3 Economic, social, cultural and new rights

This chapter examines the constitutional inclusion of economic, social and new types of emerging rights, drawing from experience in OECD countries. After briefly outlining their prevalence in contemporary constitutions, the first sections present the debates regarding the advisability of their constitutionalisation, the "strength" they ought to be accorded, and the impact of differences between constitutional ideals and reality. It discusses particular economic, social, cultural, and new rights, including health, education, employment, environmental, privacy and digital rights, making reference to existing patterns of entrenchment. Issues pertaining to accessibility and enforcement as well as the potential contribution of human rights commissions are noted. Finally, some cautionary concerns are raised about the specificity of rights language, progressive realisation and deference to the elected branches.

Key issues

When considering the inclusion of economic, social, cultural and new rights (ESCNRs) in a constitution, four key questions present themselves:

- *Which rights, if any, should be included?* Nearly every constitution written in the past two decades includes at least some ESCNRs, and most contain a large number. However, this does not mean that it is necessary to include them. Rights ought to be included only if the ideas and goals they represent are thought desirable and worthy of some level of protection from the will of the majority. Including a large number of rights risks lessening their rhetorical value, as well as undermining the value of those rights deemed to be of the greatest importance. Moreover, many developed countries have made significant advances through civil society mobilisation and legislation (e.g. employment standards and minimum wages) alone. Decisions regarding whether and which rights should be included need to carefully balance these considerations.
- *How strong should those rights be?* As explained in Box 3.1, rights may be strong-form justiciable, weak-form justiciable, or aspirational. The violation of each comes at a cost, - which can be legal, political, or both - but the certainty and severity of those costs vary. Strong-form rights are associated with the idea of "judicial supremacy" in that the highest court, rather than the legislature or executive, has the final say on what is or is not constitutional. This accords a great deal of power to judges. On the one hand, judges are likely to be better insulated from political and partisan considerations than their elected counterparts. On the other, they are not necessarily best situated to fully understand the complexities and nuances of the relevant social issues. Nor are they accountable to the people to the same degree as elected officials. It may well be that the matter of how to best realise the goals of these rights is best left to the legislature. In this respect, weak-form review offers a degree of protection in that it provides an institutional mechanism by which a legislature must expressly justify its intent to violate a right, while leaving planning and policy to the civil service under the direction of elected officials. Aspirational rights do not provide direct legal protection, but have frequently proved effective at shaping the discourse concerning the performance of sitting governments and increasing public awareness and concern about specific issues. There is no single "best" approach, nor is it necessary to assign the same strength to each right included in the constitution.
- *How specific should those rights be?* In general, rights ought to set out broad principles and goals that are to be protected or pursued. The more complex the issue, the more rights will need to be left to the discretion of politicians and bureaucrats to address in the manner they believe to be most effective. However, in certain instances more concrete provisions may be appropriate, particularly if the right is intended to prevent a particularly egregious event or to insulate a particular issue or matter from political interference in light of past scandals or abuse.
- *Who will defend these rights and how?* Courts will likely serve as the principal interpreter of ESCNRs, but they are far from the only actors involved. Court cases require claims; who is able to bring those claims and how much it costs to do so will significantly impact the types of claims brought. Individuals, particularly those without independent wealth, are likely to find it difficult to find redress for a violation of their rights if there is not some form of civil society or public defender support mechanism. Other institutions – such as human rights commissions – can also be created to aid in the realisation of these rights. If they are to be meaningful, rights should have a solid, real-life basis and credible methods for correcting violations, even if somewhat slow, should be in place.

Introduction

Bills of rights are a defining feature of contemporary constitutions. In addition to civil and political rights,[1] the vast majority of constitutions drafted in the past several decades have included at least some economic and social rights – for example, rights to a pension, to education, and to healthcare.[2] More recently and in response to emerging ideas and technologies, constitutions have also begun to include new types of rights relating to matters as diverse as environmental sustainability, digital access and privacy, indigeneity, and consumer protections. These economic, social, cultural and new rights (ESCNRs) find support in many of the ideas that underlie civil and political rights, such as human dignity, cultural and religious identity, and the belief that individuals are entitled to lead the types of lives they choose in pursuit of their visions of "the good life" without undue interference from the state (Fredman and Campbell, 2016[1]). They can also serve as powerful symbols of national values, commitments and beliefs. At the same time, it has been argued that ESCNRs inevitably raise political questions – the answers to which are best left to the elected branches – and that attempting to constitutionalise them may unduly limit the ability of the state to implement policies and programmes that are responsive to changing circumstances and needs.

Their inclusion in a nation's constitution is also part of an attempt to achieve and/or protect concrete benefits, such as a living wage for all workers or access to healthcare treatment and medicines for all citizens. But simply placing these rights in a constitution does not achieve their goals; that requires more than words on paper. Indeed, there are countries that have constitutionalised these rights but not achieved their underlying goals, and others that have not constitutionalised yet have realised those goals. Realising ESCNRs requires popular support, buy-in by political parties, extensive planning, sustained investment, and a responsive judicial system capable of holding the relevant public authorities to account. Not only will policies and programmes intended to give effect to these rights be competing for the limited resources of the state, but the rights themselves can conflict with other legitimate aims of government as well as with one another. Should living wages always take precedence over economic competitiveness? If a group of people establish an informal settlement on a privately-owned farm because they have nowhere else to go, must the farmer accept the trespass, or ought the squatters to be evicted despite a constitutional guarantee to adequate housing? If a seriously ill patient goes to court seeking much-needed kidney dialysis on the basis of a constitutional right to healthcare, what is the response to a department of health that says it has no more resources to expend on dialysis because of its commitments to innumerable other worthy treatments and facilities?

The decision as to which ESCNRs – if any – are to be included in a constitution and how they should be structured should give due consideration to the values and beliefs of the nation to which it will apply; the interconnectedness of the rights with one another as well as with the nations' other goals and priorities; and the measures that will be put in place to ensure that policy makers are held accountable for the decisions they make about where and how they choose their resource allocation.

Brief overview of issues

Should such rights be constitutionalised?

The first issue to consider with respect to ESCNRs is whether they ought to be included in a given constitution. In addition to the more general concerns about the undemocratic aspects of judicial review, several objections have been raised about these rights in particular. The core of the concerns appears to be that unlike "negative rights" – such as freedom of speech – that limit the ability of the state to act, ESCNRs are principally "positive rights" in that they tend to compel state action and may require significant expenditure. Although negative rights are not costless (Holmes and Sunstein, 1999[2]), there is something unquestionably different about a right that could cause a judge to require the executive to spend tens or hundreds of millions of euros to, for example, build new schools or expand the eligibility criteria for public

pensions. The inclusion of some or all of these rights will not necessarily result in such decisions, but regardless of their constitutional status, achieving the goals they encapsulate will almost certainly involve large investments and ongoing expenditures.

A stronger set of objections to the inclusion of such rights, particularly in their "strong" form,[3] is that the complexity and uncertainty of the issues involved, coupled with the reality of limited state resources, means that there is generally no one, "best" way of achieving the goals these rights seek to advance: providing healthcare to all citizens is not simply a matter of hiring doctors and building hospitals. Decisions must be made about the allocation of resources across preventive, curative, and rehabilitative care as well as how best to provide service to marginalised communities. Moreover, there is often no clear way to determine which right(s) ought to take priority over others in terms of state resources. For example, is it more important to ensure that all workers (or citizens generally) can rely on a pension that will prevent their destitution in old age, or that life-saving medication be provided to a small number of people suffering from a rare disease? Similarly, court-ordered provision of specific goods or services (e.g. textbooks) could very easily lead to reduced spending in other areas such as school maintenance, as individual government departments are compelled to reallocate their budgets to comply with their legal obligations.

In general, the choices will not be nearly so stark, nor is it truly a zero-sum game – some options will be more or less obviously preferable, and others will have foreseeable knock-on effects that would make future goals less (or more) costly to achieve.[4] On the other hand, difficult decisions with serious consequences will need to be made based on imperfect information. Such decisions necessarily involve moral judgements and guesswork and it is very possible for reasonable people to disagree about which choice is "best." At least in their official capacity, these are decisions that judges may not be well equipped to make. From this perspective, they are more appropriately made by elected officials – the representatives of the people – based on information provided to them by a civil service staffed with experts in the relevant areas. In short, so the argument goes, in the absence of uniquely correct answers, the ultimate responsibility for deciding such matters should lie with elected officials who are accountable to the people via elections, than with judges, who are not.

On the other hand, rights, both individual and group/cultural, are by definition counter-majoritarian, and leaving their realisation and protection in the hands of majoritarian institutions such as legislatures presents its own problems. If human dignity and cultural vibrancy are to be taken seriously, it should not be possible to ignore the rights intended to ensure their protection simply because it is inconvenient for the majority or costly. This is particularly true where, as is often the case, these rights are intended to address historical marginalisation or disadvantage caused by a failure of the political system to adequately represent the interests of all members of society. Nor does a winner-takes-all approach to electoral democracy fit with contemporary ideas about legitimate and, perhaps more importantly, stable democracy. More contentiously, it has been argued that democratic legitimacy is contingent on the ability of all those subject to its laws having a meaningful opportunity to have the information, abilities, and material security necessary to participate in political life in an informed manner (Shue, 2020[3]); many of the rights discussed in this chapter directly support such legitimacy.

Some constitutions contain no ESCNRs. Indeed, a number of well-established democracies with high standards of living do not include such rights in their national constitutions – The United States, for example.[5] Others, such as Canada and Germany, contain relatively few.[6] Instead, matters such as healthcare, unionisation and consumer rights are dealt with by statute, and the benefits and protections they accord to citizens (or groups) can, at least conceivably, be altered or even revoked by a simple legislative majority. Indeed, despite the lack of constitutional rights to healthcare in Australia, Canada or the United Kingdom, all three have robust systems of public healthcare that, although not immune from criticism, ensure that at least a basic level of medical care is provided to all regardless of ability to pay. That said, almost all countries falling into this category industrialised and expanded the size of their state apparatus more than half a century ago, and their constitutions tend to date from before that era. It should not be assumed that what worked in the past will continue to work in the present.

