

United Nations Development Programme



Protecting Human Rights in Constitutions



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United Nations Development Programme



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Foreword

As the supreme law of a nation to which all other law is subordinate, constitutional guarantees of human rights are vital in cementing human rights protections and ensuring legal accountability for their realization. As such, provisions on fundamental rights and freedoms enshrined in constitutions provide strong legal means to respect, protect and promote human rights, especially in combination with constitutional provisions that ensure effective enforcement mechanisms, which is vital for lasting peace, justice and inclusive societies.

While a human rights-based approach has been a longstanding feature of United Nations development assistance, the need to mainstream human rights into development programming has become a matter of particular urgency at this time in history. Democratic values are being eroded across the globe as governments grapple with how to respond to the COVID-19 pandemic, the global economic shocks created by the pandemic and other economic forces, and the environment under attack. People are calling for social justice and human rights to be realized for all, irrespective of their sex, race, colour, language, religion or belief, political or other opinion, gender identity, national, ethnic or social origin, wealth, birth or other status.

The Sustainable Development Goals (SDGs) confirm the central importance of constitutions to lasting peace and justice. Constitutions frame the approach of States to social and economic development and poverty reduction (SDGs 1-4, 7-11), gender equality and women's empowerment (SDG 5), reducing inequality (SDG 10), environmental protection (SDGs 6, 12-15) and fostering peaceful, just and inclusive societies (SDG 16). Support to constitution-making and constitutional reform processes is thus a cornerstone of United Nations Development Programme's (UNDP) support for the 2030 Agenda and the achievement of the SDGs, as well as the Decade of Action's prioritization of solutions that catalyse simultaneous progress on multiple SDGs.

Protecting Human Rights in Constitutions is a guidebook that delivers practical and accessible advice for securing human rights in constitutions. It identifies the rights one would expect to find in a democratic society which complies with international human rights norms and standards; describes the scope of each right and the different protections it seeks to afford; and provides examples of the way the right has been translated into different constitutions, as well as references to the international treaties and standards that enunciate the right. In this way, it is designed to develop the capacity of UNDP staff, other international constitutional assistance providers, and national partners engaged in constitution-drafting processes to promote the effective inclusion of human rights in constitutions. By providing examples from older and more recently adopted constitutions from around the globe, and constitutions of both long-standing and newer democracies, it also hopes to stimulate exchanges through which constitution makers can draw inspiration from constitutional provisions of similarly situated countries.

This guidebook contributes to, and complements, the support that UNDP provides to a range of national partners and stakeholders in writing or amending their constitutions. It also complements UNDP's larger efforts in achieving lasting peace and sustainable development, and in contributing to establish a culture of respect for the rule of law, as well as in embedding human rights principles in UNDP's work to build integrated and sustainable solutions for people and planet.



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Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child (1990)
AfCHPR	African Charter on Human and Peoples' Rights (1981)
AmCHR	American Convention on Human Rights (1978)
ArCHR	Arab Charter on Human Rights (2004)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women (1979)
CRC	Convention on the Rights of the Child (1989)
CRPD	Convention on the Rights of Persons with Disabilities (2006)
ECHR	European Convention on Human Rights (1953)
EUCFR	European Union Charter of Fundamental Rights (2000)
HRC	United Nations Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination (1965)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
ILO	International Labour Organization
NGO	Non-governmental organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
Ref Conv	Convention Relating to the Status of Refugees (1951) and the 1967 Protocol
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples (2007)
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change (1992)
UNODC	United Nations Office on Drugs and Crimes

Introduction


People expect constitutions to respect, protect, and promote human rights.¹ To do so effectively, a constitution should include:


- A list of the human rights that are protected. The list usually appears in a special chapter in the constitution, sometimes called a “Bill of Rights” or “Charter of Rights”.
- Provisions setting out how the rights operate: who enjoys them, who is bound by them, who can enforce them, and so on.
- Clear directives as to which rights may be limited or restricted, and the criteria for any limitations, including provisions ensuring that rights are protected during states of emergency.
- Mechanisms enabling people to demand and supervise the enforcement of rights, including an independent and impartial judiciary.
- A system of democratic and accountable institutions that have the authority and capacity to protect and enforce rights.

Protecting Human Rights in Constitutions addresses only the first three issues. This does not imply that the way in which a constitution addresses the enforcement of rights is less important than the list of rights, but only that the study of the institutions and mechanisms for the enforcement of rights is beyond its scope. Neither should the focus of this guidebook on charters of rights suggest that the protection of rights is provided through the charter of rights alone. On the contrary, the charter of rights must be complemented by constitutional values and principles that reinforce it. Thus, constitutional preambles frequently assert a country’s commitment to respecting human and civil rights. Also, constitutions may establish general basic principles that assert the dignity of all people and the importance of respecting human rights in provisions not directly linked to the charter of rights, and they may expressly require that the country’s public administration and security services promote rights. Such provisions may not be directly enforceable through law on their own but may influence the interpretation of other constitutional provisions and contribute to building a human rights culture and an understanding that human rights form the bedrock of the State. Furthermore, rights are not self-enforcing. An independent and impartial judiciary is essential to the protection of rights, as are other mechanisms, such as national human rights institutions, that promote the protection of rights. Similarly, rights cannot be protected and promoted unless the State has the capacity to do this: a democratic system of government with strong accountability mechanisms is essential for a proper protection of human rights.

¹ Some constitutions refer to “rights and freedoms” rather than “rights” or “human rights”. This does not affect the way rights provisions work. Here we have chosen to use the term “rights” (or “human rights”) because it is the most frequently used in international conventions.

The guidebook is divided in two parts.

 **Part A** provides an introduction to the general issues relating to the protection of human rights in constitutions. Section 1 of Part A frames the issues and describes how rights are usually categorized, the relationship between rights and duties, the ways in which rights may protect disadvantaged groups and individuals, as well as the possible role of rights in tackling climate change. Section 2 examines different ways to organize and articulate rights in a constitution and how decisions may be made about which rights to include. Section 3 is more technical and focuses on the scope of rights, i.e., who enjoys rights, who is bound by them, how they are limited, and so on. Section 4 provides a brief description of the relationship between constitutional rights and international law, and Section 5 discusses the protection of rights during states of emergency.

 **Part B** offers a brief account of the human rights that are usually protected in democratic societies that adhere to international human rights norms. It also provides examples of how rights are worded in different constitutions and references to the international agreements that protect the different rights.

Most importantly, this guidebook should not be seen to offer a checklist or a compendium of best practices: rights provisions in a constitution are closely bound to the legal, social, political and economic context in which they are drafted and enforced and, therefore, universally applicable model provisions are inappropriate. Instead, it is hoped that readers will treat it as an introduction and refer to the immense body of work on human rights, some of which is directed to helping constitution makers, for more information. (Much useful material is available online.) In using *Protecting Human Rights in Constitutions*, readers should also note that constitutions change constantly. When excerpts are provided, as far as possible, the date of the latest available version of the constitution is indicated. These references will, of course, not be accurate when a constitution has been replaced or amended after going to print. Nonetheless, whether or not the provision is still in force, it may suggest possibilities to constitution makers.

Part A



The Framework for Protecting Rights in Constitutions





1. Introduction

People have fought for rights for millennia – some view the ancient Persian Cyrus cylinder, which is 2,500 years old, as the first human rights document, and many religions include some form of rights in their fundamental texts, for example. Our modern understanding of rights began to develop about 300 years ago. Since the late 18th Century, many constitutions have included rights, with the number of rights being included increasing steadily after 1800.²

The expression “human rights” emerged only in the 1930s, however. Slowly, after the adoption of the Universal Declaration of Human Rights (UDHR), its use became more common. At the same time, the protection of rights in constitutions expanded. The UDHR itself incorporated many rights that had been included in constitutions before it was adopted. But, importantly, since its adoption, it has had a significant influence on what rights are enshrined in new constitutions.

1.1 “Categories” of human rights

The concept of human rights stems from the idea that individuals must be protected from tyrannical government: the idea of “civil and political” rights to protect individuals from excessive state action emerged directly from the struggles of people against the oppressive use of power. They include the rights to security of person, freedom of expression, equality, property, and a fair trial, among others. Over time it became clear that limiting constitutional rights to “civil and political” rights did not secure equal respect and dignity for all persons. Consequently, the list of rights that constitutions sought to secure expanded to cover what are now commonly referred to as “social, economic and cultural rights”. These include the rights to work, to safe and healthy working conditions, to food, to housing and to education. “Group rights”, to which individuals are entitled as members of a group, or that make sense only if they are exercised by a community, are often considered as yet another, separate category of rights. Although particular rights that may be designated group rights, such as language rights, have been recognized in many places for a long time, the idea of group rights remained somewhat contentious until relatively recently. Now, however, group rights have become widely accepted. They include rights directly associated with specific groups of people, such as indigenous peoples, and collective aspects of rights like the right to a clean, healthy and sustainable environment.

In the past, these three categories of rights (civil and political rights; economic, social and cultural rights; and group or collective rights) were sometimes referred to as first, second and third generation rights because this is roughly the sequence in which they were formally recognized. This three-way categorization is problematic for a number of reasons. In particular, it may be taken to suggest that there is a hierarchy of rights, with first generation rights being most important and, it does not provide an accurate depiction, since all the rights are deeply interrelated. As the 1993 Vienna Declaration states: “All human rights are universal, indivisible and interdependent and interrelated.” The right to equality, for example, has both individual and group elements as it may have specific implications for some individuals because they are members of a particular group. Moreover, the categories are not particularly relevant when drafting a constitution: the important thing to consider is a practical way to secure different rights.

2 Zachary Elkins, Tom Ginsburg and Beth Simmons, “Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice”, *Harvard International Law Journal*, Vol 54, No.1 2013, pp. 61-96.

1.2 Duties and responsibilities

Constitutions may impose responsibilities (duties) on individuals; for example, a duty to serve in the military or to treat the environment with respect. In addition, the fulfilment of a human right may impose duties on individuals. An individual's right to marry, for example, involves a duty on others not to force that person into marriage against their will. The right to freedom of expression cannot be exercised in a way that infringes on another's right to privacy. These responsibilities are implicit in the concept of rights and in the way in which constitutions regulate the limitation of rights (see Part A 3.4). Occasionally, such corresponding duties are set out expressly. For example, provisions on the rights of the child often include a clause about parents' duties to care for children.

Crucially, while constitutions contain implied and express duties relating to the fulfilment of rights, the rights themselves are still inalienable. Therefore, no one should ever be deprived of a right simply because they have not fulfilled a duty (for example, no one should lose the right to vote because that person acted in a manner that violated someone else's privacy).

Constitutions sometimes include lists of duties and responsibilities with provisions such as "It shall be the duty of every citizen of India ... to uphold and protect the sovereignty, unity and integrity of India" (Constitution of India, Article 51A). Similarly, Article 7 of the Constitution of Vanuatu sets out fundamental duties of "every person" including the duty "to work according to his talents in socially useful employment...". Again, it is an infringement of rights to make exercising them dependent on the fulfilment of such responsibilities or duties, even if the responsibilities or duties are set out in the constitution. For example, it is incompatible with the concept of inalienable human rights to refuse to uphold and/or protect the rights of people who fail to fulfil various civic duties, such as participating in community service. This does not mean that the State cannot enforce civic duties, and impose penalties, such as fines or even imprisonment, for a failure to fulfil them. What a State cannot do is make the exercise of rights conditional on fulfilling such duties; this would infringe international human rights law.

Sometimes, a law may impose a duty on citizens to exercise a right. For example, over 20 countries make voting compulsory.³ In most cases, this is not problematic because a failure to fulfil the duty to vote does not affect a person's right to vote or any other right. In a very small number of countries, however, not voting may lead to citizens being deprived of the right to vote in the future or of access to other social goods. This deprivation of the right to vote or to access social goods would usually be considered an infringement of rights.

1.3 Paying special attention to disadvantaged, marginalized and excluded individuals and groups

Historically, constitutions have generally done a poor job protecting people who have limited or no access to public life or to economic resources, like women, persons with disabilities and members of minorities or marginalized communities. Even where constitutions would seemingly protect disadvantaged groups, for example through an equality provision, in the face of real, structural social inequality, constitutions have not been particularly successful in securing the protection of their rights.

Three main, complementary approaches to drafting constitutional rights address this concern.

- First, rights charters may include clauses that set out the rights of specific groups, addressing practices of particular concern to them and authorizing special measures to deal with particular challenges. For example, constitutions routinely include specific clauses listing the rights of the child.

3 For information on compulsory voting see <https://www.idea.int/data-tools/data/voter-turnout/compulsory-voting>.

Many recent constitutions include provisions specifically concerned with women and their rights to marry only with their free consent, to own land, to an inheritance and to make decisions concerning their health, including reproduction, among other things. Similarly, even more recently, constitutions have expressly acknowledged and sought to address the specific concerns of persons with disabilities, the elderly and marginalized groups. (See Part B 1.4.)

- The second approach is mainstreaming. This means that the situation of members of disadvantaged groups is not merely addressed in special provisions for those groups, but their situation is taken into account in relation to the entire bill of rights and every provision in it. For example, in addition to exclusion from public life, women suffer disproportionately from violence, and women belonging to ethnic or religious minorities or indigenous groups are especially vulnerable. To respond appropriately to these situations, general rights provisions applicable to all persons can expressly encompass such specific concerns and be carefully crafted so that they do not (perhaps inadvertently) make it more difficult to secure substantive equality. Thus, the right to health care should include reproductive health; the right to freedom from violence should apply to domestic violence; and so on. Special attention to minority languages may be important in fair trial provisions to ensure that adequate interpretation is provided in trials. For persons with disabilities, including the right to gain access to polling stations is an important element of the right to vote. Mainstreaming, however, will not always require a specific mention of the matters affecting disadvantaged groups. Sometimes the scope of the rights will implicitly provide specific benefits for these groups. For instance, protecting civil society groups may open opportunities for disadvantaged groups to participate in the public arena. Including social and economic rights in a constitution can have special relevance for women, who bear the burden of care for children and the elderly, and who are consequently more likely to be economically vulnerable than men.
- Third, constitutions may include provisions to operationalize the protections for specific groups. For instance, to foster women's participation in public life, legislatures and other public bodies may be required to include women and, sometimes, to meet a set quota; special commissions, such as gender commissions, may be mandated to address the situation of disadvantaged groups; and the civil service and security services may be required to ensure gender equity and equity towards marginalized groups in their employment practices.

UNDP's 2016 policy guidance, *Women's Rights in Constitutions: Global Good Practices in Advancing Gender Equality and Women's Empowerment in Constitutions*, is an important source on securing women's rights in constitutions.

1.4 What about the climate?

Climate change is likely to be on the agenda of all constitution-making processes going forward. As noted in Part B 3.1, environmental rights such as the right to a clean, healthy and sustainable environment have been included in constitutions for many decades. Increasingly, however, they are supplemented by other provisions, some of which refer directly to climate change and the rights of future generations. Many provisions concerned with climate change are not framed as rights but, instead, impose obligations on the State, or, possibly less strongly, are part of a set of principles of state policy that may not be considered to be enforceable by courts. Nonetheless, as both the German Constitutional Court and the Nigerian Supreme Court have demonstrated, it is possible that these provisions will be interpreted as rights.⁴ They are also increasingly used to guide the implementation of rights.

4 Neubauer et al. v Federal Republic of Germany, German Federal Constitutional Court, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, (24 March 2021); Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation (NNPC), SC 319/2013, (2019) 15 Nigeria Weekly Law Report 1666 (20 July 2018).

Clear provisions setting out the State's obligation to protect the environment, stop climate change and mitigate its impact are important, and rights directly linked to climate change issues, such as rights protecting a sustainable environment and securing proper living conditions, clean water and so on are a central part of this. Additionally, as litigation on climate change shows, other rights such as the rights to access to information and fair administrative action that, for example, enable people to challenge government policy on energy and contractual arrangements within the extractive industries, ensure that government policies on energy and contractual arrangements with mining companies can be scrutinized and, if necessary, challenged. Ideally, rights are complemented by constitutional arrangements making access to the courts easier than it usually is. Examples include permitting public interest litigation (see Part A 3.5), requiring government transparency and citizen involvement in decisions about natural resources (including rights of indigenous peoples to limit deforestation and other degrading land uses), ensuring that the use of land is principled and takes social and environmental interests into account (perhaps through an independent land commission), clarifying that rights belong to all people and not citizens alone (for climate refugees, for example), incorporating international obligations into national law, and obliging the State to consider the climate implications of all its decisions, among many others.



2. Drafting charters of rights

2.1 Identifying the rights

There is no single correct list of rights to include in a charter of rights and no two charters of rights are identical.

- **Some constitutions include more rights than others.** More recent constitutions often contain more rights than older ones, presumably reflecting the increased attention to rights worldwide and the impact of comparative knowledge – constitution drafters learn from other constitutions and international developments and adopt those ideas. In some contexts, rights are included to address particular social problems. For example, the 2013 Fiji Constitution includes the right to reasonable access to transportation in response to the importance of transportation for access to services between islands that in some cases are great distances apart.
- **Different constitutions contain different rights.** Some rights are found in virtually all constitutions but many constitutions contain rights that are found in only some other constitutions. A major distinction here is between constitutions that include social and economic rights and those that do not, although it is rare for new constitutions to omit social and economic rights altogether.
- **Including international human rights commitments.** Although there is no international obligation to implement international human rights through a constitution, constitutions and particularly charters of rights, are a good starting point. Accordingly, many constitutions include the State's international human rights obligations in some way. For example, constitutions usually include some rights that are part of the State's international obligations in their list of rights. Constitutions sometimes also identify significant human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and incorporate them directly into domestic (that is national) law. Some constitutions require the rights that they enshrine to be interpreted in a way that is consistent or informed by international human rights law. (Various ways in which constitutions deal with international human rights law are discussed further in Section 4 below.)

2.2 Choosing the words

Just as there is no single correct list of rights to include in a constitution, there is no single correct way to draft the rights provisions. This section examines ways in which charters of rights are structured and worded.

Constitutions may include rights in different ways:

- **Rights may be included with varying levels of detail.** For example, some constitutions simply protect the right to a fair trial while others explain in detail what this right entails. Some constitutions have a single equality clause, others include a general equality clause as well as specific clauses to spell out what is required to secure equality for disadvantaged, marginalized or excluded individuals or groups, as discussed in 1.3 above. Decisions about how much detail to include are often based on a country's history. Where rights have been systematically abused, constitutions are likely to include greater detail. For example, although the right to freedom of expression is generally construed also to protect the media, Kenya's history of arbitrary State action against the media led to the inclusion of specific rights for the media in the 2010 Constitution, in addition to the right to freedom of expression. Experience in implementing rights is another reason for adopting more detailed provisions. For example, the equality provision in the United States of America's Constitution says merely that: "No State shall deny to any person within its jurisdiction the equal protection of the laws." The vagueness of this provision has at times allowed for interpretation that has left some vulnerable groups unprotected and restricted the measures that may be taken to remedy inequality. To prevent this, among other things, more recent constitutions have included detailed equality clauses that, for example, expressly permit affirmative (or positive) action (sometimes referred to as "reverse discrimination").
- **Rights may be clustered in different ways.** For example, the right to security of person may specifically include the right to be protected from unreasonable searches by the State. On the other hand, sometimes protection from unreasonable searches is covered under a general privacy clause.

The choice of words (and the degree of detail) of rights provisions is determined by many factors, including:

- **The legal tradition of a country.** At a formal level, words may carry different meanings in different jurisdictions. For example, the term "due process" captures a wide range of fair trial guarantees in some countries but not in others. Similarly, the concept of "public order" has a different legal history in different countries.
- **The approach chosen to limit (restrict) rights.** As discussed in Part A 3.4, few rights operate absolutely (important exceptions include the prohibition on torture which is absolute). Modern constitutions set out permissible limits (or restrictions) on rights. The approach chosen to limiting rights affects the way in which individual rights are worded.
- **How language in previous constitutions has been interpreted.** If in the past a right has been interpreted in a way that gives people strong protection, the language of the previous charter might be maintained to ensure that approach is maintained. If a right was interpreted too restrictively in the past, the language may be revised to promote change.
- **Using the language of international human rights.** Constitution makers may choose to use language taken directly from international instruments. The way in which human rights are framed in international agreements is seldom copied verbatim in a constitution, however. Usually this is because international human rights instruments establish minimum global standards, and national constitutions are often expected to offer more robust protections.

Moreover, since the international agreement was adopted, there may have been developments in the understanding of particular rights both at the international level and in countries that apply them as well as challenges in enforcing them at a domestic level. The constitution needs to respond to these things.

- **The way neighbouring countries or countries with similar legal traditions have worded rights.** A new constitution may follow the wording used in a neighbouring constitution that is perceived to be successful, assuming that the way the right has been interpreted in that country will be followed, because courts are frequently influenced by judicial decisions in neighbouring countries.
- **Commitment to clear language.** If constitution drafters are committed to making the constitution broadly accessible, the charter of rights will be drawn in simple and clear language. This involves using comprehensible language that, nonetheless, is legally sound.

2.3 Avoiding sham rights

Although there are many ways in which rights may be formulated, some formulations that may appear to protect rights fail to do so:

- **Fundamental principles.** Sometimes provisions formulated as rights appear in a part of the constitution headed “fundamental principles” or “founding principles”, or in a special section headed something like “directive principles” (see Part B 2) and not in the chapter on rights. It is possible that courts will find ways to make these provisions enforceable or use them when they interpret the constitution. In particular, directive principles have been used in some countries to grant people some social and economic rights and, more recently, to enable the use of rights to fight climate change. However, unless the constitution states clearly that the provisions included under such headings are enforceable and that enforcement mechanisms apply to these provisions as well, there is a significant risk that they will not create entitlements. Instead they may be merely aspirational or may have only political rather than legally binding effect. Enforcement usually comes only with the designation “rights”.
- **How rights are limited.** Most rights may be limited or restricted in certain circumstances. Sometimes a right may be formulated in a way that gives the State the power to limit it in ways that remove most of its value or negate it completely. This is discussed in more detail in Part A 3.4.
- **Is a law needed to enforce rights?** In some legal traditions a constitutional right must be put into an ordinary law before it is binding. Sometimes, even if this is not strictly correct, this argument is used as an excuse to block attempts to enforce rights that are not also incorporated in ordinary law. To prevent this, the constitution should state unambiguously that no further law is required for rights to bind the state.



