however, advocates have successfully leveraged Article 21 in wide-ranging health-related matters, including a “right to food” case that dramatically expanded access to free school lunch<sup>9</sup> and an air pollution case that yielded important new regulations promoting the use of clean fuels.<sup>10</sup> Within the past decade, the health protections encompassed by the right to life have provided powerful tools to promote accountability for the preventable deaths of poor women during childbirth because of inadequate medical services.

#### *Exclusion from Basic Care and Services*

On a hot day in May 2009, Fatema<sup>11</sup> went into labor beneath the tree where she herself had been born 21 years earlier,<sup>12</sup> in an open area steps from the *Nizamuddin Dargah*, a popular Delhi mausoleum frequented by thousands weekly.<sup>13</sup> Fatema lived in the open space with her mother Jaitun, a retired laborer in her sixties, along with a number of other homeless families. Abandoned by her husband upon becoming pregnant, Fatema had turned to her mother for support throughout her pregnancy. With only the tree’s boughs offering any protection from the elements, Fatema gave birth to a baby girl, Alisha, in full view of passersby and without any professional help.<sup>14</sup>

This was not by choice. Fatema had tried, repeatedly, to access the care she needed—and qualified for.<sup>15</sup> Given her epilepsy, which caused regular seizures, she had known she faced additional medical risks. Twice while pregnant, she visited a government-run maternity hospital near where she lived, inquiring about the cash assistance she could receive upon giving birth there through the Janani Suraksha Yojana (JSY) program. Both times, her questions were ignored, her pregnancy went unregistered, and medical staff made no effort to provide her with the other prenatal services, benefits, and nutrition for which all poor pregnant women in India are eligible.

Shortly after Fatema gave birth outside, Jaitun once again went to the maternity hospital, alerting staff to the delivery and requesting an ambulance. Yet no ambulance was dispatched, and no hospital staff visited. In the ensuing weeks, the frustra-

tions mounted: Fatema was able to get Alisha vaccinated at the maternity hospital in early June, but the child received no checkup. Hospital staff told Fatema she was anemic, but conducted no blood tests. Fatema, who was illiterate, received from the hospital the discharge slip she needed to get her JSY benefits, but it was written in English and she was unable to understand the actions required. She visited the hospital repeatedly seeking the benefits, but was refused. Finally, with an activist's help, Fatema collected 550 rupees from the hospital—around 8–9 U.S. dollars.<sup>16</sup>

In the following months, both Fatema's and Alisha's health deteriorated. Without adequate nutrition, Fatema could not breastfeed, and had no money to buy milk. Alisha was going hungry during the most critical time of her development. Despite having repeated contact with a government hospital during and after her pregnancy, neither Fatema nor Alisha received the assistance designed to help impoverished mothers and their children.<sup>17</sup>

Finally, as their circumstances grew truly desperate, Fatema and her daughter connected with legal assistance and discovered that they could initiate a case against the maternity hospital for its failure to provide care. In interim orders, the Delhi High Court ordered immediate relief for Fatema and Alisha: Alisha would receive the nutritional benefits provided by the Integrated Child Development Scheme; Alisha and Fatema would receive their ration card for grains and oil; Fatema would receive the cash assistance guaranteed by the National Maternity Benefit Scheme; and both would receive a checkup at the maternity hospital, accompanied by social workers, and have access to an ambulance in case further treatment at the primary hospital was necessary.<sup>18</sup>

The Court did not stop there. A few months before hearing Fatema's case, the presiding judge, Justice Muralidhar, had heard arguments in a similar case, *Laxmi Mandal v. Deen Dayal Harinagar Hospital*.<sup>19</sup> The case had been brought by the brother of an impoverished woman, Shanti Devi, who was also denied the care she was entitled to and died just minutes after giving birth. To address issues common to both cases, Justice Muralidhar issued a joint decision the following summer. In June 2010, the Delhi High Court established for the first time that India's constitution protects the right to maternal health—thus obligating the government to ensure *all* pregnant women and new mothers can access the services they need. As the Court declared, Article 21 of the Indian Constitution protects “the right to health, reproductive health and the right to food. . . . [T]he right to health . . . would include the right to access government (public) health facilities and receive a minimum standard of treatment and care. In particular this would include the enforcement of the reproductive rights of the mother and the right to nutrition and medical care of the newly born child and continuously thereafter till the age of about six years.”<sup>20</sup>

#### *One Case Leads to Another*

According to lawyers who worked on the *Laxmi Mandal* case, the recognition of a constitutional right to maternal health in India was a turning point: failure to provide adequate care would no longer be mere medical negligence, but a violation of

a fundamental, justiciable right.<sup>21</sup> While ensuring implementation of the Court's orders has posed significant challenges, advocates' commitment to leveraging the judgment to improve maternal health nationwide invites hope.

Because the decision came from the Delhi High Court rather than the Supreme Court, it was binding only in Delhi. Nevertheless, the judgment is clearly influencing other High Courts' decisions. For example, in a 2012 case in the rural state of Madhya Pradesh, advocates argued that the poor quality of medical services was contributing to high maternal mortality rates and violating poor pregnant women's constitutional rights. Echoing Justice Muralidhar, the High Court found that the right to survive pregnancy was a fundamental right guaranteed by Article 21.<sup>22</sup>

Moreover, the case compellingly illustrates how courts can help enforce substantive constitutional rights despite government inaction. Months after issuing the decision in Shanti Devi's and Fatema's cases, Justice Muralidhar learned of another woman who died days after giving birth in the street near busy Connaught Place. Dismayed, he contacted the chief justice, urging him to initiate a case *sua moto* (on his own motion)—a power of the courts established in India as part of the “public interest litigation” permitted by the constitution.<sup>23</sup> The chief justice agreed and ordered the Delhi government to establish five shelters for poor pregnant and lactating women, with food and medical care available around the clock. Again, the Court grounded its ruling in Article 21: “[W]e . . . cannot become the silent spectators waiting for the Government to move like a tortoise and allow the destitute pregnant women and lactating women to die on the streets of Delhi . . . giving birth to a child or . . . along with the child. Such a situation cannot be countenanced and is not possible to visualize in the backdrop of Article 21 of the Constitution of India.”<sup>24</sup>

### *Health Rights' Growing Role in Addressing Maternal Mortality Globally*

These rulings from India affirm the potential of constitutional rights as tools for addressing preventable deaths and strengthening health protections for some of the most marginalized groups. Moreover, the role of the right to health in promoting accountability for preventable maternal deaths is gaining traction in other parts of the globe. In Uganda, where 16 women die during childbirth every day, a case initiated in 2011 to hold the government accountable for two mothers' preventable deaths, based on the constitutional rights to health, life, and gender equality, was still moving through the court system as of 2018.<sup>25</sup> Similarly, in Brazil, the family of a woman who died during childbirth brought a claim before the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee in 2007, arguing that the government had violated her rights to health and life by failing to provide her timely access to emergency care.<sup>26</sup> In the first-ever decision on maternal mortality by an international body, the committee ruled that the state's responsibility to prevent maternal deaths was “strongly anchored” in Brazil's constitution, particularly five articles addressing the right to health.<sup>27</sup>

Through these landmark cases, the right to health has emerged as a critical tool for promoting accountability and reducing preventable deaths worldwide.

As these examples illustrate, constitutional health rights have significant potential to have both individual- and population-level impacts. But how commonly do constitutions guarantee health rights, and where are these rights lacking? Further, is an enforceable constitutional right to health feasible across countries, or will it overburden medical and legal systems? Finally, how can constitutional health rights be most effectively designed and implemented to improve health outcomes for *everyone* in a country—not just those who make it to court?

#### HEALTH AS A HUMAN RIGHT: GLOBAL FOUNDATIONS

The first global agreements recognizing health as a human right were drafted in the wake of World War II, as international human rights law was gaining legitimacy globally as a mechanism for maintaining peace and promoting well-being.<sup>28</sup> In 1945, delegates from around the world began drafting the constitution of the emerging WHO, which opened for signature the following year and defined health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>29</sup>

This broad understanding of health is reflected in other U.N. agreements. The 1948 Universal Declaration of Human Rights laid out a similarly comprehensive understanding of health’s foundations: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”<sup>30</sup>

In 1966, the U.N. built on this agreement and adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantees the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” specifically calling on states to fulfill this right through disease prevention, the reduction of infant mortality, and universal access to medical services.<sup>31</sup> In detailing this right, the U.N. Committee on Economic, Social and Cultural Rights has affirmed that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”<sup>32</sup>

#### THE NATURE OF HEALTH RIGHTS

At the national level, what do health rights cover? Do they primarily focus on access to medical care and medicines, as in this chapter’s introductory cases, or

do they also cover crucial aspects of public health that prevent sickness or injury in the first place? For example, does a right to health cover a right to vaccines, which can prevent illnesses; a right to information about and access to measures necessary for preventing the spread of infectious diseases; and a right to the kind of prenatal nutrition and testing that would lower the risk of pregnancy-related complications?

*Accounting for the Full Range of Factors Influencing Health*

This chapter's opening cases illustrate a trend in many countries, wherein most health rights cases brought to court focus on the right to treatment or medical care. Care and treatment are unequivocally important. Yet substantial evidence shows that medical care contributes to a minority of overall health improvements.<sup>33</sup>

Public health measures, from immunization campaigns to effective efforts to lower smoking and traffic accident injuries, profoundly impact health. Similarly, the health of one's environment, including exposure to pollutants or violence, shapes the likelihood of injury and illness. Likewise, social conditions ranging from income, which shapes access to food and other necessities, to access to education, which can shape health literacy, all critically influence health outcomes. This final set of factors is commonly referred to as "the social determinants of health," which WHO defines as "the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life."<sup>34</sup>

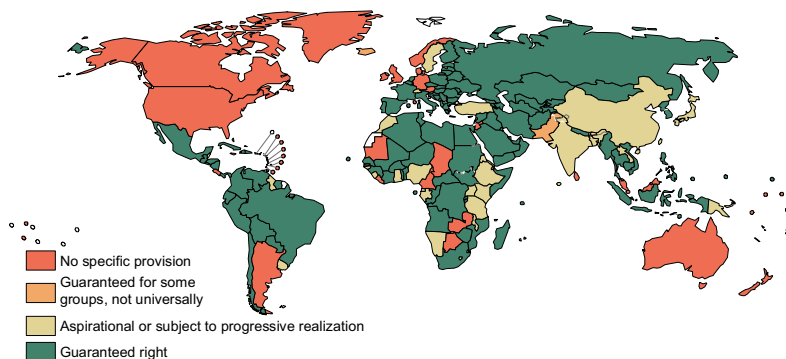
*The Broad Benefits of Preventive Health Measures—and Risks of Focusing Exclusively on Medical Care*

Given the importance of public and population health approaches to improving health from the get-go, policymakers, civil society leaders, and researchers alike have warned of the risks of any approach to health rights that solely addresses access to medications and medical care.

The problems are twofold. First, prioritizing medical care alone would neglect many of the most effective means of improving individuals', families', and whole countries' health. It makes little sense to pay for young children's hospitalization for diarrheal disease but not for lower-cost sanitation measures that would prevent their illness in the first place. Prevention measures can help far more people, and no one would prefer treatment for a severe illness over the ability to avoid it altogether.

Second, with regard to rights, if courts address only individual treatment for specific illnesses without considering the broader needs for public health, they may shift resources in resource-constrained environments away from critical measures to protect and promote health for all.

To comprehensively address the right to health, constitutions must address both access to health services and the underlying determinants of health, including social determinants like education, poverty, and equality and environmental



MAP 33. Does the constitution explicitly guarantee an approach to the right to health?

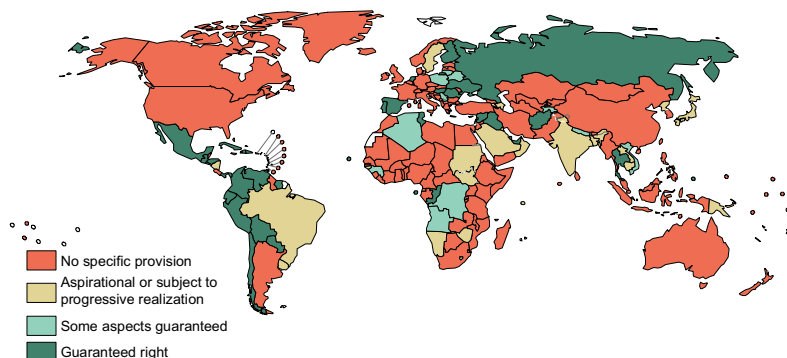
factors like access to clean water and sanitation. Chapters throughout this book address constitutional approaches to some core social determinants of health, including inequality, discrimination, and access to education. This chapter focuses on constitutional approaches to public health, a healthy environment, and health-care services. In the following section, we examine how often countries guarantee a right to medical care; a broad right to health, interpretable as primarily a right to medical care but potentially extendable to public health; and/or a specific right to public health.

### THE RIGHT TO HEALTH IN CONSTITUTIONS

As of 2017, nearly 60% of the world's countries take some approach to guaranteeing the right to public health, overall health, or healthcare services through their constitutions (Map 33). Nineteen percent guarantee the right to public health, compared to 41% guaranteeing the right to medical care and 36% guaranteeing the right to overall health. Additionally, 16% protect health rights in aspirational terms; as with education rights, these provisions commonly describe the right to health as a "goal" or "principle" of the state. Despite providing more modest protections than guarantees, aspirational provisions have catalyzed tangible health improvements, as we explore later. Further, some governments explicitly commit to progressively realizing the right to health as resources increase, consistent with international treaties.

Countries' commitments vary enormously in their level of detail. Some countries, like Cape Verde, delineate how the protection and promotion of health will be accomplished:

1. Everyone shall have the right to health and the duty to defend and promote it, independently of economic condition.
2. The right to health shall be realised through an adequate network of health services and through the creation of economic, social, cultural and environmental conditions which promote and facilitate a better quality of life for the population.



MAP 34. Does the constitution explicitly guarantee citizens' right to public health?

3. In order to guarantee the right to health, the state shall have the following duties:
  - (a) To assure the existence and functioning of a national health system;
  - (b) To encourage the community's participation at the various levels of health services;
  - (c) To assure the existence of public health care;
  - (d) To encourage and support private initiative in the rendering of preventive, curative and rehabilitative health care;
  - (e) To promote the socialisation of the costs of medical care and medication;
  - (f) To regulate and supervise the activity and quality of health care services;
  - (g) To regulate and control the production, commercialisation and use of pharmaceutical products, and other means of treatment and diagnosis.<sup>35</sup>

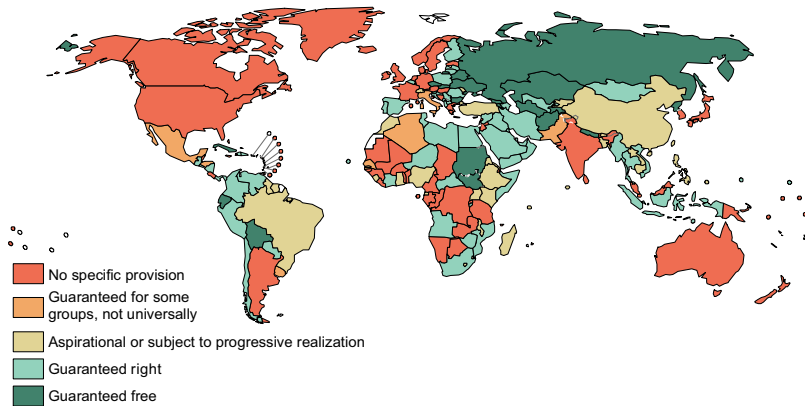
Other countries provide little specificity in describing the state's responsibility. For example, Togo's constitution provides: "The State shall recognize to all citizens the right to health. The State shall strive to promote it."<sup>36</sup>

#### *The Right to Public Health*

Among the 19% of constitutions guaranteeing the right to public health, the provisions vary widely in scope (Map 34). Some countries' constitutional public health protections primarily focus on preventing the spread of disease. For example, Kuwait's constitution states: "The State cares for public health and for means of prevention and treatment of diseases and epidemics."<sup>37</sup> Other constitutions, like Venezuela's, provide for broader public health protections: "In order to guarantee the right to health, the State creates, exercises guidance over and administers a national public health system that crosses sector boundaries, and is decentralized and participatory in nature, integrated with the social security system and governed by the principles of gratuity, universality, completeness, fairness, social integration and solidarity. The public health system gives priority to promoting health and preventing disease, guaranteeing prompt treatment and quality rehabilitation. Public health assets and services are the property of the State and shall not be privatized."<sup>38</sup>







MAP 36. Does the constitution explicitly guarantee citizens' right to medical care?

### *The Right to Medical Care or Services*

As of 2017, 41% of constitutions guarantee a universal right to medical care (Map 36). Fifteen percent address the medical needs of specific groups (such as children, older residents, persons with disabilities, or people living in poverty), either in addition to a universal right (11%) or instead (4%). For example, Nicaragua's constitution guarantees free healthcare "for the vulnerable sectors of the population, giving priority to the completion of programs benefiting mothers and children,"<sup>44</sup> while Italy's constitution requires the state to "[provide] free medical care to the poor."<sup>45</sup> Ten percent of constitutions guarantee the right to universal free healthcare; an additional 5% guarantee free healthcare to one or more groups listed above.

Countries define the right to medical care in varying detail and take different approaches to describing its scope. Some include healthcare under a broader guarantee of social protection or a minimum standard of living for individuals. For example, Romania's constitution states:

- (1) The State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens.
- (2) Citizens have the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law. Citizens have the right to social assistance, according to the law.<sup>46</sup>

Other countries include more detailed provisions on medical care systems. For example, Bolivia's constitution guarantees the right to health and further pronounces: "There shall be a single health system, which shall be universal, free, equitable, intra-cultural, intercultural, and participatory, with quality, kindness and social control. The system is based on the principles of solidarity, efficiency and co-responsibility, and it is developed by public policies at all levels of the government."<sup>47</sup>

### *The Right to Life*

Some countries guarantee a constitutional “right to life,” which in some contexts has been interpreted to include a “right to health” and thus extend similar protections, as illustrated by the introductory case from India. The ambit of this right is wide-ranging. In some countries, the “right to life” is part of the constitution’s due process or liberty protections. For example, Canada’s constitution establishes: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>48</sup> In others, the “right to life” appears in relation to the death penalty, as in Ghana’s constitution: “No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.”<sup>49</sup> In some, the “right to life” is framed as limiting or negating women’s reproductive health options and decision-making,<sup>50</sup> contradicting international law<sup>51</sup> and placing women’s health at risk.<sup>52</sup>

Overall, of the constitutions lacking a “right to health,” approximately three-quarters describe life as a value or right.<sup>53</sup> Because of its wide-ranging meanings explored above, our data on constitutional approaches to health do not capture the “right to life.” Nevertheless, depending on its articulation, the right to life can be important for advancing health. In countries whose constitutions include both, the rights to life and to health are commonly invoked together in court; in a study of 71 access-to-medicine cases across 12 Central and Latin American countries, 83% of successful cases referenced both rights.<sup>54</sup>

### *Impact of Emphasis on Medical Care*

The numbers show that countries far more often guarantee a right to medical care than a right to preventive healthcare. Moreover, countries that provide a broad right to health have overwhelmingly interpreted it as a right to medical care. Further, courts have often resolved cases focused on an individual’s right to medical treatment without considering impacts on the government’s ability to fund important preventive measures.<sup>55</sup>

This is not always the case. While South Africa’s right to health jurisprudence has largely focused on access to pharmaceuticals and medical care,<sup>56</sup> the constitution’s explicit guarantee of broader social rights enables South Africans to claim their rights to adequate housing, food, and other basics essential to health. Notably, the TAC case, the first major success in applying health rights to expand access to medicines, was for a preventive measure. Moreover, the Constitutional Court’s general approach of evaluating “reasonableness” rather than ordering specific individual remedies, as we later discuss in more detail, enables the government to evaluate how to balance prevention and treatment in fulfilling the right to health.