Concerns have been expressed about the effectiveness of constitutionalising these types of rights, and that if viewed as a formality, doing so may actually be harmful in the medium to long term (OECD, 2017[4]; Bjørnskov and Mchangama, 2019[5]). In fact, there is a good deal of evidence supporting their direct and, more commonly, indirect effectiveness in achieving their intended goals.[7] According to this research, allocation of benefits from rights litigation is not restricted to elites and, more importantly, can trigger important policy changes that have significant "pro-poor" consequences (OECD, 2017[4]; Ferraz, 2020[6]). There is also a clear trend in practice: new constitutions almost invariably contain economic and social rights and many contain other emerging rights.

How "strong" should economic, social, cultural and new rights be?

ESCNRs can be included in constitutions as either justiciable or aspirational rights. Justiciable rights are legally enforceable in that the government can be taken to court for failing to meet the obligation(s) placed on it by a particular right. The specific mechanisms by which such claims can be made, which vary significantly, are discussed in Chapter 6. Rights entrenched in this way give some element of society – often all citizens, but sometimes a narrower set of actors such as opposition parties, trade unions, or non-governmental organisations (NGOs) – legal recourse to ensure fulfilment of their constitutional rights. This can occur via challenging the constitutionality of a piece of legislation in the abstract; or by alleging that they have experienced a concrete harm as the result of an action taken by or on the authority of the state; or by alleging that an "unconstitutional state of affairs" exists because of the absence of a constitutionally adequate system for providing the guaranteed rights.

Box 3.1. The "strength" of rights

Rights are included in constitutions in a variety of ways, and a number of different terms are used to describe how this is done. For the most part however, constitutional rights are found in one of three forms. In descending order of "strength," these are:

- *Strong-form justiciable* – The right is included in the constitution, an alleged violation can serve as the basis for a court case, and the elected branches cannot (legally) disregard or overrule a judicial decision finding that a right has been violated or directing a particular action to correct the violation.
- *Weak-form justiciable* – The right is included in the constitution and an alleged violation can serve as the basis for a court case. However, the elected branches have at least some ability to (legally) disregard or overrule a judicial decision that a right has been violated. This may be a matter of design (as it is in Canada) or the result of a constitutional document that has quasi- rather than full constitutional status (as in New Zealand).
- *Aspirational* – The right is included in the constitution, but an alleged violation cannot serve as the basis for a court case. Rather, the right is supposed to act as a directive principle of state policy that is to inform all government decision making. To the extent that there are consequences for failing to respect such rights, they come via popular opinion and voting.

The strength of rights tends to be indicated by explicit language in the constitution itself. For example, the Finnish Constitution states, "Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice" (art. 21).

In general, rights included in that constitution are justiciable.

Other constitutions expressly preclude challenging the validity of laws on the basis of some or all rights included in the constitution. Article 41 of the Swiss Constitution, which lays out a number of economic and social guarantees, includes a clause that "No direct right to state benefits may be established on the basis of these social objectives" (art. 41(4)). However, constitutions tend to be complex documents and there are often qualifications, even to seemingly clear statements about justiciability. The Spanish Constitution, for example, contains several clauses indicating that specific rights are justiciable, others are aspirational, and others still are justiciable but only under certain circumstances. The particulars of the language vary from jurisdiction to jurisdiction, but it is important to recognise the differences between rights' "strengths" and to consider (and specify) how each particular right is to be included in the constitution.

Sources: Gardbaum (2001[7]), "The New Commonwealth Model of Constitutionalism," *The American Journal of Comparative Law*, Vol. 49/4, pp. 707–760, https://doi.org/10/dp6q36; Jung, Rosevear and Hirschl (2019[8]), "Justiciable and Aspirational ESRs in National Constitutions", *The Future of Economic and Social Rights,* Cambridge University Press, pp. 37-65.

The outcome of a successful constitutional challenge is principally determined by whether a jurisdiction employs an intense/strong or mild/weak form of judicial review (see Chapter 6). Where strong-form review is in place, a court may invalidate some or all of the offending legislation or require the state to provide the claimant(s) with a particular good or service, as has frequently been the case with medicines in countries such as Brazil and Colombia. It may also result in a court requiring the state to provide details on its plan to address a particular rights-related issue – for example, a national housing policy – and demonstrate that all rights-relevant factors, including the views of those affected by the policy, were given the appropriate weight when the policy was crafted, an approach that has been employed a number of times by the South African Constitutional Court. The remedy may also take a number of other forms, depending on the nature of the violation, past practice in the jurisdiction, and the creativity of the judges hearing the case. Although the mechanisms for bringing claims relating to justiciable rights are generally well defined in constitutions, the precise nature of the remedies used to correct violations tends to be somewhat ambiguous, perhaps necessarily so.

In many ways, mild (weak-form) review is an intermediate category, located between aspirational and justiciable rights. The form and procedure of the court's activities are similar to intense (strong-form) review, but courts are restricted to advising the legislature of their finding that an act of government violated a right (as in the United Kingdom) or requiring the legislature to reconsider a piece of legislation in light of the fact that it has been found inconsistent with a right (as in New Zealand).[8] A more powerful version of weak-form review that exists in a limited set of circumstances in Canada accords the courts the power to strike down offending legislation, but gives the legislature the option to temporarily override the court by declaring that it operates "notwithstanding" its unconstitutionality. The capacity of mild review to defend constitutional rights depends on the context. In many countries that have adopted it (including Canada), a relatively high degree of popular support for the courts and the constitution make contravening even the advisory rulings of the courts a politically costly decision. How costly, however, could be subject to changes in public sentiment, particularly with respect to the relative trustworthiness of the courts and elected branches. Mild reviews are often seen as less rigid and able to strike a balance between the judicial and elected branches, discouraging overreach or abuse by either.

Aspirational rights express the values, goals and priorities of the nation and articulate a vision of what the country strives to be. As such, they are often considered to be directive principles of state policy, articulating a set of medium- to long-term goals intended to guide the actions and choices of elected officials, bureaucrats and other state actors. Although the failure to meaningfully pursue these principles carries no formal legal sanction, aspirational rights can have a concrete impact on state policy in at least two ways. The first can be observed in the electoral arena. To the extent that these rights accurately reflect widely held societal values and beliefs, or that there exists a strong belief in the value of operating in line

with constitutional principles, a decision to disregard these directive principles by a sitting government is likely to be seized upon by opposition parties as a rallying cry for support and negatively impact popular and electoral support for the governing party. A second area of potential impact exists where the non-enforceability of a right is not made explicit in the constitution. There have been instances in which a court or a particular judge has, when confronted with ambiguous phrasing or terminology in the text of a constitution, determined that what many believed was (and may well have been intended as) an aspirational right was, in fact, grounds for the judiciary to pass judgement on the actions of state actors, or to interpret other laws or rights in light of these aspirations.

Constitutions in books versus constitutions in action

Another consideration regarding the inclusion of ESCNRs is the likelihood of "slippage" between the rights and obligations outlined in the text of the constitution and their application. Constitutions tend to contain both backward- and forward-looking elements. The former seek to prevent past excesses or failures by outlining a set of proscribed practices and imposing certain conditions on the use of state power.[9] The latter tend to articulate goals or ideals that a society seeks to achieve.[10] Both elements legitimately fall within the scope of a constitution as they serve to identify and, to a limited extent, operationalise the values and beliefs of the nation. However, caution should be exercised when articulating these rights. In particular, the practicality of their realisation ought to play a role in determining their "strength" in relation to the judiciary and the capacity of the state to realise them; a piece of paper guaranteeing healthcare for all regardless of ability to pay does not, in and of itself, provide such care.

To the extent that an expansive set of rights, guarantees and obligations is set down in the constitution without regard to practicality, unrealistic expectations could be created. If expectations are set too high or the constitution demands too much within too short a time, the rights and the constitution itself may come to be perceived as formalities that are not necessarily connected to reality. This, in turn, can damage the credibility – and potentially, stability – of the political system. The implication here is not necessarily to lower expectations, but rather to temper them with recognition of the reality of incremental change. To the extent that grand goals are to be included, they should be expressed in a way that communicates that they are to be progressively realised over time. Striking the right balance between realistic expectations on the one hand and a vision of a good and just society that sparks hope and commitment in the people on the other is one of the most difficult challenges of the drafting process.

Core Features

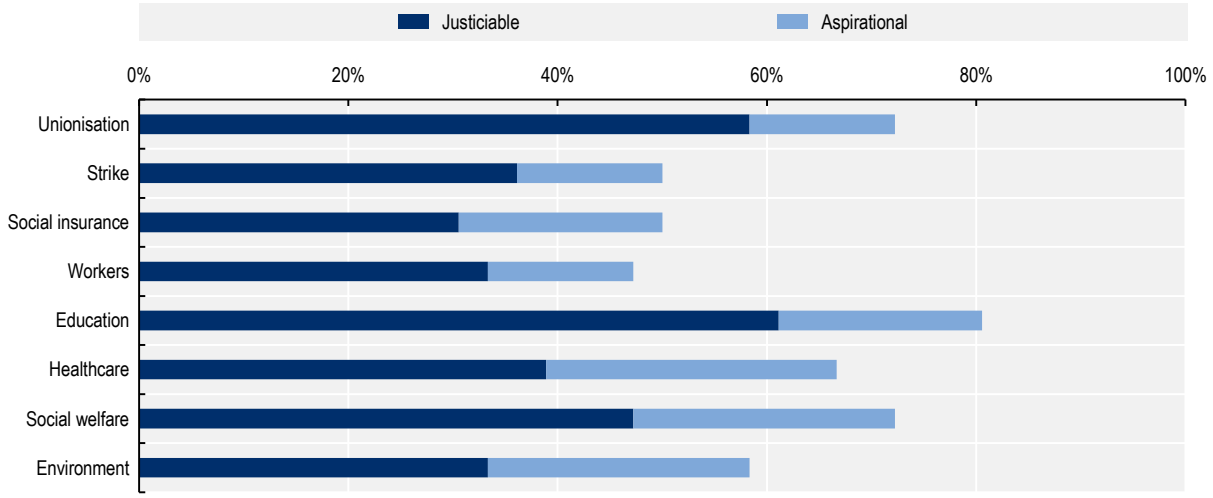
The following section discusses economic, social and new rights in turn, with a special focus on the constitutions and quasi-constitutional documents of Australia,[11] Finland, Germany, New Zealand,[12] Portugal, Spain and Switzerland. While such comparisons could be valuable, there is no one-size-fits-all model of constitutional design; a country's history, politics, economy and culture each have a significant impact on how well a particular model, structure or clause will work. Moreover, international and regional law may supersede, at least formally, some of the rights discussed below.