3. How human rights work: Operational provisions

Stating a right in a constitution is merely a first step towards people's full enjoyment of the right. For the full realization of rights the constitution must also address a range of "operational" issues, including:

- **The status of rights?**
What is the status of rights in the constitutional framework?
Do they take priority over ordinary law?
- **Who enjoys the rights?**
All people in a particular country? Citizens only? Individuals only? Legal bodies like companies and other organizations?
- **Who is bound by the rights?**
Only the State and public officials? Corporations and/or private persons as well?
And, what does it mean to be bound by them?
- **When and how can rights be limited (restricted)?**
- **Who can demand the enforcement of rights?**
Only the person directly affected by the breach of the right? Others?

Many older constitutions leave these questions more or less unanswered (e.g. United States 1789 and France 1958). This means that courts fill in the legal gaps over time as they are confronted with cases that raise the questions. Other constitutions (such as the German Basic Law of 1949 and the South African Constitution of 1996) contain important operational provisions that address these questions directly.

Clear constitutional provisions answering these questions facilitate the practical enjoyment of rights and reduce the possibility of blocking their application by technical and procedural arguments.

3.1 The status of listed rights

Constitutions are expected to set out a country's basic framework for governance and commitment to the rule of law and protection of rights. This means that rights secured in a constitution are superior to ordinary law and cannot be limited or restricted by other laws unless special circumstances set out in the constitution exist (see Part A 3.4). Sometimes constitutions state this specifically in order to dispel any ambiguity. The Constitution of Ghana (below) provides an example. The South African Constitution is even clearer in asserting that not only law but also conduct (such as the actions of State officials) must comply with it, specifically stating in Section 8 that all State institutions are bound by the Constitution including, of course, the Bill of Rights.



Ghana, 1992 (rev. through 1996)

Supremacy of the Constitution

Article 1. (2) This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.



South Africa, 1996 (rev. through 2012)

Supremacy of Constitution

Section 2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Application

Section 8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

3.2 Who enjoys rights?

By definition, human rights belong to all human beings and, in some cases, to groups or communities (such as indigenous communities). To emphasize that everyone enjoys rights, some constitutions spell out that non-citizens and stateless persons enjoy rights.



Finland, 1999 (rev. through 2018)

Section 7. Everyone has the right to life, personal liberty, integrity and security.



Bolivia, 2009

Article 14. III. The State guarantees everyone and all collectives, without discrimination, the free and effective exercise of the rights established in this Constitution, the laws and international human rights treaties.

VI. Foreigners who are in Bolivian territory have the rights, and must fulfill the duties, established in the Constitution, except for the restrictions that it may contain.



Estonia, 1992 (rev. through 2015)

Article 9. The rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia.

3.2.1 Human rights for institutions and organizations

Sometimes the rights in a charter of rights are extended to bodies or institutions other than individuals or communities.



South Africa, 1996 (rev. through 2012)

Section 8. (4) A juristic person [legal person] is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

This provision allows entities such as corporations, civil society organizations, trades unions or political parties to claim rights in certain circumstances. For instance, a legal person may want to assert its right to property to protect its assets from being seized by the State. But the cautious wording of the South African provision (“to the extent required by the nature of the rights and the nature of that juristic person”) allows courts to limit the rights that legal persons may claim.

3.2.2 Human rights for citizens only

Some constitutions secure certain rights for the country’s citizens only. This is generally unacceptable because human rights belong to everyone and restricting them to citizens is usually unacceptable discrimination. However, there are two common exceptions: some aspects of the right to take part in public affairs, like the right to vote and the right to stand for election; and the right to freedom of movement, such as the right to enter a country, may be restricted to citizens. The 1966 ICESCR also

recognizes that developing countries may have legitimate reasons to restrict economic rights like the right to work (but not social rights) to citizens.

States generally have an obligation to ensure that non-citizens are treated equally, however, equality provisions should include nationality and citizenship as impermissible grounds for discrimination.



Finland, 1999 (rev. through 2018)

Section 14. Every Finnish citizen who has reached eighteen years of age has the right to vote in national elections and referendums. Specific provisions in this Constitution shall govern the eligibility to stand for office in national elections.

3.3 Rights are legally binding

Most obviously, rights bind State actors. Often, however, rights apply more broadly. Two issues arise in this context: (i) who is bound by the rights; and (ii) what obligations do rights impose on those bound by them?

3.3.1 Who is bound?

The State

Human rights started as guarantees secured by people to protect them from abuse of power by the State. Many constitutions contain provisions that clearly affirm that rights bind public authorities in their exercise of power. This means that all branches of government (legislative, executive and judicial) at all levels of the State (national, regional and local), as well as any other State bodies (such as commissions, State owned corporations and educational institutions that receive public money, for example), are bound by human rights.

See South Africa's Section 8 (above) and Germany (below):



Germany, 1949 (rev. through 2020)

Article 1. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Individuals and non-State entities

Although the idea of human rights developed in response to the abuse of power by the State, certain rights, like the right to form a trade union and the right to strike, obviously must bind non-State actors as well. Moreover, it is now recognized that big corporations and other non-State bodies and individuals wield considerable power and may commit serious rights abuses (including discrimination, environmental degradation, substandard working conditions, etc.). In many countries, human rights obligations apply to private institutions through ordinary legislation, like labour and anti-discrimination law. In addition, many constitutions now stipulate that everyone is bound to adhere to human rights, not only State authorities. The Guiding Principles on Business and Human Rights, unanimously endorsed by the Human Rights Council in 2011, provide a non-binding but authoritative framework for assessing the corporate responsibility to respect human rights and the requirement for the State and businesses to provide access to effective remedy for victims of business-related abuse.⁵

5 For a more detailed discussion see: United National Development Programme, HRDD Training Facilitation Guide, UNDP Business and Human Rights in Asia (2021), available at <https://www.undp.org/publications/human-rights-due-diligence-training-facilitation-guide>.

There may be situations in which it is not appropriate to bind non-State actors by rights provisions. For instance, it is agreed that corporations are not responsible for securing all aspects of the right to education. (They may, of course, have an obligation not to stand in the way of people trying to enjoy the right, as is the case with agricultural corporations based in remote areas that may need to facilitate transport to schools for children living on their estates.) For this reason, constitutional provisions binding private parties to respect the rights of others are carefully worded, as Portugal (Article 12) and Namibia (Article 5) show.



Portugal, 1976 (rev. through 2005)

Article 12. (2) Bodies corporate shall enjoy such rights and be subject to such duties as are compatible with their nature.



Namibia, 1990 (rev. through 2014)

Article 5. The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Ecuador (Article 88) and Colombia (Article 86) take a slightly different approach by spelling out specific circumstances when a non-State actor can be sued.



Ecuador, 2008 (rev. through 2021)

Protection proceedings

Article 88. Protection proceedings ... can be filed whenever there is a breach of constitutional rights ... when the violation proceeds from a particular person, if the violation of the right causes severe damage, if it provides improper public services, if it acts by delegation or concession, or if the affected person is in a status of subordination, defenselessness or discrimination.

The text of Ecuador's constitution purports to restrict the circumstances in which non-State actors are bound to respect rights further than the Portuguese and Namibian approaches, but both approaches are heavily dependent on judicial and legislative interpretation and, in practice, the differences in outcomes may be small.

3.3.2 What obligations do rights impose on the State?

International human rights law has developed a useful way to understand the obligations established by rights. The obligation that rights impose goes beyond merely refraining from infringing rights: the State must respect, protect, and fulfil rights. In some cases, this requires considerable action from the State, as with the right to vote. The State must adopt laws for elections and run them. The obligation to respect means that the State must not interfere with the enjoyment of this right (e.g. it must not infringe on a person's right to vote by setting unreasonable conditions). The obligation to protect requires the State to provide safeguards to individuals and groups against abuses of their rights (e.g. by preventing people from obstructing another person's access to a voting booth). And the obligation to fulfil means that the State must act positively to secure the enjoyment of human rights (e.g. the State must take reasonable measures to make voting possible for people living in remote places and facilitate access to voting booths to persons with disabilities).

Some constitutions, such as Fiji's, add an obligation for the State to promote rights. This includes an obligation to promote public awareness of rights through education, public outreach, and the creation and support of bodies that promote and protect rights.



Fiji, 2013

Application

Section 6. (2) The State and every person holding public office must respect, protect, promote and fulfil the rights and freedoms recognised in this Chapter [the Chapter on Rights].

The different types of obligation that human rights impose are often discussed in terms of a distinction between positive and negative aspects of rights. This distinction helpfully clarifies important aspects of what rights mean in practice and is important to consider when drafting or reviewing rights.

Negative aspects of rights are those that require the State or others to refrain from doing something (for example, not to practice torture or not to detain people without trial). In contrast, positive aspects of rights require action. The right to vote, mentioned above, provides a good example of a right with positive aspects, because it requires the State to run elections, among other things. It is seldom, perhaps never, possible to classify a right as entirely positive or negative. Most rights, like the right to vote, impose both negative and positive obligations.

Because human rights as we know them now originated in attempts to protect people from the power of the State, negative aspects of rights are often most familiar – the aspects of rights that prohibit certain State (or private) action. When writing a constitution, however, consideration of the positive aspects is important as well. In some cases (right to vote, fair trial), it is obvious that the right has positive aspects. For other rights, the positive aspects may be less clear. For instance, does the individual right to personal security require the State to take active steps to prevent criminal action? Does the right to housing extend beyond the right not to be arbitrarily deprived of housing to a right to possess a house? Section 26 of South Africa's Constitution (right to housing) is an example of a provision that sets out both negative and positive aspects of the right.



South Africa, 1996 (rev. through 2012)

Housing

Section 26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Finally on the positive and negative aspects of rights, the enforcement process for rights with extensive positive aspects requires careful thought, and the enforcement of the positive aspects of social and economic rights raises particularly difficult questions. These are discussed in Part B 2.

3.4 Limiting or restricting rights

As already noted, few rights are absolute, applicable in all circumstances without any exceptions, and many constitutions expressly permit rights to be limited (or restricted) in some way. Moreover, every law that regulates human activity carries with it at least the potential for the limitation of some right. For example, freedom of expression is routinely limited by legal prohibitions against defamation, inciting violence and holding noisy gatherings outside hospitals or late at night. Freedom of movement is limited by traffic rules, rules relating to detention and imprisonment (as for persons detained to stand trial and for convicted criminals) and immigration rules.

However, limiting rights carries the danger of undermining them. Accordingly, limitations must be carefully controlled by ensuring that any restriction (limitation) of a right complies with the principles of legality, legitimate purpose and proportionality, and does not permit breaches of the State's international human rights obligations.

3.4.1 How rights are limited

Constitutions take different approaches to the fact that rights must be limited in certain circumstances. They may:

- Be silent on how rights may be limited.
- Permit rights to be limited in a way that provides little or no protection of the rights (clawback clauses).
- Permit rights to be limited in ways that protect the rights by restricting the permissible goals and extent of limitations. Such constraints on the limitation of rights may be secured through specific limitation clauses for individual rights or through a general clause that applies to all rights, or both.

The Constitutions of the United States and Argentina, for example, do not address the limitation of rights at all. This effectively leaves the issue to the courts. If the judiciary is sufficiently independent and respected, this approach may empower them to adopt a protective stance towards rights. On the other hand, a weaker judiciary will allow the State a relatively free hand to limit rights.

The 1951 Libyan Constitution and 1971 Constitution of Egypt (now both replaced) provide examples of an approach to limiting rights that, in effect, leave the rights entirely unprotected because they place no restrictions on the way in which the rights may be limited.



Libya, 1951 (repealed)

Article 25. The right of peaceful meetings is guaranteed within the limits of the law.



Egypt, 1971 (now replaced)

Article 47. Freedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally or in writing or by photography or by other means within the limits of the law.

These provisions may be interpreted in the spirit of a charter of rights intended to protect people, and thus could provide real protection. Without an exceptionally strong and secure judiciary, however, such provisions give a government that is uncommitted to the protection of human rights almost unlimited discretion to limit rights. Thus, they are referred to as “clawback” clauses: they appear to grant rights but then allow the State to remove them (claw them back) through ordinary laws. For example, in Egypt under the 1971 Constitution, a law was passed that prohibited any public discussion of the president’s health on public security grounds and rules were passed that prohibited any public criticism of the police, of the army, or of the courts. It became almost impossible to criticize the State. This meant that freedom of expression was essentially non-existent, despite a broad and generously worded right.

Today the two main approaches to controlling the way rights may be limited is through specific limitation clauses and general limitation clauses. A specific limitation clause is a clause connected to a particular right that sets out the purposes or means by which that right may be limited. A general limitation clause is a single set of instructions for how all rights in a constitution, or a particular body of rights, may be limited. Each of these approaches has benefits and drawbacks, and their impact depends very much on how the clauses are written and applied. Most importantly, as noted above, whether a constitution uses specific limitation clauses or a general one or a combination of both, for rights to be properly protected, the clauses need to ensure that any restriction on a right complies with the principles of legality, legitimate purpose and proportionality as well as international human rights law.



General and specific limitation clauses: Benefits and drawbacks

Specific limitation clauses are tailored to each right. They can set out the ways and circumstances in which a particular right may be limited. The ambit and limitations of rights are clear to the public. But specific limitation clauses may be inflexible, making it difficult to respond to new situations. They usually also set very general criteria for limiting rights, such as “national security,” “public morals” and “public safety”. Although attempts have been made to define them, for example in General Comments of the Human Rights Committee (HRC) such as General Comment 37 on Article 21 (the right of peaceful assembly), criteria like these are susceptible to abuse. (Note: The ICCPR uses specific limitations.)

A general limitation clause applies to all rights. They are flexible, allow limits on rights to be crafted and tested as circumstances change, and encourage a consistent approach to limiting rights because the same test is used in relation to all rights. But the lack of specificity of a general clause may create space for abuse of limitations; the way it is applied will depend first on the ability of legal drafters and finally on the orientation of courts. In addition, a general limitation clause gives little indication to people of what individual rights may mean in practice and how they may be restricted.

Specific limitation clauses

Specific limitation clauses vary, but they are usually tailored to some extent to the specific right to which they are attached and are aimed at preventing arbitrary restrictions of that right.



Finland, 1999 (rev. through 2018)

The right to privacy

Section 10. (3) Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. In addition, provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act.

The ICCPR has been an influential guide on framing limitation clauses, and although its language on limitations is not always tailored to the particular right, it provides a good guide for constitution drafters.



ICCPR, 1966

Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The limitation formula used in Article 21 of the ICCPR and many other articles, captures the principles of legality, legitimate purpose and proportionality mentioned above in requiring limitations to be done by law (legality), to be intended to achieve only listed, legitimate goals (legitimate purpose), and to be proportionate to those goals (the limitation must be “necessary”). The limitation of rights is not to be easy. In particular, the term “necessary” in the ICCPR provisions is intended to set a high bar for limitations. In some constitutions, however, the protection offered by the ICCPR’s insistence on

necessity is weakened by replacing the necessity requirement with a reasonableness requirement (a requirement that limitations on rights must merely be reasonable). This change is undesirable because it increases the scope for the State to limit rights.

The interests listed in Article 21 as grounds for limiting rights are susceptible to interpretation. For example, the ICCPR's acceptance here and elsewhere of restrictions necessary to protect public morals has become controversial because it can easily be used as a cover for imposing restrictions on rights for political reasons. Important guidance on how to interpret these provisions is provided, for example, in HRC General Comments on specific rights.

General limitation clauses

General limitation clauses set out the means and purpose necessary for the limitation of all rights in the constitution. These clauses are flexible and allow limits on rights to be crafted and tested as circumstances change. They also encourage a consistent approach to limiting rights because the same test is used in all cases in relation to all rights. The language of a general limitation clause must be broad because it applies to all rights, but drafters should avoid open-ended or ambiguous language that will allow for arbitrary limitations.



Canada, 1867 (rev. through 2011) Constitution Act, 1982

Article 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society.



South Africa, 1996 (rev. through 2012)

Limitation of rights

Section 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.



Tunisia, 2022

Article 55. No restrictions shall be placed on the rights and freedoms guaranteed in this Constitution except by virtue of a law and for the necessity of a democratic order, the protection of the rights of others, national defense, public security, or public health.

These restrictions must not affect the essence of the rights and freedoms guaranteed in this Constitution, and they must be proportionate to their objectives and consistent with their justifications.

No revision may prejudice the gains and freedoms of human rights guaranteed in this Constitution and all judicial bodies must protect rights and freedoms from any violation.

The concepts captured in these clauses are discussed below, but note the differences and similarities:

- Canada's general limitation clause is short, and its meaning has been developed by the Canadian Supreme Court, which is Canada's top court for all matters.
- South Africa's limitation clause is more detailed. Its formulation provides guidance to legislators who may wish to limit certain rights and to the courts that adjudicate the constitutionality of a limit on a right. Its wording uses concepts taken from international human rights law and Canadian case law among other sources.
- Tunisia's limitation clause references many of the same elements as South Africa's clause, but it also specifically indicates that it is the responsibility of the courts to protect rights, thus recognizing the judiciary's role in protecting people from violations of their rights by the executive and legislature.

Commonly, constitutions with general limitation clauses also include some rights that have specific limitations attached to them. For example, Section 22 of South Africa's Constitution states: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." The second sentence means that the right to choose a trade, occupation or profession can be regulated but may not be entirely removed. Any law regulating a trade, occupation or profession would also have to comply with the general limitation clause in the Constitution.

When a general limitation clause is used, it is preferable not to attach specific limitation clauses to particular rights. Specific limitation clauses will hinder the development of a clear framework within which citizens and legal professionals can understand rights and the legitimate scope of limitations. Nonetheless, specific and general limitations clauses can work beneficially together if, for example, perhaps for historical or political reasons, a particular type of limitation of a right needs to be expressly prohibited.

3.4.2 Content of limitation clauses

As already noted, to protect rights from arbitrary restrictions, limitations must meet three core requirements: they must (i) comply with the principle of legality (be established by law and not be arbitrary); (ii) have legitimate purposes; and (iii) be proportionate to the purpose of the limitation.⁶

Legality: limits on rights must be set by law and not be arbitrary

The principle of legality requires any limitation of a right to be authorized by law. This, in turn, means that the process of establishing limitations on rights must be constitutional and not arbitrary. Usually, the principle of legality also requires limitations on rights to be: (i) general (of general application) and not designed to apply to a specific person or case; (ii) accessible, that is, they must be published and not secret; and (iii) clear and comprehensible. This does not necessarily mean that every limitation must be fully and immediately understood by everyone; for instance, limits on the right to information concerning security held by the state may require relatively technical drafting.

In some countries, laws establishing limits on the rights must be adopted by the legislature. In other countries, rights may be limited by other laws, such as regulations issued by the executive (sometimes called subordinate legislation). However, executive regulations must still be authorized by the constitution or by a law adopted by the legislature, that is, rights cannot be limited by executive fiat.

⁶ Many international instruments, such as the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by the American Association for the International Commission of Jurists in 1985, capture these standards.

Some constitutions expressly state that limitations must be general and that a person's rights cannot be restricted by a law designed with a specific individual or individuals in mind. For example, Section 36 of South Africa's Constitution says that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application". This means that a law limiting a right may not be directed at one particular case only. Article 18 (3) of the Portuguese Constitution (below) achieves the same effect by requiring limitations to "possess an abstract and general nature":



Portugal, 1976 (rev. through 2005)

Article 18. (3) Laws that restrict rights, freedoms and guarantees shall possess an abstract and general nature and shall not possess a retroactive effect or reduce the extent or scope of the essential content of the provisions of this Constitution.

Purpose: limits on rights must have legitimate purposes

Limitation clauses should require any restriction of a right to serve a legitimate purpose. Some constitutions specify categories of legitimate purposes in a list (Tunisia above), but these lists do not necessarily protect rights because despite attempts to contain them, the terms they usually use, such as public order, welfare and morals, are open to broad interpretations. The existence of a list should not lead to the assumption that any limitation that is claimed to fall within one of the matters included on it is acceptable. Limitation clauses should always require a reasonable link between the limit and the purpose or goal that the State intends to secure.

A number of constitutions clarify the idea of legitimate purpose by requiring limitations to be justified in a free and democratic society (for example, Canada's Charter of Rights and Freedoms, Section 1; South Africa's Constitution, Section 36; and Kenya's Constitution, Article 24). Tunisia's 2022 constitution retains the traditional list of reasons for restrictions but tempers the dangers of this approach by adding that any restriction must be necessary to secure the democratic order (Article 55). When the Tunisian courts apply this provision, they will be required to define what can be qualified as being "necessary" (a stiff test) and what a "democratic order" is. The test of what is acceptable in a democratic society has been useful in many countries.

Proportionality: limits on rights must be proportionate to the purpose of the limitation

The requirement of proportionality means that the seriousness of the limitation of the right should not exceed the benefit that the limitation is intended to achieve. The German judiciary has been at the forefront in developing the idea of proportionality, although the German Basic Law (Constitution) contains no direct reference to the concept. When deciding cases, German courts routinely check to ensure that acts of public authorities (whether legislative, executive, or judicial) are:

- pursuing a legitimate aim/interest.
- suitable to achieve this aim.
- using the mildest possible means.
- proportionate in relation to the extent of the limitation and the importance of the affected fundamental right.