Clearly, countries can guarantee rights to both the foundations for health—decent housing, adequate nutrition, education, and public health—and medical

care. These are complementary. For example, protecting and fulfilling the right to public health, from essential vaccinations to clean water, lowers the cost of the right to medical care. But to be realized, it requires explicit attention.

### IMPACTS OF CONSTITUTIONAL HEALTH RIGHTS

A critical question for policymakers and civil society members who care about advancing health is whether a constitutional right to health is necessary, or whether a comprehensive social safety net in legislation and policy would just as effectively achieve the goals of fostering healthy environments and ensuring universal quality care. Growing evidence suggests that constitutional health rights have the potential to yield unique additional benefits that strengthen health systems overall.

#### *Protecting and Improving Access to Essential Medicines*

One way that health rights may improve health outcomes is by providing tools for advocacy and improvements in national health systems. For example, constitutions' health rights protections have played notable roles when other policies or international relations have created health threats. In Peru, the constitutional protection of the right to health provided an important basis for trade negotiations with the United States on access to essential medicines,<sup>57</sup> an important example of the intersection among the right to health, global trade, and intellectual property law that emerges across contexts.<sup>58</sup> Likewise, in Kenya, HIV-positive individuals successfully challenged portions of a law limiting their access to generic anti-retrovirals, based on their constitutional right to health.<sup>59</sup> Health rights litigation can also pressure governments into improving policies to avoid being taken to court. In Brazil and Costa Rica, for instance, health authorities decided to include anti-retroviral drugs in their public health plans after losing multiple lawsuits calling for coverage of those drugs.<sup>60</sup>

#### *Providing a Foundation for Systemic Improvements*

Brazil also provides an example of a country where the introduction of a constitutional right to health led to broader systemic improvements. Brazil's 1988 constitution made health a fundamental right following two decades of social mobilization.<sup>61</sup> The provision's introduction had faced strong resistance from politicians wanting to privatize the healthcare system, and the government elected after the constitution's passage continued to resist the idea of a unified national health system.<sup>62</sup> However, pursuant to the constitutional guarantee, the Sistema Único de Saúde (SUS) was implemented in 1992. Today, approximately 70% of Brazilians are exclusive users of SUS, which has become the world's largest free public health system.<sup>63</sup> Additionally, in 2000, a constitutional amendment guaranteed funds to finance health and public services.<sup>64</sup> Over the following decades, wide-ranging

studies have found SUS to be associated with significant decreases in hospitalizations and infant and child mortality.<sup>65</sup>

Some countries without a constitutional right to health have achieved widely accessible, high-quality healthcare through strong social service provision. Denmark, for example, has a strong public healthcare system but no constitutional right to health; its constitution was adopted in the 1950s, when constitutions less commonly included health rights.<sup>66</sup> In Brazil, however, the constitutional right to health catalyzed this change.

#### *Improving Health Outcomes over Time*

Two studies have quantitatively documented the relationship between a constitutional right to health and improved population health outcomes for large numbers of countries. One difference-in-differences study of 157 countries from 1970 to 2007 found that introducing a justiciable constitutional right to healthcare reduced the under-five mortality rate by 5%—increasing to 8.7% for countries with high levels of democratic governance—after controlling for women’s education levels, country GDP, and country and year fixed effects.<sup>67</sup> Using a difference-in-differences approach and individual-level data on more than 400,000 births in 15 Latin American countries, another study by the same author found the enactment of a constitutional right to health or healthcare to be associated with a 2.6% subsequent reduction in infant deaths among poor mothers, but not the population as a whole, after controlling for other constitutional economic and social rights and both country-level and child-specific factors.<sup>68</sup>

#### *Supporting the Expansion of Life-Saving Public Health Interventions*

Finally, constitutional health rights, including the right to a healthy environment, can provide a powerful legal basis for enacting life-saving public health measures, including immunization campaigns. For example, in Argentina, a woman went to court in 1998 to urge the government to complete production of the vaccine against Argentine hemorrhagic fever, a potentially deadly disease that put over 3.5 million people at risk, especially in rural areas. In 1991, Argentina had begun producing the vaccine, which was shown to be 95% effective, but discontinued production before the vaccine was made publicly available. In its ruling, citing Argentina’s commitments to health rights in both international treaties and the constitution, the Court ordered the government to complete production according to a specific timeline.<sup>69</sup>

Similarly, that same year in Colombia, over 400 parents from a poor part of Bogotá filed a lawsuit demanding that the government provide their children with a free meningitis vaccine, citing their constitutional rights to health, life, and social security.<sup>70</sup> The minister of health had previously stated that a new program would make the vaccine freely available in poor neighborhoods, but the program had not been implemented. Meanwhile, many of the petitioners’ children were attending

crowded daycares while their parents worked, putting them at high risk of contracting the disease, while the vaccine's cost made it inaccessible.<sup>71</sup> Citing the constitution's right to health, along with its provision allowing affirmative measures for marginalized groups, the Court ordered the Ministry of Health to immediately implement the free vaccine program, underscoring that it "[could not] accept that indigent children or those whose parents do not have sufficient resources, have to face the risks that are products of terrible diseases and the inaction of public health administrations."<sup>72</sup>

Health rights have also provided foundations for improving nutrition,<sup>73</sup> upholding restrictions on exposure to tobacco,<sup>74</sup> and strengthening other public safety and environmental health measures.<sup>75</sup> Catalyzed by the constitutional right to health, these improvements have collectively saved countless lives.

#### THE FEASIBILITY AND EFFECTIVENESS OF A RIGHTS APPROACH

Questions about a constitutional right to health commonly surround the economic and judicial challenges of implementation. While this issue emerges across social and economic rights, the right to health, perhaps more than any other, raises questions about the level of government investment required for fulfillment. While challenging for all countries, this question is most pressing for low-income countries. The judicialization of the right to health also has implications for courts and for equity: if too many health cases come before the courts, the judicial system's overall efficiency may decrease, and if the only people bringing those cases and benefitting from their rulings are those who can afford private lawyers, the right to health may undermine rather than advance health equity.

##### *Economic Questions: Affordability for the Government*

Although the issue of limited resources is more acute in low-income countries, similar debates emerge in courts across middle- and higher-income contexts. In a 2010 case from Latvia, in which a plaintiff challenged the cap on reimbursement for a drug used to treat leukemia, the Riga District Court ruled that the compensation limit was necessary "to provide as large [a] part of society as possible [the] right to health," citing the constitution's guarantee of "a basic level of medical assistance for everyone."<sup>76</sup> Likewise, in a case about dialysis, South Africa's Constitutional Court reasoned: "There will be times when [fulfilling health rights] requires [the Court] to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."<sup>77</sup>

The principle of progressive realization offers an approach to drafting and interpreting constitutions that shows promise for both broadly advancing health rights and ensuring that governments of all resource levels can manage costs. This principle rests on the acknowledgment that many countries will need time for further

economic development before they can fully guarantee access to comprehensive medical care for all residents. Nevertheless, all countries can begin to fulfill the right to health; public health can provide a tool for preventing illness for entire populations and reducing future healthcare costs.

### *Progressive Realization*

Under many international human rights agreements, like the ICESCR, countries are only allowed to “progressively realize” rights that are likely to involve more significant financial costs, like the right to health. While ratifying countries agree to devote the maximum available resources and take immediate concrete steps toward realizing these rights, fulfillment is expected to grow over time as resources increase.

At the same time, low-cost steps and the guarantee of nondiscrimination are understood as immediate obligations.<sup>78</sup> Further, the U.N. has articulated a set of core, “nonderogable” obligations states must meet to fulfill the right to health, including, at minimum, the provision of essential primary care; access to adequate food, water, and shelter; the provision of essential medicines; and the execution of a public health plan to meet the needs of the whole population.<sup>79</sup> In practice, the line between specific state actions with respect to health that are subject to progressive realization and those that must be realized immediately is subject to debate within courts and among advocates. Further, as later sections explore, courts’ determinations about how to operationalize these concepts to both protect individual rights and ensure the health of the population as a whole vary around the world.<sup>80</sup> Some countries have directly embedded the idea of progressive realization in their constitutions’ approaches to articulating the right to health. For example, South Africa’s constitution provides that “[e]veryone has the right to have access to . . . health care services, including reproductive health care,” but clarifies within the same article that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”<sup>81</sup>

In others, although the right is “guaranteed” constitutionally, courts interpret the right through a progressive realization lens. For example, Peru’s constitution provides that “[e]veryone has the right to protection of his health” and that “[t]he State guarantees free access to health benefits.”<sup>82</sup> In practice, however, Peru’s Constitutional Court has held that “the enforceability of a social right always depends on three factors: a) the seriousness and reasonableness of the case, b) its relationship with other fundamental rights, and c) budget availability.”<sup>83</sup>

Kenya’s constitution not only spells out a commitment to progressively realizing the right to health, but also explicitly articulates what courts must consider when the government has indicated it lacks sufficient resources to fulfill an aspect of the right. Article 43 provides that “[e]veryone has the right to the highest attainable standard of health, which includes the right to health care services, including

reproductive health care,” and guarantees that “[a] person shall not be denied emergency medical treatment.” Article 21, however, establishes that these rights are subject to progressive realization, while Article 20 articulates a set of principles for courts evaluating Article 43 claims:

- (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.

Globally, all countries can afford to do something to protect and promote the right to health. In fact, low- and middle-income countries more commonly take constitutional approaches to this right than their high-income counterparts (see Figures 14–16). By committing to progressive realization, either directly in constitutional text or through court doctrine, countries can effectively advance health rights in step with their economic development.

### *The Impact and Importance of Addressing Public Health*

The right to public health, by its very nature, has broad population benefits, and by helping prevent the spread of disease, its implementation can reduce health costs down the line. Courts have demonstrated the feasibility of enforcing rights to public health, including when they are phrased as aspirational or progressive commitments.

For example, in Bangladesh, a former Member of Parliament brought a suit against the government for failing to prevent arsenic contamination of wells across the country, which had put millions at risk of poisoning. The appellant argued that this negligence violated the constitutional rights to health and to life.

Under Article 18(1) of Bangladesh’s constitution, located in the section on “fundamental principles of state policy,” “[t]he State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties.”<sup>84</sup> Although this language did not rise to the level of a guarantee, the Court still held that the government’s noncompliance with laws on safe drinking water amounted to a violation of its duty to promote health, as well as the right to life, the right to protection of the law, and the state’s responsibility to provide basic necessities (another aspirational provision).<sup>85</sup> Consequently, the Court ordered the government to undertake extensive measures to comply with the law, test for arsenic in wells in affected areas, prevent further contamination, and initiate a media campaign to increase public awareness of the risks of arsenic contamination and provide information about how to find safe, clean water.<sup>86</sup>



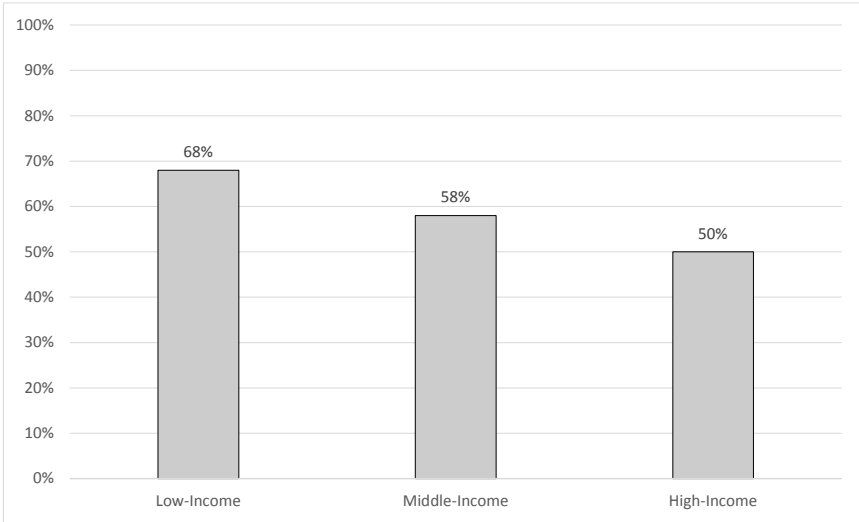


FIGURE 14. Explicit constitutional approach to protecting the right to health by country income group

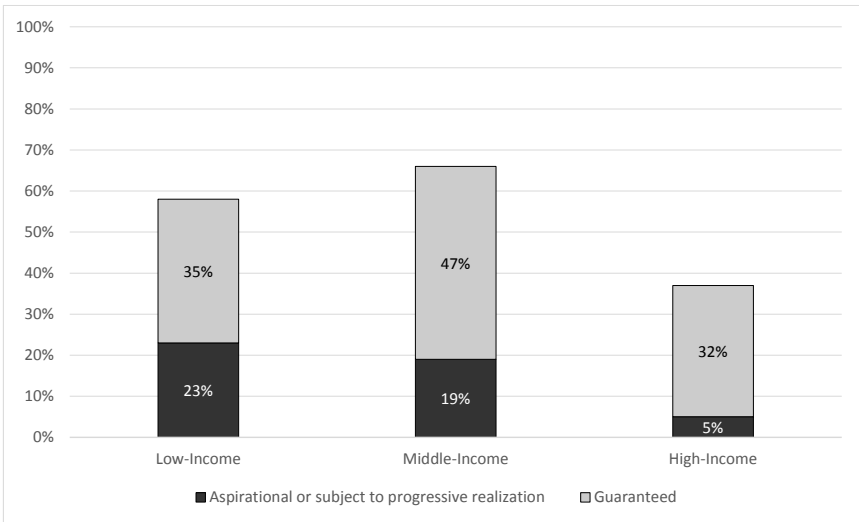


FIGURE 15. Explicit constitutional protection of the right to medical care by country income group

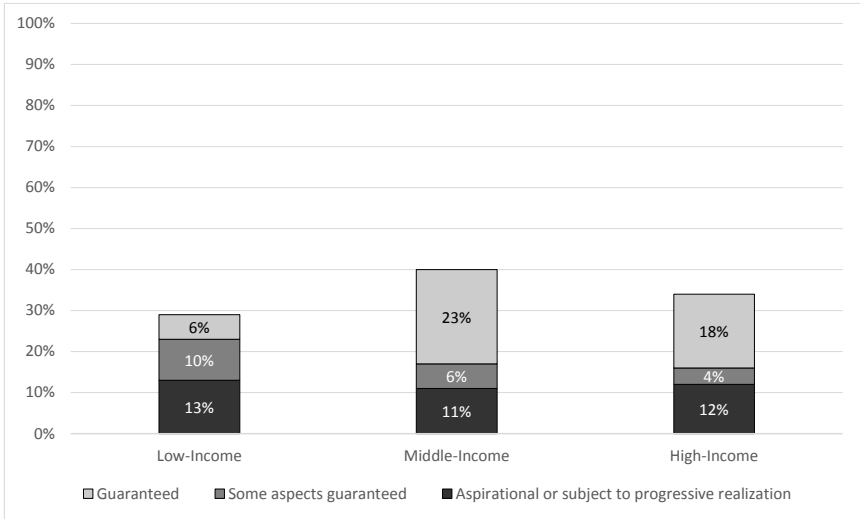


FIGURE 16. Explicit constitutional protection of the right to public health by country income group

Similarly, in India, residents of Ratlam, a Madhya Pradesh city, brought a case before the Supreme Court in 1980 arguing that the Municipal Council had violated their rights to health by failing to provide adequate sanitation, particularly by allowing septic fluids and overflow from an alcohol factory to flow in the streets.<sup>87</sup> Like Bangladesh's Article 18, Article 47 of the Indian Constitution, which is a "directive principle" rather than an enforceable right, provides: "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties." Although ordered by a lower court to construct a drainage system, the Council had argued they did not have sufficient funds to do so. However, the Supreme Court, citing Article 47, ruled that this excuse was insufficient: "A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability." As a result, the Court ordered the Municipal Council to improve sanitation infrastructure based on a plan produced by engineers affiliated with both parties to the case, and ordered the Madhya Pradesh government to loan funds to the council to ensure the improvements were financially feasible.<sup>88</sup>

These two cases further underscore why the right to public health, though underrecognized in constitutions, has particularly transformative potential. In both India and Bangladesh, waterborne diseases are among the leading causes of death for young children;<sup>89</sup> leveraging public health rights to improve sanitation can therefore powerfully affect entire communities. Given their broad and

demonstrated impact, and the fact that governments are often best positioned to advance public and population health, ensuring constitutions contain commitments to public health should be a priority. Currently, the share of countries with constitutional provisions protecting public health falls far behind the share protecting the right to medical care, even as public health and prevention would reduce poor health, illness, and injury at a far lower cost than medicine can treat them.

*Judicial Questions: Implementing Rights for All Regardless of Income*

Across social and economic rights, judicial rulings that are likely to change conditions for entire groups of people, rather than one individual at a time, have the greatest potential to effectively realize these rights without clogging the courts.<sup>90</sup> Collective actions and judgments are also often better vehicles for equity, particularly since litigation costs can make individual justice through the courts inaccessible to the poorest. The right to health is no exception.<sup>91</sup> While public health rights are collective by nature, the collective impact of medical care litigation depends largely on the reach of the court's decision. While individual claims to access a particular medicine or treatment can powerfully shape one person's life, collective claims or decisions expanding access for an entire class can be transformative for society.

However, litigants' ability to make claims collectively, or on behalf of a group, varies across countries. Likewise, the effects of courts' rulings on future judicial decisions depend partly on countries' legal traditions. As previously noted, the two major traditions are *common law*, which has origins in the United Kingdom and remains prevalent across former British colonies, and *civil law*, which began in continental Europe and today also applies throughout much of South America and East Asia. Many countries incorporate elements from both traditions and may also integrate aspects of customary or religious law; generally, however, one tradition is dominant.<sup>92</sup>

A key difference between the two is that common law systems rely heavily on court precedent, whereas civil law systems are based almost exclusively on codified law. As a result, in predominantly civil law countries, prior court decisions are not binding on all subsequent cases. Meanwhile, in predominantly common law countries, precedents typically dictate future decisions, making a series of repetitive claims less likely. Furthermore, in civil law countries, usually only a specialized court (typically the Constitutional Court), or a small number of specialized courts, can declare a law unconstitutional.<sup>93</sup> This requirement aligns with the limited role of precedent, since otherwise courts at all levels could rule inconsistently about constitutionality. By contrast, in the United States and some other common law countries, "ordinary" courts are empowered to rule on constitutionality, but decisions from higher courts are controlling.<sup>94</sup> These and other procedural aspects of countries' judicial systems, such as the rules of standing, have implications for the most effective approaches to realizing the right to health for all.<sup>95</sup>

### *Collective Claims across Contexts*

For the right to health, issues of individual versus collective claims are often at the core of questions of justiciability, including whether courts have the capacity to both hear all claims brought before them and issue effective remedies. Across countries, the ease of bringing class actions and other types of collective lawsuits varies. Some notable examples follow.