Broadly speaking, economic rights are rights that accrue to individuals due to their engagement with the formal labour market and persist only as long as they remain employed or in some relationship with the formal economy. Included in this category are rights such as those to form or join a trade union and to strike; contribution-based social security (particularly pensions, but also parental leave, disability insurance, and similar matters) and, somewhat less commonly, rights relating to working conditions, wages and rest periods. These types of rights often necessitate the difficult task of balancing the ability of business to be globally competitive and responsive to changes in demand against a desire to provide citizens with steady employment, living wages, and decent standards of living.

Unionisation and strikes

The rights to join or form a trade union and to strike are two of the most common economic rights. As shown in Figure 3.1, they appear in approximately 75% and 50% (respectively) of OECD area constitutions. They are also closely connected with the right to free association, a civil and political right. However, they are distinctive in that they enable a specific class of people—workers—to unite in a legally protected manner in order to offset perceived power imbalances between employers and employees and, in turn, to seek job security, higher wages, and better working conditions.

Figure 3.1. OECD area constitutions containing ESCNR provisions



Note: As of 1 January 2016, without including Chile.
Source: Based on Jung, Rosevear and Hirschl (2019[8]), "Justiciable and Aspirational ESRs in National Constitutions", *The Future of Economic and Social Rights*, Cambridge University Press, pp. 37-65.

Trade unions, collective bargaining and strikes exist, to varying degrees, in each of the seven comparison countries. However, they are not constitutionally protected in either Australia or New Zealand, where they exist by virtue of a combination of case law and legislation. The right to unionise is included in the Finnish and German Constitutions, but the right to strike is not expressly guaranteed. Both rights are constitutionally protected in Portugal, Spain, and Switzerland.

Where the right to strike is present, it is generally subject to limitation. This tends to manifest itself as prohibitions on strikes by those who render essential services and an indication in the constitution that the precise nature of the limitations and which services are "essential" should be defined by legislation. In Spain, for example, the legislature can limit or prohibit unionisation for members of the military or other security forces, and set special conditions on civil servant unionisation (art. 28(1)).

In some cases certain measures affecting the balance of power between workers and employers have been included in constitutions. The Constitution of Portugal, for example, prohibits employer lockouts and forbids the legislature from limiting the scope of interests that are to be defended by a strike (art. 57). In contrast, the Swiss Constitution expressly permits the formation of employer/sectoral organisations and prohibits compulsory union membership (art. 28). While such variation may not seem significant, changes such as these could have a strong impact on the power dynamic between labour and capital. Close attention should be paid to both the structure of the economy and the historical dynamics of the relationship between the two in order to ensure that the proper balance is struck.

Social insurance (Including pensions, unemployment, and disability)

Old-age pensions involve a complex set of issues relating to eligibility and benefit amounts, public versus private management, contribution requirements, and tax incentives. Other social benefit schemes relating to unemployment, disability, and survivorship involve a similar set of issues. This chapter divides these benefits into two categories: i) those funded at least in part by employee/employer contributions and eligibility for which is contingent upon having contributed; and ii) those funded largely from general revenues and eligibility for which depends on meeting a certain condition (e.g. having children, being over a certain age) and/or falling below a certain level of income. The former are discussed in this section and the latter in the section on social welfare below. However, this distinction is somewhat artificial, as the two types will often work in conjunction with one another, frequently supported by supplementary private investment or insurance coupled with tax incentives.

There are no constitutional guarantees for old-age or disability pensions in Australia, Germany or New Zealand. Nor are there explicit rights to unemployment benefits. Both the Finnish and Spanish Constitutions make general guarantees regarding public provision of adequate benefits during unemployment; in Spain these are extended to cover times of hardship generally (art. 41), and in Finland they cover retirement or disability as well as leave during the birth of a child or the loss of a provider (s. 19). Both documents leave the details of eligibility, funding and benefit level to legislation.

The Portuguese Constitution contains a more detailed set of guarantees in this area. It explicitly entrenches the right of workers to material assistance when involuntarily unemployed or unable to work due to a work-related injury (art. 59). Moreover, it tasks the state with organising and subsidising a unified and decentralised social security system to protect individuals who are disabled, elderly, widowed or orphaned (art. 63). It also requires that all periods of work, regardless of sector, be included in the calculation of benefit levels for old-age and disability pension amounts and guarantees the right to maternity leave and a period of leave post-childbirth for mothers and fathers (arts. 63, 68).

The Swiss Constitution contains the most specific prescriptions in this area. The various levels of government are required to establish compulsory insurance schemes for old age, survivorship, and invalidity; the minimum benefit level is required to cover basic living expenses and the maximum benefit level cannot exceed double the minimum.[13] These schemes are to be funded by a combination of employee and employer contributions as well as state subsidies; the latter cannot amount to more than half of the value of disbursements (arts. 112, 112b, 112c). The Confederation (as opposed to the cantons[14]) is also required to create: i) a mandatory occupational pension scheme that, in conjunction with the three previously mentioned, is intended to allow retired individuals to maintain their "previous lifestyle in an appropriate manner"; and ii) an unemployment insurance scheme. Both are to be funded by employee and employer contributions, with employer contributions equivalent to at least half of employee contributions in the former and the latter being evenly split (arts. 113, 114).

Workers' rights: Working conditions, wages and leisure

Workplace health and safety standards are nearly universally accepted as legitimate limitations on freedom of contract and free enterprise. The most common of these rights are those to a fair wage, to healthy working conditions, and to rest. Each are present in over 30% of OECD area constitutions and nearly 50% contain at least one. These rights imply the existence of a reasonably well-established formal economy and, in conjunction with unionisation, can be seen as an additional layer of protection aimed at allowing individuals to provide themselves and their family with the means of material subsistence without damaging their health as a result of overwork or unsafe conditions.

The constitutions of Australia, Germany and New Zealand do not include any explicit constitutional protections in this area, but as with most OECD member countries there is statute law addressing these matters and affording workers a significant degree of protection. Statutory protection can sometimes be

problematic because it can be repealed or amended by a simple majority of the relevant legislature. For instance, in a number of jurisdictions, legislation excludes or allows lower wages for specific occupations or groups such as farm labourers or domestic workers (ILO, 2020[9]), despite the fact that such groups are often those most in need of protection from exploitation. At the same time however, most of the improvements in employment standards over the past century have come via legislation rather than constitutional law.

In Finland there are no explicit guarantees, but the state is tasked with the protection of the labour force generally (s. 18). More concretely, the Swiss Government must endeavour to ensure that everyone who is fit to do so can earn a living by working under fair conditions (art. 41(1)). The most expansive guarantees in this area in the comparison country group are found in the constitutions of Spain (arts. 35, 40(2)) and Portugal (art. 59), both of which include rights to a fair or living wage, safe working conditions, limitations on the length of the working day, and periodic days of rest and holidays. In Portugal these rights are justiciable; in Spain however, while the right (and duty) to work for sufficient remuneration is justiciable, the other rights of this type are aspirational. However, neither document moves beyond general statements. For example, no specifics are given as to what constitutes a fair wage or the maximum number of hours that can be worked in a day or week. The highly variable nature of employment, however, means that it may not be realistic to outline a more specific set of protections for workers at the level of constitutional law.

Social rights

Constitutional social rights grant personal entitlements to both in kind and monetary transfers, generally on the basis of citizenship. In contemporary constitutions, the most commonly found social rights are those to education, healthcare and social welfare benefits (frequently tied to old age or disability). In addition to this, many constitutions also identify specific aspects of individuals' material well-being that are to be ensured by the state, such as rights to adequate housing, water, and proper nutrition. Although there is often overlap with economic rights such as the right to a contribution-based pension, these rights are distinct in that they are not directly contingent on participation in the formal labour market. In addition to promoting human dignity, these rights can be understood as facilitating democratic legitimacy (and stability) in that they are directly connected to providing the underlying conditions necessary for meaningful participation in political life.

Education

The right to education is the most common economic or social right in the OECD area, present in 80% of constitutions. Broadly speaking, constitutional guarantees having to do with education are of three types: those relating to the free provision of basic education; those pertaining to the accessibility of higher education; and those relating to the permissibility and regulation of private and/or religious education.

Although Australia, Germany and New Zealand have freely available public education, it is not constitutionally guaranteed. The constitutions of Finland, Portugal, Spain and Switzerland on the other hand do guarantee the right to a free basic education for all.[15] The right to basic education appears in a number of subnational constitutions throughout the world. In the United States for example, a number of state constitutions contain that right, and there has been extensive (often successful) litigation on the matter in states such as New York, New Jersey, Kansas and Washington (Weishart, 2017[10]).