Article 24 of Kenya's Constitution builds on this tradition:



Kenya, 2010

Article 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Provisions like these guide entities seeking to limit rights, as well as courts determining the constitutionality of restrictions.

3.5 Who can demand the enforcement of human rights?

For the effective protection of fundamental rights, it must be possible to challenge rights violations in court. However, most individuals whose rights have been violated do not have the time, financial resources or legal expertise to bring successful claims, particularly when they are up against actors such as the State or big corporations. A solution adopted by some constitutions is to allow for greater access to the courts by third parties. In legal terms, this involves giving “legal standing” to a wide range of people and institutions, such as human rights commissions, and non-governmental organizations (NGOs).



South Africa, 1996 (rev. through 2012)

Enforcement of rights

Section 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

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

The South African provision grants broad access to the courts, enabling parties with more resources or civil society organizations, for example, to bring claims on behalf of individuals who may not have the resources to litigate or may not be aware of their rights.



4. International human rights law and constitutions⁷

Most international human rights law is set out in treaties (international agreements) like the ICCPR and the ICESCR, among many, many others. These treaties bind those States that are party to them. In addition, peremptory norms of international law (*jus cogens*) that bind all States include human rights (such as the prohibitions of genocide, slavery, racial discrimination and torture).

For constitution makers, the important point is that international law that binds a State at the international level is not always part of the domestic law of the State. Whether or not international law becomes part of domestic law and thus enforceable in courts depends on what the State's constitution says and/or on the legal tradition of the country. As a result, constitution makers who want the State to adhere to international human rights norms and to enable people to enforce them by law, seek to provide for this in the constitution. This is not simple, however.

On the implications of treaty obligations for domestic law, the traditional distinction is between the so-called “monist” and “dualist” approaches:

- On the monist (incorporation) approach, treaties that the State ratifies at the international level are part of domestic law. Ratification occurs when a State signifies its consent to be bound, usually when the executive deposits an instrument of ratification in the manner set out in the treaty. In many countries the executive may ratify a treaty only if it has been approved by the legislature.
- On dualist (transformation) approach, treaties become part of domestic law only if they are specifically enacted into law, for example by an Act of Parliament. This process may not be set out in the constitution; it is often part of the country's legal tradition.

Although this distinction is superficially clear, in practice, there is a great deal of variation in the way in which treaties binding on a State become part of its domestic legal system.

First, even if treaties that are ratified by the State are deemed to be part of its domestic law, their status in the legal system may differ. There are several possibilities:

- Treaties may have the same status as other, “ordinary” law. If so, they are subject to the constitution and valid only in so far as they are consistent with the constitution. This is the case in Kenya and South Africa, for example.
- Treaties may be superior to ordinary law but subject to the constitution (Georgia).
- Treaties may have a status equivalent to the constitution. In such cases, all “ordinary” law must conform to treaties in the same way as it must conform to the constitution. This is the case in Greece and Poland. This approach raises the question of how inconsistencies between the constitution and the treaty are resolved.
- Treaties may be superior to the constitution. For example, it is sometimes said that the Netherlands constitution provides for supremacy of international treaty law. Some constitutions specifically grant international human rights treaties supremacy over domestic law, which is interpreted as including constitutional law (for example, Czech Republic, Slovakia, Romania, and Bolivia). In such a case, if there are inconsistencies between the constitution and the treaty, the treaty provision would prevail in the domestic legal system.

⁷ For a more detailed discussion see: United Nations Office of the High Commissioner for Human Rights, Human Rights and Constitution-Making (Geneva: United Nations, 2018).

Secondly, a constitution may differentiate among different treaties, stating, for example, that only certain, specifically identified treaties are part of the domestic law, or that only treaties concerning certain matters are part of the law. They may give certain treaties a special status in the domestic legal system, sometimes, as noted above, superior to ordinary law. For example, Article 75 (2) of the Argentina Constitution gives a list of ten human rights treaties the same status as the Constitution itself. The 2011 Constitution of South Sudan gives international human rights constitutional status by stating that “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill” (Article 9 (3)).

Thirdly, the provisions of a treaty may require a legal framework for their implementation and so, even in a so-called monist system, those provisions are not automatically accepted as part of the domestic legal system but need legislation for their implementation within the State.

Finally, domestic courts may develop legal techniques to avoid applying treaties directly⁸ or a court may interpret the domestic status of international human rights law generously, effectively expanding its impact.

This great variety in approaches across the globe does not mean that constitution makers can pick and choose. The way constitutional arrangements concerning international law will work in practice depends to a great extent on the legal tradition and practice of the country. This means that decisions about what constitutions say on the implementation of international human rights obligations within in the country need to be especially alert to the local context. If constitution makers wish to change the practice concerning the domestic status of treaties, constitutional provisions need to indicate that clearly.



Kenya, 2010

Supremacy of this Constitution

Article 2. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.



Georgia, 1995 (rev. through 2018)

Article 4. (5) The legislation of Georgia shall comply with the universally recognised principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia.

International human rights law and constitutional interpretation

Sometimes a constitution directs courts on how to interpret rights. The Spanish Constitution requires courts to interpret rights in line with its international obligations. The South African Constitution has a weaker provision, as it merely requires courts to “consider” international law.



Spain, 1978 (rev. through 2011)

Section 10. (2) Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.



South Africa, 1996 (rev. through 2012)

Interpretation of Bill of Rights

Section 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

8 International Law Association Study Group, “Principles on the Engagement of Domestic Courts with International Law: Final Report”, (Antonios Tzanakopoulos Co-Rapporteur)” (2016), para 21. Available at [conference-study-group-report-johannesburg-2016 \(ila-hq.org\)](https://www.ila-hq.org/publications-and-works/conference-study-group-report-johannesburg-2016).



5. States of emergency

Constitutions usually establish special processes and principles for states of emergency when a country faces exceptional circumstances that threaten life and security, like major natural disasters, health crises, invasions or armed conflicts. Such situations may justify exceptional measures that limit (or “derogate from”) human rights and, accordingly, standards have been developed to protect rights from unnecessary abuse during a state of emergency. Any limitation/derogation should follow a strict constitutional process and be narrowly construed to avoid abuse.

To maintain strong protection of human rights during a state of emergency, constitutions should include clear provisions stating: (i) the conditions under which a state of emergency may be called; (ii) the procedures for declaring, extending and terminating the state of emergency; (iii) appropriate restrictions on the government’s powers during the state of emergency; and (iv) that rights may not be limited unless it is entirely necessary.

The general provisions on a state of emergency should:

- Permit the declaration of a state of emergency only if there is a real public emergency and limit the measures taken to those strictly required by the emergency.
- Require an official declaration of the state of emergency by law and in a manner that ensures that the people affected by the declaration receive appropriate and sufficient information about it.
- Guarantee the right of people to challenge the declaration of the state of emergency itself and any laws issued or acts performed under it, as well as identify the courts that have jurisdiction over such matters.
- Set out the role of the legislature in approving the declaration or extension of the state of emergency and any extraordinary actions taken under it.
- Specify the permissible duration of the state of emergency and the conditions and procedures required to extend it.

In relation to the derogation from rights in an emergency, a constitution should:

- Establish a narrow framework under which derogation from any international or constitutional right is permissible only:
 - Pursuant to an officially declared state of emergency on the basis of a serious threat to the life of the nation.
 - When necessary to serve the goals of the state of emergency (usually to restore order).
- Limit the extent of derogation from rights. Under international legal standards, the constitution should:
 - List those rights from which derogation is never permitted. Article 4 of the ICCPR lists the following rights as non-derogable: right to life, prohibition on torture or cruel, inhuman, or degrading treatment, prohibition on slavery, prohibition of imprisonment because of inability to fulfil a contract, principle of legality in criminal law, recognition of everyone as a person before the law, and freedom of thought, conscience and religion. In addition, a State may not derogate

from rights in a way that conflicts with other international human rights obligations and may not take measures that discriminate. (On discrimination, the ICCPR states that measures taken under a state of emergency may not discriminate “solely on the ground of race, colour, sex, language, religion or social origin”.)

- Require derogation to be temporary and specify the timeframe and methods for extending it if necessary. Derogations must be lifted as soon as the situation permits.
- Require any particular derogation to be necessary and proportional to the severity and scope of the emergency. A declaration of a state of emergency does not automatically justify any derogation from rights.
- Prohibit any derogation from rights that is discriminatory as well as any discrimination in the implementation of laws permitting derogations. For example, if a law derogates from the freedom of movement by imposing a curfew, that curfew cannot apply only to members of a particular language group or ethnic community.
- Set out procedures for a valid derogation from rights: derogations must be set out clearly in a law that is publicly available and clear (that is, language that is comprehensible).
- Give people the right to challenge in court the legality of any derogation from rights.



Portugal, 1976 (rev. through 2005)

Suspension of the exercise of rights

Article 19. (1) Bodies that exercise sovereign power shall not jointly or separately suspend the exercise of rights, freedoms and guarantees, save in the case of a state of siege or a state of emergency declared in the form provided for in this Constitution.

(2) A state of siege or a state of emergency may only be declared in part or all of Portuguese territory in cases of actual or imminent aggression by foreign forces, a serious threat to or disturbance of constitutional democratic order, or public disaster.⁹



South Africa, 1996 (rev. through 2012)

States of emergency

Section 37. (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
- (b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

- (a) prospectively; and
- (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or

9 Article 19 continues to set out details about conditions for declaring a state of siege or emergency, their permissible duration, rights that must be protected, and what public authorities may do.

- (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—
- (a) the derogation is strictly required by the emergency; and
 - (b) the legislation—
 - (i) is consistent with the Republic’s obligations under international law applicable to states of emergency;
 - (ii) conforms to subsection (5); and
 - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—
- (a) indemnifying the state, or any person, in respect of any unlawful act;
 - (b) any derogation from this section; or
 - (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.¹⁰
- (6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:
- (a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.
 - (b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee’s name and place of detention and referring to the emergency measure in terms of which that person has been detained.
 - (c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
 - (d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
 - (e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
 - (f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
 - (g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
 - (h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

10 The Table of Non-Derogable Rights in the South African Constitution lists the constitutional provisions that may not be subject to derogation.

Part B



Human Rights



This Part of *Protecting Human Rights in Constitutions* discusses many of the human rights that are commonly protected in democratic societies based on the rule of law. It is not comprehensive and could not be because, with the exception of a relatively small core, there is enormous variation in the rights included in constitutions. Rather it provides an introduction to the most commonly included rights. It also provides examples of the language used in different constitutions and references to the international instruments that protect the right. The examples should not be taken as universal models to be copied without careful consideration. As explained in Part A, human rights need to be drafted according to the country's context, responding in particular to its political and legal history and traditions, and respecting its international human rights obligations.

The Part is divided into three sections:

- Civil and political rights.
- Social and economic rights.
- Group rights.

As explained in Part A, many discussions of rights follow these categories. The categories should not, however, be seen as rigid and constitution drafting needs to be guided by the fact of the indivisibility, interdependence and interrelatedness of rights.

The references to international instruments in each section point to the most prominent international instruments covering each right. These instruments and commentaries on them—such as the General Comments published by the United Nations human rights treaty bodies¹¹—are essential to better understand the scope and operation of the different rights.



1. Civil and political rights

Civil and political rights centre on the idea of protecting individuals and their private realm from abuses of State power. Among the oldest of these rights is the right to security of person, captured in many western systems by the right to require the State to bring a detained person to court so that proof that the person is alive is provided and the legality of the detention can be challenged. It is called habeas corpus.

As discussed in Part A, over time the category of civil and political rights has been expanded in several different ways to apply to some action by private entities as well as governments (see Part A 3.3.1); to include some positive obligations as well as negative restrictions on governments (see Part A 3.3.2); and to include collective or group aspects of rights it covers along with aspects focused on individuals (see Part A 1.1).

There have been periods in history when it was argued that civil and political rights are less important than social and economic rights. The argument was: “What is the value of the right to freedom of speech if a person is too hungry to speak?” Such arguments have now been acknowledged in the recognition of social and economic rights and in the principles of interdependence and indivisibility of all human rights. The conceptual foundation of civil and political rights, however, was to build a wall around certain aspects of individual freedom against excessive government interference. Protection of individual freedom against government tyranny is still a critically important project in every country in the world.

11 Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED).

1.1 Human dignity

The right to human dignity may be seen as the foundation of all rights. It means that every human being has intrinsic worth and is entitled to respect.

Dignity is a value common to all cultures, religions and traditions, and appears in most modern constitutions, sometimes as a principle (a binding norm that does not correspond with an entitlement) and sometimes as a right. It may also provide a standard for judging whether a limitation on a right is acceptable (see Part A 3.4). For example, the South African and Kenyan constitutions require limitations on rights to be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. Even if it is recognized as an underlying constitutional value, to be fully effective human dignity should also be included as a right unto itself so that it can be directly enforced and applied in interpreting and reinforcing other rights.

In many countries the right to dignity has played a foundational role in developing and implementing rights. For example, the right to dignity may be used to determine what distinctions between groups of people are acceptable (such as treating children differently from adults) and when distinguishing between people is unjustifiable discrimination. Furthermore, it guides determinations of what is prohibited inhuman treatment; it underpins the right to equality because it protects the inherent dignity of all people; and, because dignity protects the right of individuals to self-fulfilment (self-determination), it also provides a basis for protecting the right to privacy. For example, in the United Kingdom, the decision that depriving asylum seekers of the right to work is an infringement of the prohibition on inhuman and degrading punishment was based largely on a recognition that rendering people jobless and potentially destitute is a violation of human dignity and thus constitutes degrading treatment. In South Africa, courts have used the right to dignity in reaching decisions about how to balance conflicting rights claims such as those between landowners and homeless people squatting on the land.

The right to free development of one’s personality or identity (or self-fulfilment) is commonly understood as part of the right to dignity. Increasingly, however, it is included in constitutions as a separate right on its own (Colombia, Estonia). Similarly, a right to die or, in other words, a right to euthanasia or physician-assisted suicide, may be argued to be an aspect of the right to dignity (right to die with dignity).

Examples of provisions on human dignity



Germany, 1949 (rev. through 2020)

Article 1. [Human dignity - Human rights] (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.



Honduras, 1982 (rev. through 2013)

Article 59. The dignity of the human being is inviolable.



Andorra, 1993

Article 4. The Constitution recognises human dignity to be inalienable and therefore guarantees the inviolable and imprescriptible rights of the individual, which constitute the foundation of political order, social peace and justice.

Examples of provisions on free development of personality or identity



Colombia, 1991 (rev. through 2021)

Article 16. All individuals are entitled to the unrestricted development of their identity without limitations other than those imposed by the rights of others and the legal order.



Estonia, 1992 (rev. through 2015)

Article 19. Everyone has the right to freely develop his/her personality.

International instruments

AfCHPR, 5; EUCFR, 1; preambles of UDHR, ICCPR, ICESCR and UNESCO Constitution.

1.2 Right to life

The core element of the right to life is that life may not be taken arbitrarily. This means that lethal force may not be used unless it is absolutely necessary, such as when it is essential in self-defence or in defence of others.

The right to life can impose positive obligations on the State to protect individuals if it is aware that their life is in danger, or to investigate suspicious deaths. For example, if a prisoner is killed by a dangerous cellmate and the authorities knew that the killer was dangerous, the right to life may have been infringed. Similarly, positive measures should be taken to ensure that security forces do not take life in an arbitrary way and to prevent disappearances that may lead to the arbitrary loss of life. The obligation of the State to protect individuals extends to other obligations, such as to adopt policies that prevent child or maternal mortality and to regulate private entities, like transport businesses, that may endanger people's lives, among others.

A number of distinct issues concern the right to life, including the death penalty, fetal life (and the related question of abortion), and the right to a decent life.

The death penalty

The death penalty is a clear infringement of the right to life. The ICCPR permits the death penalty in limited circumstances (i.e. only for the most serious crimes, and after procedural guarantees, like a fair trial, have been fulfilled). The ICCPR and other international instruments also prohibit imposing the death penalty on children. Now, the Second Optional Protocol to the ICCPR is explicitly aimed at abolishing the death penalty completely, and Office of the United Nations High Commissioner for Human Rights (OHCHR), United Nations Office on Drugs and Crimes (UNODC), as well as the United Nations (UN) as a whole support the universal abolition of the death penalty, stressing notably the fundamental nature of the right to life, the unacceptable risk of executing innocent people, and the absence of evidence that the death penalty serves as a deterrent to crime, among other things.

In many countries, constitutions expressly prohibit the death penalty (e.g. Germany, Ecuador, Cape Verde, Mozambique). There are also countries in which the right to life has been interpreted as prohibiting the death penalty (South Africa). In these countries it is judged that the death penalty is not an acceptable limitation of the right to life. If a country decides to retain the death penalty, to comply with international law the constitution should define the narrow circumstances in which it may be imposed (see Zimbabwe below for an imperfect attempt to do this) and specify that:

- It may be imposed only for the most serious crimes. Consideration should also be given to clarifying what is not covered by the term "most serious crimes". For example, Human Rights Council resolution 36/17 states that the death penalty should not be imposed for "conduct such as apostasy, blasphemy, adultery and consensual same-sex relations".

- It may be imposed only in terms of a law and by order of a final court. It may not be imposed for crimes committed when a person was under 18 years of age. It may not be carried out on pregnant women. There must be an opportunity to apply for pardon or commutation of the sentence. It may not be mandatory for any crime.

Fetal life

In the context of the right to life, there are considerable differences in the treatment of the fetus. The American Convention on Human Rights is the only international human rights instrument that expressly deals with the application of the right to life from the moment of conception, but its wording—the “right shall be protected ... in general, from the moment of conception”—reflects disagreement among the Organization of American States member states: the phrase “in general” is read by some as an indication that the right does not necessarily extend to prohibiting abortion outright. Some States afford the right to life to the unborn, or at the moment of conception (Philippines, Chile, Honduras and Peru). This does not necessarily preclude access to termination of pregnancy (abortion) because the right to life before birth may come into conflict with other rights such as the mother’s right to life, dignity, privacy, health, freedom from cruel, degrading or inhuman treatment and equality. In such circumstances the right to life will have to be weighed against these rights.

Decent life

The right to life is sometimes understood to encompass the right to a decent life in which access to food and water, housing and health care, among other things, is secured. In effect this means that the right to life includes a guarantee of social and economic rights. This is the interpretation adopted by the Supreme Court of India regarding the right to life recognized in the country’s Constitution. But more recent constitutions usually protect the right to a decent life directly through enforceable social and economic rights.

Examples of provisions on the right to life



Finland, 1999 (rev. through 2018)

The right to life, personal liberty and integrity

Section 7. (1) Everyone has the right to life, personal liberty, integrity and security.



Cape Verde, 1980 (rev. through 1992)

The right to life and to physical and mental integrity

Article 26. (1) Human life and the physical and moral integrity of persons shall be inviolable. (2) No one may be subjected to torture, or to cruel, degrading or inhuman punishment or treatment; and in no case shall there be the death penalty.



Ecuador, 2008 (rev. through 2021)

Article 66. The following rights of persons are recognized and guaranteed: (1) The right to the inviolability of life. There shall be no capital punishment.



Zimbabwe, 2013 (rev. through 2017)

Section 48. (1) Every person has the right to life.

(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—

- (a) the law must permit the court a discretion whether or not to impose the penalty;
- (b) the penalty may be carried out only in accordance with a final judgment of a competent court;

- (c) the penalty must not be imposed on a person—
 - (i) who was less than twenty-one years old when the offence was committed; or
 - (ii) who is more than seventy years old;
- (d) the penalty must not be imposed or carried out on a woman; and
- (e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.

International instruments

AfCHPR, 4; AmCHR, 4, Protocol of 1990 (abolishing the death penalty); ArCHR, 4; CRC, 6; ECHR, 2, Protocols 6, 13.3; ICCPR, 6, Second Optional Protocol, 1989; UDHR, 3.

1.3 Recognition before the law

The right to recognition before the law, also known as “legal capacity”, has two dimensions. The first is to hold rights and be recognized as a legal person before the law (legal standing, see Part A 3.5). This includes having one’s birth registered and being granted a birth certificate. The second is to exercise one’s rights and have those actions recognized by the law (legal agency). Legal agency is what permits individuals to conclude legally binding commercial transactions (like buying goods or property), choose or refuse medical treatment, and get married. If a person without legal agency attempts to do these things, their actions will not be legally valid and will not be enforceable under law. Legal agency also means being able to litigate before the courts and enforce rights, including civil rights acquired through agreements or under ordinary law. The right to recognition before the law plays an important role in the context of equality because historically the oppression of women and other groups (e.g. racial and ethnic minorities) has involved a deprivation or reduction of legal capacity.

Recognition before the law secures people’s right to engage with the State and it protects their ability to conduct their affairs as they wish. It is a significant affirmation of individual autonomy, free will and personhood. For example, without a birth certificate, it may be very difficult to access other rights such as nationality, social security, secure housing, education and freedom of movement. However, the right to recognition before the law is not often explicitly articulated in a constitution as a separate right (to “legal recognition” or “legal capacity”). Instead it is most often implied in other rights, such as the rights to equality, which may be framed as equal recognition before the law, and to access to courts, etc. Also, although everyone has a right to their birth being registered and a birth certificate, this aspect of the right is often included under the rights of the child. All these approaches provide adequate protection.

Legal capacity is subject to certain generally accepted limits. Children, for instance, may be precluded from concluding legally binding agreements or may require parental approval for medical treatment. (In some countries, parental approval for medical treatment is particularly controversial with respect to access to contraception.) Historically, persons with disabilities have also faced partial or full deprivation of legal capacity (through guardianship arrangements or court declarations). These practices are being increasingly condemned, and Article 12 of the UN Convention of the Rights of Persons with Disabilities requires states to safeguard the right of people with disabilities to enjoy legal recognition on an equal basis with others, and requires any measures taken to prevent abuse to comply with the standards generally required for limiting rights (see Part A 3.4).