The U.S. was among the first countries to introduce a class action lawsuit, which allows a group of people experiencing the same legal issue, including constitutional rights violations, to bring a claim together and pursue a remedy that will apply to all. A U.S. class action requires a “class representative” who was personally harmed by the challenged law or action.<sup>96</sup> Once a class action is decided, people who were members of the class, or were eligible to be members but opted out, cannot bring individual claims based on the same allegations, regardless of how the court rules. If the class wins the case, all of its members are typically entitled to monetary damages or other relief. The U.S. also allows for punitive damages, meaning defendants can be required to pay compensation to the class that exceeds mere restitution, as well as attorneys’ fees, which increases the incentive for lawyers to bring class action cases.

While it has been criticized as making the U.S. a more litigious society, the class action has yielded some significant victories for health. For example, in 1997, facing the threat of numerous class actions nationwide, the four largest tobacco companies paid over \$200 billion to reimburse 46 states for public health costs attributable to smoking, and agreed to discontinue their deceptive marketing practices.<sup>97</sup> It is estimated that the settlement, which also resulted in tobacco companies raising their prices, reduced the share of 18- to 20-year-olds who smoked by 13% over the next four years, and 21- to 65-year-olds by 5%.<sup>98</sup>

Likewise, in countries like India and Bangladesh, as discussed in chapter 8, public interest litigation (PIL) has provided a powerful tool for securing legal remedies with population-wide benefits.<sup>99</sup> While similar, an important distinction between PIL and the traditional class action is the standing requirement: for a PIL action, any concerned community member can initiate the lawsuit, even if they have not been directly harmed.

This aspect of PIL has enabled important rulings on behalf of vulnerable groups who might otherwise struggle to access the courts. For example, in 1985, a lawyer brought a case on behalf of child laborers in match factories in Tamil Nadu, India, arguing that their work in dangerous conditions violated constitutional rights including the (aspirational) right to public health.<sup>100</sup> In a sweeping order, the Supreme Court addressed the obligations of the government, employers, and parents in realizing the constitutional prohibition on child labor, and in subsequent years India strengthened its child labor laws.<sup>101</sup>

In many civil law countries, particularly in Latin America, individuals enjoy remarkably straightforward access to the courts, though collective actions are less well established. Specifically, the *amparo* and *acción de tutela* are two “fast-track”

mechanisms common throughout the region that allow any individual to go to court to immediately enforce their fundamental rights.<sup>102</sup> Notably, some countries, such as Argentina, allow groups of individuals represented by an NGO to bring an *amparo* together, thus facilitating both quick court access and a more efficient path to justice.<sup>103</sup> While full implementation of judicial orders in Argentina's collective cases has not yet been realized,<sup>104</sup> this mechanism, dubbed the *amparo colectivo* by some, has been instrumental in advancing more structural changes, including with respect to HIV/AIDS treatment.<sup>105</sup>

However, across civil law countries, traditional class actions remain rare.<sup>106</sup> One exception is Brazil, which introduced a class action through a 1985 statute. By contrast to the U.S. model, however, a group seeking to bring a class action in Brazil must be represented by an NGO or government body, such as a municipality.<sup>107</sup> Further, the "notice" requirement—whereby potential class members learn of the lawsuit—requires only a single publication in a newspaper.<sup>108</sup> Finally, the action itself establishes the defendant's liability, but each class member must still initiate individual proceedings to claim damages, typically limited to compensation for actual harms.<sup>109</sup> Consequently, the Brazilian class action as currently designed may not be as accessible or impactful as possible.

Further, despite the class action's availability in Brazil, the collective approach is largely underutilized, at least with regard to health rights—perhaps because litigants prefer the *amparo*'s simplicity. According to legal scholar Alicia Ely Yamin, the combination of unusually easy individual access to the courts in Latin America and the one-off nature of most courts' decisions has produced "high levels of individual litigation for treatments and services, which as a general matter exploit the system but do not attempt to transform it."<sup>110</sup> Indeed, across Brazil, just 3% of "right to health" suits against the federal government are collective.<sup>111</sup> This apparent preference may also reflect pragmatic considerations of the odds of winning: data on the top Brazilian courts' decisions reveal that claimants in individual "right to health" cases are far likelier than those bringing collective suits to be successful, possibly reflecting judges' more conservative approach to cases that would have sweeping impacts or significant budgetary implications.<sup>112</sup>

Regardless, as individual health rights cases have become increasingly common, the courts have become overburdened and have experienced a significant backlog.<sup>113</sup> In Rio de Janeiro, the number of "right to health" cases filed skyrocketed from a single lawsuit in 1991 to 1144 in 2002.<sup>114</sup> Similarly, in Colombia, the right to health was "the most commonly litigated right" between 1999 and 2011, accounting for 869,604 out of 2,725,361 total cases.<sup>115</sup> In 2008 alone, one in every 300 Colombians filed a health-related *tutela*.<sup>116</sup> Observers feared that the "high volume of rights litigation [could] challenge the very sustainability of a public healthcare system and distort resources away from those most in need,"<sup>117</sup> while potentially undercutting the *tutela*'s legitimacy.<sup>118</sup>

### *Collective Judgments in Colombia and South Africa*

As noted, to some extent, courts' ability to issue decisions with far-reaching effects depends on the role of precedent within their particular legal system. In countries where prior decisions are not binding on future cases, it is not unusual for courts to hear a series of similar claims. However, courts can also shape their decisions' impact by how narrowly or broadly they resolve the issue before them. Both civil law and common law courts have demonstrated the feasibility of deciding cases to have more structural effects.

For example, in Colombia, the aforementioned volume of individual claims culminated in a 2008 Constitutional Court ruling addressing the health system's "structural failures," including inadequate regulation of the insurance companies that should have been covering many of the medicines and treatments sought through the courts.<sup>119</sup> The landmark decision "called for significant restructuring of the health system based on rights principles, including non-discrimination, participation, and accountability."<sup>120</sup>

While the impact of the Court's decision is still unfolding, its efforts to address the systemic issues that have engendered the high volume of litigation provide one example of how judges even in civil law jurisdictions can shape their rulings to have larger collective impact.<sup>121</sup> In 2015, the legislature enacted a new statute aimed at implementing the ruling, recognizing the fundamental right to health and articulating new rules for insurers and health providers.<sup>122</sup> Meanwhile, individual health claims before the Court have been declining: health rights accounted for 42% of all *tutela* claims in 2006, falling to 24% by 2014.<sup>123</sup>

Over the past two decades, the Constitutional Court in South Africa, a predominantly common law country, has illustrated the feasibility of effectively adjudicating social and economic rights, even in a lower-resource setting, by focusing on the reasonableness of the government's overall decision-making process rather than each plaintiff's specific circumstances.<sup>124</sup>

Justice Albie Sachs discussed the considerations in a controversial right to health case decided by the Court, in which a man with kidney failure, Thiagraj Soobramoney, was seeking further treatment from a state hospital.<sup>125</sup> He had already received emergency treatment at the state hospital once, and was told then that in the future he would have to wait his turn to receive treatment, in accordance with hospital policies establishing very strict criteria for determining which patients' treatment was prioritized, given limited resources. The Court found that the hospital

had applied criteria that were compatible with constitutional standards and values, that they used rational grounds for deciding who should have access to emergency treatment, and that the selection process used was not discriminatory, except on pure health grounds (which was relevant as criteria); therefore, we could not order the hospitals to act otherwise. To move him head of the queue would be to prejudice other people who had greater health claims, by saying that government must take

money away from dealing with HIV, immunization for children, health education programs, victims of trauma, and all other diseases that we have such as cancer and tuberculosis. We decided that, as judges, we could not interfere with the priorities in that particular area, and could not say that the hospital's expenditure and way it was utilized did not meet constitutional standards.<sup>126</sup>

In this case, rather than narrowly evaluate the facts of a particular plaintiff's claim, the Court evaluated the reasonableness and fairness of the government's action (or inaction) and whether the government had established a reasonable, non-discriminatory process for making decisions about the use of limited healthcare resources. In 2013, a Kenyan High Court reached the same conclusion in an almost identical dialysis case, applying its constitution's criteria for progressive realization and directly citing the *Soobramoney* ruling.<sup>127</sup> These decisions thus back the view that courts can effectively support progressive rights realization by ensuring that "public decision-makers follow a fair process in decision making, weighing the interests of individual needs with the importance of fairly distributing limited public resources across the whole population."<sup>128</sup>

However, this is not to say the "reasonableness" approach provides a perfect solution, or has been immune from criticism. To some, addressing "reasonableness" falls short of requiring the government to fulfill a "minimum core" of the rights to health, housing, or other socioeconomic rights;<sup>129</sup> some courts, such as Germany's Constitutional Court, have applied a "reasonableness"-like test that also takes into account minimum standards, which may better ensure meaningful assessment of both the government's process and what it takes to fulfill the right at hand.<sup>130</sup> Others argue that it requires courts to defer too much to the executive and legislative branches, thereby limiting constitutional rights' potential as a check on government inaction.<sup>131</sup> Finally, despite being premised on fairness, the "reasonableness" approach may not always bring justice to each individual, especially if inadequate attention is devoted to implementation.<sup>132</sup>

Yet for those who question whether courts can address health rights in the first place, South Africa's approach provides an example of judicial decision-making that takes collective concerns into account. Further, while the nature of the challenge varies across contexts, cases from wide-ranging countries have shown that the right to health can improve health on a large scale. Even in civil law countries, collective "right to health" challenges and court actions to initiate broad improvements to health systems have yielded benefits to significant numbers of people. Continuing to identify effective strategies for leveraging health rights to advance collective well-being across different constitutional systems will be important for ensuring their full impact.

#### PROGRESS ON HEALTH RIGHTS AND IMPLICATIONS FOR BROADER EQUALITY

Over the past few decades, a growing number of constitutions and courts worldwide have begun recognizing—and enforcing—the right to health, which has

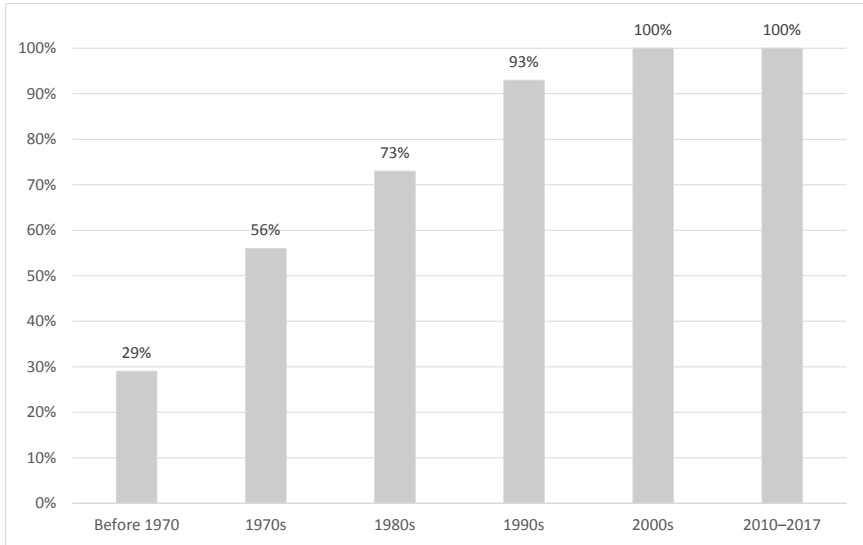


FIGURE 17. Explicit constitutional approach to protecting the right to health by year of constitutional adoption

assumed new importance in shaping citizens' access to public health and medical services. Despite the complexities explored in this chapter, the right to health has both yielded tangible impacts for individuals and populations, and provided the basis for structural improvements to national health systems.

Like other social and economic rights, explicit constitutional protections of health rights have become more common over time. Only 29% of constitutions adopted before 1970 took an approach to health, while all constitutions adopted in 2000–2017 included the right to health, public health, and/or medical care (see Figure 17). Among newer constitutions, health is emerging as a priority area: all four of the constitutions newly adopted following the Arab Spring, in Egypt, Tunisia, Libya, and Yemen, guaranteed an approach to health, which some view as a step toward universal health coverage.<sup>133</sup>

Still, more is needed, especially with regard to public health. While 57% of high-income countries, 76% of middle-income countries, and 94% of low-income countries have enacted some constitutional approach to health, only 19% across income groups take an approach to the right to public health. The persistence of preventable diseases and death evidences the grave need for further action: despite recent progress, around 5.9 million children die before age five each year,<sup>134</sup> while over three times as many lack key immunizations.<sup>135</sup> Maternal mortality also remains indefensibly high, with approximately 830 women dying each day.<sup>136</sup> Health disparities based on gender, socioeconomic status, race, and other characteristics and statuses compound other inequalities, demonstrating the need for both uni-



versal access to public health and healthcare and strong protections against all forms of discrimination. Countries that have already enshrined health rights in their constitutions can provide insight into effective approaches to drafting and implementing rights to health elsewhere. For the 51 countries that have yet to do so, establishing a constitutional right to health would be an important step toward strengthening the human right to health and reinforcing countries' accountability to their citizens' well-being.

## How Far Has the World Come?

Constitutions state the rules of the game for each of our countries. They represent agreements between governments and their people, and commitments to respect, protect, and fulfill fundamental rights. How far have we come as humanity in ensuring that everyone has the right to live, learn, love, and work fully?

In nearly every area, there has been substantial progress in equal rights since 1970. While barely over half of current constitutions (54%) adopted before 1970 explicitly protect women's equal rights, 100% of those adopted in 2010–17 do so. Similarly, for race/ethnicity, just 49% of constitutions adopted before 1970 include explicit protections, compared to 79% of those adopted in 2010–17. Looking at religion, only 56% adopted before 1970 clearly establish equal rights; between 2010 and 2017, 92% do so. For socioeconomic status (SES), the share with explicit protections jumped from 34% adopted before 1970 to 83% adopted in 2010–17. And while progress on disability rights has been more recent, the increase in protections in just the past few decades has been similarly dramatic: only 9% of constitutions adopted in 1980–89 protect equal rights on the basis of disability, compared to 71% adopted in 2010–17. However, rights continue to lag far behind for two groups: people living in countries where they are not citizens, and people whose sexual orientation or gender identity places them in the minority.

Moreover, commitments to provide every citizen with the opportunity for an education, and access to the healthcare and healthy environments needed to survive and thrive, have dramatically increased. All constitutions adopted since 2010

take some approach to protecting the right to education, compared to just two-thirds of current constitutions adopted before 1970. Further, while less than half of constitutions adopted before 1970 guarantee free primary education, two-thirds of those adopted in 2010–17 do so. Similarly, just one-third of constitutions adopted before 1970 take any approach to health, whereas all those adopted in 2010–17 include the right to health, public health, and/or medical care.

Despite remarkable progress over the past six decades, substantial work remains to be done. In the following section, we summarize key findings of where we are as a global community, as well as priorities for action.

## SUMMARY OF FINDINGS: EQUAL RIGHTS

### *Historic Exclusion and Persisting Inequalities: Advancing Equal Rights on the Basis of Race and Ethnicity*

As of 2017, 76% of constitutions guarantee equal rights before the law regardless of race/ethnicity. At the beginning of the constitutional era, nothing could have been further from the case. Through its infamous “Three-Fifths Compromise,” the U.S. Constitution specified that slaves were worth “three fifths of all other Persons” for purposes of determining states’ representation in Congress.<sup>1</sup> Beyond sanctioning slavery as an institution, this and other legal provisions symbolized the dehumanization of African Americans and Native Americans that characterized centuries of U.S. history.

Over the past 50 years, the share of constitutions guaranteeing equal rights and prohibiting racial discrimination has gradually increased: 49% of current constitutions adopted before 1970, 78% adopted in the 1970s, 73% adopted in the 1980s, 88% adopted in the 1990s, 89% adopted in the 2000s, and 79% adopted in 2010–17 explicitly protect equal rights regardless of race/ethnicity.

However, far fewer protect against subtler forms of discrimination. Throughout history, governments have enacted laws and policies that are not racially discriminatory on their face, but have discriminatory impacts. In the United States, for instance, post-Civil War poll taxes disproportionately excluded African Americans from voting; it is estimated that Georgia’s poll tax, enacted in 1871, reduced voting overall by 16–28%, and voting by black citizens by half.<sup>2</sup> More recently, some evidence suggests that strict voter identification laws are having similar effects.<sup>3</sup> Private employers often engage in indirect discrimination as well. For example, a job posting requiring a “native English speaker” would indirectly discriminate against a fully bilingual candidate whose first language was not English. This example also illustrates how language discrimination often intersects with discrimination on the basis of race/ethnicity, national origin, or migration status. Yet just 45% of constitutions protect against language discrimination, while a mere 5% protect against indirect racial/ethnic discrimination.

Racial/ethnic discrimination is also not solvable without addressing discrimination based on SES. Across countries, centuries of racial/ethnic segregation, bans, barriers, and discrimination have left racial/ethnic minorities and marginalized groups with a far greater likelihood of living in poverty than majority populations. In Australia, 19.3% of indigenous households fall below the poverty line, compared to 12.4% of other Australians.<sup>4</sup> In the United States, poverty rates among the black and Hispanic populations are 22% and 20%, respectively, compared to 9% among white Americans.<sup>5</sup>

Moreover, studies have demonstrated that while there is independent discrimination based on race/ethnicity and social class, simultaneous discrimination places many people in greater jeopardy. As one simple example, a U.S. study involved responding to job openings by submitting CVs, identical but for applicant names and addresses, to see who would be invited to interview. Applicants with names that were more prevalent among African Americans were far less likely to receive invitations; their odds decreased even further when their addresses indicated low-income neighborhoods.<sup>6</sup> The same occurred in India where names on the CVs represented both caste or social class and the likelihood of darker skin color.<sup>7</sup> Yet, while 76% of constitutions guarantee equal rights across race/ethnicity, only 59% protect against class-based discrimination.

In nearly one-quarter of countries, the first step must be enacting an explicit protection of equal rights on the basis of race/ethnicity; a constitutional equal rights guarantee provides a foundation for challenging a wide range of discriminatory laws and practices. Moreover, a clear protection of equal rights for people of all racial/ethnic backgrounds represents an important rebuke of the history of constitutions that excluded racial/ethnic minorities from full citizenship.

