

Providing a foundation for decent work and adequate income during health and economic crises: constitutional approaches in 193 countries

Income and
decent work in
193
constitutions

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Abstract

Purpose – As coronavirus disease 2019 (COVID-19) spreads globally, the economic and health consequences are disproportionately affecting marginalized workers. However, countries' existing labor and social security laws often exclude the most vulnerable workers from coverage, exacerbating existing inequalities. Guaranteeing the rights to adequate income even when ill, decent working conditions and nondiscrimination in constitutions may provide a foundation for protecting rights universally, safeguarding against counterproductive austerity measures, and providing a normative foundation for equality and inclusion as economies recover. The purpose of this article is to examine the prevalence of these rights globally and assess some of their early impacts amid the pandemic.

Design/methodology/approach – The authors created and analyzed a database of constitutional rights for all 193 United Nations member states. All constitutions were double coded by an international multidisciplinary, multilingual team of researchers.

Findings – This study finds that 54% of countries take some approach to guaranteeing income security in their constitutions, including 23% that guarantee income security during illness. Thirty-one percent guarantee the right to safe working conditions. Only 36% of constitutions explicitly guarantee at least some aspect of nondiscrimination at work. With respect to equal rights broadly, constitutional protections are most common on the basis of sex (85%), followed by religion (78%), race/ethnicity (76%), socioeconomic status (59%), disability (27%), citizenship (22%), sexual orientation (5%) and gender identity (3%). Across almost all areas, protections for rights are far more common in constitutions adopted more recently.

Originality/value – This is the first study to systematically examine protections for income security and decent work, together with nondiscrimination, in the constitutions of all 193 UN member states.

Keywords Social policy, Unemployment, Inequality, Income, Social security, Decent work

Paper type Research paper

Introduction

The coronavirus disease 2019 (COVID-19) pandemic – and the economic shutdowns imposed to contain the virus' spread – have had disastrous impacts on workers and their families worldwide. Amid large-scale unemployment, rates of poverty, hunger and homelessness are on the rise. Workers who remain employed but have no option to work remotely, including many informal workers, face significant health risks. Workers from marginalized groups have been disproportionately affected, and as economies begin to reopen, the heightened risks of hiring discrimination stemming from the downturn have the potential to widen gaps further.



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In this paper, we examine one aspect of countries' national legal frameworks that is especially pertinent to the current crisis: whether their constitutions provide a foundation for decent work and adequate income. Specifically, we analyze to what extent the constitutions of all 193 UN member states protect the rights to: (1) social insurance during illness, unemployment and a variety of other common circumstances; (2) decent working conditions; (3) nondiscrimination in employment and (4) broad equality and nondiscrimination for different social groups. While the details of social insurance programs and labor protections are often covered through legislation rather than constitutions, constitutional provisions establishing a foundation for these laws offer several unique strengths. First, as countries' foundational documents, constitutions express a set of values and commitments on behalf of the state; in this respect, constitutions – more than other laws – help shape norms and expectations about a government's duties to its citizens, both during times of crises and always. Second, in nearly all countries, constitutional rights supersede conflicting legislation. Finally, in many countries, constitutions are more difficult to amend than ordinary laws, and thus constitutional provisions can provide especially powerful and enduring protections for fundamental rights.

This paper proceeds in four sections. First, we examine the global context for our study, including the documented consequences of the pandemic on marginalized workers worldwide, and describe four key functions of constitutional protections for social insurance, decent working conditions and nondiscrimination in the current moment. Second, we describe our methodological approach to quantifying constitutional protections in more detail. Third, our Findings section presents a detailed global picture of how many constitutions protect each of these rights, including their prevalence by decade of constitutional adoption. In the Discussion, we highlight examples from recent case law that shed light on the practical impacts of these constitutional provisions, note key limitations and identify areas for future research.

Background

As COVID-19 has swept the globe, both the health and economic consequences have been devastating. In March 2020, the International Labour Organization (ILO) estimated that job loss worldwide could easily reach 25 million (ILO, 2020a); by April, it was clear this was a vast underestimate, as 20.5 million workers became newly unemployed in the US alone following the economic shutdown (Horsley, 2020). At the same time, essential workers who had no option to work remotely faced increasingly dire health risks, and often lacked access to adequate personal protective equipment (PPE). Meanwhile, the widespread closure of schools and childcare facilities spurred many workers to leave their jobs or reduce their hours in order to meet their caregiving needs.