Higher education is not addressed in the Australian, German or New Zealand Constitutions, nor is it mentioned in the Spanish Constitution other than to assert the autonomy of universities. The Finnish Constitution guarantees everyone equal opportunity to receive other educational services in accordance with their abilities and special needs. As with basic education, the details of how this is accomplished are to be set out in legislation (s. 16). The Swiss Constitution also makes reference to ensuring access to higher education on the basis of ability and contains provisions permitting confederal contributions to

cantonal grants for higher education (arts. 63a, 66), while the Portuguese Constitution tasks the government with progressively making all levels of education free as well as with creating a preschool system, eliminating illiteracy, and providing disabled children with access to education (art. 74).

Private educational institutions, subject to state oversight and regulation, are explicitly or implicitly permitted in the Finnish, German, Portuguese, Spanish and Swiss Constitutions. The Swiss Constitution also contains several provisions relating to the promotion of vocational/professional education, musical education, sport, and culture (arts. 64a, 67-69). With respect to religious education, the right of parents to have their children educated in accordance with their beliefs is guaranteed in Germany (art. 7) and Spain (art. 27(3)).

Healthcare

The right to good health is present in nearly 70% of OECD area constitutions. Key issues relating to its entrenchment and operationalisation tend to revolve around the role of the private sector; the allocation of resources between what is preventative (e.g. vaccinations, health education) and curative (e.g. surgery, pharmaceuticals); the extent of goods and services to be provided; the matter of progressive realisation; and how the state is to be held accountable for healthcare's realisation. In general, public healthcare systems operate in conjunction with private healthcare facilities and insurance providers, but there are numerous models of healthcare system design. The complexity, expense and gravity of the issues involved suggest caution with regard to the level of detail to be included at the constitutional level.

Australia, Germany, and New Zealand do not constitutionalise the right to healthcare but substantively realise the related services via extensive public healthcare systems. The Finnish Constitution adopts a straightforward, high-level approach stipulating that the state must guarantee adequate medical and health services for all, the details of which are to be provided by law (s. 19). The Swiss Constitution requires the national and subnational governments to seek to ensure access to healthcare for all and, within their respective powers, promote the adequate and accessible provision of primary medical care for all (arts. 41(1) and 117a). This obligation, however, is framed "as a complement to individual responsibility and private initiative", which are understood to be the primary drivers of healthcare provision. The national government is required to establish health and accident insurance, but can decide whether to make participation mandatory.

The Spanish Constitution explicitly recognises a right to health, and tasks the state with oversight of the public's health and responsibility for implementing appropriate preventative measures as well as the provision of necessary benefits and services. The specifics of these obligations are to be established by statute law (art. 43). The Portuguese Constitution also adopts a state-centred approach to health, assigning the state primary responsibility for guaranteeing access to preventative, curative and rehabilitative care regardless of individuals' ability to pay. However, in view of the scale of such an undertaking – both administratively and financially – the state is directed to *work toward* as opposed to simply "creating" a fully public healthcare system that is rational and efficient (art. 64). The relevant article of the constitution also provides direction as to how the right is to be realised, including through the establishment of a national health service with a decentralised and participatory management structure and a general requirement to improve economic, social, cultural and environmental conditions that will benefit the health of the population as a whole.

Social welfare (including housing, food and water)

In contrast to the rights and associated programmes discussed in the section on social insurance, the rights discussed in this section deal with benefits in cash or in kind available to all citizens as opposed to only those who had contributed to a specific social insurance scheme. Historically, programmes of this type were restricted to the "deserving poor" who were not thought capable of providing for themselves. Included in that category would often be widows, the elderly, young children, and the physically or mentally

disabled. Able-bodied men, however, tended not to be considered "deserving"; that they did not earn a living via their labour was deemed to be a moral failing on their part and their plight did not warrant society's charity. Attitudes have changed substantially in this regard. Particularly since the Second World War there has been an increasing acknowledgement, manifest in the structure of state benefits, that individuals are not necessarily under- or unemployed because of any personal failing. When coupled with growing recognition of the link between income and human dignity, there has been increasing support for at least some level of universally accessible benefit capable of providing for the basic subsistence of all adults.[16]

The constitutions of Australia and New Zealand do not entrench any rights of this type, although as with most other categories discussed herein both countries do have a system of basic social supports.[17] None are explicit in the German Constitution, but case law has given rise to a quasi-constitutional state duty to provide social welfare assistance to those in need.[18] The Finnish Constitution guarantees the "means necessary for a life of dignity" to those otherwise unable to obtain it, as well as requiring the public authorities to "promote the right of everyone to housing and the opportunity to arrange their own housing space" (s. 19).

The Portuguese Constitution contains a justiciable general right to social security with particular reference to the elderly, who have a right to economic security independent of their eligibility for contribution-based pensions or insurance, and for whom policies must be created that provide opportunities for personal fulfilment (arts. 63, 67, 72). It also states that everyone is entitled to adequately sized housing, and obligates the state to take action to realise that right. The Spanish Constitution contains a set of aspirational social welfare rights guarantees nearly identical to those of Portugal, with two principal differences. The first is the absence of an explicit statement that everyone has the right to social security. The second is a requirement that regulation of land use and the prevention of speculation play a role in facilitating realisation of the right to adequate housing (art. 47). Both the Spanish and Portuguese Constitutions also include provisions requiring the state to take measures to ensure that those with disabilities are capable of fully enjoying their rights.

The Swiss Constitution is the most specific in this area of social rights. With respect to housing, the constitution requires the Confederation and cantons to facilitate the ability of all individuals to secure adequate housing (art. 41(d)). In furtherance of this requirement, the Confederation is required to pay particular attention to the interests of vulnerable populations when making policies intended to encourage the production of housing stock; interestingly, no more than 20% of residential units in any given area can be second homes (art. 75b). In addition, supplementary benefits are to be provided to those whose basic needs are not met by the mandatory contributory schemes, with the amount determined by law (art. 112a). The state is also responsible for managing the availability of food and potable water, although no specific rights to either are guaranteed (arts. 76, 104a).

A number of constitutions also recognise and address the particular challenges and vulnerabilities experienced by elderly people. The Spanish Constitution, for example, directs the state to develop a system of social services that supports the elderly in terms of health, housing, culture and leisure (art. 50). More assertively, the Portuguese Constitution contains several justiciable guarantees intended to foster the continued autonomy and dignity of the elderly, including the provision of opportunities for "active participation in community life" (art. 72). The Swiss Constitution also contains provisions of this type.

It should also be noted that the right to housing has proven contentious in a number of jurisdictions, generally in relation to conflicts between the so-called "occupiers" of informal settlements and the owners of the property. For example, in some countries (e.g., South Africa), the courts have frequently prevented the eviction of informal settlement dwellers until there is a specific place for them to go, thus denying the property owners redress for the infringement of their rights. However, should it be determined that the state has taken too long to fulfil its obligation to secure alternative accommodation, it is possible for the property owner to claim "constitutional damages" for the inability to enjoy their property (Stuart and Clark, 2016[11]). Disputes of this type raise the issue of whether property rights ought to be considered absolute. On the

one hand, it can be problematic to violate one right (housing) in order to protect another (property), suggesting that some form of judicial balancing should be considered. On the other hand, there can be a legitimate concern that failure to vigorously protect property rights would have a negative impact on investment and economic growth.

Cultural rights

An increasing number of jurisdictions have added constitutional protections to protect aspects of culture. These include rights to maintain group identity through language and culture; rights for specific communities to develop; and specific rights for Indigenous communities. Many of these rights have been recognised in international law, including the United Nations Declaration on Human Rights. Such rights differ from more traditional anti-discrimination rights (such as rights to be free from discrimination on the basis of gender, race or sexual orientation), which protect individuals.

Language and culture

Many constitutions protect rights to culture and language, although the varying manner in which they are expressed suggests different purposes. In some instances, the protections appear to be directed at majority groups. The Constitution of Portugal, for example, protects a general individual "right to education and culture" (art. 73) as well as "the right to enjoyment and creation, together with the duty to preserve, defend and enhance the cultural heritage" (art. 78). In other jurisdictions cultural rights are primarily addressed to minority groups, or to foster cultural diversity. In Spain the constitution provides that "all are entitled" to culture (art. 44(1)), and the preamble says that the state will "protect all Spaniards and peoples in the exercise of human rights, of their culture, traditions, languages, and institutions". In addition, article 3 of the Spanish Constitution establishes Castilian as the official language of the state, but declares the other Spanish languages as also official in the respective Autonomous communities and proclaims that "the wealth of the different language modalities of Spain is a cultural heritage which shall be the object of special respect and protection". Similarly, in Canada the constitution contains a clause requiring it to "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (art. 27). Similarly, the quasi-constitutional bill of rights in New Zealand protects the rights of members of minorities "in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority" (s. 20)) via weak-form review. Similar protections exist in the statutory bills of human rights of two subnational units in Australia (Victoria and Queensland).

Indigenous rights

Recognition of Indigenous peoples in constitutions can be achieved in many different ways. Sometimes this will be through recognition of Indigenous self-government as part of the state's vertical allocation of power, discussed in more detail in Chapter 5. Indigenous peoples may also be constitutionally protected, often through general rights to culture and language. Some constitutions, however, recognise the special place of Indigenous peoples by explicitly providing for Indigenous constitutional rights.

Indigenous rights provisions are common in Latin America. The Constitution of Mexico, for example, includes significant protections for Indigenous peoples, including rights to representation, voting, education and health. It also guarantees their rights to self-determination, self-government, and development (art. 2). Many of these rights are also recognised in international law;[19] among other things, they emphasise the rights of Indigenous peoples to free, prior and informed consent concerning the use of their land or other resources. This approach is also reflected in the decisions of some constitutional courts, which require states to "meaningfully engage" with Indigenous groups before making decisions that affect their well-being or self-determination (Rodríguez-Garavito and Kauffman, 2014, pp. 46-49[12]).

Other OECD member countries also include specific protections for Indigenous peoples. The Finnish Constitution contains specific protections for the culture and language of the Sami people (art. 17) and the Canadian Constitution protects First Nations' rights to land guaranteed by treaties (art. 35). It also stipulates that Indigenous treaty rights and freedoms are not affected by other rights guaranteed in the charter (art. 25).