Examples of provisions on recognition before the law



Hungary, 2011 (rev. through 2022)

Freedom and responsibility

Article XV. (1) Everyone shall be equal before the law. Every human being shall have legal capacity.



Serbia, 2006

Right to legal person

Article 37. Everyone shall have legal capacity.

Upon becoming of age all persons shall become capable of deciding independently about their rights and obligations. A person becomes of age after turning 18. A person may choose and use personal name and name of their children freely.

International instruments

AfCHPR, 5; AmCHR, 3; ICCPR, 16; UDHR, 6.

1.4 Equality and non-discrimination

A good equality provision secures formal equality (that is, equality before the law and/or equal protection under the law) and substantive equality, which is aimed at ensuring what may be called “real” equality in practice (e.g. equal results, access and opportunities).

Most current constitutions protect the right to equality and non-discrimination. In the past, equality and non-discrimination were often seen as separate rights but, increasingly, they are addressed jointly. This is a more satisfactory approach because it acknowledges equality as an overarching right with a number of implementation mechanisms. For example, to secure equality, discrimination on unreasonable grounds is prohibited. In addition, special measures (affirmative or positive action) may be used to respond to the position of groups that have historically been denied equal opportunities with the rest of society.

Formal equality

A right to formal equality prohibits distinctions among people based on unfair grounds. For example, a law blocking women from being teachers would infringe the right to formal equality. This aspect of the right to equality is most often expressed in constitutions through an affirmative statement of equality as well as a prohibition of discrimination.

Constitutions now usually include a list of personal characteristics that may not ordinarily be used as a basis for making distinctions between people, such as sex, race, ethnic or national background, language, religion or belief, disability, gender identity, sexual orientation, pregnancy, political or any other opinion, and, more recently, age. The lists may differ slightly depending on a country’s history and culture, but they should be open-ended to prevent any type of unfair discrimination (South Africa and Ecuador offer examples of open-ended lists). Furthermore, because vulnerable people often suffer discrimination on several grounds (for example for being a woman and belonging to a marginalized group), the constitution should state clearly that discrimination on one or more of the listed grounds is prohibited.

The prohibition of discrimination should also cover indirect discrimination. Indirect discrimination occurs when a policy, practice or law that is seemingly neutral has an unequal impact on different groups and treats some groups unfairly (a height requirement of six feet for firefighters seems neutral but excludes women in disproportionate numbers). Some non-discrimination clauses, such as those in the constitutions of South Africa and Montenegro, state this expressly. South Africa’s Constitution also affirms that private actors may not discriminate (see Part A, 3.3.1).

Substantive equality

It is an infringement of formal equality to stipulate that only men may take senior jobs or that people from a particular ethnic group will not be considered for a job. However, the right to substantive equality may be infringed even when law or policy makes no reference to the identity of those who may be hired if no women are found in senior jobs, or when no member of a particular ethnic group is hired.

That absence would suggest systemic or structural impediments to their being treated similarly to others and to having access to similar opportunities. To remedy such situations and to achieve substantive equality, States may be required to take positive measures, like adopting quotas, and implementing targeted recruitment and preferential treatment. These measures may differentiate people on the basis of a technically prohibited ground such as race or gender. Although such positive measures are adopted to secure the overarching goal of equality, it is sometimes argued that they conflict with a commitment to non-discrimination. To make it absolutely clear that these measures are constitutionally permissible and promote rather than limit or infringe the right to equality, and to avoid much litigation, constitutions sometimes expressly state that they are permitted (Canada, South Africa).

Securing real equality for vulnerable groups

Increasingly, constitutions include provisions that set out the rights of particular groups that historically have suffered from systemic discrimination or oppression. Although these provisions may cover a wide range of issues and are sometimes classified as protecting group rights, in essence they strive to secure substantive equality for individual members of the group. By identifying matters that particularly affect the group, they also identify the special measures that can contribute to securing substantive equality for group members. See, for instance, Nepal on women's rights, Egypt on the elderly and Kenya on the rights of persons with disabilities.

These provisions can also serve political purposes: they assert unambiguously to members of such groups that they are entitled to be treated with dignity and respect as full citizens and reminds governments and law makers of their duty to end the disparate treatment of disadvantaged people.

Equality as an “accessory” right

More generally, equality acts as an accessory right that applies to the way other rights are implemented. For example, to enforce the right of access to justice equally may require building accessible entrances at courthouses or providing interpreters for witnesses testifying at trials to make the proceedings available to all.

Examples of provisions on equality and non-discrimination



Canada, 1867 (rev. through 2011) Constitution Act, 1982

Equality rights

Section 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.



South Africa, 1996 (rev. through 2012)

Equality

Section 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.



Montenegro, 2007 (rev. through 2013)

Prohibition of discrimination

Article 8. Direct or indirect discrimination on any grounds shall be prohibited.

Regulations and introduction of special measures aimed at creating the conditions for the exercise of national, gender and overall equality and protection of persons who are in an unequal position on any grounds shall not be considered discrimination.

Special measures may only be applied until the achievement of the aims for which they were undertaken.



Ecuador, 2008 (rev. through 2021)

Article 11. The exercise of rights shall be governed by the following principles: ...

(2) All persons are equal and shall enjoy the same rights, duties and opportunities.

No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law. The State shall adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality.

Examples of provisions on securing equality for particularly vulnerable people



Nepal, 2015 (rev. through 2016)

Rights of women

Article 38. (1) Every woman shall have equal right to lineage without any gender discriminations.

(2) Every woman shall have the right relating to safe motherhood and reproductive health.

(3) There shall not be any physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on religious, social and cultural tradition, and other practices. Such an act shall be punishable by law and the victim shall have the right to obtain compensation in accordance with law.

(4) Women shall have the right to access to participate in all state structures and bodies on the basis of the principle of proportional inclusion.

(5) Women shall have the right to special opportunity in the spheres of education, health, employment and social security on the basis of positive discrimination.

(6) Both the spouses shall have equal rights in property and family affairs.



Egypt, 2014 (rev. through 2019)

The elderly

Article 83. The state shall guarantee the health, economic, social, cultural and entertainment rights of the elderly, provide them with appropriate pensions to ensure them a decent standard of living, and empower them to participate in public life. The state shall take into account the needs of the elderly while planning public utilities. It also encourages civil society organizations to participate in caring for the elderly.



Angola, 2010

Article 82. (1) The elderly shall have the right to economic security, housing and a family and community life that respects their personal autonomy and prevents and overcomes isolation or social marginalisation.



Kenya, 2010

Persons with disabilities

Article 54. (1) A person with any disability is entitled—

- (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
- (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- (c) to reasonable access to all places, public transport and information;
- (d) to use Sign language, Braille or other appropriate means of communication; and
- (e) to access materials and devices to overcome constraints arising from the person's disability.

(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.



Guatemala, 1985 (rev. through 1993)

Protection of minors and the elderly

Article 51. The State will protect the physical, mental, and moral health of the minors of age and of the elderly. It will guarantee to them their right to food, health, education, and security and social prevision.

International instruments

AfCHPR, 2; AmCHR, 5; ArCHR, 11, 40; CRC, 2; CRPD, 5; ECHR, 14, Protocol 12; ICCPR, 2; ICESCR, 2; ICMW, 7 UDHR, 2.

1.5 Right to private life or privacy

The right to privacy or to a private life has many dimensions, including:

- Freedom from observation (such as surveillance and unlawful searches).
- Privacy of information about individuals (such as official records, diaries, photographs, letters, and financial and medical records) which includes freedom from unwanted access to and collection of information, and a right not to have information stored or distributed without consent.
- Freedom of private communication (that is, without monitoring), including electronic communication. Protection of physical and mental well-being.
- Freedom of every individual to develop their personality, including freedom to make choices about identity and social connections.

Some of these dimensions may be protected through other rights. For instance, the inviolability of one's home and protection from arbitrary searches is usually understood to be part of the right to privacy or to a private life but might be categorized as a right concerning the criminal justice system, such as freedom from unreasonable searches and seizures. Central aspects of the protection of physical and mental well-being are usually covered under the right to security of person, which is discussed below.

Constitutions address the right to a private life with different levels of detail. However, the right to privacy of information and communication is usually clearly specified. This is especially important, as monitoring communication and storing and distributing personal data is becoming increasingly widespread. The way in which data is collected and stored does not affect the right to privacy. But, for instance, the 2015 Constitution of the Dominican Republic avoids any disputes on this by referring specifically to digital and electronic formats as well as physical formats (Article 44(3)).

Examples of provisions on the right to private life or privacy



Kazakhstan, 1995 (rev. through 2019)

Article 18. (1) Everyone shall have the right to inviolability of private life, personal or family secrets, protection of honor and dignity.
(2) Everyone shall have the right to confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other messages. Limitation of this right shall be permitted only in the cases and according to the procedure directly established by law.
(3) State bodies, public associations, officials, and the mass media must provide every citizen with the possibility to obtain access to documents, decisions and other sources of information concerning his rights and interests.



Dominican Republic, 2015

Right to privacy and to personal honor
Article 44. All people have the right to privacy. The respect and non-interference into private and family life, the home, and private correspondence are guaranteed. The right to honor, good name, and one's own image are recognized. All authorities or individuals who violate them are obligated to compensate or repair them in accordance with the law. ...



Montenegro, 2007 (rev. through 2013)

Right to privacy
Article 40. Everybody shall have the right to respect for his/her private and family life.



Marshall Islands, 1979 (rev. through 1995)

Personal autonomy and privacy
Section 13. All persons shall be free from unreasonable interference in personal choices that do not injure others and from unreasonable intrusions into their privacy.



Norway, 1814 (rev. though 2020)

Article 102. Everyone has the right to respect for his private and family life, his home and his correspondence. Search of private homes shall not be made except in criminal cases.



United States of America, 1798 (rev. through 1992)

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

International instruments

AmCHR, 11; ArCHR, 15; CRC, 16; CRPD, 22; ECHR, 8; EUCFR, 7; ICCPR, 17; ICMW, 14; UDHR, 12.

1.6 Rights to family life, to found a family and to marry

This set of rights usually covers the following matters:

- The right to protection of the family, or recognition and protection of the family, including a right for family members not to be separated.
- The right to found a family and to marry.
- Prohibition on forced marriages.
- Prohibition of child marriage, sometimes with a specific age stipulated.
- Equality between partners at the commencement of a marriage, during it and on divorce.
- The right to make decisions about reproduction, including the number and spacing of children, and about raising children.
- Family rights of people in de facto relationships (sometimes referred to as stable relationships).

Private life and family life

The right to family integrity is an aspect of the right to privacy, now often addressed separately in constitutions. “Family” is usually understood in a broad sense, including relationships between parents and children, partners (married or unmarried, heterosexual or same sex), and siblings. The interaction between private and family life means that the separation of family members (e.g. by deportation or by child welfare services) can amount to a violation of the right to private life, family life, or both.

The right to found a family

The right to found a family covers issues like co-habitation, conception, adoption, and freedom to choose a certain number of children or to conceive using reproductive technology.

Restrictions on the right to marry

Forced marriages and child marriages infringe international human rights norms. Accordingly, many constitutions require marriage to be consensual and state that no one under a certain age established by law may marry. Some constitutions set the minimum age for marriage. “Marriages of convenience” are marriages concluded so one of the parties can receive a State benefit such as citizenship or social security, and States may legitimately refuse to recognize such marriages. Other limits on the right to marry that were accepted in the past are now contested. For example, prohibitions on marriage between people of the same sex or transgender people, marriages deemed to be incestuous, polygyny, marriages of people with mental incapacity, and marriage by prisoners are increasingly challenged.

Examples of provisions on the rights to family life, to found a family and to marry



Estonia, 1992 (rev. through 2015)

Article 27. The family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state.



Portugal, 1976 (rev. through 2005)

Article 36. (1) Everyone shall possess the right to found a family and to marry on terms of full equality.



Armenia, 1995 (rev. through 2020)

Freedom to marry

Article 35. (1) A man and a woman of marriageable age shall have the right to marry each other and form a family by free expression of their will. The age of marriage and the procedure of marrying and divorcing shall be stipulated by law.

(2) In marrying, during marriage, and in divorce, a man and a woman shall have equal rights.



Uganda, 1995 (rev. through 2017)

Rights of the family

Article 31. (1) A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age–

(a) to found a family; and

(b) to equal rights at and in marriage, during marriage and at its dissolution.



Serbia, 2006

Right to enter into marriage and equality of spouses

Article 62. (3) Contracting, duration or dissolution of marriage shall be based on the equality of man and woman.



Germany, 1949 (rev. through 2020)

Article 6. [Marriage – Family – Children] (2) 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.



Mexico, 1917 (rev. through 2020)

Article 4. ... 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.



Guatemala, 1985 (rev. through 1993)

Article 48. The State recognizes de facto unions and the law will regulate [perceptuará] everything relative to them.

International instruments

AfCHPR, 15; AmCHR 17; ArCHR, 33; CRC 5, 9, 18; ECHR, 12; EUCFR, 9; ICCPR, 23; UDHR, 16.

1.7 Rights of the child

Children's rights overlap considerably with general rights. Consequently, constitutions differ greatly in the extent to which they detail children's rights. Nevertheless, some key issues are specifically relevant to children:

- **Survival/welfare rights** (e.g. right to life, health, shelter, adequate living standards).
- **Developmental rights** (e.g. right to education, cultural activities, recreation).
- **Protection rights** (e.g. safeguards against abuse, exploitation and trafficking; prohibition of child labour; special support through the justice system; special protection when detained).
- **Autonomy and participation rights** (e.g. right to be treated as a person, ability to make decisions protected, freedom to participate in matters affecting their lives, respect for views of the child).

An overarching right is that all actions (public or private) concerning a child must be undertaken with the child's best interests as a primary or paramount consideration. What is in the child's best interest may conflict with other interests, such as the parent's right to raise a child in a particular way. The priority and balancing of these competing interests usually depend on each case, but sometimes the rights of children are specified as taking precedence over others (Colombia).

Other aspects of children's rights that are sometimes expressly stated in constitutions relate to the prohibition of discrimination against children born outside of marriage; state regulation of child adoption; situations for removal of children from parents or family care; parental responsibilities and state assistance for parents; and special protection and integration support for orphaned, disabled, refugee or otherwise vulnerable children.

The right to a name and a birth certificate/registration is not exclusive to children and constitutions may include it under the right to private life or equal recognition before the law. However, it is often included in provisions relating to rights of the child. This is wise because, although a birth certificate is important for everyone, issuing one is an urgent obligation to ensure that children can access other rights. Therefore, including the right in a provision dedicated to the rights of the child emphasizes its importance to children. Children born to refugees or stateless people are frequently refused birth certificates in their country of refuge or residence. This is a breach of the right to a name and birth certificate and constitutions should be worded in a way that ensures the right is extended to all children, whether or not they are citizens or lawfully in the country.

Examples of provisions on the rights of the child



Ethiopia, 1994

Rights of children.

Article 36. (1) Every child has the right:

- (a) To life;
 - (b) To a name and nationality;
 - (c) To know and be cared for by his or her parents or legal guardians;
 - (d) Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;
 - (e) To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children.
- (2) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child.
- (3) Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.
- (4) Children born out of wedlock shall have the same rights as children born of wedlock.
- (5) The State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education.



Colombia, 1991 (rev. through 2021)

Article 44. The following are basic rights of children: life, physical integrity, health and social security, a balanced diet, their name and citizenship, to have a family and not be separated from it, care and love, instruction and culture, recreation, and the free expression of their opinions. They shall be protected against all forms of abandonment, physical or moral violence, sequestration, sale, sexual abuse, work or economic exploitation, and dangerous work. They shall also enjoy other rights upheld in the Constitution, the laws, and international treaties ratified by Colombia.

The family, society, and the State have the obligation to assist and protect children in order to guarantee their harmonious and integral development and the full exercise of their rights. Any individual may request from the competent authority the enforcement of these rights and the sanctioning of those who violate them.
The rights of children take precedence over the rights of others.



Egypt, 2014 (rev. through 2019)

Article 80. A child is considered to be anyone who has not reached 18 years of age. Children have the right to be named and possess identification papers, have access to free compulsory vaccinations, health and family care or an alternative, basic nutrition, safe shelter, religious education, and emotional and cognitive development. The state guarantees the rights of children who have disabilities, and ensures their rehabilitation and incorporation into society. The state shall care for children and protect them from all forms of violence, abuse, mistreatment and commercial and sexual exploitation. Every child is entitled to early education in a childhood center until the age of six. It is prohibited to employ children before they reach the age of having completed their primary education, and it is prohibited to employ them in jobs that expose them to risk. The state shall establish a judicial system for child victims and witnesses. No child may be held criminally responsible or detained except in accordance with the law and the time frame specified therein. Legal aid shall be provided to children, and they shall be detained in appropriate locations separate from adult detention centers. The state shall work to achieve children's best interest in all measures taken with regards to them.



Belgium, 1831 (rev. through 2019)

Article 22bis. Each child is entitled to have his or her moral, physical, mental and sexual integrity respected. Each child has the right to express his or her views in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and maturity. Each child has the right to benefit from measures and facilities that promote his or her development. In all decisions concerning children, the interest of the child is a primary consideration. ...

International instruments

ACRWC; CRC; European Convention on the Exercise of Children's Rights; ILO Conventions No 138, 199.

1.8 Prohibition of torture and cruel, inhuman or degrading treatment or punishment

There is an absolute prohibition on torture and ill treatment in international law and no derogation from (or limitation of) this prohibition is permitted whatsoever. A constitution is most likely to secure the prohibition on torture and other cruel, inhuman and degrading punishment or treatment effectively and in a way that conforms with international norms if, in addition to including this prohibition, it states expressly (i) that the right applies to both the public and the private sphere (in other words, the State and individuals are bound by the prohibition); (ii) that corporal punishment is prohibited in all contexts; and (iii) that evidence secured through torture may not be used in judicial proceedings.

Most constitutions capture the prohibition of torture and of cruel, inhuman or degrading treatment or punishment in one provision. This is appropriate because these different ways of infringing a person's rights cannot be firmly distinguished: they are on a continuum, with torture the most egregious, and degrading treatment (or "ill treatment") the least so. Nonetheless, the following distinctions have been developed to clarify the right:

- Torture is deliberate infliction of very serious physical or mental suffering.
- Conduct that does not reach the threshold of torture (either because intention to cause suffering is missing or the level of seriousness is not met) may nevertheless be prohibited cruel and inhuman treatment. This is generally taken to be treatment causing intense physical or mental suffering. Examples include threats of torture, physical assault, and brutal detention conditions and overcrowding in prisons.
- Degrading treatment is treatment, often a punishment, which causes fear, feelings of inferiority, or debasement beyond that which is usual for punishment. Inflicting emotional harm may constitute degrading treatment.

Corporal punishment

Under international human rights law, the prohibition on torture and ill treatment prohibits corporal punishment (i) imposed by a court as a punishment for a crime; (ii) in schools or other training and medical institutions (UN Human Rights Committee General Comment No 20, 1992, (A/44/40); and (iii) of children in general (UN Committee on the Rights of the Child General Comment No 8, 2006, (CRC/C/GC8)). Sometimes constitutions draft the prohibition to cover only corporal punishment that is administered by the State (see, for example, Malawi). However, the Convention on the Rights of the Child extends the right to be free from violence to the private sphere. Accordingly, in some countries, courts have interpreted the provision to prohibit all corporal punishment, and legislation prohibiting corporal punishment of children has been enacted in countries like South Africa and Fiji as well as many European Union countries. Some more recent constitutions expressly state that corporal punishment is prohibited (Poland). This serves two purposes: it makes the protection concrete and clearly relevant to people's everyday lives; and it provides legal certainty, excluding arguments that corporal punishment is not covered by the prohibition on degrading punishment.

Security of person

Constitutions usually have separate provisions on torture and security of person although the right to security of person overlaps with the right to be free from torture, and inhuman or degrading treatment or punishment. The separation has no real significance and, as in Fiji (see below), the provisions may be combined.

Examples of provisions on the prohibition of torture and cruel, inhuman or degrading treatment or punishment



Colombia, 1991 (rev. through 2021)

Article 12. No one shall be subjected to forced disappearance, or to torture or to cruel, inhuman, or degrading treatment or punishment.



Fiji, 2013

Freedom from cruel and degrading treatment

Section 11. (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.

(2) Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.

(3) Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.



Benin, 1990

Article 18. No one shall be submitted to torture, nor to maltreatment, nor to cruel, inhumane or degrading treatment.



Poland, 1997 (rev. through 2009)

Article 40. No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.

International instruments

AfCHPR, 5; AmCHR, 5; ArCHR, 8; CAT; ECHR, 3, 15 (2); EUCFR, 4; ICCPR, 7; UDHR, 5.

1.9 Prohibition of slavery, servitude and forced labour

Consistent with international law, constitutions today outlaw slavery and most forms of forced labour. More recent constitutions (Fiji) also explicitly prohibit trafficking. Sometimes, this provision also contains a prohibition on forced child labour (Afghanistan), but generally the prohibition on child labour is included as an aspect of the rights of the child.

Slavery refers to a situation in which someone exercises any or all ownership rights over another person. Servitude is similar to slavery in that a person may be compelled to live on another's premises and work for them, although formal ownership rights are not exercised. Forced labour refers to a person performing work under physical or psychological threats.

Under international law, the prohibition covers a wide range of practices such as:

- Promising or giving a person, without the right to refuse, in marriage in exchange for some sort of payment. Allowing a husband to transfer his wife to another person in exchange for some sort of payment; the inheritance of a woman by another person upon the death of her husband.¹²
- Human or sex trafficking.
- Delivery of children to someone for labour.
- “Debt bondage” (in which a debtor pays off debts by becoming a “slave” of the creditor) and labour arrangements that in effect enslave workers (now often referred to as “modern slavery”).