For the 146 countries that already protect equal rights regardless of race/ethnicity, addressing the ways that racial/ethnic discrimination often overlaps and intersects with class discrimination would strengthen these approaches. Likewise, prohibiting indirect discrimination would allow for the identification of policies and practices that disproportionately affect specific groups, and various countries' courts have shown it is feasible to evaluate these policies with nuance. Currently, however, just nine countries address indirect racial/ethnic discrimination. Finally, just a handful of countries explicitly address segregation. While it is now broadly recognized that "separate but equal" is not equal at all, the legacy of racial/ethnic discrimination in the law, including its impacts on economic inequality, has perpetuated segregation in practice. Including a commitment to desegregation in constitutions could spur governments to take more proactive steps.

### *Why Addressing Gender Equality Is Foundational*

The history of legal discrimination based on gender is millennia old. Throughout much of recorded history, women have been banned from voting and holding office, owning property, and performing many jobs. Yet equal rights for women

in constitutions have dramatically transformed over the past 50 years. Among constitutions enacted before the 1970s—the decade of the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—just 54% guarantee equal rights regardless of sex; among constitutions adopted each decade after the 1970s, at least nine out of ten consistently include these protections.

And yet gender inequality remains profound around the world, with high costs to all.<sup>8</sup> While countries nearly universally guarantee equal civil and political rights for women, a huge gap lies in addressing economic equality. Women’s wages still fall far behind men’s, with women globally earning 24% less than men.<sup>9</sup> The World Economic Forum’s 2017 Global Gender Gap report showed that the economic gap between men and women had in fact widened rather than narrowed over the preceding 12 months, and that closing it would take 217 more years.<sup>10</sup>

These gaps are due to both discrimination in workplaces and disadvantages that surface much earlier in life. Despite progress, girls remain less likely to get an education: across low-income countries, just 66 girls finish secondary school for every 100 boys.<sup>11</sup> Yet when education is free and discrimination banned, this gap closes.

Clearly, discrimination and unnecessary obstacles deeply diminish girls’ and women’s hopes, opportunities, and life experiences. Equally clearly, research reveals profound costs to whole economies. Strengthening women’s legal rights has been associated with higher labor force participation by women, which in turn boosts national GDP.<sup>12</sup> Indeed, increasing women’s labor force participation to its full potential would boost annual GDP in 2025 by \$2.9 trillion in India and \$4.2 trillion in China.<sup>13</sup> Even smaller increases would be transformative. For example, if women’s labor force participation across the United States matched that of the highest-performing U.S. state, national GDP would rise \$2.1 trillion over the same time period.<sup>14</sup> Similarly, according to the International Labour Organization, closing the gender gap in labor force participation by just 25% by 2025 could increase global GDP by \$5.3 trillion.<sup>15</sup>

Moreover, the extent to which countries address whether differences between men and women that are irrelevant to the job lead to exclusion in employment has varied widely. When jobs unnecessarily require individuals to be a certain height, more women are excluded. This form of “indirect discrimination” is covered in only 5% of constitutions. When countries allow employers to fire on the basis of pregnancy or childbearing, this affects only women. Ensuring an equal playing field requires recognizing, appreciating, and adapting to these differences, rather than allowing them to provide bases for discrimination.

For the 28 countries that have yet to enact a gender-specific constitutional equality provision, doing so should be a priority. This includes some of the oldest constitutions, which were adopted at a time when women’s equal rights were largely ignored.

There is no reason that older constitutions cannot be amended to explicitly guarantee gender equality; Luxembourg's 2006 revision of its 1868 constitution provides a prime example. After seven years of active efforts, the legislature adopted new language: "Women and men are equal in rights and duties. The State must actively promote the elimination of any existing obstacles to equality between women and men."<sup>16</sup> The reform process was accelerated by international commitments; early drafts of the provision borrowed language from the Treaty on European Union.<sup>17</sup> In addition, during its presentations to the CEDAW committee, delegates from other countries urged Luxembourg to hasten its reform process to ensure that the constitution aligned with Luxembourg's international treaty commitments.<sup>18</sup>

In the United States, the revived fight to adopt the Equal Rights Amendment (ERA) has likewise recognized the power of globally contextualizing one's constitution. In a 2018 op-ed, a leading ERA advocate noted that gender equality provisions are "enshrined in most constitutions around the world, and our government has insisted that an equal rights provision be included in the constitutions of other countries, such as Iraq and Afghanistan. Yet this same provision is missing from our own."<sup>19</sup> Amending centuries-old documents takes political will, and people who want to realize this change in their constitutions must demand their policymakers take action.

For the countries that already have gender-specific protections, in many, they could be strengthened. Most critically, the 14 countries that guarantee gender equality but allow customary or religious law to take precedence over the constitution, including when they do not provide women with equal rights, should remove these exceptions. Countries can also strengthen their constitutions by clearly protecting against indirect gender discrimination—an approach that is missing from 184 constitutions globally. Similarly, protections against pregnancy, marital, and family status discrimination are critical if constitutions are to address some of the most common forms of discrimination that women face in schools, workplaces, and elsewhere. One hundred eighty-two constitutions have yet to prohibit pregnancy discrimination, while 175 are lacking protections against marital or family discrimination.

Finally, constitutions can more comprehensively protect against discrimination by guaranteeing equal rights regardless of both sex and gender. While most constitutions use the word "sex," including "gender" as well provides a stronger foundation for addressing discrimination against people whose appearance, speech, or behavior does not conform to societal expectations of stereotypical male and female roles and characteristics.

*One in Thirty: Protecting Fundamental Rights for the World's  
Migrants and Refugees*

At the time of the drafting of the U.S. and French constitutions, two eighteenth-century documents that so many countries emulated, movement across vast

territories and international migration were far more limited. Traveling across the United States took months. No easy routes connected North Africa and France. And even once long-distance journeys became more feasible, discrimination erected high barriers to naturalization, as illustrated acutely when people from China immigrated to California to work in the nineteenth century.

International agreements on the rights of all people grew in number and strength in the twentieth century at the same time that migration for all reasons—economic security, persecution and war, and environmental catastrophes—increased. These included a binding convention specifically on refugees' rights, which has 145 states parties, alongside a treaty on the rights of migrant workers and their families, ratified by 51 countries.

These treaties make clear that refugees and migrants do not relinquish their most fundamental rights upon crossing the border. Specifically, migrant workers' children must have equal access to education as citizens, regardless of their parents' immigration status. Likewise, both agreements protect migrants' and refugees' equal access to health services. With respect to work, the Refugee Convention guarantees that "lawfully staying" refugees—i.e., those who have registered with their host countries' governments—are accorded the same rights to decent working conditions that are granted to citizens. Similarly, the Migrant Workers Convention guarantees that migrant workers receive treatment equal to that of citizens with respect to pay and working conditions.

Yet countries' constitutions have clearly not caught up. Less than one in five guarantee the right to education for noncitizen children. Less than one in six guarantee access to health, while one in five guarantee nondiscrimination at work. This not only leaves migrants behind, but also leaves the 10 million people who find themselves stateless deeply vulnerable to discrimination and exclusion across countries.

Further, even today, racism and religious discrimination infuse immigration policy—a fact laid bare by the Trump administration's so-called "Muslim ban," as well as wide-ranging countries' discriminatory actions over the past five years. In Australia, thousands of refugees and asylum seekers from Asia and the Middle East have been relegated to remote detention centers, drawing comparisons to a set of laws and policies, in place until 1973, that the Australian government later referred to as the "White Australia" policy.<sup>20</sup> Denmark's government has officially designated 25 low-income, predominantly Muslim immigrant neighborhoods as "ghettos"; beginning at age one, children in these neighborhoods are required to separate from their parents to participate in 25 hours of mandatory instruction in "Danish values" weekly.<sup>21</sup>

The civil and political rights of racial/ethnic minorities who are citizens are far closer to equal in 2018 than they were in 1970. Yet immigration policies designed to limit racial/ethnic minority populations' growth, and to restrict the rights and success of migrants who are already within country borders, are widespread. Only

one in four constitutions explicitly prohibit discrimination against foreign citizens without exceptions. For the 151 that do not, banning both discrimination against refugees and migrants and racial/ethnic discrimination must be a priority for ensuring countries do not use race/ethnicity as a criterion for deciding who stays and who goes.

Among the 42 countries that guarantee migrants' rights within their broad equal rights provisions, 19 could further strengthen migrants' and refugees' ability to integrate into new communities and meet their basic needs by ensuring decent working conditions and specific protections from discrimination in education and health. These protections would also better align many countries' constitutions with their commitments under international human rights treaties.

### *Negotiating the Balance of Religious Freedom and Equal Rights*

Ensuring equal rights for all regardless of religion, belief, or nonbelief comes down to a few principles. First, governments should avoid privileging one religion over other religions, beliefs, or nonbeliefs. Second, governments should ensure strong protections against religious discrimination. And finally, the state should protect freedom of religion for all, up to the point that religious practice conflicts with other people's fundamental rights.

Constitutions are often countries' key instruments for defining the relationship between religion and government—and constitutions around the world have shown it is possible to address all the elements that advance equality. Globally, 14 constitutions take an approach to each of the following: nondiscrimination on the basis of religion; freedom of religion, belief, and nonbelief; limitations on religious practice to protect the rights of others; and no implicit or explicit state privileging of religion.

Many more countries have achieved at least part of this vision. Forty-one percent of constitutions have language committing to the separation of religion and state. Ninety-five percent address freedom of religion, including 41% describing themselves as secular. Likewise, 25% protect the freedom to not believe, including 21% with no state religion or affiliation with a specific religious tradition. Seventy-eight percent of constitutions explicitly guarantee equality and nondiscrimination based on religion or belief, including 92% of those adopted in 2010–17. Forty-six percent of countries note that religious conduct may be limited when it infringes the rights of others.

We also know that religious practice can thrive when these principles are in place and respected. Every major religion can be found thriving in countries that separate religion and state and protect freedom of religion. Further, studies have shown that religious practice fares better in these settings. Countries that protect freedom of religion and have no state religion are less likely to have discriminatory laws that privilege one faith over another, and likelier to support the regular practice of religion.



At the same time, we have a long way to go to ensure that religious freedom and equality are realized in all countries. Moreover, some evidence indicates governments are becoming more religious, not less, with potential consequences for equality. While constitutions adopted in 2000–2017 are likelier than those adopted before 1970 to identify as secular and have no role for religion (38% compared to 20%), there has also been an increase in established state religions that govern public as well as private life. Among constitutions adopted before 2000, only 7% established a state religion with control over public life, compared to 26% of those adopted in 2000–2009 and 21% adopted in 2010–17.

Overall, 31 countries currently have constitutional provisions limiting equal rights for minority religions. In some, minority religions face unique and explicit restrictions on religious practice. In others, a single religion forms the basis for governance in public and/or family life. Additionally, eight constitutions allow religious law to fully or partly take precedence over the constitution, potentially threatening equal rights not only across religions but on the basis of gender, sexual orientation, race/ethnicity, and other aspects of identity.

Further, among countries that identify as “secular,” nearly half nevertheless privilege one religion in other parts of the text. While many of these references likely have more symbolic value than explicit impacts on equal rights, they matter as statements of norms. Especially in an era of growing religious diversity, indirect indications that people of a particular religion or heritage are more welcome than others can undermine full equality.

Given the history of religion-based genocides and massacres, we should all recognize the importance of moving equality forward. It is this history that catalyzed the development of the Universal Declaration of Human Rights (UDHR) and subsequent agreements, including the International Covenant on Economic, Social and Cultural Rights, that clearly protect nondiscrimination on the basis of religion, freedom of belief, and the freedom to practice, subject to others’ fundamental rights. The agreements also protect the rights to change religions or forego religion entirely, recognizing that the rights to believe and not believe are two halves of a whole. Most fundamentally, equality across religions and beliefs is about the freedom of thought, which is core to human experience around the world.

The coming decades will likely bring many more constitutional drafting and amendment processes in which the role of religion will be a key issue. Throughout these processes, participants should return to these foundational human rights principles and areas of global consensus as a framework for taking action.

*Moving Forward in the Face of Backlash: Equal Rights Regardless of  
Sexual Orientation and Gender Identity*

Of all the groups we have studied, the LGBT+ community has received the fewest protections from discrimination in national constitutions. Only 11 constitutions

explicitly protect equal rights on the basis of sexual orientation, while just six also cover gender identity.

Over the past century, constitutional trends have overwhelmingly reflected progress toward equal rights for most groups. With each decade, new constitutions have been increasingly likely to recognize each person's equal worth and humanity regardless of gender, race/ethnicity, religion, or disability. Likewise, older constitutions have adopted amendments recognizing the equality of people of every religion, of men and women, of all racial/ethnic groups, and with and without disabilities.

Recognition of equality across religions began in the mid-1800s, followed quickly by recognition across race/ethnicity. It was not until the early 1900s that equal rights for women began to receive recognition, and these equal rights were protected in a minority of constitutions until the 1960s. Protections for persons with disabilities did not emerge until the 1980s.<sup>22</sup> The vast majority of these protections were introduced when new constitutions were adopted, but countries with older constitutions, including Belgium, Chile, France, Greece, Haiti, Luxembourg, Mexico, and Panama, have strengthened equal rights for all through amendments.

But there has not been clear momentum for two groups: migrants and LGBT+ individuals. Even worse, for one group, the rate of constitutions' denial of equal rights has kept pace with protections: although 6% of constitutions now guarantee equal rights regardless of sexual orientation, another 6%, all adopted or amended since 2000, explicitly prohibit same-sex marriage or allow legislation to do so.

Among the countries where constitutions have guaranteed equal rights on the basis of sexual orientation and/or gender identity (SOGI), public recognition of equality has begun to change. In Mexico, where the constitution newly protected equal rights regardless of sexual orientation through a 2011 amendment, support for same-sex marriage more than doubled from 2000 to 2016.<sup>23</sup> In South Africa, 37% of people agreed or strongly agreed that same-sex marriage should be legal in 2015, compared to just 14% in 2012; meanwhile, twice as many South Africans believe the constitution should retain its equal rights provision on the basis of sexual orientation as believe it should be removed.<sup>24</sup>

Cases in these countries and others with explicit protections have led to important steps forward, while broad equal rights provisions have provided foundations in some countries without explicit guarantees. Still, at both the national and international levels, much remains to be done to ensure that equal rights on the basis of SOGI are fully protected.

With respect to constitutional protections, the next steps are clear. In 182 countries, newly establishing equal rights on the basis of sexual orientation in the constitution would represent a profound step forward for equality, which could provide the foundation for overturning discriminatory laws and enacting new legislation to ensure comprehensive protections for equality in every sphere. Likewise, in 187 countries, extending protections to gender identity would be

transformative. Countries should also reform how they describe the right to marry specifically, beginning with the 12 countries that explicitly deny or allow the denial of the right to same-sex marriage. Likewise, the 16 countries that limit constitutional marriage rights to a man and a woman—language that in some countries is a historical holdover, in others a more recent and intentional effort to limit LGBT+ rights—should revise this language to make marriage everyone’s right. Countries should also ensure these provisions do not contradict one another. While it is not unusual for countries to experience piecemeal progress toward equality, simultaneously guaranteeing equal rights on the basis of sexual orientation and prohibiting same-sex marriage is an inherent inconsistency that can undermine constitutions’ broader legitimacy. Finally, a global treaty specifically protecting the rights of the LGBT+ population is long overdue, and would strengthen efforts to pass critical reforms at the national level.

*From Nondiscrimination to Full Inclusion: Guaranteeing the Equal  
Rights of People with Disabilities*

People with disabilities are the largest group in the world whose equal rights are ignored. An estimated one billion people, or 15% of the global population, live with disabilities. Yet only a minority of constitutions, 27%, explicitly protect equal rights on the basis of disability, and protections in key areas of life are scarce. Less than one in five constitutions explicitly guarantee a right to education for children with disabilities. Healthcare is essential to all but particularly to the quality of life of people with disabilities, yet less than one in five countries guarantees the right to health services for children and adults with disabilities. The situation is worse with regard to work, where only one in nine countries guarantees nondiscrimination.

True equal rights must include nonsegregation. We have long since stopped accepting the legal segregation of neighborhoods or schools on the basis of race/ethnicity. Yet far too many countries segregate children with disabilities in school, implying that they are different, preventing relationships from forming, and implicitly supporting bias about abilities and value from the earliest ages. Just seven of the world’s constitutions include commitments to integration of students with disabilities; in most, these commitments fall short of full inclusion. In some cases, the segregation of children with disabilities may also reinforce racial/ethnic segregation, as discrimination contributes to a higher proportion of children from marginalized racial/ethnic groups being designated as disabled.<sup>25</sup>

Nevertheless, the progress in recent decades, and in particular since the adoption of the Convention of the Rights of People with Disabilities (CRPD) in 2006, is encouraging. Only 12% of constitutions adopted before 1970 explicitly protect equal rights for people with disabilities; among those adopted between 2010 and 2017, 71% do.

Many of the CRPD’s fundamental commitments, including inclusive education and reasonable accommodations in employment, have also been implemented at the national level through legislation. For example, the Americans with Disabilities

Act (ADA), enacted in 1990 and strengthened in 2008, provides comprehensive standards for how workplaces, schools, public transportation, hotels, stores, and restaurants must ensure accessibility for people with disabilities. Also in 1990, Congress passed the Individuals with Disabilities Education Act, which addressed inclusive education in detail. Over the past several decades, many countries have enacted similar laws.

Yet in many countries, laws are much easier to amend or repeal than constitutional provisions. In the United States, the ADA has been relentlessly attacked in recent years, while shifts on the Supreme Court may further weaken the extent to which persons with disabilities are interpreted as being covered by the constitution's general equality clause.<sup>26</sup> While ordinary laws may be the best vehicles for spelling out the details of standards like reasonable accommodation and inclusive education, enshrining these same principles explicitly in constitutions can guard against efforts to dismantle legislative protections, while importantly supporting shifts in norms and ensuring basic rights do not erode as the top court's composition evolves. In this way, laws and constitutions play complementary roles in establishing rights and ensuring their enforcement.

For most—141—of the world's countries, explicitly prohibiting discrimination on the basis of disability in the constitution would be a powerful step forward for equal rights. Additionally, 78 countries need to eliminate their constitutional provisions explicitly restricting rights on the basis of disability; many more need to eliminate outdated language and conceptions of disability.

For the 23 countries that broadly guarantee equality for people with disabilities but do not address specific rights, explicit protections against discrimination in education, health, and work—including guarantees of reasonable accommodation in employment and inclusive classrooms—would strengthen constitutional support for equality.

#### *Ensuring Rights and Full Participation Regardless of Social and Economic Position*

Among some of the world's first constitutions, socioeconomic status (SES), and particularly property ownership, dictated whether individuals had access to full citizenship and all associated rights. In 1948, the UDHR proclaimed that fundamental rights and liberties were guaranteed to all, regardless of "social origin, property, birth or other status." Today, however, even as most societies have abandoned rigid social class distinctions, SES discrimination persists. People whose names, appearance, or accents suggest lower-SES backgrounds commonly face discrimination in employment, while poverty more broadly remains stigmatized.