In New Zealand, Māori rights are also considered protected by the constitution. The Treaty of Waitangi, the founding treaty between the British Crown and Māori representatives, has constitutional status and influences the interpretation and application of New Zealand law (New Zealand Ministry of Justice, 2020[13]). Māori are also guaranteed rights to minimum parliamentary representation under the country's quasi-constitutional electoral law. In Australia, the quasi-constitutional rights charter of the state of Victoria provides that "Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community" to goods such as identity, culture, language, kinship ties, and the natural world (art. 19(2)).

Cultural and indigenous rights interrelate with the social and economic rights discussed above. Sometimes cultural rights will require other rights to be exercised in a way that is consistent with the culture or language of a particular group. For example, article 23 of the Constitution of Canada provides that English- or French-speaking children have the right to receive education in their first language, and article 2(B)(III) of the Constitution of Mexico specifies the healthcare rights of Indigenous peoples, including support for traditional medicine. Provisions such as these may ensure that social and economic goods are not provided in a way that is inconsistent with cultural rights, such as education policies which suppress Indigenous cultures, or housing policies which are not suited to minority cultures. In some cases, however, cultural rights have conflicted with states' provisions of economic and social goods. For example, in 2013 the Supreme Court of Justice of Mexico found that a major infrastructure project, which would have provided water to the city of Hermosillo, violated the rights of the Indigenous Yaqui tribe to be consulted on the project, in accordance with their own habits and customs *Independencia Aqueduct Case* (2013[14]).

Emerging or "new" rights

The rights discussed in this section address important issues arising from technological development, improved understanding of the world, globalisation, and changing attitudes about the importance of and respect for diversity and difference, both natural and cultural. Their relative "newness" should not be taken as evidence that they are somehow less important than more commonly constitutionalised rights. Box 3.2 reflects examples of rights included in new, progressive constitutions around the world.

Box 3.2. New constitutions around the world: Progressive viewpoints

While this report analyses constitutional provisions primarily from OECD member countries, it recognises that many of the recent new constitutions and amendments have been adopted elsewhere, in OECD partner countries around the world. These contemporary constitutions show examples of progressive approaches to a number of key topics covered in this report, some of which are highlighted below:

1. *Well-being* – There is no single definition of well-being, although most approaches agree that it is a multi-dimensional concept encompassing material and non-material dimensions.[20] Some countries have integrated an idea similar to that of well-being into their constitutions, for example South Africa (Chapter III), Bolivia (art. 8) and Ecuador (art. 3 and Chapter II), in the latter cases dubbed "*buen vivir*".

2. *Citizen participation* – The Brazil Constitution of 1988, through a 2020 amendment, states that the government will guarantee the participation of society in the process of formulation, monitoring, control and evaluation of social policies (Article 193). The Ecuadorian Constitution contains a chapter on participation in democracy, with several articles describing the forms of citizen and stakeholder participation to ensure that "citizens, individually and collectively, participate as leading players in decision making, planning and management of public affairs…" (Article 95). More recently, in 2019 the subnational Constitution of Mexico City included a right to good government though open government initiatives (Articles 60 and 26).
3. *Gender equality* – In Tunisia, the state guarantees equal opportunity access for women and men to all levels of responsibility in all domains, including attainment parity in elected assemblies. It also outlines that the state shall take all necessary measures in order to eradicate violence against women (art. 46). In Bolivia, the Constitution establishes that women have the right not to suffer physical, sexual or psychological violence, either in the family or in society (art. 15.II) and that the state shall prevent, eliminate and punish sexual violence, or any form of physical, sexual or psychological suffering, whether in the public or private spheres (art. 15.III). The constitution also establishes that internal election of the leaders and the candidates of the citizen associations, and of the political parties shall guarantee the equal participation of men and women (art. 210). In Namibia, the constitution establishes that the parliament shall enact legislation considering the fact that women in that country have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation (art. 23.2).
4. *Reproductive and family rights* - the Constitution of Paraguay protects "the rights of persons to freely and responsibly decide on the number and frequency of the birth of their children" (art. 61); the Constitution of Venezuela establishes that "couples have the right to decide freely and responsibly how many children they wish to conceive" (art. 76). In the case of Brazil, the Constitution establishes that "couples are free to decide on family planning; it is incumbent upon the State to provide educational and scientific resources for the exercise of this right, prohibiting any coercion on the part of official or private institutions" (art. 226.7).

Environmental rights

Most countries' constitutions include environmental provisions. As of 2012, 147 constitutions protected the environment in some way (Boyd, 2012[15]). This included provisions involving: i) enforceable *rights* to environmental quality (such as a "clean", "healthy" or "pollution-free" environment); ii) state *duties* to protect to environment, or environmental principles; iii) specific rights or duties addressing environmental issues (such as forests or future generations); and iv) "rights of nature". Environmental rights have also been recognised as aspects of other constitutional rights, such as the right to life or human dignity (Boyd, 2011[16]). Environmental issues are also affected by other human rights. For example, the right to health might require governments to ensure there is clean air and water; procedural rights may help people access information about the environment; and Indigenous rights may empower Indigenous peoples to protect their lands and resources against environmental damage.

The most common form of constitutional protection is an individual right to environmental quality. The right is sometimes paired with a duty to defend the environment, as is the case in Portugal: "everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it" (art. 66(1)).

In some countries the right is justiciable: claims can be brought against the government in court. For example, the Portuguese Constitution specifies that environmental claims can be brought in the interests of the general public through a streamlined process called an *actio popularis* (art. 52(a)). Constitutions in

a number of Latin American jurisdictions, including Colombia and Mexico, allow these rights to be enforced through streamlined individual claims (*tutela* or *amparo* procedures). In Colombia, they can also be enforced following collective claims, such as the *acción popular*. They can moreover amount to restrictions on other constitutional rights, especially property rights. Courts have interpreted the Finnish Constitution to permit deprivation of property when such deprivation is proportional to environmental benefits (KHO, 2014[17]).

Environmental rights can also take the form of procedural rights. These rights protect access to information, participation and justice. For example, the Finnish Constitution guarantees citizens the right "to influence decisions concerning their own living environment" (art. 20). This obligation has been implemented in several statutes, and used to appeal environmental decisions in the Finnish courts.

In some countries, environmental rights are not justiciable. Instead, legislatures and executives are directed to respect environmental rights through legislation and regulation, as is the case in Spain (arts. 45(1), 53(3)). The Spanish legislature has enacted environmental legislation in accordance with article 45(1), which specifies rights that can be enforced. Other constitutions impose duties on the state, rather than guaranteeing individual rights. The constitutions of Germany and Switzerland require public authorities to "protect the natural foundations of life and animals" (Germany, art. 20A) and to "legislate on the protection of the population and its natural environment" (Switzerland, art. 74). In both cases, governments have passed statutes and regulations referring to these directives.

Rather than protecting "the environment" in general, some constitutions outline detailed environmental rights and duties. In 2004, the Constitution of France was amended to include a justiciable ten-article Charter for the Environment; and a constitutional change is under way (via the proposal of the Citizen Convention on Climate) to amend the constitution and include in the first article a state responsibility to ensure the preservation of the biodiversity, the environment and the fight against climate change.[21] Article 66(2) of the Portuguese Constitution has both a general rights provision (article 66(1)) and a set of more specific responsibilities related to pollution, conservation and education, while articles 73-80 of the Swiss Constitution set out a detailed set of directions for federal and subnational implementation, including for issues such as spatial planning, water, forests and conservation. Several constitutions also include a right to clean drinking water (that of South Africa, for example). Others, such as art. 20a in Germany and art. 73 in Switzerland, include rights or duties owed to "future generations", provisions relating to "sustainability", or the obligation to safeguard resources for future use. The concept of sustainability is connected to the issue of "environmental justice", the rights of which require states to pay attention to the ways that environmental harms and benefits are distributed – for example, across race, gender and class. Environmental justice also requires expanding the definition of "environment" to include everyday places where people live, play and work (for example, the fair siting of waste facilities, rather than focusing only on national parks and species preservation) (Schlosberg, 2007[18]).

More recently, several countries have assigned rights to specific natural phenomena such as rivers or forests. These rights allow people to bring judicial proceedings, and the establishment of bodies to govern, on behalf of nature. Such rights can be found in the constitution of Ecuador (arts. 71-74), the law of New Zealand, and Colombian judicial decisions (Centre for Social Justice Studies et al v. Presidency of the Republic, 2016[19]).

Environmental rights can sometimes conflict with other rights, such as the right to property. For example, the Constitutional Court of Hungary has found that in the context of forestry conservation, environmental rights and principles are sufficiently important that they outweigh private property rights (*First Forests Case, 1994; Second Forests Case,* 2020). In South Africa, the Constitutional Court has applied the concept of "sustainable development" as a way to proportionately balancing environmental rights and competing considerations, such as the right to development (*Fuel Retailers Association v. Director General, Environmental Management*, 2007). Finally, environmental rights and policies may align with indigenous rights, or be in conflict with them. For example, the Constitutional Court of Colombia has found that river

pollution will often violate both indigenous *and* environmental rights (Centre for Social Justice Studies et al v. Presidency of the Republic, 2016[19]). On the other hand, government programmes that aim to improve the environment – such developments of renewable energy – may violate the rights of indigenous peoples to manage their own lands, or be afforded a consent process that is free, prior and informed. This has been the case in Mexico, where a wind farm development was first blocked by the Supreme Court as a violation of indigenous rights (*Wind Farms Case*, 2018), before later being permitted to proceed.