The prohibition on slavery is absolute, but the prohibition on forced labour usually does not prohibit work required of a lawfully detained person; work in response to a calamity or emergency; civic obligations (e.g. jury service); or military service. Sometimes these exceptions are expressly listed in the constitution (e.g. Mauritius and Nigeria), other times they are permitted under a general limitation clause (see Part A 3.4).

Examples of provisions of the prohibition of slavery, servitude and forced labour



Fiji, 2013

Section 10. Freedom from slavery, servitude, forced labour and human trafficking (1)
A person must not be held in slavery or servitude, or subjected to forced labour or human trafficking.

12 United Nations Human Rights Office of the High Commissioner (OHCHR), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1957). Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>.



Ecuador, 2008 (rev. through 2021)

Article 66. The following rights of persons are recognized and guaranteed: ...

(29) The rights of freedom also include: ...

- (b) Prohibition of slavery, exploitation, bondage and smuggling and trafficking in human beings in all their forms.



Mauritius, 1968 (rev. through 2016)

Protection from slavery and forced labour

Article 6. (1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purposes of this section, the expression “forced labour” does not include–

- (a) any labour required in consequence of the sentence or order of a court;
- (b) labour required of any person while he is lawfully detained that, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;
- (c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service; or
- (d) any labour required during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable, in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation.



Afghanistan, 2004

Article 49. Forced labor shall be forbidden. Active participation in times of war, disaster, and other situations that threaten public life and comfort shall be among the national duties of every Afghan. Forced labor on children shall not be allowed.



Nigeria, 1999 (rev. through 2017)

Right to dignity of human person

Article 34. (1) Every individual is entitled to respect for the dignity of his person, and accordingly–

- (a) no person shall be subject to torture or to inhuman or degrading treatment;
- (b) no person shall be held in slavery or servitude; and
- (c) no person shall be required to perform forced or compulsory labour.

(2) For the purposes of subsection (1) (c) of this section, “forced or compulsory labour” does not include–

- (a) any labour required in consequence of the sentence or order of a court;
- (b) any labour required of members of the armed forces of the Federation or the Nigeria Police Force in pursuance of their duties as such;
- (c) in the case of persons who have conscientious objections to service in the armed forces of the Federation, any labour required instead of such service;
- (d) any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or
- (e) any labour or service that forms part of–
 - (i) normal communal or other civic obligations of the well-being of the community,
 - (ii) such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly, or
 - (iii) such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly.

International instruments

AfCHPR, 5; AmCHR, 6; ArCHR, 10; ECHR, 4; EUCFR, 5; ICCPR, 8; ILO Conventions No 29, 105; UDHR, 4.

1.10 Right to liberty and security of person

In this context, the right to liberty means physical freedom (i.e. the right not to be detained arbitrarily) and security of person means freedom from physical harm or pain. Nowadays, security of person also demands freedom from psychological or emotional harm. Although these rights overlap in some aspects and are usually combined in international conventions, here they are considered separately. Freedom from arbitrary searches of one's property, which is closely related to the right to liberty and the security of person, is covered together with the right to privacy in this guidebook.

1.10.1 Right to liberty

Provisions protecting the right to liberty often detail:

- Acceptable circumstances for depriving people of their liberty through detention.
- Rights of detained people including, most importantly, the right to challenge detention (see below comment on habeas corpus and rights relating to the conditions of detention).
- Rights that apply to people detained on a criminal charge.

If a constitution has a general limitation clause (see Part A 3.4), it is not necessary to state expressly the circumstances in which detention is justified; those circumstances can be enacted in a law. However, such circumstances are nonetheless often set out in the constitution to provide clear information to people, to signal that past abuses will not be tolerated or because they have been included in previous constitutions. In such cases, the question is how exhaustive the list is – will it be permissible to add further grounds by law or not?

The Constitutions of Albania and Ghana, for example, include exhaustive lists of the circumstances in which detention is justified, and a constitutional amendment would be needed to expand the number of circumstances. The opposite extreme is to permit a list to be expanded by law. In such cases great caution should be exercised in drafting the right so that the state cannot expand the list in an arbitrary manner. As discussed in Part A 3.4, many recent constitutions deal with this problem by subjecting any legislative exceptions to the right to liberty to a general limitation clause or by requiring them to meet standards set out in the same provision (e.g. they may not be arbitrary, necessary for public health).

Typically accepted circumstances under which a person may be deprived of liberty include detentions:

- After conviction by a court.
- To bring a person to trial when there is a reasonable suspicion that a crime has been committed and that the suspect may flee from justice or commit further crimes.
- For failing to fulfil a court order.
- Of a minor for educational supervision or for care (subject to special conditions).
- To prevent the spread of infectious diseases.
- To prevent unauthorized entry to a country.

Detention to secure the fulfilment of a debt was once acceptable, but Article 11 of the ICCPR prohibits detention for inability to fulfil a contractual obligation and many constitutions, such as Albania's, state this expressly. Some constitutions extend this prohibition to cases where there is an inability to pay any civil debt, including obligations to compensate someone for damage to their property.

Over the past two decades, an increasing number of countries has introduced legislation to allow “security detention” (also referred to as preventative or administrative detention or internment). These laws permit the State to detain people without criminal charge, usually on suspicion that they represent a danger to national security. Such detention will infringe the right to liberty unless it is subject to stringent safeguards, including oversight by the judiciary. A constitutional provision that purports to permit such detention will not overcome this problem.¹³

Constitutions should also include special provisions for the detention of children and stipulate, at least, that children should be detained only as a measure of last resort and for the shortest possible time, and that if they are detained, they should be kept separately from adults in an age-appropriate facility. These rights may be included in provisions dealing with detention (e.g. Malawi, below) or in a section on rights of the child (as in Ethiopia’s Constitution, Article 36 (3) and Egypt’s, Article 80, above).

The rights of people who are detained, including people detained on a criminal charge, usually encompass the rights:

- To be informed promptly of the reason for the detention in a language the person understands.
- To challenge the lawfulness of the detention before a court and to be released if the detention is found to be unlawful. The right to a writ of habeas corpus is the legal mechanism established in many countries to give effect to the right to challenge detention. Some constitutions actually use the term habeas corpus (e.g. Ecuador, Article 89), while others spell out this aspect of the right to liberty in non-legal terms (e.g. South Africa, Section 35 (2)(d)).
- To choose a legal practitioner and to consult with them. To a lawyer paid for by the State if it would otherwise not be possible to deliver justice.
- To conditions of detention that are consistent with human dignity (e.g. exercise, adequate food, medical treatment, reading material).
- To communicate with and be visited by partner/next of kin/religious counsellor/medical practitioner of choice.
- To be informed of these rights promptly.

The special rights of people arrested on a criminal charge further include the rights:

- To be brought before a judge promptly (constitutions often set the time within which a person must be brought before a court).
- Not to be compelled to make a confession or admission that may be used against them.
- To be charged or informed of the reasons for the arrest at the first court appearance.
- To be released unless the interests of justice require further detention.
- In many countries, to remain silent and be informed promptly of this right, and of the consequences of not remaining silent.

13 Human Rights Committee General Comment No 35, 16 December 2014, (CCPR/C/GC/35).

Examples of provisions on the right to liberty



Albania, 1998 (rev. through 2020)

Article 27. (1) No one's liberty may be taken away except in the cases and according to the procedures provided by law.

(2) The liberty of a person may not be limited, except in the following cases:

- a) when he is punished with imprisonment by a competent court;
- b) for failure to comply with the lawful orders of the court or with an obligation set by law;
- c) when there is a reasonable suspicion that he has committed a criminal offense or to prevent the commission by him of a criminal offense or his escape after its commission;
- ç. for the supervision of a minor for purposes of education or for escorting him to a competent organ;
- d) when a person is the carrier of a contagious disease, mentally incompetent and dangerous to society;
- dh) For illegal entry at state borders or in cases of deportation or extradition.

(3) No one may be deprived of liberty just because he is not in a state to fulfil a contractual obligation.

Article 28. (1) Everyone whose liberty has been taken away has the right to be notified immediately, in a language that he understands, of the reasons for this measure, as well as the accusation made against him. The person whose liberty has been taken away shall be informed that he has no obligation to make a declaration and has the right to communicate immediately with his lawyer, and he shall also be given the possibility to exercise his rights.

(2) The person whose liberty has been taken away, according to article 27, paragraph 2, subparagraph c, must be brought within 48 hours before a judge, who shall decide upon his presentence detention or release not later than 48 hours from the moment he receives the documents for review.

(3) A person in pre-sentence detention has the right to appeal the judge's decision. He has the right to be tried within a reasonable period of time or to be released on bail pursuant to law.

(4) In all other cases, the person whose liberty is taken away extrajudicially may address a judge at any time, who shall decide within 48 hours regarding the legality of this action.

(5) Every person whose liberty was taken away pursuant to article 27 has the right to humane treatment and respect for his dignity.



South Africa, 1996 (rev. through 2012)

Arrested, detained and accused persons

Section 35. (1) Everyone who is arrested for allegedly committing an offence has the right—

- (a) to remain silent;
- (b) to be informed promptly—
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

- (2) Everyone who is detained, including every sentenced prisoner, has the right—
- (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - (f) to communicate with, and be visited by, that person's—
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.



Ghana, 1992 (rev. through 1996)

Protection of personal liberty

Article 14. (1) Every person shall be entitled to his personal liberty and no person shall be deprived of personal liberty except in the following cases and in accordance with procedure permitted by law—

- (a) in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or
 - (b) in execution of an order of a court punishing him for contempt of court; or
 - (c) for the purpose of bringing him before a court in execution of an order of a court; or
 - (d) in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community; or
 - (e) for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or
 - (f) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or
 - (g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.
- (2) A person who is arrested, restricted or detained shall be informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.
- (3) A person who is arrested, restricted or detained—
- (a) for the purpose of bringing him before a court in execution of an order of a court; or
 - (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, shall be brought before a court within forty-eight hours after the arrest, restriction or detention.
- (4) Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.
- (5) A person who is unlawfully arrested, restricted or detained by any other person shall be entitled to compensation from that other person.

(6) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment.

(7) Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted.



Dominican Republic, 2015

Article 40. All people have a right to liberty and personal security. Accordingly:...

(10) Physical constraint may not be established for debts that do not come from an infraction against the penal laws; ...

Special attention to the detention of children



Malawi, 1994 (rev. through 2017)

Arrest, detention and fair trial

Section 42. (2) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right - ...

(g) in addition, if that person is a person under the age of eighteen years, to treatment consistent with the special needs of children, which shall include the right—

(i) not to be sentenced to life imprisonment without possibility of release;

(ii) to be imprisoned only as a last resort and for the shortest period of time consistent with justice and protection of the public;

(iii) to be separated from adults when imprisoned, unless it is considered to be in his or her best interest not to do so, and to maintain contact with his or her family through correspondence and visits;

(iv) to be treated in a manner consistent with the promotion of his or her sense of dignity and worth, which reinforces respect for the rights and freedoms of others;

(v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role;

(vi) to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards; ...

1.10.2 Security of person

Our understanding of the right to security of person has developed over time. As demonstrated by the discussion of the right to be free from torture, and cruel, inhuman or degrading punishment or treatment, there is considerable overlap between that set of rights and the right to security of person. Nonetheless, many constitutions deal with them separately.

Ideally, a constitutional provision protecting the right to security of person would provide a protection from physical harm or pain; emotional and psychological harm (e.g. Constitutions of South Africa and the Dominican Republic); private forms of violence (which would cover domestic violence, such as the Constitutions of the Dominican Republic, Ecuador and South Africa); and medical or scientific experiments without informed consent.

Examples of provisions on security of person



Dominican Republic, 2015

Article 42. All people have the right to have their physical, psychic, moral integrity and the right to live without violence respected. They shall have the protection of the state in cases of threat, risk, or violation of the same. Consequently:

- (1) No one may be submitted to punishments, tortures, or degrading proceedings that imply the loss or decrease of his health or of his physical or psychic integrity;
- (2) Familial and gender based violence in any of its forms is condemned. The State shall guarantee through the law the adoption of necessary methods to prevent, sanction, and eradicate violence against women;
- (3) No one may be submitted, without prior consent to experiments or proceedings that do not conform to internationally recognized scientific and bioethical norms, nor to examinations of medical proceedings, except when his life is in danger.



Ecuador, 2006 (rev. through 2021)

Article 66. The following rights of persons are recognized and guaranteed:

- (3) The right to personal well-being, which includes: ...
 - (b) A life without violence in the public and private sectors. The State shall adopt the measures needed to prevent, eliminate, and punish all forms of violence, especially violence against women, children and adolescents, elderly persons, persons with disabilities and against all persons at a disadvantage or in a vulnerable situation; identical measures shall be taken against violence, slavery, and sexual exploitation.



South Africa, 1996 (rev. through 2012)

Freedom and security of the person

Section 12. (1) Everyone has the right to freedom and security of the person, which includes the right–

- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right–
- (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.

International instruments

AfCHPR, 6; AmCHR, 7; ArCHR, 14; CRC, 37; ECHR, 5; EUCFR, 6; ICCPR, 9; UDHR, 3.

1.11 Freedom of movement

The right to freedom of movement entails several interrelated but distinct aspects. The first is the right to move freely within a country, including choosing a place of residence without restrictions (e.g. without having to justify that choice to a public official). Some constitutions limit this right to citizens (Uganda), but international instruments extend protection to “everyone lawfully within the territory of a State” (see ICCPR, Article 12). Violations of this aspect of freedom of movement include forced internal displacement and preventing a person from entry to or staying in a particular part of state territory. For instance, a woman’s freedom to choose her residence should not be contingent, by law or practice, on the decision of others (e.g. spouse or other relatives). The State is required to prevent such actions, whether committed by public or private actors.

A second aspect of the right to freedom of movement is an individual's right to leave any country, including their own, for a short term, long term, or permanently. This right cannot be made contingent on an individual's purpose for leaving. To protect this aspect of the right, States must issue the relevant travel documents in an appropriate manner (for example, undue delay of passport renewal may violate this right).

Third, people have the right to enter their own country free from arbitrary interference. This helps ensure the right of return for refugees seeking voluntary repatriation and implies a prohibition of mass population expulsions to other countries. Most constitutions limit this right to citizens, but the wording and interpretation of international instruments suggests that both citizens and non-citizens can enjoy this right. One of the implications is that people stripped of their citizenship in violation of international law, for example, leaving them stateless, would still have the right to enter the country of their nationality.

Constitutions often set out limits on these rights based on national security, public or environmental health, an individual's criminal record, or the property rights of others. Such express limits are not necessary if rights are accompanied by a general limitation clause.

Examples of provisions of freedom of movement



Malawi, 1994 (rev. through 1999)

Freedom of movement and residence

Section 39. (1) Every person shall have the right of freedom of movement and residence within the borders of Malawi.

(2) Every person shall have the right to leave the Republic and to return to it.



Timor-Leste, 2002

Freedom of movement

Article 44. (1) Every individual has the right to move freely and to settle anywhere in the national territory.

(2) Every citizen is guaranteed the right to emigrate freely, as well as the right to return to the country.



Uganda, 1995 (rev. through 2017)

Article 29. (2) Every Ugandan shall have the right—

- (a) to move freely throughout Uganda and to reside and settle in any part of Uganda;
- (b) to enter, leave and return to, Uganda; and
- (c) to a passport or other travel document.

International instruments

AfCHPR, 12; AmCHR, 22; ArCHR, 26; ECHR Protocol No. 4, 2; ICCPR, 12; ICMW, 39; UDHR, 13.

1.12 The right to asylum

The right to asylum enables individuals who face persecution in their country to seek refuge in a country that protects the right to asylum.

Constitutions vary in the protection that they give to asylum seekers (or refugees). The constitutional grounds on which asylum may be sought are likely to be limited in some way; for example, it may be restricted to people who fear prosecution in the country from which they have fled on account of their identity, or political or religious views. Many constitutions recognize the right only within the boundaries of laws or regulations. As discussed in Part A 3.4, the implications of an approach that permits a right to be subject to ordinary law vary and depend on the exact language of the constitution.

For example, a national law may be required before the right to asylum can be asserted (Poland, Italy); the constitution may give the executive and/or legislature the right to define the right as they wish, which may lead to the right being narrowly circumscribed in practice; or the constitution may establish that laws can restrict the right, provided they meet the standards of the limitation test.

The 1951 Convention relating to the Status of Refugees (Refugee Convention), which is the main international agreement on refugees, defines a refugee as a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Responding to crises that have arisen since the adoption of the Refugee Convention, some regional bodies use a wider definition. For example, the African Union and the group of 10 Latin American States that adopted the 1984 Cartagena Declaration include as refugees people who have fled their country because their lives, safety or freedom have been threatened by violence, internal or international conflicts, massive violation of rights or other egregious circumstances. Perhaps because the obligations of a State in relation to asylum are clearly defined in international law, a number of constitutions (e.g. Poland's) expressly link this right to international legal instruments.

Apart from the right to asylum, refugees depend on proper protection of other rights, including access to justice (particularly administrative justice), the right to liberty and security, the prohibition on torture and ill treatment, and socio-economic rights. Consequently, it is important that these rights are available to everyone and not citizens alone. (See also Part A 3.2.)

Examples of provisions on the right to asylum



Haiti, 1987 (rev. through 2012)

Article 57. The right to asylum for political refugees is recognized.



Germany, 1949 (rev. through 2020)

Article 16a. [Right of asylum] (1) Persons persecuted on political grounds shall have the right of asylum.



Poland, 1997 (rev. through 2009)

Article 56. (1) Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute.

(2) Foreigners who, in the Republic of Poland, seek protection from oppression, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.



Italy, 1947 (rev. through 2020)

Article 10. Paragraph 3. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law.

Paragraph 4. A foreigner may not be extradited for a political offence.

International instruments

AfCHPR, 12; AmCHR, 22; ArCHR, 28; EUCFR, 18; Ref Conv; UDHR, 14.

1.13 Right to property

The right to property protects individuals' ability to own, enjoy and dispose of their property, free from unlawful interference. It is particularly concerned with protecting property against arbitrary State action or private action condoned by the State. The right typically includes:

→ The right to own and possess property.

- A prohibition on arbitrary deprivation of property (including arbitrary restrictions on its use) by the State.
- The requirement that any deprivation of property by the State must be according to the law and that a decision to deprive a person of property and any compensation to be paid must be subject to review by the courts.
- The requirement that any deprivation of property by the State must be in the public interest.
- The requirement that fair and just compensation must be paid for any deprivation of property either before the property is seized or promptly/without delay after that.

The concept of “property” covers immovable assets like land and dwellings, and moveable objects like cars, furniture and clothes. Intellectual property (people’s ideas) is also protected by a right to property, although there is trend towards including a separate right to intellectual property in charters of rights. The kinds of rights people have in property vary greatly. For instance, all legal rights to property through contracts like leases are protected by the right to property. Generally, illegal possession is not. For example, in the absence of some form of recognition of squatters’ rights in domestic law, squatters would usually not be able to claim a property right. They may be able to claim a right to housing (see Part B 2.2.4).

Interference with the right to property most obviously occurs when people are completely deprived of their belongings and assets, as when land is seized by the State or a person is evicted from their home or business. The right to property is also infringed when there is partial interference with a person’s right to deal with their property as they wish. For example, building restrictions that limit what a person can do on their property may be construed as an infringement of the right to property.

Deprivation of property is presumptively prohibited but there are generally accepted circumstances in which it is legitimate. Property expropriation for public use or in the public interest, with just compensation (e.g. South Africa Constitution, Section 25 (2)) is usually considered a legitimate limitation on the right. In the early 20th Century, many Latin American constitutions added clauses stating that property has a social purpose in order to prevent the right to property from becoming a rigid impediment to regulation of land use and its redistribution (see Bolivia, Article 56, and Colombia, Article 58, below). However, many forms of partial interference with the right to property are generally considered acceptable, and sometimes even necessary. Here, restrictions on the right are also often acceptable without compensation. How a constitution deals with the inevitable tension between property rights and State interests will depend largely on the overall approach taken to limiting rights (see Part A 3.4).

The right to property also imposes a positive obligation on States to provide mechanisms, including legal ones, through which individuals can defend their right to property, including protecting people from arbitrary eviction from their homes.

Under international human rights law, the rights of individuals (or entities) to some form of protection of their intellectual property is different from rights to cultural heritage and indigenous knowledge.

Examples of provisions on the right to property



United States of America, 1789 (rev. through 1992)

Amendment V. No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



Afghanistan, 2004

Article 40. Property shall be safe from violation. No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law. No one's property shall be confiscated without the order of the law and decision of an authoritative court. Acquisition of private property shall be legally permitted only for the sake of public interest, and in exchange for prior and just compensation. Search and disclosure of private property shall be carried out in accordance with provisions of the law.



South Africa, 1996 (rev. through 2012)

Property

Section 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.



Bolivia, 2009

Article 56. I. Everyone has the right to private, individual or collective property, provided that it serves a social function.

II. Private property is guaranteed provided that the use made of it is not harmful to the collective interests.



Colombia, 1991 (rev. through 2021)

Article 58. Private property and the other rights acquired in accordance with civil laws are guaranteed and may neither be disregarded nor infringed by subsequent laws. When in the application of a law enacted for reasons of public utility or social interest a conflict between the rights of individuals and the interests recognized by the law arises, the private interest shall yield to the public or social interest.

Property has a social dimension which implies obligations. As such, an ecological dimension is inherent to it.

The State shall protect and promote associative and joint forms of property.

Expropriation may be carried out for reasons of public utility or social interest defined by the legislature, subject to a judicial decision and prior compensation. The compensation shall be determined by taking into account the interests of the community and of the individual concerned. In the cases determined by the legislator, the expropriation may take place by administrative action, subject to subsequent litigation before the administrative law courts, including with regard to the price.

1.14 Access to courts

The right of access to courts gives everyone the right to have legal disputes resolved in public proceedings in an independent court or, if appropriate, in a tribunal, and access to legal assistance if justice cannot be achieved without such assistance.