Yet beyond these forms of SES discrimination targeting individuals, when basic healthcare or public education are available only to those with financial resources, these barriers sharply undermine equal opportunity on a broad scale. There is no way a child born into an environment where families cannot afford to send children to school would have the same opportunity as a child born into a wealthy

home where the cost of education is no barrier—unless there is a guarantee of free education. Clearly, even then, wealth is likely to lead to substantial disparities, but their impact and insurmountability are markedly reduced by the guarantee to all of an affordable quality education.

Compared to other areas of equal rights, relatively few constitutions, 59%, prohibit SES discrimination. At the same time, these protections appear in 83% of the constitutions adopted in 2010–17. Where it is not included explicitly in the constitution, some courts, including the U.S. Supreme Court, have held that this type of discrimination receives no special protection.

To better support equal opportunity, the 79 countries that have yet to enact constitutional protections on the basis of SES should do so. Beyond guarantees of nondiscrimination, these protections can include guarantees of access to education and healthcare regardless of income. For example, one in ten constitutions guarantee free medical care for all, while 6% guarantee the right to medical services specifically for low-income adults and children. In one-third of countries, the constitution guarantees that secondary education will be tuition-free. These are important initial steps for creating an equal playing field.

#### CROSS-CUTTING ISSUES FOR EQUAL RIGHTS

Across Part One of this book, some common themes emerged. While explicit protections of equal rights have generally grown for each of the characteristics we examined, none receives protection in all the world's constitutions, and case law has underscored how these omissions matter. In 2013, India's lack of constitutional protection against discrimination on the basis of sexual orientation led the Supreme Court to reinstate a 153-year-old law criminalizing same-sex relationships—a decision that was only overturned five years later based on an expansive reading of the right to privacy and the general equality clause. In the United States, the failure to specifically prohibit SES discrimination led the Court to uphold school financing policies that provided public schools in the poorest neighborhoods with the fewest resources. Although general equal rights protections have produced some transformative victories, their coverage is unpredictable and, in some countries, subject to the interpretations of a handful of judges.

In addition, even when countries have enacted explicit protections, some broader considerations arise about their scope and potential for impact. For example, what about discrimination bridging multiple characteristics? What about discrimination by private-sector employers or private service providers? And if we aim to advance equality not just on paper but in practice, when is prohibiting discrimination inadequate?

#### *Intersectionality*

One challenge for constitutional drafters is whether constitutions and courts can effectively address situations where different types of discrimination intersect and

overlap. Facets of our identities do not work in isolation; in moving through the world and interacting with institutions and each other, we cannot always separate discrimination based on gender, race/ethnicity, disability, and other characteristics. Yet in the law, these bases of discrimination are generally understood as discrete categories, which often oversimplifies lived experiences of bias and creates a barrier to justice.

For example, if an employer terminates all black female employees but all the black men and white women keep their jobs, a court may find that the fired employees cannot statistically prove either racial discrimination or gender discrimination—even when both are at work. In her seminal article on intersectionality, legal scholar Kimberlé Crenshaw examined a real case involving exactly these facts, *DeGraffenreid v. General Motors*, in which a district court dismissed five black women’s lawsuit against General Motors, finding that “this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.”<sup>27</sup> As Crenshaw observed, the case revealed how under employment discrimination law, “[b]lack women are protected only to the extent that their experiences coincide with those of [white women and black men].”<sup>28</sup>

Although few constitutions explicitly address intersectionality or related concepts like “multiple” or “cumulative” discrimination, these ideas are receiving greater attention by constitutional courts and the legal community at large—and are increasingly making their way into law.<sup>29</sup> For example, Spain’s Law 3/2007 on Effective Equality between Women and Men calls for particular attention to “cases of double discrimination and to the particular difficulties that women face when in a situation of vulnerability, like women belonging to a minority, migrant women and women with disabilities.”<sup>30</sup> Similarly, in a decision about the rights of Aboriginal women, Canada’s highest court reasoned that it was essential to “recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.”<sup>31</sup> As courts and constitution drafters continue to wrestle with how to address all forms of discrimination, understanding and identifying strategies to tackle the ways that different forms of bias intersect will be crucial.

### *Affirmative Measures*

As explored in detail in chapter 2, constitutional provisions that leave the door open to affirmative measures can provide legislatures with important flexibility to address past discrimination, whether on the basis of race/ethnicity, gender, SES, or other grounds. Without acknowledging and addressing the historic policies and practices that led to inequality in the present, there is no way to fully advance equality in the future. A common metaphor illustrates the point clearly: two adults do not have the same chance of crossing a finish line within seven or eight minutes if one begins a half-mile away and the other begins three miles away. In other

words, equal rights alone do not address disadvantages that preceded the competition or a chance to excel; equal rights alone do not address ongoing sources of disadvantage. Affirmative measures can play important roles in addressing past exclusion and discrimination.

Constitutions should ensure that courts do not automatically consider taking past discrimination into account an equal rights violation; in fact, doing so is often central to advancing equality in practice. Globally, one in six constitutions expressly permit affirmative measures to address histories of discrimination and advance equal rights on the basis of race/ethnicity, as do one in four on the basis of gender.

While policymakers in many countries have struggled with how to most effectively design affirmative measures, experiences from various national settings have offered insights into promising approaches. Considering experiences of discrimination and disadvantage as part of a holistic evaluation, committing to periodic reviews of how policies are working, and targeting the economic and exclusionary impacts of past discrimination can both advance restorative justice and foster more inclusive and representative institutions, with benefits for everyone.

The importance of an intersectional lens also extends to affirmative measures. For example, across numerous countries, past and ongoing racial/ethnic discrimination has created an unequal playing field. Without taking SES into account, though, affirmative measures might primarily benefit individuals who are better off financially and were able to attend better-funded schools, faced fewer financial responsibilities as youth, and had other resource advantages. The issue is not about addressing race, ethnicity, *or* class—racial/ethnic discrimination and its consequences cut across income levels—but about addressing them together. This also better positions courts and policymakers to focus their efforts on those who have faced the greatest consequences of past discrimination.

#### *Reaching Discrimination in the Private Sphere*

The oldest constitutional protections against discrimination applied only to the government, or to individuals or institutions acting on its behalf. However, private-sector discrimination, both explicit and implicit, substantially contributes to group-based economic disparities and gaps in opportunities. In Brazil, black workers' average wages are half those of their white counterparts.<sup>32</sup> In Canada, native-born “visible minorities” are lower-paid than white Canadians in private-sector jobs, even though earnings are closer to equal in the public sector. For example, controlling for sociodemographic and human capital variables, black men in private-sector jobs earn 16% less than their white male colleagues.<sup>33</sup>

In recent years, however, a growing number of countries have begun exploring ways to hold private workplaces accountable under their constitutions. Some countries have done this directly through their constitutional texts. For example, Bolivia's constitution provides: “The State shall . . . guarantee [women] the same

remuneration as men for work of equal value, both in the public and private arena.”<sup>34</sup> Others, such as Colombia, have developed judicial doctrines and procedures that allow individuals to enforce their equal rights against private employers and individuals. In Uganda, the Bill of Rights is expressly applicable against non-state actors.<sup>35</sup> While an expansion on the original role of constitutions, addressing private-sector discrimination is integral to the state’s responsibility to respect, protect, and fulfill fundamental human rights.

### *Nondiscrimination and Leveling Up*

Constitutions can also help address private-sector employment inequalities by ensuring that all children, regardless of race/ethnicity, gender, SES, or other factors, have access to a high-quality education, including university, before entering the labor market—an aspect of equal rights that too many countries continue to neglect, despite seminal cases like *Brown v. Board of Education* condemning racial inequality in the classroom. This example also underscores the important relationship between nondiscrimination and social and economic rights, and why protecting both is important to substantive equality and “leveling up.”

For example, if governments respond to prohibitions of racial/ethnic discrimination in education by simply defunding public education rather than desegregating school systems, we have not advanced equality. In the early 1960s, these exact circumstances unfolded in Prince Edward County, Virginia, resulting in nearly 2,000 black students going without public education after a state senator called for “massive resistance” to the *Brown* ruling.<sup>36</sup> It was not until a 1964 Supreme Court decision, which found that the students were being denied “their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia,” that the county was ordered to reopen—and integrate—its public schools.<sup>37</sup>

Unfortunately, the “right to education” in the United States—which is not explicitly protected by the constitution—would not prove to be durable, as detailed in chapter 9. But as the story of the Prince Edward schools underscores, the right to nondiscrimination can only do so much if the government refuses to provide essential public services that are foundational to equal opportunity.

## SUMMARY OF FINDINGS: SOCIAL AND ECONOMIC RIGHTS

In Part Two of this book, we move from nondiscrimination to social and economic rights. Yet although the book’s first and second parts address different types of rights, they are deeply intertwined, as the previous section began to elucidate. There is simply no way to achieve equal opportunity without ensuring all people are meeting their basic needs. There is no way two children can have equal opportunities to succeed in school if one is undernourished, arrives hungry, is preoccupied all day by that hunger, and leaves the same. We know this from common



sense, and from studies demonstrating how much better low-income children perform in school when provided with food. Likewise, there is no way two adults can have equal opportunities to succeed at work or in a profession if one has received extensive education and training and the other has not.

By removing financial barriers to decent healthcare services and an adequate education, while supporting the ability of families to have incomes sufficient to meet basic needs, we can reduce barriers to equal opportunity going forward.

*The Right to Education: A Foundation for Equal Opportunities*

The right to education is among the foundational social and economic rights. Education has widespread individual benefits for income, health, employment, and equality, and just as substantial benefits for entire economies. Yet the history of groups' exclusion from education by public and private sectors alike is long. For these reasons, embedding strong commitments to quality, accessible education for all in national constitutions is both an important safeguard for equal rights and a powerful basis for equal opportunities.

Globally, a majority of constitutions—83%—protect the right to education, including 53% that guarantee primary schools will be free. These provisions have played a critical role in advancing the accessibility, affordability, and quality of education in countries around the world. In Colombia and Swaziland, constitutional protections provided the foundation for eliminating tuition fees that led to exclusion. In Indonesia and some U.S. states, constitutional protections for education led to increased government funding for school systems. And in South Africa, constitutional education provisions helped ensure students have the books and desks they need to learn.

Yet with 57 million children still out of school, and persisting gaps in access and attainment across gender, disability, SES, and other factors, much remains to be done. Of the 148 countries that guarantee the right to education, many could strengthen their approach by expanding its scope to keep pace with evolving education standards. Ensuring that the right to education ultimately extends from pre-primary to university would have a transformative impact for both individuals and each of our societies. The 75 countries that currently guarantee only primary can extend these protections to secondary, as Mexico did in 2012. Likewise, the 41 that guarantee only primary and secondary, can consider expanding these protections to include post-secondary education and training.

Affordability is a critical barrier to educational access and attainment. The 47 countries guaranteeing only that primary education is free can support more children to finish their education by establishing that secondary is tuition-free as well. Further, to reduce disadvantages facing particular groups that have historically been excluded from schools and learning opportunities, countries should directly address equal opportunities in education; 122 countries currently take no approach to addressing discrimination within education specifically.

*The Right to Health: From Treatment and Care to Creating the  
Conditions for a Healthy Life*

Health is foundational to full participation in society and the effective exercise of other fundamental rights. Around the world, constitutional protections for health have produced critical, wide-ranging improvements in people's lives, from expanding access to lifesaving immunizations in Argentina to improving water and sanitation in Bangladesh to increasing access to essential medicines in Peru, Brazil, Costa Rica, and Kenya.

Constitution drafters have increasingly recognized the importance of addressing health. Just one-third of constitutions adopted before 1970 protect a right to health; among those adopted since 2000, 100% do. Nevertheless, there are still important ways to improve health rights' potential to genuinely improve population health.

First, ensuring that constitutions' and courts' approaches support prevention and health protection, not just treatment after people become sick, will reduce the incidence of illness and injuries and help ensure that resources for health have greater benefits for more people. Measures to make cars, buses, and other transportation safer can save millions of lives and prevent countless more injuries. They also cost countries less than the medical care needed when injuries are not prevented. The same can be said for the millions of preventable deaths due to diarrheal disease, preventable cancer, cardiac conditions, and other causes. People would rather not get sick or injured in the first place—and in countless areas, prevention is far cheaper than treatment. At the same time, a right to medical care is essential: not all illnesses can be prevented, and ensuring access to treatment when sick is fundamental to equal chances in school, work, family, and civic life.

Second, addressing the structural shortcomings of public health and medical systems—rather than solely individual claims that are symptomatic of those flaws—can more dramatically improve the lives of people throughout a country, while ensuring the courts' continued accessibility and efficiency. If thousands of people are approaching the court to seek access to a specific essential medicine, addressing the gaps in their health insurance coverage that put those treatments out of reach would be a more effective and efficient approach than hearing and deciding on each individual claim. In countries that have a “common law” tradition, where prior court decisions are binding on future cases, a series of repetitive claims is less likely, although individuals may also face greater barriers to quickly accessing the courts when their rights are infringed. In “civil law” countries, these circumstances are common. However, courts in civil law countries including Brazil and Colombia have demonstrated the feasibility of calling for more structural solutions.

Ensuring that individuals facing the same legal issue can bring collective claims would advance rights on a broader scale and help prevent backlog in

court systems. In a range of countries, mechanisms like “public interest litigation” have allowed civil society organizations (CSOs) and public interest lawyers to bring highly impactful cases on behalf of communities and vulnerable groups. Likewise, class action lawsuits have enabled large groups of people to claim their rights to health all at once. These collective approaches have yielded critical victories for child laborers in India, consumers harmed by misleading tobacco marketing in the United States, and people affected by industrial pollution in Bangladesh.<sup>38</sup>

For the 49 countries that do not yet have any constitutional rights to health—or even goals of achieving it—the first step is to take an approach to supporting health promotion, disease and injury prevention, and medical treatment. For the 58 countries that do address medical care but do not clearly address public health or preventive care, doing so could help ensure that the constitution improves the well-being of the largest number of people. Across countries, developing judicial procedures that allow individuals to approach the courts collectively, and courts to issue structural remedies, would further strengthen constitutional health rights’ potential to have a transformative impact on people’s daily lives and environments.

#### IS ANYONE PLAYING BY THE RULES?

For the many countries that do have good rules on the books in at least some areas, is there any evidence that the constitutions matter? Our review of cases from around the world is encouraging. In every area, there are examples of major cases that have transformed whether all people are treated equally by the government, educational and health services, and employers. In Mexico, the Supreme Court was instrumental in establishing equal rights for same-sex couples in practice across the country, building on the constitution’s prohibition of discrimination on the basis of sexual orientation. In Brazil, the constitution’s commitment to inclusive education prompted the Supreme Court to find that both public and private schools must provide a quality education to students with disabilities. The South African Constitutional Court’s decision enabling HIV-positive women to access the treatment necessary to prevent transmitting HIV to their babies, alongside large-scale social mobilization related to the judgment, saved hundreds of thousands of lives.<sup>39</sup> And in India, Supreme Court rulings have improved urban air quality and reduced children’s risk of malnutrition nationwide.

This is not to say there have not also been major cases that have been lost, where equality was diminished, despite the constitution’s clarity on the point. Lawyers and judges are human, and courts are imperfect institutions. Any lawyer, whether working to advance equal rights, ensure that governments honor the rights to education and health, protect freedom of speech or association, or encourage the pursuit of environmentally sustainable approaches, will attest that they may lose many cases before winning an important one that proves transformative.

Our review of cases also illustrates steps that can be taken to increase the likelihood that the values held in constitutions are not just aspirational but lead to improvements in peoples' daily lives. This must include ensuring that all people have straightforward access to the courts and that access to lawyers is affordable. Reforms to the legal system to facilitate individual access must also be accompanied by efforts to remove more informal obstacles, such as language barriers and a distrust of legal institutions previously experienced as punitive rather than empowering.<sup>40</sup> Beyond individuals having meaningful access, it is critically important that individual cases can have benefits that extend beyond the individual who brings the case to larger groups.

An active civil society can be instrumental in ensuring that landmark court decisions are actually enforced. Beyond monitoring the implementation of courts' specific orders, civil society groups can play a key role in building on judgments to enact complementary laws and policies. For example, the Right to Food campaign in India, a network of individuals and civil society groups across the country, has played a pivotal role in monitoring enforcement of a series of orders—issued by the Supreme Court since the “right to food” case was heard in 2001—addressing everything from the midday meal program for schoolchildren to a new maternity benefit designed to ensure mothers' adequate nutrition.<sup>41</sup> The campaign has also led the charge on complementary laws, including 2013's National Food Security Act. In this way, using the constitution in court can be understood as just one piece of a broader strategy for advancing social change.

### EVOLVING TOWARD EQUALITY

In some countries, constitutions embody transformative visions for building a new society. Such constitutions may include guarantees of equality of opportunity that exceed the on-the-ground reality at their time of passage. Other countries have centuries-old constitutions whose core provisions are outdated. In both cases, time and civic engagement will determine whether the constitution will make a meaningful difference for equality. In countries with transformative constitutions, the critical challenge will be implementing and realizing their promises to enable the constitutional visions to reach alignment with lived experiences. In countries with much older constitutions, the challenge will be amending the text to ensure interpretations keep pace with contemporary needs and appreciation of equality.

#### *South Africa: Realizing a Transformative Vision*

South Africa's constitution, which provides an example of the former, was written at a critical period. In the midst of leaving the system of apartheid behind, the majority of people in South Africa were acutely aware of the importance of guaranteeing equal rights to all. The soon-to-be first president, Nelson Mandela, was committed to every minority group having equal rights, even the white Afrikaner

minority who had developed the system of race-based segregation and oppression. Leaders argued passionately that equal rights would truly be achieved for the large black South African majority who had been denied access to education and health only if the rights to education and health were enshrined in the constitution. As a result, South Africa's constitution embodies an extraordinary vision.

Realizing that vision will take time. Vast educational, housing, health, and economic disparities are not overcome overnight. The Constitutional Court is constrained in the pace at which it can demand change in the spheres of education, health, and housing, which require substantial budgets. Predictably, given the historical context, full participation in the political system is still emerging. In most countries, democratic institutions take years to fully and successfully emerge when they have previously been suppressed.

Still, the South African Constitution's accomplishments are truly remarkable. In addition to taking a major stride forward on preventing mother-to-child HIV transmission, the Constitutional Court has served as a global example in other areas of equal rights. In a 1994 case based on the interim constitution, the Court's ruling that asylum seekers could not be excluded from receiving public education or seeking work is estimated to have impacted over 50,000 individuals, all of whom were socioeconomically disadvantaged.<sup>42</sup> In a series of rulings on education, the Court has strengthened the constitutional commitment to quality, inclusive education for all students, and the end of segregation. And its 2005 ruling on same-sex marriage made South Africa the first African country to guarantee marriage equality.