Rights of women and gender equality

Constitutions can play an important role in achieving gender equality by including provisions that protect and enforce the rights of women, and by enshrining provisions that could guide the enactment of legislation and policies to promote particular features of gender equality. While gender equality and non-discrimination clauses are common markers of constitutional commitments to formal equality, the current tendency in global constitutionalism is to include gender-specific provisions that can promote substantive equality. Based on the premise that formal equality is necessary but not sufficient to attain equality between men and women, constitutional provisions increasingly reflect the idea of "equal outcomes". In this context, they may acknowledge the unequal position of women in society "in order for them to be able to take advantage of [their access to] opportunities and resources".[22]

Gender-specific drafting style strategies of modern constitutions increasingly reflect the use of gender-neutral language. The cases of the constitutions of the OECD countries under study reflect this tendency: Finland, Switzerland, New Zealand, Germany and Colombia use gender-neutral language.

In addition, some constitutions establish provisions that acknowledge the importance of having women in government, or provisions that recognise the obligation of the state to address women's equality in different spheres. In the case of Portugal, for example, the constitution establishes that a "fundamental task of the state" is to promote equality between men and women" (art. 9). In Austria, "the Federation, Länder and municipalities subscribe to the de-facto equality of men and women. Measures to promote factual equality of women and men, particularly by eliminating actually existing inequalities, are admissible" (art. 7.2). The French Constitution establishes that "statutes shall promote equal access by women and men to elective offices" (art. 1), and on its preamble it mentions that "the law guarantees women equal rights to those of men in all spheres".

The following sections examine gender-inclusive constitutional practices with regard to gender equality and women's rights paying special attention to the constitutions and quasi-constitutional documents of Australia, Finland, Germany, New Zealand, Portugal, Spain, Switzerland and Colombia.

Framing gender equality

Gender equality provisions within constitutions can reflect commitments to both formal and substantive equality. Formal equality is approached by including non-discrimination provisions that prohibit discrimination on the basis of sex and gender, as well as equality provisions that state that everyone is equal before the law, emphasising equality between men and women. An approach to substantive equality takes into consideration differences between men and women. Substantive equality provisions aim to address how women can be found in an unequal position in accessing specific areas of social life such as work or education, often due to historical trends. Consequently, provisions that target substantive equality often aim for equal access to opportunities and equality of outcomes through a recognition that equal treatment alone may not result in similar outcomes for women as compared to men.

The constitutions of Switzerland, Finland, Germany and Colombia include an explicit declaration that men and women are equal. These constitutional provisions also address a specific goal on substantive equality that should be achieved by the state. For example, in the case of Switzerland, the constitution mandates that "men and women have equal rights" and that "the law shall ensure their equality…in the family, in

education, and in the workplace. Men and women have the right to equal pay for work of equal value" (art. 8.3). The Constitution of Finland similarly indicates that "equality of the sexes is promoted in societal activity and working life, especially in the determination of pay" (s. 6). The Constitution of Germany establishes that "men and women 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" (art. 3). Finally, the constitution of Colombia establishes that "women and men have equal rights and opportunities…during their periods of pregnancy and following delivery, women will benefit from the special assistance and protection of the State" (art. 43).[23]

All the constitutions of the OECD countries under study include non-discrimination provisions that prohibit discrimination based on a number of factors, including gender or sex.[24] Constitutional recognition of multiple grounds of discrimination has the potential to require states to enact legislation and policies that can tackle the layered nature of women's inequality. In this context, non-discrimination clauses usually specify that discrimination is prohibited based on "one or more grounds", and can include an open list of other types of discriminatory factors that intersect with gender or sex, such as race, religion, national origin and language.[25]

Women's rights

Constitutional regulation of the *political rights* of women includes provisions related to their participation and representation in the political system. These provisions are typically oriented toward increasing the participation of women in political parties, and ensuring their inclusion in decision-making structures across the legislative, judicial and executive branches of government. For example, Portugal affirms that "the direct and active participation in politics by men and women is a fundamental instrument in the consolidation of the democratic system, and the law shall promote both equality in the exercise of civic and political rights and the absence of gender-based discrimination in access to political office" (art. 109). Similarly, the constitution of Colombia mandates that state authorities "will guarantee the adequate and effective participation of women in the decision-making ranks of the public administration" (art. 40). Also, the constitution of Belgium establishes that "the law, federate law or rule referred to in Article 134 guarantees that women and men may equally exercise their rights and freedoms, and in particular promotes their equal access to elective and public mandates" (art. 11). The constitution of Italy establishes that "any citizen of either sex is eligible for public offices and elected positions on equal terms…the Republic shall adopt specific measures to promote equal opportunities between women and men" (art. 51).

The constitutional protection of the *social and economic rights* of women aims to advance substantive equality, as it may address specific inequalities between men and women relative to education, property, employment – including equal pay and protections related to maternity – and the participation of women in economic activities. For example, the Spanish Constitution establishes, in relation to the right to work, that "under no circumstances may they be discriminated against on account of their sex" (s. 35). Similarly, Portugal establishes that the state shall implement policies aimed at creating conditions to avoid "gender-based preclusion or limitation of access to any position, work or professional category" (art. 58). Workers, regardless of their sex, have right to remuneration that respects the principle of equal pay for equal work, and that the state should ensure "special work-related protection for women during pregnancy and following childbirth" (art. 59). The Colombian Constitution also mandates that the appropriate labour law "will take into account at least the following minimal fundamental principles: … special protection of women, mothers, and minor-age workers" (art. 53).

Some countries also put in place constitutional provisions that aim to protect women's right to health, which may include the obligation of the state to provide access to healthcare, including family planning and abortion. For example, Portugal includes a provision that guarantees "the right to family planning by promoting the information and access to the methods and means required therefore and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned" (art. 67.d).[26] The Czech Republic Constitution establishes that "women, adolescents, and

persons with health problems have the right to increased protection of their health at work and to special work conditions" (art. 29.1), while the Slovak Republic Constitution indicates that "women, minors, and persons with impaired health are entitled to an enhanced protection of their health at work, as well as to special working conditions" (art. 38.1). Some constitutions recognise women's right to a *life free from violence* and discrimination. This right protects women from gender-based violence, "one of the most systematic and widespread" human rights abuses worldwide.[27] The Colombian Constitution establishes on its article 43 that women cannot be subject to any type of discrimination. While it does not specifically mention gender violence, it indicates that "any form of violence in the family is considered destructive (…) and will be sanctioned according to law" (art. 42). .

Women's reproductive capacities are connected to their ability to make decisions related to their bodies and overall health. From this perspective, *women's right to health and access to health care* is important to protect women's agency in making their reproductive choices. Constitutional provisions that aim to protect this right may include the obligation of the state to provide access to healthcare, including family planning and abortion. In this context, Portugal includes a provision that guarantees "In order to protect the family, the state shall particularly be charged with: (d) with respect for individual freedom, guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned." (art. 67.d).[28]

As noted in the example of Portugal, some countries of the OECD include provisions that protect the family as an institution. Some countries, such as Colombia and Mexico, mention that it is the obligation of the State to protect and even promote the family, however, they also include a provision that regarding family planning to protect the right of couples or individuals to decide when and how many children they want to have. In the case of Colombia, for example, in the context of the protection of the family, the Constitution establishes that "the couple has the right to decide freely and responsibly the number of their children" (art. 42). In the case of Mexico, the Constitutions establishes that "every person has the right to decide, in a free, responsible and informed manner, about the number of children desired and the timing between each of them. (art. 4)." These norms can be interpreted as protecting the right of women to make decisions in relation to reproduction and on the number of children to have.

Special measures

While the elimination of discrimination is important in achieving gender equality, a commitment to achieving substantive equality between men and women often calls on states to take specific actions that may be incorporated in the constitution. Provisions may include the passing of laws, policies or programmes aimed at granting preferential treatment for women that may be temporary (e.g. quotas) or permanent (e.g. maternal healthcare, parental leave), or that provide incentives that target women's exercise of the above-mentioned rights (e.g. education programmes).

Apart from the examples of special measures mentioned in the previous sections, the constitutions under study include other types of measures. In Spain for example, the constitution broadly mandates "special protection of mothers" (art. 39.2), while that in Switzerland establishes the creation of a maternity insurance scheme (art. 116.3). Similarly, the constitution of Portugal protects mothers and establishes that "women shall possess the right to special protection during pregnancy and following childbirth, and female workers shall also possess the right to an adequate period of leave from work without loss of remuneration or any privilege" (art. 68). New Zealand also grants preferential treatment to women during pregnancy or childbirth.[29]

Enforcement

The mechanisms of enforcement of the rights of women and the prohibition of discrimination on the grounds of gender are found in the larger mechanisms of protection of fundamental rights enabled in the constitutions under study. Beyond these mechanisms, constitutions may establish a national women's or gender commission or other institution in charge of developing a national agenda or policy on gender and women's rights. The constitution of Sweden, for example, includes a provision that authorises the Committee on the Labour Market to prepare matters concerning "equality between women and men, insofar as these matters do not fall to any other committee to prepare" (art. 13). Many other countries opt to rely on other types of legislation to establish the gender machinery.

Rights of children and young people

Many constitutions recognise the rights of children and young people (CYP).[30] Some states have recognised that CYP are vulnerable because of their relative lack of power and inability to vote. CYP are therefore often dependent on adults. Constitutions frequently require the state to recognise minimum rights standards for CYP, especially when the state regulates childcare and families. As noted above, many constitutions also recognise the rights of "future generations" as a part of environmental rights. CYP rights are also connected to the rights to social security, healthcare and education discussed above. CYP moreover will often be protected by fundamental rights against aged-based discrimination. The rights of CYP are also prominent in international law; the Convention on the Rights of the Child is one of the most recognised international human rights treaties.

Constitutions tend to balance the rights of children to a minimum standard of care (and the state's role in guaranteeing that care) against the rights of parents to raise children as they see fit (e.g. in line with religious or cultural beliefs). Many constitutions address this balance by stating that parents have *rights*, but also *duties*. For example, the German Constitution states that "the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty" (art. 6). Article 6(3) allows the state to separate children from their parents or guardians, but only if they "fail in their duties or the children are otherwise in danger of serious neglect". Article 37 of the Portuguese Constitution clarifies that "parents shall possess the right and duty to educate and maintain their children" and limits the circumstances under which children can be separated from their parents. The Spanish Constitution recognises similar rights in an aspirational manner.