The establishment of independent and impartial courts or tribunals is usually covered in a constitutional chapter dedicated to the judiciary, and not in the chapter on rights. A number of international instruments set out the requirements for an independent and impartial court system, including ICCPR General Comment 32, and the 1985 UN Basic Principles on the Independence of the Judiciary.

The right of access to courts covers all disputes (civil, criminal and administrative), as the South African Constitution affirms. The right should not be limited to criminal cases or to disputes that raise constitutional issues.

In countries within the civil law system, special consideration needs to be given to the right of access to courts to defend constitutional rights. In common-law countries, most courts can usually consider such matters, but this is usually not the case in civil-law countries where the constitutional court may be the only court with the jurisdiction to make decisions on constitutional issues. When this is the case, it is important to guarantee the right of individuals and groups to lodge constitutional complaints.

A right of access to courts precludes restrictions on judicial review for certain areas of law or for certain classes of people. In so doing, it secures the right to equality before the law (the Indian Constitution states this expressly). It means that actions of all public authorities must be subject to judicial review. For example, prisoners cannot be deprived of the opportunity to have courts review the enforcement of prison regulations by prison authorities.

This right also imposes an obligation on the State to provide legal assistance, such as legal aid, to those who would otherwise be unable to access justice. Ideally, a constitution will state this aspect of the right expressly and place the burden on the law to define situations in which it may be limited (e.g. for trials that do not involve complicated or highly technical issues). The right of access to legal assistance may also be inserted in provisions elsewhere in the constitution (e.g. in relation to criminal trials).

A right of access to courts also means that access to a court should not be curtailed by excessive court fees, unreasonable statutory limitations on bringing claims (such as unreasonable time limits), and formalism of legal applications. A constitution may state this.

Examples of provisions on the right of access to courts



Japan, 1946

Article 32. No person shall be denied the right of access to the courts.



Ecuador, 2008 (rev. through 2021)

Article 75. Every person has the right to free access to justice and the effective, impartial and expeditious protection of their rights and interests, subject to the principles of immediate and swift enforcement; in no case shall there be lack of proper defense. Failure to abide by legal rulings shall be punishable by law.



South Africa, 1996 (rev. through 2012)

Access to courts

Section 34. Everyone has the right to have any dispute that can be resolved by the

application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.



India, 1949 (rev. through 2019)

Equal justice and free legal aid

Article 39A. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

International instruments

AfCHPR, 7; AmCHR, 25; ArCHR, 31; CRPD, 29; ECHR, 6; ICCPR, 14; UN Basic Principles on the Independence of the Judiciary (General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985); UDHR, 10.

1.15 Right to a fair trial

The right to a fair trial or hearing has several components. These components may be laid out in detail in a constitution or simply understood as part of the concept of a fair trial.

The main components of the right to fair trial are an adjudicating body that is independent and impartial, and established by law (see above under right of access to courts); and a fair, public and timely (i.e. speedy) hearing and decision.

Ensuring fairness in criminal trials requires certain specific minimum rights, including the right:

- Not to be found guilty of an act or omission that was not a crime defined by law at the time it was done (or not done).
- Not to be punished twice for the same act.
- To be promptly informed of accusations and corresponding rights, including the right not to incriminate oneself.
- To adequate time to prepare a defence.
- To legal assistance and, if necessary to secure a fair trial, to legal assistance supplied by the State.
- To be presumed innocent.
- To call witnesses, adduce evidence, and examine witnesses.
- To have the free services of an interpreter if the accused cannot understand the language of the court.
- To have a conviction and/or sentence reviewed by an appellate court.

Constitutions may also contain provisions concerning the use of illegally obtained evidence against the accused person (for example, providing that it may not be used unless it is in the interest of justice to do so). A jury trial is not an essential element of the right to a fair trial: many countries do not provide for jury trials, and this does not undermine fairness and justice.

Military courts

The constitutional treatment of military justice varies widely and requires special attention. Sometimes, military courts are separated from the “main” legal system and controlled by the military. Sometimes, they use standards and procedures that would not be acceptable in civilian courts. At the other end of the spectrum, in many countries military courts are independent, either integrated in the general judicial system or an institution on their own. (When military courts are part of the general judicial system, they may be constituted as a special branch of the judiciary and include judicial officers with military experience.) Germany and Portugal, among other countries, have abolished the use of military courts in peacetime.

Generally, the approach to military justice is moving towards using courts that are independent rather than being part of, or controlled by, the military. Usually this will mean that they are integrated in the general (independent) judicial system. In addition, whether military courts are part of the military or not, they are increasingly restricted to hearing only military offences committed by military personnel, are not permitted to try cases involving gross violations of human rights, and are required to follow rules of fair procedure.¹⁴

Military courts are usually not mentioned in a charter of rights but instead are included under constitutional provisions dealing with the judiciary or the security services. To secure the right to a fair trial, it is important that these parts of the constitution do not condone a lower standard of justice in military courts.

In summary, regarding the treatment of military courts in a constitution attention should be paid to three major issues: (i) that members of the military are entitled to the same guarantees of fair trial as non-military individuals; (ii) that allegations of human rights violations (even if committed by members of the military) be heard by the ordinary courts and not by military courts; and (iii) that civilians not be tried by military courts.

Examples of provisions on the right to a fair trial



Germany, 1949 (rev. through 2020)

Article 103. [Fair trial] (1) In the courts every person shall be entitled to a hearing in accordance with law.

(2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

(3) No person may be punished for the same act more than once under the general criminal laws.



Serbia, 2006

Right to a fair trial

Article 32. Everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgment on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them.

Everyone shall be guaranteed the right to free assistance of an interpreter if the person does not speak or understand the language officially used in the court and the right to free assistance of an interpreter if the person is blind, deaf, or dumb.

The press and public may be excluded from all or part of the court procedure only in the interest of protecting national security, public order and morals in a democratic society, interests of juveniles or the protection of private life of the parties, in accordance with the law. Special rights of persons charged with criminal offence

14 See International Commission of Jurists, “Military jurisdiction and international law: Military courts and gross human rights violations”, (2004). Available at <https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf>.

Article 33. Any person charged with criminal offense shall have the right to be informed promptly, in accordance with the law, in the language which this person understands and in detail about the nature and cause of the accusation against him, as well as the evidence against him.

Any person charged with criminal offense shall have the right to defend himself personally or through legal counsel of his own choosing, to contact his legal counsel freely and to be allowed adequate time and facilities for preparing his defence.

Any person charged with criminal offense without sufficient means to pay for legal counsel shall have the right to a free legal counsel when the interests of justice so require and in compliance with the law.

Any person charged with criminal offense available to the court shall have the right to a trial in his presence and may not be sentenced unless he has been given the opportunity to a hearing and defence.

Any person prosecuted for criminal offense shall have the right to present evidence in his favor by himself or through his legal counsel, to examine witnesses against him and demand that witnesses on his behalf be examined under the same conditions as the witnesses against him and in his presence.

Any person prosecuted for criminal offense shall have the right to a trial without undue delay. Any person charged or prosecuted for criminal offense shall not be obligated to provide self-incriminating evidence or evidence to the prejudice of persons related to him, nor shall he be obliged to confess guilt.

Any other natural person prosecuted for other offenses punishable by law shall have all the rights of a person charged with criminal offense pursuant to the law and in accordance with it.



Japan, 1946

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.



South Africa, 1996 (rev. through 2012)

Section 35. (3) Every accused person has a right to a fair trial, which includes the right—

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (o) of appeal to, or review by, a higher court.
- (4) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

International instruments

AfCHPR, 7; AmCHR, 8; ArCHR, 13; CAT, 7 (3); ECHR, 6; EUCFR, 47; ICCPR, 14; Rome Statute of ICC, 64 (2), 67 (1); UDHR, 10, 11.

1.16 Administrative justice

A right to administrative justice is a right to legal, reasonable and fair decisions and acts by public officials. The right requires all administrative actions (and omissions) to be based on a general legal rule and not arbitrary. This right includes the right to lawful, timely and reasonable decisions reached according to fair procedures; the right for people who are adversely affected by an administrative decision to be given reasons for the decision in writing; and a right to challenge the decision. The Cayman Islands Constitution includes a requirement that administrative action be “proportionate”. This is an important development, because it gives greater content to the meaning of reasonable decisions and actions. (Proportionality in this context is comparable to the requirement that limitations of rights should be proportionate (see Part A 3.4).)

Elements of the right to administrative justice are inherent in the concept of the rule of law, and more recently a number of constitutions have expressly established administrative justice as a basic right. This is because administrative actions (decisions and acts by public officials at every level of government and in public entities) are pervasive in modern societies. Their impact is widespread and they provide opportunities for considerable abuse of authority. For example, public officials make regulations (that is subordinate laws), issue licenses, determine immigration applications, give people access to water, housing and electricity, assess taxes, monitor compliance with regulations, such as building regulations, admit patients to hospital, decide whether or not to prosecute a person accused of a crime, determine whether or not to detain somebody, among many other things. Independent regulatory agencies such as media boards and consumer protection agencies also take decisions affecting individual rights. Other public bodies such as those regulating a profession may undertake disciplinary procedures. Unfair, corrupt, unreasonable or long delayed administrative action can affect lives in profound ways, threatening livelihoods and access to other basic rights, and may lead to mistrust of government and within communities.

Examples of provisions on administrative justice



South Africa, 1996 (rev. through 2012)

Just administrative action

- Section 33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.



Maldives, 2008

Fair Administrative Action. Article 43. (a) Everyone has the right to administrative action that is lawful, procedurally fair, and expeditious.

(b) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(c) Where the rights of a person, a group or community has been adversely affected by administrative action, every such person, group or every person who may be directly affected by such action has the right to submit the matter to court.



Ghana, 1992 (rev. through 1996)

Administrative Justice

Article 23. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.



Cayman Islands, 2009

Lawful administrative action

Section 19. (1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.

International Instrument

EUCFR, 41.

1.17 Right to take part in public affairs, to vote and to stand for public office

The right to take part in the conduct of public affairs is the essence of democracy. It is an overarching right, realized when people stand for public office, vote, engage in processes of constitutional review, or exercise rights of expression and assembly. Constitutions should expressly recognize this right because it is broader than the rights to vote and to stand for election and emphasizes the right citizens have to constant engagement in public life, rather than sporadic involvement when they vote.

The rights to vote and to stand for public office are closely linked and protect a citizen's right to influence public policy and government decision-making. The right to vote belongs to citizens above a specified age, includes the right to vote in secret, and places an obligation on the State to "ensure that all persons entitled to vote are able to exercise that right" (ICCPR General Comment 25, Para 11). The obligation of the State to facilitate people's right to vote implies, among other things, that voter identification or residency requirements must not indirectly exclude people, that polling stations have accessible entrances and that there is protection against voter intimidation. These details are usually set out in an electoral law, although some constitutions include them in provisions concerning elections or the Electoral Commission (e.g. Kenya, Articles 81 and 82).

The rights to take part in public affairs and to vote and stand for public office are usually granted to citizens only. However, democracies do not exclude people who are not citizens from public life generally and many countries permit non-citizens to stand for election and vote in local elections. In the United Kingdom, citizens of Commonwealth countries resident in the United Kingdom may also vote in national elections and referendums.

Right to vote

The voting age varies and is usually established in the constitution. Other limitations on the right to vote are most often covered by ordinary law. Until recently, it was generally considered acceptable to withhold the vote from convicted prisoners. Sometimes this restriction was extended to people with a criminal record. However, an automatic exclusion of convicted prisoners from the right to vote is now widely rejected on the grounds that it is not in proportion with securing a legitimate public interest. Similarly, depriving people who have completed a criminal sentence of their right to vote is viewed as an infringement of the right. Length of residency abroad and mental capacity are also common limits on the right to vote, but they are also contested now.

Right to stand for public office

The right to stand for public office is closely linked to the right to vote, but a greater range of legally imposed limitations is considered acceptable. These can be set out in the constitution (usually in sections that cover elections, and the legislative or the executive branches) or in legislation, and may include restrictions based on age, citizenship, status as a prisoner serving a criminal sentence or mental health. Whether or not people holding dual citizenship may stand for election is contested in many countries. Note, however, that criteria for standing for office set out in the constitution itself are not subject to any provisions on restricting or limiting rights specified in the charter of rights.

International human rights norms require qualifications for standing for and holding office to be reasonable and not discriminatory. For example, an education requirement other than the basic qualification needed to perform a particular representative function would not be acceptable. On the other hand, electoral quotas such as quotas for women or other groups do not infringe the right to stand for office if their goal is to remedy inequality.

Right of access to positions in public service (public administration)

Under international human rights law, the right of access to positions in the public service is included with the rights to take part in public affairs, to vote and to stand for public office. However, because this right is primarily concerned with discrimination (such as exclusion on the basis of ethnicity, sex or religion), it is not often stated expressly in a charter of rights. Nonetheless, consideration should be given to complementing whatever constitutional provisions there may be on public service employment with an express right in the charter of rights to make it easier to demand and enforce the right to access a position in the public service.

Examples of provisions on the right to take part in public affairs



Angola, 2010

Article 52. (1) Every citizen shall have the right to take part in political life and the direction of public affairs, either directly or via freely elected representatives, and to be informed of the actions of the state and the management of public affairs, under the terms of the Constitution and by law.



Czech Republic, 1993 (rev. through 2013)

Article 21. (1) Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives.



Colombia, 1991 (rev. through 2021)

Article 40. Any citizen has the right to participate in the establishment, exercise, and control of political power. To make this decree effective the citizen may:
(1) Vote and be elected.



Germany, 1949 (rev. through 2020)

Article 38. [Elections] (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.



Italy, 1947 (rev. through 2012)

Article 48. Any citizen, male or female, who has attained majority, is entitled to vote. The vote is personal and equal, free and secret. The exercise thereof is a civic duty. The law lays down the requirements and modalities for citizens residing abroad to exercise their right to vote and guarantees that this right is effective. ...

The right to vote cannot be restricted except for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law.



Bolivia, 2009

Article 149. To be a candidate to the Pluri-National Legislative Assembly, one must satisfy the general requisites for public service, be 18 years of age at the time of election, and have resided permanently for at least two years immediately prior to the election in the corresponding district.



Cape Verde, 1980 (rev. through 1992)

Article 118. (1) To be elected President of the Republic, the candidate must be a native-born Cape Verdian voter, at least thirty-five years of age at the date of candidacy, and have been a permanent resident in the national territory for three years immediately preceding that date.

International instruments

AfCHPR, 13; AmCHR, 23; ArCHR, 24; CEDAW, 7; CRPD, 29; EUCFR, 39, 40; ICCPR, 25; ICERD, 5; ICMW, 41; UDHR, 21.

1.18 Freedom of opinion and expression

Freedom of opinion means being able to hold and change opinions without interference (i.e. harassment, stigmatization, criminalization). Freedom of expression is the right to communicate information and ideas of all kinds in a variety of ways, including through images (including art) and actions (see Cape Verde's constitutional provision below stating this expressly). Generally, the term "expression" is now used instead of "speech" to capture its broader meaning more clearly.

Freedom of expression also necessarily means freedom of the media, including print, radio, broadcast and online, and protection of the media and journalists. Some constitutions address these aspects in detail.

Although the right to freedom of opinion and expression is most obviously concerned with safeguarding political speech, it is now understood to cover expression more broadly, including matters that may not generally be considered "political" and that may be expressed through literature, academic work, art, pornography and commercial advertising. This broader understanding does not mean that all expression must be tolerated. Common limitations on, or exclusions from, freedom of expression include national security concerns, reputational integrity (defamatory speech is usually not protected), concerns about the vulnerability of children and young people (child pornography is not permissible), incitement of violence against particular racial, ethnic, religious or other groups, criminal communications (e.g. bribery, perjury, blackmail) and competing privacy rights (e.g. confidentiality agreements).

Freedom of opinion and expression are sometimes protected in the same provision and sometimes separately; freedom of opinion may be combined with freedom of religion and conscience.

Free expression is generally protected on a content-neutral basis: under international human rights law it is largely irrelevant if the expression is morally unacceptable or factually incorrect. Restrictions on expression must be justified, just as restrictions on other rights. Sometimes, however, constitutions exclude certain categories of expression, such as propaganda for war or hate speech, from protection entirely. This means that prohibitions on such types of expression do not need to meet the standards of a limitation clause. (See, for example, Constitution of South Africa, Section 16.)

Examples of provisions on freedom of opinion and expression



Cape Verde, 1980 (rev. through 1992)

Article 45. (1) Everyone shall have freedom of expression by speech, image, or any other medium; no one shall be harassed because of political, philosophical, religious, or other opinions.



Latvia, 1922 (reinstated in 1991; rev. through 2016)

Article 100. Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited.



Eswatini, 2005

Protection of Freedom of Expression

Section 24. (1) A person has a right of freedom of expression and opinion.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say—

- (a) freedom to hold opinions without interference;
- (b) freedom to receive ideas and information without interference;
- (c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
- (d) freedom from interference with the correspondence of that person.



South Africa, 1996 (rev. through 2012)

Freedom of expression

Section 16. (1) Everyone has the right to freedom of expression, which includes—

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.



Kenya, 2010

Freedom of the media

Article 34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

- (a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

- (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that–
 - (a) are necessary to regulate the airwaves and other forms of signal distribution; and
 - (b) are independent of control by government, political interests or commercial interests.
- (4) All State-owned media shall–
 - (a) be free to determine independently the editorial content of their broadcasts or other communications;
 - (b) be impartial; and
 - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Parliament shall enact legislation that provides for the establishment of a body, which shall–
 - (a) be independent of control by government, political interests or commercial interests;
 - (b) reflect the interests of all sections of the society; and
 - (c) set media standards and regulate and monitor compliance with those standards.

International instruments

AfCHPR, 9; AmCHR, 13; ArCHR, 32; CRC, 13; CRPD 21; ECHR, 10; EUCFR, 10, 11; ICCPR, 19; UDHR, 19.

1.19 Freedom of association and assembly

Freedom to associate covers all forms of human association including the right of individuals to associate with whom they please and the right to form or join any organization, such as a religious community, trade union, advocacy group or political party. A necessary corollary is the right not to form or join such organizations. The right covers both formal and informal (such as unregistered or temporary) associations.

Freedom of assembly, sometimes framed as the right to peaceful assembly, is the right to gather in public or in private, without approval by the State, and to express, discuss or advocate for mutual interests. This right protects various forms of assembly, including strikes, sit-ins, demonstrations and marches.

Like the right to freedom of expression, the rights to freedom of association and assembly are largely content-neutral, that is, there cannot be interference with an association or assembly on the mere basis of disagreement with a particular organization or protest's views. As with most rights, these rights are not absolute, however, and certain restrictions are generally accepted. For instance, provided the restrictions meet the standards for limitations set in the constitution, intentionally violent organizations or protests can be prohibited; requirements that certain types of associations must be registered with the State may be set; notice to the State for holding an assembly above a certain size may be required; and so-called "time and place" restrictions, restricting when and where protests or public assemblies may be held (e.g. preventing noisy gatherings outside a hospital) may be imposed.

In some cases, the right of association is drafted to deny certain associations and gatherings the protection of the right. For example, the Constitution of Paraguay states that secret associations and those of a paramilitary character are prohibited (Article 42). Circumscribing rights in this way may be justified and even demanded by a country's history, for instance. Nonetheless, great care is needed to ensure that provisions that circumscribe the ambit of the right (define the right) itself are narrow and cannot be used to restrict freedoms unduly. For instance, restrictions on political parties included in the definition of the right can be easily used to limit fair political competition. Similarly, restrictions on unions can be used for partisan political purposes (see workers' rights below).

Usually, the right to associate can be interpreted also to protect its opposite, that is, people cannot be required to join associations. However, laws or constitutional provisions that require people working in certain fields to be members of the association or professional body that governs the field are considered acceptable. Such requirements will meet international standards provided they fulfil a legitimate need. Professional medical bodies, established to regulate the practice of medicine are an obvious example.

Examples of provisions on freedom of association and assembly



Japan, 1946

Article 21. Paragraph 1. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.



Canada, 1867 (rev. through 2011) Constitution Act, 1982

Section 2. Fundamental freedoms

Everyone has the following fundamental freedoms: ...

(c) freedom of peaceful assembly; and

(d) freedom of association.



Finland, 1999 (rev. through 2018)

Section 13. Paragraph 2. Everyone has the freedom of association. Freedom of association entails the right to form an association without a permit, to be a member or not to be a member of an association and to participate in the activities of an association. The freedom to form trade unions and to organise in order to look after other interests is likewise guaranteed. Paragraph 3. More detailed provisions on the exercise of the freedom of assembly and the freedom of association are laid down by an Act.



Hungary, 2011 (rev. through 2020)

Article VIII. (1) Everyone shall have the right to peaceful assembly.

(2) Everyone shall have the right to establish and join organisations.

(3) Political parties may be formed and may operate freely on the basis of the right to association. Political parties shall participate in the formation and expression of the will of the people. Political parties shall not exercise public power directly.

(4) The detailed rules for the operation and management of political parties shall be laid down in a cardinal Act.

(5) Trade unions and other interest representation organisations may be formed and may operate freely on the basis of the right to association.



Paraguay, 1992 (rev. through 2011)

Of the Freedom of Assembly and of Manifestation

Article 32. Persons have the right to meet and to manifest peacefully, without weapons and with licit ends, without the need of a permit, as well as the right not to be obligated to participate in such acts. The law may only regulate its exercise in places of public traffic, [and] at certain hours, preserving the rights of third parties and the public order established by the law.

Of the Freedom of Association

Article 42. All persons are free to associate or unionize themselves with licit ends[;] also no one is obligated to belong to a specific [determinada] association. The law will regulate the form of the colleges of professionals [colegiación profesional].

Secret associations and those of a paramilitary character are prohibited.