#### *United States: Cultivating Protections for Equality over Time*

Similarly, though its constitution is centuries older, realizing equal constitutional rights in the United States has been a long—and ongoing—process. As drafted exclusively by a group of white, male property owners in the eighteenth century, the U.S. Constitution guaranteed rights to the few, not the many. Following the Civil War, the constitution's potential to advance equality increased immensely, with the Thirteenth Amendment's prohibition of slavery, the Fourteenth Amendment's establishment of the Equal Protection Clause, and the Fifteenth Amendment's extension of the right to vote to freed male slaves.

These provisions took on new life during the Civil Rights Movement, providing tools for dismantling Jim Crow and dispensing with the idea that "separate but equal" could be compatible with true equality. In *Brown v. Board of Education*, the Supreme Court ruled in 1954 that segregated public schools were unconstitutional. That same year, the Court ruled for the first time, in *Hernandez v. Texas*, that the Equal Protection Clause applied to Mexican Americans, reasoning that it should extend beyond distinctions between white and black Americans to any instance in which a particular group of people was singled out for differential treatment. In 1960, the Court held in *Gomillion v. Lightfoot* that the redrawing of city boundaries

in Tuskegee, Alabama, into a 28-sided shape that would exclude virtually all black voters was unconstitutional under the Fifteenth Amendment. And in 1967, in *Loving v. Virginia*, the Court found that state laws prohibiting interracial marriage violated the Equal Protection Clause.

Civil rights lawyers also drew on both the Fourteenth Amendment and other constitutional provisions to expand the reach of antidiscrimination laws to the private sphere. In *Shelley v. Kraemer*, in 1948, the Supreme Court held that the Equal Protection Clause prohibited the enforcement of real estate covenants that banned black people from purchasing homes. Even though the constitution did not apply to private contracts, the Court ruled, courts' enforcement of discriminatory contracts would amount to "state action" prohibited by the Fourteenth Amendment. In 1964, the Court ruled in *Heart of Atlanta Motel v. United States* that the Civil Rights Act of 1964, which prohibited discrimination by privately owned hotels, restaurants, and other public accommodations, was a valid exercise of Congress's constitutional authority to regulate interstate commerce. The Court reached the same conclusion in *Katzenbach v. McClung*, ruling against an Alabama restaurant owner who refused to serve black customers, arguing that the Civil Rights Act was unconstitutional.

Despite generations of progress, however, the U.S. has far to go toward realizing the ideals that many Americans believe the constitution represents. While the Equal Protection Clause was a critical step forward, courts and legislatures have still done too little to address the enduring economic impacts of centuries of racial exclusion created by law. For nearly four decades, an amendment to guarantee equal rights to women has languished in the state legislatures, although its momentum began rebuilding in 2017. While court rulings and legislative reforms have critically advanced equal rights for people with disabilities and the LGBT+ community, the lack of explicit protections for either group in the constitution puts rights at risk as politics shift and the Supreme Court's composition evolves. The U.S. Constitution is also now one of the few in the world that fail to guarantee fundamental social and economic rights, and vast inequalities in access to quality education and healthcare underscore the consequences of this neglect.

Across constitutions new and old, fully realizing rights takes time. It also takes continued engagement by people who care about ensuring that their constitution genuinely reflects our shared values and priorities. But when these rights on paper become reality on the ground, the impact on individual lives and communities can be profound.

## Each of Us, All of Us

### *Taking Action to Strengthen Rights Globally*

Expressed in our living rooms and around our kitchen tables, these are rules that most of us teach our children: that everyone should be treated fairly, and that we all have a responsibility to one another. The inherent dignity and worth of every human being represent widely shared values. In 57 of the 60 countries covered by the World Values Survey, a majority of respondents said that it is especially important that children learn tolerance and respect for other people. Likewise, in 58 of the countries, large and often overwhelming majorities of respondents indicated it was important to them to do something for the good of society.<sup>1</sup>

These values did not originate in a single region but span countries and continents, and give shape to the agreements that have been reached globally by the United Nations. Consistently and comprehensively, these treaties speak to the fundamental value of every person. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by 189 countries, asks every government to recognize that “discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.”<sup>2</sup>

Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination, with 179 states parties, proclaims that “the existence of

racial barriers is repugnant to the ideals of any human society,”<sup>3</sup> while the Convention on the Rights of Persons with Disabilities, with 177 states parties, notes that “discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.”<sup>4</sup> As these commitments stress, equality and dignity are intimately linked; achieving one requires achieving the other.

#### EACH OF US, ALL OF US

What each country’s constitution does to ensure everyone can reach their full potential matters to each of us. Our children, and our siblings’ children, can be any gender. We cannot know whom they will fall in love with, marry, and form families with. What will their race/ethnicity be? Their place of residence?

Globally, one in 30 (that is, 258 million) people are migrants.<sup>5</sup> While some planned their moves in advance, or immigrated seeking better opportunities, others had little warning: wars, natural disasters, or economic and political collapse in their countries forced their departure. Wherever we each live, the histories of our countries and families provide strong reminders that many of us may need to cross borders; we should care about having equal rights in all countries for ourselves and for our friends, families, and all people.

We also all face uncertainties in core aspects of life. It is impossible to predict our future health. While our family members may not personally face disability discrimination today, equal rights on the basis of disability could become critical to their daily lives tomorrow, or in a decade. The same is true for equal rights and opportunities regardless of social class. Present education and employment circumstances may have enabled our family to succeed in the current economy, but that does not guarantee future financial security.

Beyond the human implications, discrimination impedes our collective capacity to thrive as societies. According to a 2015 McKinsey Global Institute report, fully closing the gender gap in the labor market by 2025 could increase global GDP by \$28 trillion, equivalent to the U.S.’s and China’s economies combined.<sup>6</sup> Similar studies have documented the widespread economic benefits of ensuring the full inclusion of racial/ethnic minorities, immigrants, people with disabilities, LGBT+ workers, and others.<sup>7</sup>

Guaranteeing equality for all changes the world we live in. Ensuring that everyone has the chance to reach their full potential changes the art we see, the music we hear, the food we eat, how economically successful our countries are, what scientific discoveries are made, and how well major social problems are solved. Conversely, every instance of discrimination both causes individual harms and diminishes our collective success. If we do not ensure that every person gets a good education, decent healthcare, and the opportunity to work to their full capacity, we are trying to build countries with half a team or less.



Constitutions provide vehicles for translating fundamental beliefs about the value of every human being, and evidence on the impact of achieving equal opportunity for all, into meaningful improvements in people's lives and powerful statements of countries' values. In this concluding chapter, we evaluate how constitutions can advance equality not just on paper but in practice, highlighting demonstrated strategies for realizing this vision.

## HOW CAN WE TAKE ACTION?

### *You Shape the Future*

You have a part to play in shaping the future of your country. Citizens and residents of every country, community organizations and companies, lawyers and advocates, policymakers and business leaders all have roles and responsibilities to ensure that equal opportunity exists in practice.

Getting the ground rules right makes a difference. Just since we entered the twenty-first century, over 130 countries have enacted constitutional amendments. Now implementing the constitutional rules that promote equal opportunity and equal rights is essential.

Good building codes can ensure safe places to live and work, free from cancer-causing asbestos or lead paint that degrades health and cognition. These ground rules can also help ensure buildings do not collapse. However, they work only when implemented. Inspectors must check whether building codes are followed. When neighbors, engineers, and visitors are aware of dangerous code violations, their active participation makes it far likelier that everyone's life will be healthier. Blueprints can make buildings easier to construct, not harder.

Similarly, once a good constitution is in place, we all need to participate to ensure it succeeds. We each have a role to play in transforming norms, addressing discrimination, and ensuring our governments provide access to education, health, and the ability to work and live to our fullest potential.

We understand that it may be difficult initially to imagine how you can contribute. But around the world, individuals and small groups have played pivotal roles in both strengthening their constitutions' protections and ensuring they have impact. In this section, we share information about a wide range of these initiatives to demonstrate the many different ways it is possible.

### *Movements to Pass Constitutional Amendments*

Over the past several decades, everyday citizens in countries around the world have come together to demand that their constitutions better ensure the rights of all. These movements have relied on various strategies for their success, including direct actions and demonstrations, large-scale organizing to shift public attitudes and get out the vote, and strategic litigation aimed at precipitating constitutional reform. A few examples follow.

*India: Leveraging Case Law and Building a Broad Civil Society Movement*

In India, the movement to enact a constitutional right to education was a long-term effort requiring the dedication, energy, and persistence of countless parents, educators, activists, and lawyers committed to change. In 1990, a government committee headed by social activist Acharya Ramamurti reviewed the national education policy of the past five years, issuing a report urging recognition of education as a fundamental right and increased government expenditure on education.<sup>8</sup> That same year, India joined the UNESCO-initiated Education for All movement, and, in 1992, ratified the U.N. Convention on the Rights of the Child.

Two Supreme Court decisions further catalyzed activism to advance universal education through a constitutional amendment. In a 1992 case brought by a medical school applicant who could not afford the out-of-state fees, the Court determined for the first time that the constitution guaranteed a right to free education.<sup>9</sup> The justices pointed to the “directive principle” on education, which described education for all children until age 14 as a goal of the state, as well as the “right to life,” which the Court stated “cannot be assured unless it is accompanied by the right to education.”<sup>10</sup> The following year, in *Unni Krishnan*, the Court affirmed the existence of a constitutional right to free education, but limited its scope to ages 6–14 rather than education at all levels.

While these court victories were major steps, advocates were nevertheless keenly aware that an explicit protection in the constitutional text was still needed. First, enshrining the right in the constitution would increase awareness that education was a fundamental right, and that schooling was both free and compulsory. Although enacted by some states and local governments throughout the twentieth century, compulsory education laws were often perceived as a duty on parents (sometimes enforced through criminal penalties) rather than a right of the child or a governmental commitment to ensure that all children could attend school.<sup>11</sup> Moreover, many school administrators were unaware of the laws.<sup>12</sup> Second, case law could be more easily overturned; even the two cases that established a “right to education” illustrated how the Court could articulate an expansive right in one decision and limit it in the next. Finally, some observers criticized the Court’s decision as overstepping its authority and changing policy in a way that should be reserved for Parliament.<sup>13</sup> Consequently, even though the cases importantly advanced the right to education, further work was needed to ensure a strong, enduring constitutional right that all people would be aware of simply by reading the constitutional text.

In the years following *Unni Krishnan*, the right to education movement leveraged its findings and built strong partnerships with wide-ranging stakeholders, including families, teachers, trade unions, local government councils (*panchayats*), and numerous national and international civil society organizations (CSOs). Among the primary partners were groups working on child labor, including *Bachpan Bachao Andolan* and the South Asian Coalition on Child Servitude. In 1997,

the movement successfully conveyed to Parliament a proposed amendment that was soon abandoned due to budgetary concerns and an impasse over its details. The CSOs' advocacy intensified, with networks including the National Alliance on the Fundamental Right to Education and the Forum for Crèches and Child Care Services (FORCES) leading actions and continuing the campaign nationwide.<sup>14</sup>

The movement culminated in the 115-day march for education, which traversed thousands of kilometers and 20 Indian states. The march brought even wider attention to the issues at stake and helped secure the Eighty-sixth Amendment's passage in 2002, thus creating an explicit, justiciable right to free and compulsory education for all children aged 6–14. In 2009, the legislature passed the Right to Education Act, which built on the amendment by establishing detailed standards, including the rights of students with disabilities, the prohibition of corporal punishment, and private schools' obligations to provide tuition-free education to at least 25% of their pupils.

As this brief history suggests, advancing education as a constitutional right in India required working in broad coalitions and building on both incremental victories and international commitments. According to one observer, the movement represented “the largest ever social mobilisation in Indian history post-independence for one single cause.”<sup>15</sup> The movement also required dismantling fears and misinformation about what the right to education would mean. Parents feared that making school compulsory would open the door to criminal penalties, given the prosecutions under state compulsory education acts in the preceding decades. Advocates had to clarify that the amendment was about assigning responsibility to the state to guarantee free education to all.<sup>16</sup> Today, the movement continues: FORCES and other organizations are building on the education amendment to call for an expansion of early childhood education.<sup>17</sup>

### *Ireland: Citizen Engagement and Building Wide Support for Same-Sex Marriage*

In Ireland, the movement to enact a constitutional amendment protecting the right to same-sex marriage emerged not from case law, but from a constitutional convention. In 2011, as Ireland was recovering from the global recession, the new coalition government published a policy document broadly calling for a constitutional convention.<sup>18</sup> The same year, a CSO, We the Citizens, held the Citizens' Assembly, which convened a randomly selected, representative group of Irish citizens to discuss their ability to influence politics.<sup>19</sup> The assembly drew inspiration from similar gatherings in British Columbia, Iceland, and the United States, and shared its findings with politicians and government leaders.<sup>20</sup> In 2012, the government organized a constitutional convention,<sup>21</sup> drawing on the “Citizens' Assembly” model.<sup>22</sup>

In forming the Irish Constitutional Convention (ICC), the government had a polling company select participants to ensure representation across gender, race, SES, religion, and other characteristics. Ultimately, the 100-person ICC comprised

66 members of the public, 29 parliament members, four representatives from Northern Ireland, and a government-appointed chairperson.<sup>23</sup> The ICC's Terms of Reference, established by a parliamentary resolution, listed eight discussion topics, including marriage equality.<sup>24</sup> In response to public input at regional meetings in the fall of 2013, the ICC added economic, social, and cultural rights.<sup>25</sup> Throughout the convention, which met for livestreamed discussions over ten weekends from January 2012 to February 2014, participants heard presentations on each topic, including marriage equality, and were invited to deliberate at length.<sup>26</sup> After testimony and presentations from wide-ranging experts and stakeholders, including constitutional lawyers, clergy members, adult children of same-sex couples, and marriage-equality opponents, 79% of ICC members voted to put marriage equality on the ballot.<sup>27</sup>

With this hurdle cleared, advocacy groups began focusing on strategy. Unlike in India, where constitutional amendments are adopted by parliamentary vote, in Ireland, proposed amendments are subject to a popular referendum. Like India's efforts on education, the movement to pass same-sex marriage in Ireland involved marches and public demonstrations, but ultimately focused on canvassing neighborhoods, launching social media campaigns, sharing personal stories, and other organizing tactics designed to encourage citizens to vote for the amendment.<sup>28</sup> The YES campaign emphasized a simple message: according to campaign co-director Grainne Healy, "[o]ur communications started with values. Our research told us that the electorate believed in love, equality, fairness, generosity, and being inclusive. These were what it meant to be Irish."<sup>29</sup> In May 2015, nearly 80% of the electorate turned out to vote. By a margin of 62% to 38%, voters affirmed these shared values, making Ireland the world's first country to explicitly protect same-sex marriage in its constitution.<sup>30</sup>

In the years since the ICC, much coverage has been positive, although some criticisms have also emerged regarding representative participation and transparency of topic selection.<sup>31</sup> The broader challenges with designing participatory constitutional design processes include ensuring that they provide a range of opportunities for participation that are accessible to people nationwide, and meaningfully incorporate public input as drafting moves forward. Nevertheless, Ireland's experience underscores ordinary citizens' enthusiasm and capability to engage in debates about their constitutions and identify priorities for ensuring these documents align with their values. Moreover, the clear support for marriage equality reflected in the 2015 vote illustrates how public education and civic engagement can serve as core components of movements for equal rights.

### *Malawi: Training Youth to Advocate for Themselves*

Finally, in Malawi, a campaign to amend the constitution to eliminate a loophole perpetuating child marriage started with the people with the most at stake: girls and young women. Under the 1994 constitution, children as young as 15

could be married with parental approval.<sup>32</sup> According to UNICEF, between 2002 and 2012, 11.7% of girls in Malawi were married by age 15, while 49.6% were married by 18.<sup>33</sup>

In partnership with international CSOs including Girls Not Brides and Plan International, a youth-led movement began campaigning in 2011 to prohibit child marriage at every level of law. Two national networks, the Adolescent Girls Advocacy Network and the Girls' Empowerment Network (GENET), supported these efforts across the country. GENET's work in particular focused on empowering girls to raise their own voices and tell their stories. After GENET led an advocacy training with 200 girls in southern Malawi, the girls lobbied 60 village chiefs to strengthen community bylaws against child marriage and other harmful practices. In another initiative, GENET led a story-writing workshop with girls, who put their child marriage experiences onto paper. These powerful firsthand accounts were then published and distributed to policymakers.<sup>34</sup>

The campaign's first major victory was a new law raising the minimum age of marriage to 18 in 2015. Yet the constitutional loophole for parental consent remained, and became the youth-led campaign's primary focus over the following year. The campaign was boosted by the support of Malawi's president and first lady, and built further momentum by engaging with key government bodies including the Ministries of Gender, Justice, and Education. Additionally, international and regional pressure, including multiple country visits by the U.N. Special Representative of the Secretary-General on Violence against Children, helped advance government leaders' commitments to moving the constitutional reforms forward.<sup>35</sup> In 2017, the parliament voted 131–2 to amend the constitution and eliminate the parental consent exception.<sup>36</sup>

While much work remains to ensure implementation, girls and young women raising their voices effected remarkable changes in Malawi's laws and constitution over six years, striking a crucial blow against the persistence of child marriage and laying a foundation for equality for generations to come. Memory Banda, a young woman who participated in the campaign, stated: "Marriage is often the end for girls like me. But if our leaders will invest in us and give us the chance to be educated, we will become women who create a better society for everyone."<sup>37</sup> Notably, the campaign worked to advance change at every level, from community bylaws to national legislation and finally the constitution.<sup>38</sup> Further, by training girls and young women to be their own advocates, the campaign laid bare the consequences for individual lives of failing to act, while helping to cultivate Malawi's next generation of leaders.

As the experiences from India, Ireland, and Malawi illustrate, the most effective strategies in each country vary depending on the processes for constitutional change, the stakeholders involved, and the issues at stake. Nevertheless, the critical role of individual people throughout the process is consistent, and foundational for securing change.

### *Forming Coalitions*

As the examples throughout this section have shown, ensuring the rights of all often requires building partnerships and recruiting allies to support broader movements. While a single person can make a difference, the more people who are engaged and the more voices that are raised, the greater the odds of creating lasting change.

Working in coalitions is especially important for strengthening rights for minority groups. In South Africa and Ecuador, for example, coalition-building was essential to successful efforts to include sexual orientation in the constitutional equality provision. In South Africa, integrating the fight for LGBT+ rights within the broader post-apartheid struggle for equality was pivotal for securing support for the world's first specific constitutional protection against sexual orientation discrimination.<sup>39</sup> In Ecuador, LGBT+ activists partnered with feminist groups and labor organizations to enact a SOGI-specific equal rights provision and strengthen fundamental social and economic rights. It is unlikely these new protections would have been achieved if the LGBT+ advocacy groups had not collaborated with others.

Partnering with other groups is also important for larger populations that have been politically marginalized historically. In Tunisia, women's groups played a powerful role in drafting the 2014 constitution, which explicitly protected women's equal rights for the first time. Women's groups nationwide partnered with other CSOs and labor groups to advance both strong protections for women's equal rights and provisions supporting economic opportunity.