Many constitutions also contain individual rights for CYP. The Finnish Constitution protects the right of children to be treated as equals, and to "influence matters pertaining to themselves to a degree corresponding to their level of development" (art. 6). In addition to a general right to protection, the Portuguese Constitution also contains specific language regarding the development of CYP, child labour, education, housing, and leisure (arts. 69-70). The Swiss Constitution also requires the state to "take account of the special need of children and young people to receive encouragement and protection" (art. 67) in furtherance of their development (art. 11).

Some constitutions protect the rights of CYP in the criminal justice system. The New Zealand Bill of Rights Act 1990, a statute that has constitutional significance, guarantees "the right, in the case of a child, to be dealt with in a manner that takes account of the child's age", whenever children are charged with a criminal offence (section 25). Similar rights are included in the charters of several Australian states. A number of constitutions, including those of Germany (art. 6(5)) and Portugal (art. 36(4)), prohibit discrimination against children based on whether they were produced in or outside marriage.

Digital rights, emerging technology rights and the right to privacy

As digital technologies are increasingly used in the daily activities of people, governments and businesses, opportunities to improve the efficiency, transparency and inclusiveness of their use emerge. Alongside new opportunities, the digital government, economy and society also generate risks in terms of ethics, privacy, security and equity. Governments have a critical role to play in guaranteeing that the digital disruptiveness under way does not harm fundamental rights and pillars of democratic societies. Legal and regulatory frameworks need to be in place to enable governments to seize opportunities and navigate the complexity brought about by digital transformation (OECD, 2014[20]). For example, online interactions have taken existing rights such as those related to freedom of speech and privacy to new dimensions. New technologies have also created new potential rights such as Internet access and protection of genetic material. Validity of and respect for fundamental rights and democratic values in the digital sphere are thus becoming increasingly relevant, and in some cases this is reflected in constitutional text.

Many constitutions include general privacy protections, the importance of which has been exacerbated with the increased risks to privacy posed by the use of digital tools. Examples include Portugal (art. 26(1)), Spain (art. 18), and Germany (arts. 1, 2, 10). In each of these countries the right to privacy is enforceable through intense (strong-form) judicial review. In the United Kingdom and in two Australian states, privacy is protected through mild (weak-form) review.

Courts have often interpreted the general right to privacy, as well as other constitutional rights, as protecting personal data. The German Constitutional Court has interpreted constitutional guarantees of "personality" and "dignity" as an individual's right to decide on the disclosure and use of personal data. In doing so it has struck down inconsistent legislation, and the German Government has legislated for digital privacy rights in accordance with this judicial interpretation. The Court's reasoning has been influential in Latin America where many countries, such as Argentina (art. 43), have included a "habeas data" right in their constitution that allows individuals to view government information held about them.

Other constitutions contain explicit provisions. The constitution of Switzerland, for example, provides that "every person has the right to be protected against the misuse of their personal data" (art. 119(2)). Other constitutions task public authorities with legislating in this area. The constitutions of Finland (art. 10) and Portugal (art. 26) both contain general privacy rights and direct legislatures to enact data protection laws. Article 35 of the constitution of Portugal also contains an extensive and specific set of data privacy protections, combining individual rights (such as a person's right "to access all computerised data that concern him" (art. 35(1)) and directives ("the law shall define the concept of personal data" (art. 35(2)).

Other constitutional provisions reflect specific concerns raised by new technologies. One example is the use of genetic materials. In Portugal, article 26 directs that the law shall "guarantee the personal dignity and genetic identity of the human person". This directive can also be found in the constitution of Switzerland, which justifies restrictions on the use of genetic materials with reference to "the protection of human dignity, privacy, and the family" (art. 119).

As more services become accessible primarily online, some constitutions have included a right to Internet access. The constitution of Portugal provides that "everyone shall be guaranteed free access to public-use computer networks" (art. 35(6)), while the constitution of Mexico directs the state to "guarantee access to information and communication technology, access to services of radio broadcast, telecommunications, and broadband Internet" (art. 6). The recently revised OECD Recommendation on Broadband Connectivity (2021) includes provisions on eliminating digital divides and reducing barriers in broadband deployment. Rights of use and management of the radio spectrum, net neutrality, accessibility, digital literacy and access to public services regardless of the channel are also relevant to ensure universal access to online information and public services.

Consumer rights

Although most countries have legislation relating to consumer protection, relatively few include consumer rights in their constitutions. When included they concern the quality and safety of consumer goods and consumers' ability to access information, and may also protect the rights of consumer associations. These rights have the potential to conflict with other rights such as freedom of speech (when advertising or labelling is regulated)[31] and labour rights (which affect the production of consumer goods).

The Portuguese Constitution includes provisions relating to advertising, the quality of goods, training and information, health and safety, and reparations for damages (art. 60). It also includes consumer protection as one of the grounds on which individuals can bring *actio popularis* proceedings (which make it easier to bring cases to court). The constitution of Argentina allows individual consumers to bring lawsuits to defend their consumer rights (art. 43), while the constitution of Spain contains directive principles requiring public authorities to "safeguard the protection of consumers" and "regulate domestic trade and the system of licensing commercial products" through legislation and regulation (art. 51).[32]

Finally, the Spanish and Portuguese Constitutions both include protections for consumer associations. Article 51(2) of the constitution of Spain directs public authorities to "foster the organisation" of consumer associations so that they receive state support, are heard in relation to consumer protection issues, and represent their members.

Key options and questions to consider

Models of entrenchment

One approach to the entrenchment of constitutional rights might best be described as "minimalist". As noted, Australia and New Zealand do not constitutionally entrench any ESCNRs in the strictest sense of the word.[33] At the national level in New Zealand and in two subnational units in Australia there are statutory bills of rights that contain some ESCNRs.[34] Although ordinary legislation, they are considered quasi-constitutional in the sense that other legislation is to be interpreted in accordance with the principles they lay out and, where this is not possible, the statutory bill of rights will take precedence over the other legislation unless that legislation explicitly states the contrary.

The German Constitution guarantees very few economic or social rights explicitly. Reference is made to the importance of children and education; however, to the extent they are dealt with in the context of rights, it is to assert that the state can oversee and regulate in those areas but is not explicitly obliged to provide the relevant goods or services. As noted above, however, the German Constitutional Court has determined that the constitution requires provision of a minimum level of social assistance to those in need. Although the "strength" of international treaties is not explicit in the constitution, judicial decisions suggest that they have the same status as legislation; as such, they cannot be used to invalidate laws passed by the legislature.[35]

As previously noted, constitutionally entrenched ESCNRs can be either justiciable or aspirational. In terms of enforcement, an additional layer of complexity is added by the possibility of strong-form and weak-form judicial review. The Finnish Constitution employs the justiciable model of ESCNR entrenchment, although the text of the rights themselves stipulates that their specific details are to be given effect by legislation. The same is largely true of the Portuguese Constitution.

Not all constitutions assign the same strength or review process to all the ESCNRs (or other rights) that they include. In many, the distinction is made explicit by including rights in different sections of the constitution and including specific details regarding their enforceability. The Spanish Constitution, for example, includes ESCNRs in three separate sections. Two of these contain justiciable rights[36] –including those to education, to join or form a trade union, and to strike – that can be challenged directly via the

courts. The “Principles Governing Economic and Social Policy” contains rights that are aspirational only, such as those to social security, housing, and healthcare. However, even here in one of the more straightforward cases, there is a degree of complexity. These aspirational rights cannot by themselves be used to challenge the state; yet to the extent that the state has legislated in a particular area (as it is generally directed to do by the text of aspirational rights), the rights can be used in court to the extent that the legislation permits challenges (art. 53(3)). The Swiss Constitution adopts a similar model, leaving the state with a wide variety of detailed obligations relating to economic and social rights issues. However, with limited and contestable exceptions relating to basic education, child protection, trade unions, collective bargaining and (possibly) social assistance, they are directive principles of state policy that cannot form the basis of a legal challenge.

There could be valid reasons to adopt any one of these approaches, or to pick and choose elements from them in crafting a set of ESCNRs for inclusion in a constitution. The decision to make some rights justiciable, others aspirational, and exclude still others from constitutional protection should be made in the full light of day by those with a knowledge of and experience with the people, groups and institutions to which the document will apply. Experience with benchmarking countries suggests that it is also important to clearly specify whether and when a particular right is to be judicially enforceable as well as by whom and in what venue(s).

Accessing the courts

Courts can only adjudicate cases, including constitutional rights cases, that arrive before them instigated by users of the legal system. As such, the accessibility of the justice system is a key determinant of the ability of litigants to bring forward their claims and uphold their fundamental rights. Individuals, groups and businesses can face different barriers to effectively accessing the court. Some of them stem from the formal institutional rules, while others are more informal barriers, such as the complex language and procedures of the courtroom, which are often difficult to comprehend and may well be intimidating or even frightening to poorer or less well educated individuals. There can also be geographical and cost-related barriers (OECD, 2019[21]). Formal institutional rules determine what types of claims can be considered and when, who can bring them, and what court(s) are able to adjudicate them. These matters are discussed in more detail in Chapter 6.

In many jurisdictions individual-driven rights litigation is thought unlikely, often because of financial barriers. Advancing claims, particularly those based on constitutional rights, could be difficult given the associated high costs which are likely to be beyond the reach of most individual actors. While in criminal trials there is, either as a matter of law or policy, a widespread tendency to make legal aid available for those unable to afford the costs themselves, that is much less common with respect to rights claims. The tendency is therefore to rely on the legal assistance sector (NGOs and law firms acting pro bono) to support such litigation (OECD, 2019[21]).