Angola, 2010

Article 48. (1) All citizens shall have the right to freely associate with one another without requiring any administrative authorisation, on condition that such associations are organised on the basis of democratic principles, under the terms of the law.

(2) Associations shall pursue their purposes freely and without interference from the public authorities and may not be dissolved or have their activities suspended, except in cases prescribed by law.

(3) No-one shall be obliged to belong to an association, or be coerced by any means to remain a member of one.

(4) Any associations or groupings whose purposes or activities are contrary to the constitutional order, or which incite and practice violence, promote tribalism, racism, dictatorship, fascism or xenophobia, in addition to any military, militarised or paramilitary-type associations, shall be prohibited.

International instruments

AfCHPR, 10, 11; AmCHR, 15, 16; ArCHR, 24 (6); CRC, 15; CRPD, 29; ECHR, 11; EUCFR, 12; ICCPR, 21, 22; ICMW, 40; UDHR, 20 (1).

1.20 Right to petition

The right to petition is an ancient right giving people the right to address requests to the government (originally the ruler). Now in most democracies there are many institutions that provide opportunities for people to engage with the public administration or government, and the right has become less important. Nonetheless, in trying to revitalize relationships between the people and their political representatives, some modern legislatures have set up special procedures to solicit, consider and respond to petitions. In addition, a number of constitutions require government officials to respond to petitions. The matters that may be raised in petitions are wide ranging and include allegations about infringements of rights. From this perspective, the right to petition is related to the right to seek remedy for human rights violations.

Example of provisions on the right to petition



Colombia, 1991 (rev. through 2021)

Article 23. Every individual has the right to present respectful petitions to the authorities on account of general or private interest and to secure prompt resolution of same. The legislative body shall be able to regulate its exercise by private organizations in order to guarantee fundamental rights.

1.21 Freedom of thought, conscience and religion

The right to freedom of thought, conscience and religion has two main dimensions. The first is the ability to hold or adopt—without any interference whatsoever—a thought, belief or religion. This dimension forms the absolute core of the right which cannot be limited.

The second dimension of this right is the freedom to manifest one's religion or belief, through the community or individually, in public or private. Such manifestations may include participation in rites and rituals, building places of worship, using ritual objects, displaying symbols, observing holidays or customs, wearing distinctive clothing, following dietary rules, distributing publications, or establishing religious schools. Conscientious objection to military service is considered in Europe and also by UN human rights bodies as a protected aspect of religious freedom. This dimension is linked directly to and bolstered by the right to freedom of opinion. The collective aspects of religious freedom (e.g. legal recognition when this is required by the State, autonomy in internal affairs, and the right of religious communities to choose their leaders) also raise issues of freedom of association. Some constitutions expressly protect the autonomy of religious organizations.

Those who wish to protect certain established religions and restrict the growth of other religions frequently argue for a narrow interpretation of belief and religion. The UN Human Rights Committee, however, has stressed that “[t]he terms belief and religion are to be broadly construed,” noting that the protections of this right extend to theistic, non-theistic and atheistic beliefs, as well as to the right not to profess any religion or belief, and are not limited to traditional or dominant religions and beliefs (ICCPR General Comment No 22, Paragraph 2).

The right protects individuals from having the thoughts or beliefs of another imposed upon them (freedom from coercion). Thus, requiring people to swear an oath on terms other than of their own religious convictions infringes the right to freedom of conscience.

The protection of religious freedom may require occasional exceptions from generally applicable rules or special measures (reasonable accommodation), such as rules concerning dress and provision of vegetarian meals for Buddhists at public schools or in prisons. Determining acceptable restrictions on the right to freedom of religion can be particularly controversial. Art 18 (3) of the ICCPR permits restrictions that are necessary in the interests of public safety, order, health or morals, or the fundamental rights and freedoms of others. Drawing the line is not easy, however.

While freedom of religion is a universally recognized human right, States historically differ in their stance towards religions. Some countries retain an official State religion or an established church, while others mandate separation of church and state (secularism). Depending on their traditional background, some States forbid public funding of religious organizations entirely, while others make funds available either directly to religious organizations or, indirectly, to institutions run by religious organizations (e.g. hospitals, schools). In religiously plural societies it is the duty of the state to maintain social peace without infringing upon the religious liberties of individuals, communities and religious organizations.

The prohibition of religious discrimination is compatible with a State-church regime with an official State religion or based on an established church: an official State religion is not an infringement of the right to freedom of religion unless those who are not members of the official religion are discriminated against or marginalized, or pressure is put on members of other religions to convert to or follow the official religion. In this context, the presence of religion and religious symbols is especially problematic in education, where it may be easy to put pressure on young children to conform to religious ideals against their will. Such indoctrination violates freedom of religion.

Examples of provisions on freedom of thought, conscience and religion



Benin, 1990 (rev. through 2019)

Article 23. Every person has the right to freedom of thought, of conscience, of religion, of creed, of opinion and of expression with respect for the public order established by law and regulations. The exercise of a creed and the expression of beliefs shall take place with respect for the secularity of the State.

The institutions and the religious or philosophical communities shall have the right to develop without hindrances. They shall not be subject to the guardianship of the State. They shall regulate and administer their affairs in an autonomous manner.



Colombia, 1991 (rev. through 2021)

Article 18. Freedom of conscience is guaranteed. No one shall be importuned on account of his/ her convictions or beliefs or compelled to reveal them or obliged to act against his/her conscience.

Article 19. Freedom of religion is guaranteed. Every individual has the right to freely profess his/ her religion and to disseminate it individually or collectively. All religious faiths and churches are equally free before the law.



Ecuador, 2008 (rev. through 2021)

Article 66. The following rights of persons are recognized and guaranteed: ...

(8) The right to practice, keep, change, profess in public or private one's religion or beliefs and to disseminate them individually or collectively, with the constraints imposed by respect for the rights of others.

The State shall protect voluntary religious practice, as well the expression of those who profess no religion whatsoever, and shall favor an environment of plurality and tolerance.



Finland, 1999 (rev. through 2018)

Section 11. Everyone has the freedom of religion and conscience.

Freedom of religion and conscience entails the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one is under the obligation, against his or her conscience, to participate in the practice of a religion.



Portugal, 1976 (rev. through 2005)

Freedom of conscience, religion and worship.

Article 41. (1) Freedom of conscience, religion and worship shall be inviolable.

(2) No one shall be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance.

(3) No authority shall question anyone in relation to his convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor shall anyone be prejudiced in any way for refusing to answer.

(4) Churches and other religious communities shall be separate from the state and free to organise themselves and to perform their ceremonies and their worship.

(5) Freedom to teach any religion within the denomination in question and to use appropriate media for the pursuit of its activities shall be guaranteed.

(6) The right to be a conscientious objector, as laid down by law, shall be guaranteed.



Japan, 1946

Article 19. Freedom of thought and conscience shall not be violated.

Article 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.



Republic of Korea, 1948 (rev. through 1987)

Article 19. All citizens shall enjoy freedom of conscience.

Article 20. (1) All citizens shall enjoy freedom of religion.

International instruments

AfCHPR, 8; AmCHR, 12; ArCHR, 25, 30; CRC, 14; EUCFR, 10; ICCPR, 18; UDHR, 18.

1.22 Right of access to information (or freedom of information)

The right of access to information plays a critical role in allowing people to hold the government to account and make informed choices; it is an essential element of the right to participate in public affairs; and it is an important tool in promoting human rights including for exposing past and present human rights violations. Without access to information, many rights cannot be properly enforced and, for example, the rights to freedom of expression and to participate in the conduct of public affairs, are weakened if people do not have adequate access to information.

The right usually entitles people to access information held by the State and other bodies performing public functions or receiving public funds. These bodies are presumptively obliged to make all their information publicly available, both on their own initiative and in response to requests. In addition, more recent constitutions often extend the right of access to information to information held by private

entities such as individuals and corporations. Access to information from private entities may be more limited than in the case of public entities, however. The Kenyan Constitution expressly limits the right of access to information held by private entities to information necessary to enforce constitutional rights. This would permit access to information held by a mining company that is necessary to enforce the constitutional right to a clean environment, for example.

Along with the right to private life, the right of access to information also enables individuals to ascertain “whether, and if so, what personal data is stored in automatic data files, and for what purposes” (ICCPR General Comments 16 and 34). Furthermore, people should be able to know which entities, whether public or private, control these files. If this personal data is incorrect, or was collected illegally, individuals have the right to rectify their records.

Many countries supplement this right with legislation outlining specific procedures for accessing information, so that the right is effectively implemented. The goal is to ensure that bodies respond in a timely manner to requests for information and treat requests fairly and consistently. The costs of following any prescribed procedure should be low and procedures should be accessible. Some constitutions (e.g. Mexico) set these matters out in some detail.

For the right of access to information (and freedom of expression) to work effectively, there should be specific safeguards to protect individuals who release information on wrongdoing (whistle blowers). Some constitutions protect whistle blowers directly, for example protecting the right of journalists to keep their sources confidential as in Cape Verde’s Constitution, Article 46 (8), but most instead rely solely on interpretations of the rights to freedom of expression and access to information to protect whistle blowers.

There is a very small range of appropriate justifications to limit the access to information, mostly related to considerations of state security, law enforcement and justice, and privacy. For example, access to court proceedings may be restricted if this is deemed necessary to protect the interests of a juvenile or of witnesses whose lives may be threatened by giving evidence; and the need to protect a criminal investigation may justify denying access to details of the investigation. In rare cases, it may be acceptable to withhold health records if it is feared that access to them will endanger the person concerned.

Examples of provisions on the right of access to information (or freedom of information)



Ecuador, 2008 (rev. through 2021)

Article 18. All persons, whether individually or collectively, have the right to:

- (1) Look for, receive, exchange, produce and disseminate information that is truthful, accurate, timely, taken in context, plural, without prior censorship about the facts, events, and processes of general interest, with subsequent responsibility.
- (2) Gain access freely to information generated in public institutions or in private institutions that handle State funds or perform public duties. There shall be no confidentiality of information except in those cases expressly provided for by the law. In the event of a violation of human rights, no public institution shall refuse to provide the information.



Estonia, 1992 (rev. through 2015)

Article 44. Everyone has the right to freely obtain information disseminated for public use. All state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use.

An Estonian citizen has the right to access information about himself or herself held in state agencies and local governments and in state and local government archives,

pursuant to procedure provided by law. This right may be restricted pursuant to law to protect the rights and freedoms of others or the confidentiality of a child's filiation, and in the interests of combating a criminal offence, apprehending a criminal offender, or ascertaining the truth in a criminal procedure.

Citizens of foreign states and stateless persons who are in Estonia have the rights specified in paragraphs two and three of this section equally with Estonian citizens, unless otherwise provided by law.



Kenya, 2010

Access to information

Article 35. (1) Every citizen has the right of access to–

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.



Morocco, 2011

Article 27. The citizens [feminine] and citizens [masculine] have the right of access to information held by the public administration, the elected institutions and the organs [organismes] invested with missions of public service.

The right to information may only be limited by the law, with the objective [but] of assuring the protection of all which concerns national defense, the internal and external security of the State, and the private life of persons, of preventing infringement to the fundamental freedoms and rights enounced in this Constitution and of protecting the sources and the domains determined with specificity by the law.



Mexico, 1917 (rev. through 2015)

Article 6. ... Every person shall be entitled to free access to plural and timely information, as well as to search for, receive and distribute information and ideas of any kind, through any means of expression.

The State shall guarantee access to information and communication technology, access to the services of radio broadcast, telecommunications and broadband Internet. To that end, the State shall establish effective competition conditions for the provision of such services.¹⁵



Spain, 1978 (rev. through 2011)

Section 105. The law shall make provision for: ...

(b) The access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of persons.

International instruments

AfCHPR, 9; AmCHR, 13; CRPD, 21; ICCPR, 19; UDHR, 19; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, 1998); Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin American and the Caribbean (Escazú Agreement, 2018).

¹⁵ Article 6 concludes with a detailed explanation of how the right is to be secured, including the principle of "maximum disclosure", protections for information that relates to private life, that access to public information must be free, and that an Autonomous Transparency Agency must be established.



2. Social and economic rights

This section focuses on rights that are usually categorized as social and economic rights, that is, rights concerned with the equitable distribution of social resources and social justice. The category includes two very different sets of rights:

- Labour or worker's rights, including the right to work, fair labour conditions, and the right to form and join trade unions.
- Rights relating to welfare and decent living conditions—rights to freedom from want and need — such as rights to social security, health care, food, housing or shelter, and education.

Labour rights were among the first rights recognized internationally (the International Labour Organization (ILO) was founded in 1919 and adopted its first convention setting labour standards that year). Labour rights operate in much the same way as rights traditionally categorized as civil and political rights, generally demanding relatively limited State resources for their realization and including both individual and group rights.

In contrast to labour rights, many of the rights that might be classified as rights to decent living conditions are considered different from rights classified as civil and political rights because they pose significant financial and institutional challenges for their realization, especially in developing countries: fully implementing rights to health care, housing, food and water etc. clearly demands substantial means. For this reason, among others, in the past there was considerable opposition to including them in constitutions as judicially enforceable rights.

There continues to be debate on the extent to which social and economic rights should be treated differently from civil and political rights (see Part A 1.1), as well as debate on the role of the judiciary in enforcing social and economic rights. Nonetheless, social and economic rights are now routinely included in constitutions and there are many examples of their successful legal enforcement around the globe. For example, courts have reviewed reductions in social safety nets and the reasonableness of plans to expand social safety nets to decide whether they comply with the right to social security. Also, the right to housing has guaranteed people evicted from property alternative accommodation under certain circumstances; and the right to water has secured people's access to water even when they are unable to pay for it. Some courts have ordered immediate action by the State when it was found that it was violating minimum core entitlements to rights like the rights to health and education.

How social and economic rights are included in constitutions

In the past, constitutions often did not mention social and economic rights at all (for example, the Constitution of the United States), merely mentioned them in a preamble, thus giving them no legal force (French Constitution) or included only those social rights that could realistically be enforced immediately (Denmark's 1953 Constitution protects the rights to education and social assistance but does not protect other social rights). Now, perhaps partly as a consequence of their inclusion in the UDHR and the adoption of the ICESCR, a wide range of social and economic rights are included in many constitutions.

(i) Social and economic rights included but not directly enforceable

The inclusion in constitutions of lists of national goals, including social and economic goals, sometimes called directive principles of state policy, that are not legally enforceable was an important first step in constitutionalizing social and economic rights. For example, Part IV of the Indian Constitution is headed “Directive Principles of State Policy” and includes a list of principles, such as “adequate means of livelihood”, “the right to work, to education and to public assistance”, “[raising] the level of nutrition and the standard of living” and “[improving] public health” but Article 37 (below) expressly states that these principles are not directly enforceable by the judiciary. The Constitutions of Ireland, Malta, Namibia and Nigeria, among others, contain similar provisions.



India, 1949 (rev. through 2019)

Article 37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Even if a constitution states that directive principles are not enforceable, they may provide leverage for politicians trying to achieve social goals and protect legislative programmes from being struck down by courts for incompatibility with other constitutional provisions. For example, a legislative programme to expropriate property to in order develop social housing may be challenged on the ground that it infringes the right to property, but a directive principle setting decent housing as a state goal may protect the legislative programme. Moreover, in some countries courts have implemented directive principles indirectly. Most famously, India’s Supreme Court drew on provisions of the directive principles in the Constitution in deciding that the right to life, included in the Constitution’s judicially enforceable charter of rights, encompasses certain social and economic rights, thus making those aspects of the principles enforceable. It should be noted, however, that this development in India depended heavily on creative and sympathetic courts.

(ii) Social and economic entitlements as public services

Some constitutions include healthcare, education and other social entitlements as public services without clearly designating them as rights. The wording may be interpreted by the judiciary to provide a right, as occurred in Colombia, but it may be interpreted instead to establish political goals, similar to a directive principle, preventing people from claiming these entitlements directly in court.



Colombia, 1991 (rev. through 2021)

Article 49. Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and restore public health.

(iii) Judicially enforceable (binding) social and economic rights

Many, perhaps most, new constitutions treat social and economic rights as legally enforceable rights with the same status as civil and political rights.

There are two dominant approaches to incorporating enforceable social and economic rights in constitutions. One is to indicate clearly that they are enforceable rights and to place no limits on their enforceability. With this approach, setting standards for the enforcement of the rights is left to future policy makers and the judiciary. The second approach is to draw on the concept of progressive realization used in the ICESCR to guide their implementation and enforcement. ICESCR’s Article 2 states: “Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.” (See, for example, the constitutions of South Africa, Section 26, and Kenya, Article 21.)

What the requirement of progressive realization of social and economic rights means

Initially, the concept of progressive realization was understood simply to acknowledge that the full implementation of some social and economic rights demands financial, infrastructure, and human resources that may not exist in a State. Over the years, international organizations and domestic courts have developed an understanding of what is needed for the progressive realization of social and economic rights, clarifying the notion and reaffirming the interconnectedness of all rights:

“Progressive realization now affirms a transformative framework through which rights-holders are able to claim rights and challenge structural disadvantage and social exclusion. Socioeconomic policy choices are not simply assessed against statistical indicators, but more directly, against the experiences of rights holders and human rights values of the inherent dignity and worth of every human being.”¹⁶

In summary:

- Social and economic rights are not merely a matter of providing services; they require measures that fully respect the dignity and equality of all people.
- “Progressive realization” does not mean that the State can do nothing; the State must immediately take the steps that it can to realize the rights, and over time must move towards their full enjoyment.
- Constitutions may expressly give States discretion in how to implement social and economic rights by using wording such “appropriate steps,” as in Section 26 of the South African Constitution (below). States are then expected to justify the steps they choose.
- If a State does not comply fully with its obligation to fulfil social and economic rights, it bears the burden of proving that it is unable to do so.

Restrictive steps that reduce the enjoyment of a right, e.g. a State reducing pensions, may be subject to special scrutiny. Such a measure may be justified, for example, in the face of an economic crisis, when the actions taken protect the needs of poorer workers or if the financial savings are to be used for a pressing social goal, such as expanding health care and education for the poor.

Lack of resources is not a complete defence against a failure to implement social and economic rights. According to international law, States are obliged to fulfil a certain essential core of the rights, referred to as the “basic minimum core”, that covers the most critical needs of the poorest and most marginalized people. So far, no constitution has stated expressly that the minimum core of each social or economic right must be secured immediately. However, constitutions may nonetheless be interpreted to secure the minimum core of social and economic rights. For example, a limitation clause that prohibits limitations that violate the “essential content”, “essence” or “core” of rights may be interpreted to require immediate realization of the minimum core (see, for example, Republic of Korea, Article 37). In addition, perhaps drawing on the understanding of social and economic rights in international human rights law, courts may interpret the rights themselves to demand the immediate fulfilment of their minimum core.

16 Bruce Porter, “Rethinking Progressive Realization: How Should it be Implemented in Canada?” Background Paper for a Presentation to the Continuing Committee of Officials on Human Rights. Social Rights Advocacy Centre, (June 4, 2015). Available at <http://www.socialrights.ca/documents/publications/Porter%20Progressive%20Implementation.pdf>.

Examples of provisions requiring progressive realization of certain social and economic rights



South Africa, 1996 (rev. through 2012)

Housing

Section 26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.



Kenya, 2010

Implementation of rights and fundamental freedoms

Article 21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.

2.1 Labour/Workers' rights

The ICESCR lays out three distinct aspects of workers' protection related to the right to choose employment:

- The opportunity to gain a living by work that is freely chosen or accepted (Article 6).
- Just and fair conditions of work, without any discrimination, including:
 - Remuneration that is fair and equal and enables workers to enjoy a decent standard of living.
 - Safe and healthy working conditions.
 - Equal opportunities for promotion.
 - Rest, leisure and reasonable limitation on working hours and periodic holidays (Article 7).
- Right to form and join trade unions and the right to strike (Article 8).

Examples of provisions on labour/workers' rights



Lithuania, 1992 (rev. through 2006)

Article 48. Paragraph 1. Each human being may freely choose a job or business, and shall have the right to have proper, safe and healthy conditions at work, to receive fair pay for work and social security in the event of unemployment.



Argentina, 1853 (reinstated 1983; rev. through 1994)

Article 14bis. Paragraph 1. Labor in its diverse forms shall enjoy the protection of the law, which shall ensure to workers: dignified and equitable working conditions; a limited working day; paid days of rest and vacation; fair remuneration; adjustable minimum living wages; equal pay for equal work; a share in the earnings of enterprises, with control over production and collaboration in management; protection against arbitrary discharge; permanence of public employment; free and democratic organization of labor unions, recognized simply by inscription in a special register.

Paragraph 2. Trade unions are hereby guaranteed: [the right] to conclude collective bargaining agreements; [the right] to resort to conciliation and arbitration; the right to strike. Union representatives shall enjoy the guarantees necessary for the performance of their union tasks and those relating to the permanence of their employment.



Timor-Leste, 2002

Right to Work. Article 50. (1) Every citizen, regardless of gender, has the right and the duty to work and to choose freely his or her profession.

(2) The worker has the right to labor safety and hygiene, remuneration, rest and vacation.

(3) Dismissal without just cause or on political, religious and ideological grounds is prohibited.

(4) Compulsory work, without prejudice to the cases provided for under penal legislation, is prohibited.

(5) The State shall promote the establishment of co-operatives of production and shall lend support to household businesses as sources of employment.

Right to strike and Prohibition of Lock-Out.

Article 51. (1) The workers have the right to resort to strike, the exercise of which shall be regulated by law.

(2) The law defines the conditions under which services are provided, during a strike, that are necessary for the safety and maintenance of equipment and facilities, as well as minimum services that are necessary to meet essential social needs.

(3) Lock-out is prohibited.

Trade Union Freedom.

Article 52. (1) Every worker has the right to form or join trade unions and professional associations in defense of their rights and interests.

(2) Trade union freedom is sub-divided, namely, into freedom of establishment, freedom of membership and freedom of organization and internal regulation.