Likewise, within Parliament, women worked across parties and religious lines to advance the new gender equality provisions. A key issue in the drafting process was how to reconcile Islam and strong protections for equality, but both religious and secular women parliamentarians exhibited a commitment to ensuring a women's rights provision made it into the final text.<sup>40</sup> In the words of Hela Hammi, a member of the religious party Ennahda, during the drafting process "there [were] a lot of political tensions among members of Parliament, but the women worked more or less in tandem."<sup>41</sup>

### *Sharing the Constitution*

Everyone needs to know their constitutional rights for them to be realized. It is important for individuals to know both their own rights and the expectations for respecting the rights of others.

To increase awareness of constitutional rights, CSOs, governments, and concerned individuals have undertaken efforts to share their country's constitution—including both physical copies and education on its key principles. For example, the CSO Uraia Trust works to distribute copies of Kenya's constitution throughout the country, including copies in Braille, while providing civic education to empower citizens to claim their rights. The Indian organization Nazdeek trains

communities about their constitutional rights to health, and has instituted a community monitoring program in the rural area of Assam to track implementation of the right to health for expectant mothers.<sup>42</sup> In South Africa, as part of a “Know Your Constitution Campaign,” the Constitutional Literacy and Service Initiative hosts workshops and constitutional debates at high schools and universities in disadvantaged areas throughout the country.<sup>43</sup> And in Germany, the government translated the first 20 articles of its constitution into Arabic in 2015, and distributed 10,000 copies of the document at refugee registration centers.<sup>44</sup> These initiatives underscore how sharing constitutions can both increase public awareness of rights and improve the prospects for their effective implementation.

### *Invoking the Constitution to Change Norms*

With knowledge of what their constitution protects, individuals and communities can do more to change norms and attitudes, and begin productive conversations about critical issues. In South Africa, politicians and advocates have spoken out against xenophobia by referencing the constitution’s protections of refugees’ rights, which have been clarified through case law.<sup>45</sup> In Colombia, advocates citing their government’s constitutional obligation to uphold its commitments under CEDAW spurred a dialogue across Latin America about reproductive rights, which culminated in a Constitutional Court decision ending Colombia’s complete ban on abortion.<sup>46</sup>

Individuals and groups can also invoke constitutional provisions and values to contest discriminatory policies or legislation before they are passed. In India, activists cited the constitution’s equality guarantee in protesting an amendment to the Citizenship Act introduced in 2016 that would create different standards for refugees’ ability to naturalize based on their religion.<sup>47</sup> In Malaysia, 51 national and regional civil society organizations collectively condemned the Malaysian government’s proposed “Foreign Workers First Out” policy, which urged employers to fire migrant workers before laying off citizens, notwithstanding their employment contracts. Citing the constitution’s guarantee that “all persons are equal before the law,” the groups rallied against the “unjust, discriminatory and unconstitutional policy.”<sup>48</sup>

Finally, invoking the constitution can be a powerful tactic for pushing back against discriminatory statements or unconstitutional actions undertaken by people in positions of power or influence. For example, in 2006, then-former South African deputy president Jacob Zuma came under fire after making disparaging public remarks about homosexuality and same-sex marriage, which he described as “a disgrace to the nation and to God.”<sup>49</sup> Activists and other government leaders quickly condemned Zuma’s comments, partly by referencing the constitution’s explicit protection of equal rights regardless of sexual orientation. Within days, Zuma apologized, acknowledging that “[o]ur Constitution clearly states that nobody should be discriminated against on many grounds including sexual

orientation, and I uphold and abide by the constitution of our land.”<sup>50</sup> While norm change is a complex process shaped by many factors, individuals raising their voices play an important role in shifting societal expectations.

*Claiming Rights and Challenging Discriminatory Laws in Court*

Importantly, as emphasized throughout this book, claiming rights through the courts can be among the most powerful ways to realize constitutions’ promise and translate their commitments into impact in people’s day-to-day lives. Affected individuals, government actors, and community organizations all have roles to play in ensuring that constitutional rights are fulfilled.

*Addressing Inconsistencies between Constitutions and Laws*

One powerful way that individuals and CSOs can use constitutions is to demand reforms to laws and policies that are inconsistent with constitutional values. In various countries, especially those whose laws are far older than their constitutions, aspects of the national legal system may not fully align with constitutional commitments to equality. For example, around the world, many countries’ laws treat women and men unequally, even when their constitutions guarantee equal rights. Almost one-third of countries allow girls to be married younger than boys. Nearly half of countries provide paid maternal leave but not paid paternal leave, and those with paid paternity leave often provide men with a small fraction of what they provide women. These inequalities make women more vulnerable to employment discrimination, while reducing equality at home. Scores of countries have laws barring women from certain types of work. Women often have far fewer legal rights in families than men, from financial rights, to the right to pass citizenship to children, to safety from violence. The list goes on.

Individuals and civil society groups have shown that constitutional protections can provide tools for addressing these disparities. In Zimbabwe and Tanzania, constitutional guarantees of gender equality empowered young women to demand an increase in the minimum age of marriage for girls.<sup>51</sup> In the United Kingdom, the Equality Act enabled a new father to access sufficient paid leave to take the primary caregiving role in his household while his wife returned to work.<sup>52</sup> And in Sudan, the 2005 constitution’s new “bill of rights for women” provided a foundation for activists to demand reform of the country’s rape laws, which provided that survivors of rape could be prosecuted for having sex outside of marriage. Although significant challenges remain to ensure its implementation, the law was amended in 2015 to redefine rape and eliminate this possibility.<sup>53</sup>

While inconsistencies between constitutional law and ordinary legislation are common, people have the power to close these gaps. Moreover, efforts that simultaneously change norms and challenge laws can be particularly effective. In South Korea, a network of 113 women’s organizations invoked the constitution’s protection of gender equality in its nationwide campaign to educate the public about the



“head-of-family” system, which automatically designated the eldest male family member as the legal head of household.<sup>54</sup> Alongside its efforts to increase public awareness of the issue, the group initiated a lawsuit, which resulted in a 2005 Constitutional Court ruling declaring the policy unconstitutional.<sup>55</sup>

### *Bringing Individual Cases to Advance Broader Change*

Cases brought by individuals are most transformative when their benefits extend to society as a whole. *Brown v. Board of Education*, the seminal U.S. case that ended formal school segregation, relied on the courage of 13 black families that purposefully tried to enroll their children at white schools. The case would go down in history in the name of Oliver Brown, father of nine-year-old Linda, who was the first plaintiff listed in the court filings. Linda’s case changed history.<sup>56</sup> In Canada, a case brought by a single couple, the Eldridges, both improved their access to services and changed the standard of care for people with hearing impairments in hospitals nationwide.<sup>57</sup> And in India, one woman’s fight against the discrimination she had personally faced in getting promoted at work led to a change in the law benefitting all women.<sup>58</sup>

### *Holding Private Actors Accountable*

Individuals have also brought cases, sometimes in partnership with and sometimes against government, to hold private actors accountable for rights violations. In Colombia, for example, Marco Gómez Otero brought a case against the private company charged with providing water to his neighborhood (which the public water service would not serve), arguing that it failed to supply sufficient water for personal use.<sup>59</sup> The company provided water only between 6 p.m. and midnight, and houses at higher elevations rarely received water at all, despite paying for it. Otero brought a lawsuit on behalf of his neighborhood. Citing the constitution’s protection of the rights to water and health, as well as international human rights standards, the Court ordered the company to make the necessary technical upgrades and investments to ensure an adequate daily water supply to all in Otero’s neighborhood within a month.<sup>60</sup>

### *Advancing Equality across Communities through Civil Society Organizations*

Lastly, CSOs can play major roles in identifying common rights violations in their communities, mobilizing potential parties and resources, and providing legal and technical assistance to prepare cases for court. In some countries, such as the United States, CSOs do not have jurisdiction to approach the courts on their own. In others, however, CSOs can bring cases to court directly. For example, the South African CSO Section 27 is dedicated to realizing the social and economic rights articulated in Section 27 of the constitution, and brings wide-ranging cases seeking to implement the rights to health and education for all. In 2015, Section

27 won a case on behalf of children in Limpopo, South Africa's northernmost, poorest province, establishing that students have a right to one textbook for each subject. As part of the broader campaign around the case, Section 27 engaged with parents, students, and community members to raise awareness about why #TextbooksMatter through marches, artistic demonstrations, and media outreach. More recently, the organization filed a case to secure Braille textbooks for students with visual impairments, which is still moving through the courts as of this writing.<sup>61</sup>

As these examples affirm, individuals can make a difference—whether by standing up on behalf of their communities, identifying and seeking to redress problems in their neighborhoods, joining broader equal rights campaigns, or simply speaking out against personal experiences of discrimination. Governments and private companies likewise have roles to play in understanding and fulfilling their constitutional and human rights commitments. While there are many effective approaches to achieving change, and going to court is rarely the first step, constitutional cases have been undeniably transformative in many of our countries. We can expect many more landmarks for equality in the decades to come.

## CONCLUSION

Laws and constitutions alone, even well implemented, cannot ensure every person is treated equally. But they do provide important foundations. And just as constitutions have evolved over the past century, so too has our understanding of equality. Advancing equality requires creating conditions that provide all people with equal opportunities to thrive, eliminating present-day discrimination and dismantling the lingering impacts from past discrimination. It requires recognizing, respecting, appreciating, and accommodating our real differences, while ensuring our laws are not shaped by stereotypes. It means ensuring all people have a seat at the table and the opportunity to voice their needs and opinions. And it means guaranteeing that all people can meet their basic needs and have access to foundational education, healthcare, and employment opportunities.<sup>62</sup>

Data on where countries, regions, and the global community are making progress and falling behind will have impact only if individuals use this information to make a difference. In the Philippines, two senators picked up our findings that the country provided less paid maternity leave than most of the world, and that it mattered for infant mortality. In 2017, they used these findings to pass a bill in the Senate to double maternity leave from 60 to 120 days.<sup>63</sup> In October 2018, the House of Representatives approved a similar bill guaranteeing 105 days of leave, which as of this writing awaits the president's signature.<sup>64</sup> In Ireland, together with the CSO Equality Now, we focused attention on the country's status as one of the few high-income countries not providing paid paternity leave. This inequality and the data showing that Ireland lagged behind other European countries became

an important topic of discussion in Parliament. In 2016, Parliament passed a law providing fathers with two weeks of paid paternity leave.<sup>65</sup>

Will it make a difference that we now know which countries ensure equal rights regardless of gender, and which do not? And that we have similar information about the marked advances in countries guaranteeing equal rights across race/ethnicity and religion—but also about those countries that have yet to do so? Or the fact that people with disabilities, immigrants, and the LGBT+ community have the least protections? That's up to each of us, and all of us.

## ACKNOWLEDGMENTS

Our goal from the start has been to put the information contained in this book freely in the hands of people in every country. When we released previous major studies on our website, the findings reached 150 to 190 countries within a few weeks. We wanted to find a way that a book could likewise be freely available to people around the world—because advancing equality in all countries will take all of us. We were thrilled to learn that Naomi Schneider, an editor who has an exceptional history for shepherding transformative books, had helped create Luminos at UC Press, a way through which books could become freely available worldwide.

Books often come to life because of the tremendous contributions and collaborations of many people—and this is particularly true for a book like *Advancing Equality*, which includes findings about constitutions in 193 countries.

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Court cases implement constitutions and change lives—often hundreds of thousands or millions of lives at a time. Gonzalo Moreno searched databases covering over 16,000 cases from around the world to deepen our understanding of the impact of constitutional rights on individuals, families, communities, and countries.

Constitutions shape legal rights both directly and by changing how legislators and policymakers think about their responsibilities and opportunities. To understand their impact more closely, Nicolas de Guzman worked with us to analyze over 1,800 sessions of parliament over three years in four countries to learn how often constitutions were raised in debates.

The book is filled with numbers, facts, and references that are only as useful as they are accurate and accessible. We are deeply grateful to Rebecca Wolfe, Parama Sigurdson, and Corina Post for their incredible attention to detail, and skilled editorial eyes, as they worked on the production of the manuscript. Likewise, we are indebted to Dore Brown and Paul Tyler at U.C. Press for both their thoughtful editing and their accelerating the production schedule to accommodate Amy and Aleta's maternity leaves.

In one-on-one meetings, exchanges at conferences, and field interviews about their work on transformative cases, colleagues around the world have deeply enriched our work. Dik-gang Moseneke shared insights and wisdom from his extraordinary term and leadership serving on the South African Constitutional Court. Mark Heywood brought his vast experience in leading civil society actions to make constitutional rights real to a critical review of the whole book. Michael Stein's expertise on disability and leadership in drafting and implementing international agreements deeply informed our writing in the area. Yasmeen Hassan, Faiza Mohamed, and Antonia Kirkland showed us the transformative extraordinary impact of a global collective focused on achieving gender equality in the law. Vicki Jackson, a global leader in comparative constitutions, shared her knowledge, an open door, and encouragement from the start, for which we are extraordinarily grateful. Canan Arin, Sarita Barpanda, Sejal Dand, Sukti Dhital, Pratibha D'mello, Colin Gonsalves, Shikha Nehra, Biraj Patnaik, Anubha Rastogi, Y.K. Sandhya, Sanjai Sharma, Saadet Yuksel, and many others graciously shared their time and offered critical insights as practitioners about using constitutional rights to advance equality. Rosalind Dixon posed important questions and provided encouragement on the value of this work at international conferences of constitutional experts. Conversations with Malcolm Langford deepened our early thinking about how implementation can be tracked and improved. Tom Ginsburg and the Comparative Constitutions Project have made remarkable contributions to the availability of constitutions data, including select findings that supplemented the analysis in this book. Meetings with Asli Bâli and Tendayi Achiume as they launched the UCLA Promise Institute enhanced our appreciation of what U.N. human rights mechanisms have to contribute. Where any findings we share are incomplete, that is our responsibility. Where they have been enriched, we are indebted to the generosity of time and ideas of these and many other colleagues.

A book like this would not be possible without a decade of research, but it would not be comprehensible without people who contribute to telling the story. We are indebted to Kate Huh for her careful editing of every chapter, to Carla Denly and Wendy Levin for all they have taught us over the years about communicating what matters, and to the book's reviewers, both practitioners, who focused on giving us feedback about what is most important if you are working with the law to change lives. Nick Perry and Erin Bresnahan have played instrumental roles in determining how to ensure this work has impact on the ground.

All of this was made possible because of the vision and deep commitment of funders to address inequalities and achieve universal health, full access to inclusive high-quality education, and decent work. This project would not have been possible without the generous support of the William and Flora Hewlett Foundation, Bill & Melinda Gates Foundation, in partnership with the Bill, Hillary, & Chelsea Clinton Foundation's No Ceilings Initiative, Ford Foundation, and Canada Foundation for Innovation. Our profound thanks to the foundation leaders and program officers who believed that this work can have an impact on equality, health, education, work, and economies. The work was deeply enriched through many discussions on these topics and on gender, migration, disability, and others with Haven Ley, Ruth Levine, Jen Klein, Darren Walker, Katherine Hay, David Barth, Sarah Hendriks, Rachel Vogelstein, Doug Wood, Judy Diers, Clarisa Bencoma, Jenny Lah, and Kate Somers. Working closely with us and the foundations, Jennifer Scott has for six years made us better at focusing our work on issues that have the greatest potential for leading to meaningful change in people's lives.

We have been fortunate to be based at UCLA, with its profound commitment to public service, and to have had the opportunity to learn from and brainstorm with faculty from every school at the university, from public health to law and from education to management. Our center, the WORLD Policy Analysis Center, brings people together from universities and civil society around the world. WORLD has thrived because of the support of UCLA and of Jonathan and Karin Fielding, who bring an extraordinary depth of understanding and commitment to transforming public health, education, and well-being.

As co-authors, we had tremendous support from colleagues, family, and friends beyond the many whose work lives brought them to contribute to this large collective initiative.

Jody spent a month in residency at the Rockefeller Foundation in Bellagio working on this book. Managed by Pilar Palacia, the Bellagio Center provides a truly extraordinary environment that succeeds in combining space for quiet writing and deep thinking with rich brainstorming, raucous debating, and dreaming among the residents. Jody was incredibly lucky to spend a month with an extraordinary group of fellows working on many important aspects of reducing inequalities and achieving health, education, and good governance. It will long be one of her greatest joys to have been at writers' camp taking hikes, having hillside breaks, evening brainstorms and more, while learning from Doug Hattaway, Dikgang Mosenke, Mshai Mwangola, Kate Redford, Mark Gevisser, Robin Gorna, Ishmael Weeks, Samantha Angus, Bob Barsky, Art Blume, Marcia Linn, Bob Kaplan, Jonatas Manzolli, Alvaro Sarmiento, Janice Schaffer, Judith Shamian, and Monica Skewes.

As we finished the manuscript, Jody was simultaneously working on a *Lancet* series on gender equality, norms, and health. All that she learned from her co-authors on the series enriched her understanding of the relationships among equality, norms, health, and well-being. She is immensely grateful for all the deep discussions with Geeta Rao Gupta, Nan-

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Heartfelt thanks to her mother, Ann Heymann, who raised her on Margaret Mead's adage: "Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has." Our team at the WORLD Policy Analysis Center has been that small group for this initiative—and our deepest hope for this work is that this book can help advance the work of extraordinary small groups worldwide.

Her father, Philip Heymann, a law professor and policymaker who worked on legal systems in countries around the world, took countless walks with Jody, debating and thinking through when and how law can make a difference—as well as its limits. He has been a remarkable friend and mentor for decades as he strived to make government responsive and to ensure civil and political rights were fulfilled. Her brother, who as we were writing, argued and won landmark cases on disability rights, among others, was an everpresent reminder of the law in action, its deep challenges and great victories.

Jody's sons, Ben and Jeremy, never allowed her to forget why we want a better world and always remind her of the many different views there are about how to get there. Each engages deeply with life's most fundamental and difficult questions. Their love, curiosity, friendship, and shared adventures have changed her life.

Jody's husband, Tim Brewer, has spent three decades building bridges across countries, collaborators, and disciplines—all with the goal of making a difference in people's lives. Tim provided Jody with the kind of support that is the rarest gift of someone who understands, believes completely in the work, and shares the deepest lifelong friendship. None of this would have been possible without him.

Aleta's contributions to this project were shaped and inspired by the work of friends, colleagues, and mentors seeking to realize equality and social and economic justice in practice. Rachel Black, Natalie Samarjian, Jessica Schibler, Willetta Waisath, and the entire Congressional Hunger Center family provided remarkable support through informal conversations and camaraderie, recommended readings, and their own firm convictions that a better world is possible.

Aleta is deeply grateful to her parents and siblings for their steadfast encouragement and for serving as some of her earliest editors. Her father, Frank Sprague, urged her to study law as a mechanism for effecting meaningful change in people's lives. Her mother, Connie Sprague, consistently demonstrated the importance of optimism in the face of large-scale challenges, along with the power of a well-turned phrase.

Joel Davis, Aleta's partner for more than a decade, provided incomparable support from the book's earliest stages through its publication. As both an artist and a travel companion, Joel's passion for constant exploration has continuously enriched Aleta's perspectives and experiences. His friendship and partnership have been invaluable throughout the writing process.