Many Latin American countries, including Colombia and Mexico, have put procedural mechanisms in place to expedite claims relating to individual rights violations (*tutela* and *amparo*, respectively). Although these procedures lower barriers to accessing the courts, the increased level of access could also lead to a high volume of cases, which can generate backlogs and in turn slow the efficiency and effectiveness of the judicial system. In 2019 for example, there were over 200 000 right-to-health *tutelas* in Colombia (La Tutela, 2020, p. 63[22]).

A number of other strategies have been adopted to improve access to justice in the field of fundamental rights – some at the level of the constitution, others via statute or policy. In some instances, an autonomous section of the public prosecutor’s office will take on the responsibility of advancing claims of this type, as is the case in Brazil. An alternative approach is to include an obligation to assist in reconciling the offending issue or action in the mandate of a Human Rights Commission or other such institutions.[37] Some common

law jurisdictions, such as in Canada, have also established a fund to support constitutional claims through the appeals process if they have the potential to shed light on important concerns or clarify the law.

Judicial interpretation and progressive realisation

In practice, constitutionally guaranteed ESCNRs have been interpreted in two principal ways. The first is as administrative law principles, so that social rights are understood to allow individuals or groups to have their rights considered in a meaningful manner that results in a reasonable solution. These are procedural or justificatory rights that expose to "rational" scrutiny what might otherwise be considered "political" decisions. This model of rights interpretation is most commonly associated with the South African Constitutional Court. Secondly, they have also been interpreted as representing directly realisable guarantees that may well require judicial definition of their contents. These are absolutes which, if abrogated, entitle the bearer to a court order mandating explicit levels of expenditure and/or actions by the state in order to ensure realisation. This approach is most frequently associated with litigation relating to the provision of medicines and medical treatment in the Brazilian courts.

These are, however, general characterisations. The particulars of how constitutionally entrenched ESCNRs will be interpreted will vary from jurisdiction to jurisdiction, likely even from right to right. Constitutional documents articulate general rights and principles that, like all abstract normative values and beliefs about the appropriate ordering of social relations, must be translated into specific directives and obligations taking into consideration contextual factors. This translation process is not a straightforward or uncreative exercise, but neither is it an exercise involving the unrestricted articulation of judges' policy preferences. The way in which the rights are framed – for example, whether the constitution guarantees access to medical treatment regardless of ability to pay, or sets out a general right to healthcare that the state is required to take steps to progressively realise – will have a significant impact on judicial interpretation, as will explicit instructions regarding what can and cannot serve as the basis of legal claim. However, constitutions cannot conceive of every possible set of circumstances; at some point, the judiciary (and others) will need to apply the general principles and guarantees it expounds to specific circumstances.

The reality of scarce resources and the timelines involved in infrastructure and human capital development means that regardless of what one may desire, not all rights can be realised immediately, nor are they likely to progress evenly. With respect to ESCNRs in particular, their proximity to (and in many cases overlap with) what have traditionally been considered political matters means the judges must be cognisant of the context in which they are deciding while maintaining their role as arbiters of the law. This is often a difficult balance to strike, but for rights to be given effect in a meaningful way it is a necessary role; to a certain extent, judges – as is the case with public officials – must be accorded a degree of trust if the state is to function reasonably fairly and effectively. At the same time, the statements of public officials and judges alike must not be believed simply by virtue of the office they hold. Often, an important guarantor of fairness and justice is likely to be an informed and engaged general public to oversee the system. In addition, in most continental Europe systems, the economic and social rights entrenched in the constitution need to be elaborated in more detail in legislation.

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Notes

[1] For example, the rights to vote, to free expression, to practice the religion of one's choice, and to not be discriminated against based on gender, ethnicity, race or disability. Civil and political rights will not be analysed here.

[2] Of the 64 constitutions promulgated between 2000 and 2016, only 3 contained no economic or social rights; on average they contained nearly 10 such rights (Rosevear, Hirschl and Jung, 2019[25]).

[3] Strong and weak rights are discussed in the next section.

[4] For example, the provision of basic education for all may result in overall improvements in economic productivity and competitiveness, generating both additional revenue for the state to devote to rights realisation and reduce the proportion of the population in need of state assistance.

[5] However, several US states do have constitutions that guarantee a right to education.

[6] The German Constitution explicitly includes the rights to unionise and to the environment. Its text has also been interpreted as imposing certain obligations on the state regarding social welfare and digital rights. In Canada indigenous and language rights are constitutionally entrenched, and the existence of a right to strike is a matter of debate in the courts.

[7] In this context, "direct" effects are those that occur via the enforcement of specific judicial decisions (e.g. the provision of medical treatment to a litigant who was seeking it). "Indirect" effects include things such as raising public awareness of specific rights-related issues, the promotion of public debate and calls for reform, and policy changes in response to the cost of complying with multiple adverse decisions relating to a specific policy or programme (Rodríguez-Garavito, 2011[24]).

[8] New Zealand and the United Kingdom do not have constitutions in the contemporary sense – a single document that lays out a country's political structure, allocates powers, and identifies rights and responsibilities. However, they do have legislation that outlines citizen and group rights that are recognised by many as having near or "quasi-" constitutional status, although it can technically be amended or repealed by a simple legislative majority. The most prominent of these are the New Zealand Bill of Rights Act and the UK Human Rights Act.

[9] For example, in light of the widespread use of arbitrary arrest and detention validated by various emergency orders and national security laws during the 1970s and 1980s, the article outlining the rights of the arrested, detained, and accused (Art. 35) in the post-apartheid constitution of South Africa consists of 41 clauses, sub-clauses, and sub-sub-clauses that take up three pages of the constitutional document. In addition to precluding such actions in the future, it also serves as a declaration of the principles and practices that are to guide the country's new constitutional era.

[10] For example universal access to healthcare, adequate housing for all who need it.

[11] Although it does guarantee a limited number of procedural rights, the Australian Constitution does not contain a separate bill of rights. However, three subnational units—the Australian Capital Territory and the states of Queensland and Victoria—have enacted human rights legislation intended to promote consideration of such matters in the legislative process (Staub, 2019[23]).

[12] As noted above, New Zealand does not have a written constitution in the contemporary sense. It does, however, have a set of legal instruments, including the New Zealand Bill of Rights Act and the Treaty of Waitangi, which are recognised as being of constitutional significance (Keith, 2019[26]).

[13] Here too, there is an element of uncertainty as no specific amount or definition of "basic living expenses" is provided.

[14] The 26 Swiss cantons are the federal member states of the Swiss Confederation.

[15] Analysis of the right to education is complicated by the tendency for education to be the responsibility of subnational governments in federal countries. In Switzerland and Germany for example, authority over and responsibility for the provision of basic education lies with the cantons and *Länder,* respectively.

[16] This idea has received renewed attention in recent years with pilot projects being either discussed or implemented by governments in Canada, Finland and the Netherlands (see e.g. *Basic Income as a Policy Option*, 2017).

[17] New Zealand, for example, has a flat-rate pension funded from general revenues (*Pensions at a Glance 2019*).

[18] This jurisprudence is based on the German Constitution's identification of Germany as a social welfare state – *Sozialstaat* – governed by the rule of law – *Rechtsstaat*.

[19] In particular via the UN Declaration on the Rights of Indigenous Peoples and Convention 169 of the International Labour Organization.

[20] The OECD Well-being Framework covers 11 current dimensions (income and wealth, work and job quality, housing, education, health, environmental quality, safety, civic engagement, social connections, subjective well-being, and work-life balance) and 4 resources for future well-being (human, natural, economic and social capital).

[21] www.lemonde.fr/planete/article/2020/12/15/emmanuel-macon-veut-reformer-la-constitution-pour-y-integrer-la-preservation-de-l-environnement_6063409_3244.html.

[22] Constitutional Assessment, 2016, p. 23.

[23] The constitutions of Australia and New Zealand (bill of rights) do not include an equality provision.

[24] While Spain, Portugal, Finland, Germany, New Zealand and Australia mandate prohibition based on "sex", Switzerland and Colombia prohibit discrimination based on "gender". While these provisions do not define either sex or gender, the first denotes biological differences while the latter is related to socially constructed roles.

[25] None of the constitutions of the OECD countries under study specifies "one or more grounds".

[26] The rest of the constitutions under study do not include any explicit constitutional protections in this area.

[27] Global Database on Violence against Women. https://evaw-global-database.unwomen.org/en

[28] The rest of the constitutions under study do not include any explicit constitutional protections in this area.

[29] New Zealand, Human Rights Act 1993, s. 74.

[30] Laws often differentiate between “children” and “young people”/”youth”. “Children” usually refers to a younger age bracket, typically those who are unable to make decisions for themselves. “Young people” usually refers to an older age bracket, such as teenagers, who are capable of making some decisions for themselves.

[31] This is illustrated by the complex and controversial “commercial speech” doctrine in the United States. For more information, see www.law.cornell.edu/wex/commercial_speech.

[32] The Spanish provision is not enforceable by courts, unless provided for in specific legislation or regulation.

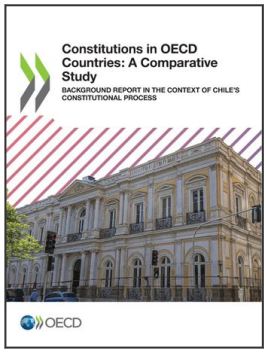
[33] The one possible exception to this is the Treaty of Waitangi, which has constitutional status in New Zealand and outlines rights related to indigeneity and culture.

[34] Courts in these countries have also developed doctrines requiring the state to act in accordance with international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights.

[35] The exception to this is the European Convention on Human Rights, which appears to have a quasi-constitutional status (Kadelbach, 2019[27]).

[36] Articles 15-29 (Fundamental Rights and Public Freedoms) and articles 30-38 (Rights and Duties of Citizens).

[37] For example an Ombudsperson with a generalist remit, or specialised agencies with expert knowledge in particular areas such as housing or the environment.



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