(3) Trade unions and trade union associations shall be independent of the State and the employers.

International instruments

AfCHPR, 15; ArCHR, 30-32; EUCFR, 15; ICESCR, 6, 7; ILO Conventions; UDHR, 23; European Social Charter, 1; Additional Protocol to the AmCHR in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) 6, 7.

2.2 Rights to welfare and decent living conditions (rights to freedom from want and need)

Rights relating to welfare and decent living conditions include the rights to education, food and water, health, housing, and social security. They can be stated in very simple terms as demonstrated in Article 43 of Kenya's Constitution and Article 23 of the Belgium Constitution. As with all rights, however, more detail may be desired to respond to specific historical, political or social issues, to clarify the ambit of the rights or to secure their better implementation.



Kenya, 2010

Economic and social rights

Article 43. (1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.



Belgium, 1831 (rev. through 2021)

Article 23. Everyone has the right to lead a life in keeping with human dignity. ... These rights include among others:..

2° the right to social security, to health care and to social, medical and legal aid;

3° the right to decent accommodation;

4° the right to the protection of a healthy environment;

5° the right to cultural and social fulfilment;

6° the right to family allowances.

2.2.1 Right to education

The right to education is commonly included in constitutions, and the ICESCR provides a very good guide to the aspects that should be covered, particularly with regard to the responsibilities of the State for different levels of education.



ICESCR, 1966

Article 13. (2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Article 13 (3) and (4) of the Covenant adds two further elements. Clause (3) asserts the right of parents to choose schools for their children other than those established by the State, including ensuring education of their children according to their own religion or morals. These schools must comply with standards set by the State. Clause (4) allows private educational institutions.

A constitution may also address issues that are particularly relevant to the country, such as the autonomy of higher (tertiary level) institutions (Albania, Article 57); minority languages (South Africa, Section 29; Afghanistan, Article 43; Czech Republic, Article 25 (2) (a)), religion in education (India, Article 28; Lebanon, Article 10); and girls' access to education (Zimbabwe, Article 27 (2)). Andorra's Constitution (below) elaborates on the right to emphasize, among other things, the relationship of education to human dignity.

Examples of provisions on the right to education



Albania, 1998 (rev. through 2020)

Article 57. (1) Everyone has the right to education.

(2) Mandatory education is set by law.

(3) General high school public education is open to all.

(4) Professional high school education and higher education can be conditioned only on merit.

(5) Mandatory education and general high school education in public schools are free of charge.

- (6) Pupils and students may also be educated in non-public schools at all levels, which are created and operate on the basis of law.
- (7) The autonomy of institutions of higher education and academic freedom are guaranteed by law.



Andorra, 1993

Article 20. (1) All persons have the right to education, which shall be oriented towards the dignity and full development of the human personality, thus strengthening the respect for freedom and the fundamental rights.

(2) Freedom of teaching and of establishing teaching centres shall be recognised.

(3) Parents have the right to decide the type of education for their children. They also have the right to moral or religious instruction for their children in accordance with their own convictions.



South Africa, 1996 (rev. through 2012)

Education

Section 29. (1) Everyone has the right—

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

(a) equity;

(b) practicability; and

(c) the need to redress the result of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.



Zimbabwe, 2013 (rev. through 2017)

Article 27. (2) The State must take measures to ensure that girls are afforded the same opportunities as boys to obtain education at all levels.

International instruments

AfCHPR, 17; AmCHR, 26; ArCHR, 41; CEDAW, 10; CRC, 28; CRPD, 24; ECHR Protocol, 2; ICERD, 5; ICESCR, 13; ICMW, 30; UDHR, 26.

2.2.2 Rights to food and water

The right to adequate food in sufficient quantities or to be free from hunger appears in many new constitutions. Sometimes it is accompanied by a right to “food sovereignty” (Nepal, Article 36). The elements of the right to food sovereignty have not yet been fully developed but, at a minimum, the right places an obligation on the State to adopt laws and policies that secure an adequate supply of food for the country.

The right to water is complex since it encompasses both individual and collective dimensions, with the individual aspect dependent on protection of the collective dimension. The individual aspect of the right guarantees individuals' adequate access to water for the necessities of life, including consumption and hygiene. To secure the right properly, constitutions should expressly state the right to clean, safe, accessible and sufficient water (e.g. Mexico, Kenya, Zimbabwe). The collective dimension of the right to water as a limited and shared resource is reflected in the Ecuadorian Constitution (below) and in some constitutional provisions concerning the environment.

Examples of provisions on the rights to food and water



Bolivia, 2009

Article 16. (l) Every person has the right to water and food.



Nepal 2015 (rev. through 2020)

Right to food.

Article 36. (1) Each citizen shall have the right to food.

(2) Every citizen shall have the right to be protected from a state of starvation, resulting from lack of food stuffs.

(3) Every citizen shall have the right to food sovereignty as provided for in law.



Democratic Republic of the Congo, 2005 (rev. through 2011)

Article 47. The right to health and to a secure food supply is guaranteed.

The law specifies the fundamental principles and the rules of organization for public health and for a secure food supply.



Zimbabwe, 2013 (rev. through 2017)

Right to food and water.

Article 77. Every person has the right to—

- (a) safe, clean and potable water; and
- (b) sufficient food;

and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right.



Mexico, 1917 (rev. through 2015)

Article 4. Paragraph 6. Any person has the right of access, provision and drainage of water for personal and domestic consumption in a sufficient, healthy, acceptable and affordable manner. The State will guarantee such right and the law will define the bases, subsidies and modality for the equitable and sustainable access and use of the freshwater resources, establishing the participation of the Federation, local governments and municipalities, as well as the participation of the citizens for the achievement of such purposes.



Ecuador, 2008 (rev. through 2021)

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

International instruments

ACRWC, 14; ArCHR, 38; CEDAW, 14; CRC, 24; CRPD, 25, 28; ICESCR, 11; UDHR, 25.

2.2.3 Right to health

The right to health may be stated in simple terms, asserting that all people have a right to health. But, modern constitutions often lay out more detailed provisions on the content of the right and the related scope of State and private duties. Provisions may also address the basic design of the health system, such as the responsibilities of private and public providers, and may deal with special situations, such as emergency care, basic preventative care, reproductive health and the healthcare system for children.

Examples of provisions on the right to health



Colombia, 1991 (rev. through 2021)

Article 49. Paragraph 1. Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health.

Paragraph 2. It is the responsibility of the state to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the state will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law.

Paragraph 3. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community.

Paragraph 4. The law will determine the limits within which basic care for all the people will be free of charge and mandatory.

Paragraph 5. Every person has the obligation to attend to the integral care of his/her health and that of his/her community.



South Africa, 1996 (rev. through 2012)

Health care, food, water and social security

Section 27. (1) Everyone has the right to have access to—

- (a) health care services, including reproductive health care; ...
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

International instruments

AfCHPR, 16; ArCHR, 37; CEDAW, 12; CRC, 24; CRPD, 25; EUCFR, 35; ICESR, 12; ICMW, 25; UDHR, 25.

2.2.4 Right to adequate housing

The right to adequate housing is usually recognized in relatively general terms (see, for example, Belgium, Article 23, and Kenya, Article 43, above). Nonetheless, it does not require the State to build housing for the entire population but encompasses the State's positive obligation to prevent homelessness. The right includes a substantial number of specific elements, including protection against arbitrary eviction and security of tenure, as well as the right to drinkable water, decent sanitation and energy sources.

Building on this right, among other things, courts have demanded that the State develop sound policies for providing shelter to the homeless and pay special attention to vulnerable groups; prohibited arbitrary removals of people from their homes; restricted the eviction of people when alternative accommodation is not available; and forbidden the seizure of a home to realize a civil debt when the eviction will leave the occupiers homeless.

Examples of provisions on the right to adequate housing



Colombia, 1991 (rev. through 2021)

Article 51. All Colombian citizens are entitled to live in dignity. The State shall determine the conditions necessary to give effect to this right and shall promote plans for public housing, appropriate systems of long-term financing, and community plans for the execution of these housing programs.



Cape Verde, 1980 (rev. through 1992)

Article 69. Everyone shall have the right to proper housing; the State shall have the duty to achieve this by gradually promoting, according to national economic development, adequate institutional, regulatory, and infrastructural conditions to encourage and support initiatives of local communities to stimulate private construction and access to proper housing.

2.2.5 Right to social security

The right to social security guarantees assistance to people who cannot support themselves and/or their families on account of age, lack of access to healthcare, disability, unemployment, sickness, maternity or injury. Constitutions generally do not specify how a State should implement this right but, in practice, two main approaches are used: contributory and non-contributory schemes. In contributory schemes, social security payments are earned (they are a form of insurance), whereas non-contributory schemes protect people who have no access to social insurance.

Examples of provisions on the right to social security



Cape Verde, 1980 (rev. through 2010)

The Right to Social Security

Article 67. (1) Everyone shall be guaranteed, in accordance with national development, the right to social security as a protection in case of unemployment, illness, disability, old age, being orphaned, and all situations of need or loss of subsistence or capacity to work.

(2) The State must assure the gradual realization of conditions indispensable to effect these rights, namely by adopting policies to create a national decentralized system of social security and a national network of medical and hospital services.

International instruments

ArCHR, 36; CEDAW, 11; CRC, 26; ICERD, 5; ICESCR 9; UDHR, 22.



3. Group rights

The term “group rights” does not have a fixed, generally agreed meaning. Moreover, many rights that are loosely categorized as group rights, such as culture and language rights, have a distinct individual element. For example, the right to speak one’s own language is the right of an individual. Because speaking is a group activity, however, the right is equally comfortably classified as a group right. Similarly, the right to a clean and healthy environment is a right of every individual and of groups because all matters relating to the environment concern everyone. A few group rights do not have an individual element. For example, the right of indigenous peoples to self-determination can only be exercised collectively. Such rights are sometimes referred to as collective rights.

Including rights with a group rights aspect in a constitution requires special attention to who can assert them—individuals, the group, or both—and the language in which they are couched. Regarding the latter, group rights are often drafted in broad language with an aspirational tone. This may make the courts reluctant to enforce them. Ideally, they should be drafted as precisely as possible.

3.1 Right to a clean and healthy environmental/right to protection of the environment

Today, it is beyond debate that human beings are dependent on a healthy environment to lead dignified, healthy and fulfilling lives. Environmental rights have been included in some form in most constitutions adopted since the mid-1970s. The right has been developed theoretically over the past 40 years, and four aspects stand out:

- A right to a healthy, clean, safe and pleasant environment.
- A right to sustainable development of the environment.
- A right to receive information and to participate in decision-making about environmental matters.
- A right to demand that the State undertakes measures to protect the environment.

Environmental rights reflect the relationship between individuals and groups as rights holders. When concerns about the environment first started to receive attention, the right to a healthy environment was included in constitutions as an individual right (Republic of Korea). More recent constitutions capture it as both an individual and group right, while also protecting the rights of future generations (e.g. Venezuela).

As the toll of environmental degradation and climate change extends across the planet, discussions about environmental rights have expanded to include an exploration of the ways in which constitutions can better respond to this challenge. Thus, Ecuador recognizes the rights of nature. While not strictly a human right, the rights of nature are closely linked to human rights because a deterioration of the environment affects the possibility of enjoying many human rights.

Examples of provisions on the right to a clean and healthy environment



Nepal, 2015 (rev. through 2016)

Article 30. (1) Each person shall have the right to live in a healthy and clean environment.
(2) The victim of environmental pollution and degradation shall have the right to be compensated by the pollutant as provided for by law.
(3) Provided that this Article shall not be deemed to obstruct the making of required legal provisions to strike a balance between environment and development for the use of national development works.



Republic of Korea, 1948 (rev. through 1987)

Article 35. (1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.



Niger, 2010 (rev. through 2017)

Article 35. Any person has the right to a healthy environment. The State has the obligation to protect the environment in the interest of present and future generations.

Each one is required to contribute to the safeguarding and to the improvement of the environment in which he lives.

The acquisition, the storage, the handling and the disposal of toxic wastes or pollutants originating from factories and other industrial or handwork sites, installed on the national territory, are regulated by the law.

The transit, import, storage, landfill, [and] dumping on the national territory of foreign pollutants or toxic wastes, as well as any related agreement constitute a crime against the Nation, punishable by law.

The State sees to the evaluation and control of the impacts of any project and program of development on the environment.



Venezuela, 1999 (rev. through 2009)

Article 127. (1) It is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future. Everyone has the right, individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment. The State shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance. The genome of a living being shall not be patentable, and the field shall be regulated by the law relating to the principles of bioethics.



Ecuador, 2008 (rev. through 2021)

Chapter 6: Rights to freedom

Article 66. The following rights of persons are recognized and guaranteed: ...

27. The right to live in a healthy environment that is ecologically balanced, pollution-free and in harmony with nature.

Chapter 7: The rights of nature

Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

International instruments

AfCHPR, 24; AmCHR Protocol of San Salvador, 11; ArCHR, 38; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, 1998); Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin American and the Caribbean (Escazú Agreement, 2018); UNFCCC; and agreements related to particular issues such as pollution, biological diversity and hazardous waste.

3.2 Cultural rights including language

Cultural rights may have both individual and group dimensions: a right to culture protects both individual rights to participate in cultural life or cultural activities (e.g. speaking a language, dressing a certain way, practicing traditional customs, holding and expressing certain beliefs) and the right of groups to maintain a cultural identity, perhaps by requiring members of the community to abide by certain rules. Rights that protect specific systems of law (such as customary law) may also be considered to be cultural rights. They are inherently collective and, in some cases, protect religious systems of personal law. For example, a religious community may have particular arrangements concerning personal status, marriage and divorce, inheritance and children that are different from the arrangements for other groups. The right to culture read together with the right to freedom of religion may be interpreted to support such arrangements (see also the right to freedom of religion above Part B 1.21).

The concept of culture is, of course, very broad and the right to culture often interacts with other rights, most notably the rights to equality, education, freedom of association, freedom of expression and freedom of religion as mentioned above, and the rights of indigenous peoples or particular minority groups.

The most difficult question raised by the right to exercise one's culture arises when cultural practices are claimed to infringe other rights. For instance, freedom of movement may be violated if a cultural community believes that non-members of the group may not enter certain places, or the right to equality may be infringed when a cultural group applies different and unequal standards to men and women. Sometimes constitutions (e.g. Ecuador, South Africa) state expressly that cultural rights cannot override other rights. If nothing is said in the constitution and the cultural rights of an individual or group infringe another right, the rights and harm alleged on each side will need to be weighed up by any legislators who wish to adopt laws relevant to the issue or, if no satisfactory balance is reached politically, by the courts. The goal will always be to resolve the conflict in a way that respects the dignity and equality of all parties but, as in all such matters, sometimes an outcome that protects rights will require changes in people's practices.

Examples of provisions on cultural rights, including language



Benin, 1990

Article 10. Every person has a right to culture. The State has the duty to safeguard and promote the national values of civilizations, as much material as spiritual, as well as the cultural traditions.

Article 11. Paragraph 1. All communities comprising the Béninese nation shall enjoy the freedom to use their spoken and written languages and to develop their own culture while respecting those of others.



Nepal, 2015 (rev. through 2020)

Right to language and culture

Article 32. (1) Each person and community shall have the right to use their language.

(2) Every person and community shall have the right to participate in the cultural life of its community.

(3) Each community living in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization and heritage.



Ecuador, 2008 (rev. through 2021)

Article 21. Persons have the right to build and uphold their own cultural identity, to decide their belonging to one or various cultural communities, and to express these choices; the right to aesthetic freedom; the right to learn about the historical past of their cultures and to gain access to their cultural heritage; to disseminate their own cultural expressions and to have access to diverse cultural expressions.

Culture cannot be used as an excuse when infringing rights recognized in the Constitution.



South Africa, 1996 (rev. through 2012)

Language and culture

Section 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Cultural, religious and linguistic communities

Section 31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.



Switzerland, 1999 (rev. through 2018)

Freedom to use any language

Article 18. The freedom to use any language is guaranteed.

International instruments

AfCPR, 17, 22; ArCHR, 35; CEDAW, 13; CRC, 39, 30, 31; CRPD, 30; ICCPR, 27; ICERD, 5; ICESCR, 15; ICMW, 31; UDHR, 27; UNDRIP.

3.3 Rights of indigenous peoples

Over the past 30 years, special attention has been paid to indigenous peoples because they usually constitute especially vulnerable groups. These groups demand a greater say in decisions affecting their lives, more respect for their traditions and culture, and better responses to the historical injustice that they have suffered and the poor conditions in which they often live. Many indigenous peoples also face new challenges, such as those created by climate change or the encroachment of extractive industries, among others. These new problems make protection of their rights all the more urgent.

There is no authoritative definition of what an indigenous people is or who qualifies as a member, nor could there be. Self-identification by groups and individuals is the approach adopted by international treaties (UNDRIP, Articles 9, 33; ILO Convention No 169, Articles 1, 2), and by some constitutions, such as Mexico's. Usually, groups that identify as an indigenous people have historical continuity from pre-colonial times, a distinct social, cultural and political system, a distinct language and culture, and are not a dominant group (often they are minorities).

Constitutions have long recognized customary legal systems and indigenous languages (Costa Rica), including a right to education in one's indigenous language (South Africa) but more expansive constitutional rights specifically for indigenous peoples (or members of indigenous groups) are relatively new. They are most developed in South America, where a number of constitutions emphasize that indigenous peoples are part of the nation and incorporate elements of their worldview; identify the special human rights of their members (rights that individuals hold by virtue of their association with the group) (e.g. Bolivia, Ecuador); and guarantee the right of indigenous peoples to govern themselves, often protecting their lands and listing the matters over which they have authority, including local judicial systems. Not all of these provisions belong in a charter of rights. But, to use the language of Article 231 of the Brazilian Constitution, together they mark recognition of indigenous peoples' differing and distinct "social organization, customs, languages, beliefs and traditions" and they should inform the way in which rights are applied.

The treatment of indigenous rights in a constitution is closely linked to the national context, but in assessing a charter of rights it is important to consider the following:

- Does the constitution give indigenous peoples a say in decisions that affect them?
- Does the constitution guarantee their right to protect their cultural, social and political identity? Does it provide mechanisms for them to defend these aspects of their life?
- Will the constitutional arrangements provide protection of indigenous peoples and their members from unequal practices and discrimination?
- Are land rights and resources fairly treated?
- Who may exercise the rights? Individual members of the group, an authoritative individual or body? Or both?
- Is it clear that indigenous rights supplement other rights and that asserting indigenous rights will not deprive indigenous people of the full range of rights? What happens when indigenous peoples' rights, such as the right to follow customary social practices or certain cultural rights, conflict with other rights in the full list of rights? For instance, the right to gender equality or freedom of religion may be in tension with traditional customs.
- How will conflicts between cultural practices of indigenous groups and constitutional rights be treated?

Examples of provisions on the rights of indigenous peoples



Costa Rica, 1949 (rev. through 2011)

Article 76. Spanish is the official language of the Nation. However, the State will see to the maintenance and cultivation of the national indigenous languages.



Mexico, 1917 (rev. through 2021)

Article 2. ... Consciousness of one's indigenous identity will be a fundamental criterion for determining to whom the provisions concerning indigenous people are applied. Communities composed of an indigenous people, [are] those that form a social, economic and cultural unit living in a territory and that recognize their own authorities in accordance with their habits [usos] and customs.

A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination and, consequently, to the autonomy to: ...¹⁷



Bolivia, 2009

Article 30. I. A nation and rural native indigenous people consists of every human collective that shares a cultural identity, language, historic tradition, institutions, territory and world view, whose existence predates the Spanish colonial invasion.

II. In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights:

- (1) To be free.
- (2) To their cultural identity, religious belief, spiritualities, practices and customs, and their own world view.

17 The list that follows includes, among other things, "determine their own forms of coexistence;" use their own legal system; elect authorities; protect their environment; and use their languages.

- (3) That the cultural identity of each member, if he or she so desires, be inscribed together with Bolivian citizenship in his identity card, passport and other identification documents that have legal validity.
 - (4) To self-determination and territoriality.
 - (5) That its institutions be part of the general structure of the State.
 - (6) To the collective ownership of land and territories.
 - (7) To the protection of their sacred places.
 - (8) To create and administer their own systems, means and networks of communication.
 - (9) That their traditional teachings and knowledge, their traditional medicine, languages, rituals, symbols and dress be valued, respected and promoted.
 - (10) To live in a healthy environment, with appropriate management and exploitation of the ecosystems.
 - (11) To collective ownership of the intellectual property in their knowledge, sciences and learning, as well as to its evaluation, use, promotion and development.
 - (12) To an inter-cultural, intra-cultural and multi-language education in all educational systems.
 - (13) To universal and free health care that respects their world view and traditional practices.
 - (14) To the practice of their political, juridical and economic systems in accord with their world view.
 - (15) To be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them. In this framework, the right to prior obligatory consultation by the State with respect to the exploitation of non-renewable natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement.
 - (16) To participate in the benefits of the exploitation of natural resources in their territory.
 - (17) To autonomous indigenous territorial management, and to the exclusive use and exploitation of renewable natural resources existing in their territory without prejudice to the legitimate rights acquired by third parties.
 - (18) To participate in the organs and institutions of the State.
- III. The State guarantees, respects and protects the rights of the nations and the rural native indigenous peoples consecrated in this Constitution and the law.



Colombia, 1991 (rev. through 2021)

Article 330. Paragraph. The exploitation of the natural resources in the indigenous territories shall be done without impairing the cultural, social, and economic integrity of the indigenous communities. In the decisions adopted with respect to said exploitation, the government shall encourage the participation of the representatives of the respective communities.

International instruments

AfCHPR, 20, 24; CRC, 30; ICCPR, 1, 27; ICESCR, 1, 15; ILO Convention No 169; UNDRIP.



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