Amy's earliest work on this project was deeply enriched by brainstorming with Adele Cassola. Her relentless enthusiasm for constitutions and tireless attention to detail greatly advanced the shape of analysis for this book. Few other people have also shared a love of constitutional puns.

Tremendous thanks to her parents, Diane and Richard Douglas, who encouraged her to advance her education and find a career that provides more than just a paycheck.

In the time frame between when this book was conceived and when it was published, Amy welcomed two new lives to the world, Aileena and “Mo.” Watching Aileena grow as the book progressed in the MeToo era was an urgent reminder of how far we still have to go for equality.

Analysis for this book would not have been possible without equal caregiving and support from Amy’s husband, August Junkala. His courage to follow his dreams and unwavering support for her to do the same has been an invaluable source of strength through a time of transition and learning to balance work with young children.





## APPENDIX

# Methods

The mission of the WORLD Policy Analysis Center (WORLD), based at the Fielding School of Public Health at the University of California Los Angeles, is to strengthen equal rights and opportunities globally by providing civil society, policymakers, citizens, and other researchers with tools to advance feasible and effective policy approaches for improving the well-being of individuals, families, communities, and societies. To date, WORLD captures quantitatively comparative data for 193 U.N. countries on constitutional rights, education, health, disability, family, adult labor and working conditions, discrimination at work, child labor, child marriage, aging, migration, environment, and income policies. WORLD works in partnership to promote evidence-based decision-making across these areas. This appendix provides an overview of our approach to constructing our constitutions database and variables used in this book. More detailed variable descriptions and information on WORLD's methodology is available at [worldpolicycenter.org](http://worldpolicycenter.org).

### BUILDING THE CONSTITUTIONS DATABASE

For nearly 15 years, we have measured the extent to which all of the world's constitutions prohibit discrimination and protect core social and economic rights, including the rights to health and education. This book pulls together these 15 years of work, including more detailed findings from our most recent database expansion, along with an analysis of change in rights over time, based on the prevalence of protections for equality in constitutions adopted each decade.

The constitutional rights examined in this book are rooted in the Universal Declaration of Human Rights (UDHR) as well as numerous binding international treaties, many of which have been widely ratified globally. As explored in each chapter, these rights also map onto the research evidence about what matters to the health, well-being, and economic conditions faced by individuals, families, communities, and societies.

To construct the most recent database, we located full-text constitutions and amendments as of May 2017. These documents were obtained in their original language or a translation into English, French, or Spanish from government websites or other reliable sources. Coding languages on the team included English, French, Spanish, Italian, Portuguese, Arabic, German, Turkish, Croatian, Polish, and Maltese, while colleagues within our broader network provided assistance with Russian, Mongolian, and other languages when reviewing original language text was indicated. For the minority of countries without written constitutions, we identified those documents or laws that are generally considered to have constitutional status within the country and by the global community of legal scholars. We focused on national constitutions and did not include constitutions at the subnational level.

## FRAMEWORK FOR COMPARING CONSTITUTIONAL PROTECTIONS

### *Approach to Rights Analysis*

Our analysis was designed with two goals in mind: (1) to evaluate the extent to which constitutions guarantee equal rights across a wide range of human domains and (2) to understand the evolution of economic, social, and equal rights over time. Beyond the many normative reasons to care about these rights, they are also embedded within numerous international treaties and agreements, such as the UDHR, the International Covenant on Economic, Social and Cultural Rights, and most recently, the U.N. Sustainable Development Goals. Additionally, within the past several decades, the global community has aimed to strengthen the individual rights of members of historically marginalized groups through a series of widely adopted treaties specifically focused on these populations.<sup>1</sup>

### *Constitutional Rights Coded*

For each right mentioned in a constitution we captured the specific right protected, the level of protection, the social group to which it applies, whether the language specifically referred to citizens, and the relevant article number(s). Based on 37 international conventions and fundamental equity principles, we developed a framework of rights in the following categories:

- Equality and nondiscrimination (equality before the law, prohibition of discrimination, formal equality or equality of opportunities, enjoyment of rights)
- Education (free, compulsory, primary through university)
- Health (public health, preventive health services, medical care)
- Family (entering and exiting marriage, same-sex marriage, equal rights within marriage)
- Disability (equal rights, accessibility, educational support, reasonable accommodation in employment, right to liberty)
- Religion (right to believe and not believe, separation of religion and state, protection of rights of others)

- Labor (right to organize, free association, equal pay, nondiscrimination)
- Civil and Political Rights (equality before the law, movement, religion, expression, association, political participation)

#### *Social Classifications*

For each of these areas, we performed a comprehensive analysis of constitutional protections of rights and nondiscrimination across 15 social classifications:

- Age
- Citizenship
- Sex/Gender
- Race/Ethnicity
- Religion
- Language
- Social Position
- National Origin
- Sexual Orientation
- Gender Identity
- Parentage
- Physical Disability
- Intellectual Disability or Mental Health Condition
- Prisoner Status
- Beliefs or Convictions

#### *Categorizing Levels of Protection*

In order to evaluate the level of protection afforded under constitutions we recorded the quality of the language used to describe rights.

#### *Guaranteed Rights*

Constitutional articles that unambiguously protected a right or phrased its implementation as a duty or obligation of the state were coded as guaranteed rights. We also coded a guarantee when constitutions declared violations of particular rights to be prohibited or illegal.

#### *Aspirational Protections and Progressive Realization*

Rights phrased in nonauthoritative language or described as state objectives were categorized as aspirational protections. Examples of this occurred when the enforcement of a right was limited by the state's resources or the constitution specified that the right could not be claimed in court. If the constitution only granted a right in the preamble, and did not specify that the preamble was an integral part of the constitution, we coded the right as an aspiration. We separately captured constitutional provisions that explicitly described a right as subject to progressive realization or that a right would be realized within a certain time period.

#### *Restrictions or Denials of Rights*

We also reviewed constitutions for any clauses that explicitly restricted or denied rights to a particular group or groups. These included denials of the rights of same-sex couples to marry, statements restricting rights on the basis of citizenship, or any disqualifications for voting or elected office, for example.

*Rights with Exceptions*

When a constitution granted a right, but allowed for possible limits to that right on the basis of an individual's membership in some identifiable group in specific circumstances, we categorized the relevant provisions as rights with exceptions.

*Affirmative Measures*

Finally, we captured cases in which constitutions permitted, promoted, or mandated positive measures to advance equality in general or in family, economic, social, or political life.

*Developing Comparable Measures*

To systematically code all 193 U.N. member states' constitutions, we relied on an international, multilingual team of researchers, with expertise in law, economics, health, and international development. The team includes people with fluency in ten languages, including four of the U.N. official languages.

Each researcher read the full constitution in its original language or an official translation. Whenever possible, when an official translation was unavailable and no team members could read the constitution in its original language, we used translations from reliable secondary sources or professional translation services. Researchers used a coding manual with detailed instructions on how to answer questions about the constitutional provisions and code them accordingly. Each constitution was double-coded and once each researcher had completed coding, they met as a pair to reconcile their answers. If the research pair was unable to reach agreement or thought the decision was not well addressed by the existing coding manual, the full research team met to discuss the best approach. The decisions from these meetings were then added to the coding manual to inform coding on all countries.

*Ensuring Rigor and Accuracy*

Once coding was complete, we conducted systematic quality checks across rights, social groups, and quality of rights. We also did targeted checks of outlier countries.

For each of our databases, we use the most up-to-date sources available. While this approach is designed to achieve accuracy, it is important to note that when publicly available sources have not been fully updated, the most recent amendments may not be captured in our databases. Further, our process of coding constitutions and other laws inevitably involves important matters of interpretation. For all databases, we welcome receiving feedback and copies of laws from anyone who believes the databases may not be fully up-to-date.

*Understanding Who Has Equal Rights*

In considering whether a particular group is guaranteed a right, we included both specific guarantees (e.g., "Women have the right to health") and instances in which constitutions broadly guaranteed a right and guaranteed enjoyment of rights for a specific group (e.g., "Everyone has the right to health" and "Women and men have equal rights").

*Analyzing Rights over Time*

Throughout this book, graphs present constitutional rights over time. These graphs provide a picture of how constitutional rights varied as of 2017 based on when the constitution was adopted as a proxy for change over time. We recognize that some provisions in older constitutions may have been introduced via amendment. For example, equal rights on the basis

of sexual orientation appear in some older constitutions and in all cases were introduced by amendment. However, the adoption of a new constitution represents perhaps the best opportunity to enact protections for equal rights.

As an alternative method of analyzing constitutional change over time, we considered showing constitutional rights by year of most recent constitutional amendment, as each amendment process represents a potential opportunity to strengthen equal rights and this would allow us to proxy for differences in difficulty of amending the constitution. However, constitutions are frequently amended and 87% of the world's constitutions were either adopted or amended since 2000, making it harder to identify patterns of change over time and obscuring stark differences that exist between constitutions that were adopted prior to 1970 and those that have been adopted in the last decade.

#### *Linking Constitutional Guarantees to Legal Change and Outcomes*

The constitutions database is part of a larger effort by the WORLD Policy Analysis Center to systematically collect data on laws and policies that matter to advancing equality. WORLD is the largest global quantitative policy center, capturing well over 2,000 legislative and policy indicators for 193 countries. Countries may take many approaches to ensuring equal rights and opportunities by embedding guarantees in constitutions and/or national legislation and/or policy documents. While countries do not necessarily need to be exhaustive in enumerating rights across all of these legal approaches, they do need to be consistent in ensuring that national legislation and policies fulfill and support constitutional rights.

Together, the constitutional and legislative data allow us to assess where countries' laws and policies are inconsistent with guaranteed constitutional rights. For example, in this book, we highlight where countries have made constitutional guarantees of equality and nondiscrimination based on gender, but undermine these guarantees by legally allowing girls to be married at younger ages than boys, perpetuating gender discrimination in law. Similarly, we can match constitutional data on the right to free education with legislative and policy data on whether countries charge tuition fees to highlight gaps between constitutional rights and policies.

Our quantitative data on constitutional rights can also be matched to harmonized data on individual-, household-, or country-level outcomes to assess the impact that constitutional rights have on outcomes. New analytic tools allow us to answer the question of what impact individual constitutional rights have on measures of health, educational attainment, poverty, and equity. Using longitudinal data on constitutional rights and outcomes, we can compare how outcomes changed in countries that enacted new constitutional guarantees compared to those that did not, all while controlling for confounding factors. We have used this approach, for example, with legislative guarantees to assess the impact that paid maternity leave has on infant mortality;<sup>2</sup> minimum wage policies have on child nutrition;<sup>3</sup> and tuition-free education has on infant mortality.<sup>4</sup> These methods provide the opportunity for future work to rigorously evaluate the impact of constitutional rights on individual and population outcomes.

#### *Identifying Case Law*

Together with our data on constitutional rights, this book reviews a wide array of upper and constitutional court decisions that illustrate how those rights are enforced in practice—and therefore why those rights matter.

### *Sources*

In total, we used search engines to access approximately 16,000 cases from 164 countries. We reviewed all cases and/or used topic and keyword searches to identify relevant cases in the following global databases:

- CODICES, an initiative of the Venice Commission that includes around 9,000 constitutional court decisions from the Supreme and Constitutional Courts of 105 countries<sup>5</sup>
- ESCR-Net, which includes cases from several dozen countries, mostly in Europe, sub-Saharan Africa and the Americas, in the broad areas of economic, social, and cultural rights<sup>6</sup>
- The Global Health and Human Rights Database, which includes over 1,600 cases from 119 countries in areas relevant to health and equality<sup>7</sup>

We also consulted regional databases, including:

- The European Equality Law Network, which includes around 400 cases from 34 European countries collected since 2011<sup>8</sup>
- Centre for Justice and International Law, which includes 220 cases from 18 countries in the Americas over the last 25 years<sup>9</sup>

In addition, we used the Common Portal of Case Law, which draws directly from existing national databases across Europe to provide access to tens of thousands of cases dating back to 1997.<sup>10</sup>

We were able to supplement our searches of these relatively broad databases through sources that address more specific topics, including sexual orientation and gender identity;<sup>11</sup> children's rights;<sup>12</sup> women's rights;<sup>13</sup> and reproductive health.<sup>14</sup>

We also used academic and general search engines for very specific purposes, especially when the type of decision we were searching for was necessarily narrow. For example, only a small number of constitutions explicitly address equal rights on the basis of sexual orientation. To identify cases applying these provisions, we used specific keyword searches for those few countries instead of searching global case law databases.

Finally, we sought to identify both landmark cases as well as newer and even ongoing cases that illustrate the relevance of constitutional rights in the current moment. The listservs of the Comparative Constitutions Project, the International Society of Public Law, and the International Association of Constitutional Law were regular sources for information about recent cases. For all cases, in addition to the court's decision itself, we consulted as many supplementary court filings, journal articles, NGO websites, book chapters, and media articles as possible to deepen our understanding of the circumstances of the case, the parties, and the implications of the decision.

### *Case Selection*

We included cases from 45 countries. In selecting what cases to present, we focused on court decisions that fulfilled the following criteria:

- 1) Significant impact
- 2) Effective remedies
- 3) Clear link between constitutional protection and court outcome
- 4) Geographic diversity

### *Limitations*

While there is no repository of constitutional law cases in the same way that there are repositories for actual constitutions, by searching through a range of global and regional case law databases, we were able to access constitutional cases from most of the world's countries. Nevertheless, the examples included throughout this book are not representative of all cases adjudicated by constitutional courts worldwide. First, because not all countries make their decisions easily available to researchers, different countries are, despite our best efforts, not equally represented. Second, the cases we present were chosen to illustrate broader points about constitutional protections, rather than randomly selected.

However, while the cases presented cannot represent the totality of constitutional decisions worldwide, they clearly demonstrate how clear constitutional protections for equal rights make a difference across contexts. Collectively, the cases in this book have led to health policy reforms that saved hundreds of thousands of lives, overturned discriminatory laws that excluded half a country's population from full participation, and ensured millions more children have a chance to go to school. These powerful impacts reveal the potential of a strong constitution in the hands of people determined to advance equality in their communities.

### *Analyzing the Role of Constitutions in Parliamentary Debates*

Finally, in this book, we provide data on an important function of constitutional rights that often goes unrecognized: their role in shaping debates about new legislation. To better understand how frequently legislators invoke constitutional rights during these debates, we analyzed the transcripts of legislative sessions from four countries in different regions with constitutions of varying ages: Brazil, Canada, India, and Kenya.

### *Data Sources*

We gathered official transcripts of legislative debates in the lower houses of Brazil, Canada, India, and Kenya from each country's government online portal. We collected transcripts from the same three-year period for each country: January 1, 2015 to December 31, 2017. In the case of Brazil, "nondeliberative solemn" sessions, which serve a ceremonial purpose and which in the vast majority cases only included a summary of events rather than a full transcription, were subsequently removed from the sample for comparability; also in Brazil, sessions that were immediately cancelled without any substantive discussion because not enough parliamentarians were present were removed as well. In total, we gathered official transcriptions for 911 legislative sessions from Brazil, 321 sessions for Canada, 198 sessions for India, and 373 sessions for Kenya.

### *Approach to Analysis*

To quantify references to the "constitution" in legislative debates, we first analyzed a combination of keywords in context, and created a dictionary of relevant terms; for example, in Canada, the dictionary would include not only the word "constitution" and its multiple variations (constitutionality, unconstitutional), but also references to the Canadian Charter of Rights and Freedoms. For Brazil, we translated relevant terms into Portuguese. In some cases, we may have underestimated how frequently legislators refer to the constitution in debates; for example, in Canada the use of the term "charter" by itself was excluded to



prevent false positives (for example, in references to chartered banks), and in India, where legislative debates occur mostly in English but to some extent also in Hindi, only instances of the terms in English were captured.

This method provides a valuable initial look at the impact of constitutional rights on decisions by other branches of government. In future work, we expect to apply the same methods to a wider selection of both countries and constitutional provisions.

## GLOSSARY

<b><i>Amparo</i></b>	a fast-track judicial mechanism found in many Latin American countries that allows individuals to directly approach the courts to seek a remedy for the violation of their constitutional rights. Similar to the <i>acción de tutela</i> in Colombia.
<b>Civil law</b>	a legal tradition that emphasizes codified law, rather than court interpretations. Predominantly civil law systems give less weight to <b>precedent</b> than <b>common law</b> systems.
<b>Civil society organization (CSO)</b>	a voluntary, nonprofit, nonstate organization composed of people working in the public domain to pursue shared interests or advance a particular cause.
<b>Class action</b>	a lawsuit brought by an individual or small group on behalf of a large group of people who all have the same legal claim.
<b>Common law</b>	a legal tradition based primarily on prior court decisions ( <b>precedents</b> ). The common law tradition originated in the United Kingdom and is predominantly found in former British colonies.
<b>Direct discrimination</b>	a law, policy, or action that explicitly and unjustly distinguishes between individuals or groups on the basis of a protected characteristic (e.g., race, gender, or religion).
<b>Disparate impact</b>	See <b>indirect discrimination</b> .
<b>Formal equality</b>	the identical treatment of two different people or groups, without regard to preexisting disadvantages, meaningful differences, or unequal outcomes.

<b>Indirect discrimination</b>	a law, policy, or action that does not explicitly distinguish between groups on the basis of a protected characteristic, but has the effect of disproportionately disadvantaging a certain group or groups. Also known as <b>disparate impact</b> discrimination.
<b>Judicial review</b>	a court's authority to determine whether a law is constitutional.
<b>Justiciability</b>	whether courts have the capacity to provide effective remedies for the violation of a specific constitutional right.
<b>Negative rights</b>	fundamental rights that primarily require the government to refrain from interfering with individuals' exercise of those rights. Most civil rights and liberties, such as freedom of speech, are generally viewed as negative rights.
<b>Positive rights</b>	fundamental rights whose fulfillment requires significant government action. Most social and economic rights, such as the right to education, are generally viewed as positive rights.
<b>Precedent</b>	a prior court decision that governs or influences future interpretations of the law.
<b>Progressive realization</b>	the principle found in some international treaties that while countries must take immediate concrete steps toward the realization of rights that require greater investment, those rights will be more fully realized over time as resources increase. Low-cost steps, and the guarantee of nondiscrimination, are immediate obligations.
<b>Public interest litigation</b>	a legal action brought on behalf of a vulnerable group. Unlike a <b>class action</b> , a public interest litigation case can be initiated by any concerned community member, rather than only by someone directly affected.
<b>Standing</b>	the legal capacity to bring a claim before the court.
<b>Substantive equality</b>	the enjoyment of equal rights in practice and not just on paper, achieved through policies that take into account meaningful differences between groups, historical advantages and disadvantages, and the persistence of bias and discrimination.

## NOTES

### 1. THE URGENCY OF ADVANCING EQUALITY

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## 6. MOVING FORWARD IN THE FACE OF BACKLASH

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## 7. FROM NONDISCRIMINATION TO FULL INCLUSION

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## 8. ENSURING RIGHTS AND FULL PARTICIPATION

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## 10. THE RIGHT TO HEALTH

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