These consequences have been borne disproportionately by groups who have long faced marginalization in the economy. Across countries, women, people of color, migrants and low-wage workers, including those in the informal sector, have faced higher risks of job loss. For example, among people who were employed prelockdown in India, women were around 20% less likely than men to be employed postlockdown (Deshpande, 2020). In Turkey, a study by the Red Crescent found that 69–87% of surveyed refugee households had experienced a job loss due to COVID (ILO, 2020b). In Brazil, 5.8 million of the 7.8 million jobs lost due to the pandemic by the end of June were in the informal economy, in which Afro-Brazilians are over-represented (Pegroso, 2020; Nogueira *et al.*, 2020). These national experiences reflect global dynamics; in May, the ILO estimated that lockdown measures triggered by the pandemic had affected the livelihoods of over 1.6 billion informal workers worldwide, leading to a 60% drop in earnings (ILO, 2020c).

Similarly, marginalized workers have faced higher risks of unsafe working conditions. In the US, Black Americans comprise 13% of the population, but 26% of public transit workers, 17.5% of health care workers, and 19.3% of child care and social services workers – all essential positions that involve significant interaction with the public and thus higher rates of exposure and infection (Gould and Wilson, 2020). Across low- and middle-income countries, low-wage workers informally employed as sanitation workers, newspaper vendors and domestic workers face outsized risks of infection due to the nature of their jobs (Harvey, 2020).

At the same time, countries' existing social safety nets have proven inadequate for protecting against such large-scale job and income loss. In many countries, workers in the informal economy – including agricultural workers, domestic workers and those in the gig economy – are excluded from social insurance and core labor protections, as are self-employed and part-time workers. One recent analysis of 193 countries, for example, found that only 42% provided sick leave to the self-employed, while just a third of countries explicitly cover those working part-time (Heymann *et al.*, 2020a). Similarly, undocumented migrants and refugees are commonly ineligible for unemployment benefits and other social insurance programs, and were likewise excluded from COVID-19 emergency measures. According to a July 2020 United Nations Development Programme (UNDP) report, nearly four billion people globally lack access to social insurance during the pandemic; moreover, “[m]any of the huge numbers of people not covered by social insurance programmes are informal workers, low-waged, women and young people, refugees and migrants, and people with disabilities – and they are the ones hardest hit by this crisis” (Molina and Ortiz-Juarez, 2020). In other words, in many countries, existing labor and social policies are not only providing insufficient support as the pandemic spreads but also making existing inequalities worse by disproportionately excluding those workers who already face heightened risks. This inadequate support both worsens existing disparities and fuels the pandemic itself by reducing people's ability to stay home when sick.

Meanwhile, as countries' economies begin to reopen, the potential for discrimination in employment amid job scarcity is high. For example, surveys have long demonstrated that restrictive gender norms continue to reinforce a bias against women in the workplace during periods of widespread economic hardship; according to the most recent World Values Survey, which asks respondents in almost 100 countries representing 90% of the population about their views on social issues, 43% agree that when jobs are scarce, men should have a greater right to work than women (WVS, 2020). Likewise, workers with disabilities, migrants, and racial and ethnic minorities are all particularly vulnerable to discrimination in contexts of higher unemployment (Couch and Fairlie, 2010; Hoynes *et al.*, 2012; Nilsson, 2015; Lessem and Nakajima, 2019), while lower-socioeconomic status (SES) workers may become uniquely stigmatized by the pandemic due to the potentially higher contagion risks of crowded living conditions and use of public transit. Globally, however, the scope and comprehensiveness of statutory protections against workplace discrimination vary widely; while a substantial majority of countries prohibit at least some discrimination at work based on sex and race, far fewer prohibit discrimination on the basis of migration status, SES, sexual orientation or gender identity (Heymann *et al.*, 2020b).

Against this backdrop of significant gaps and exclusions in labor policies, constitutional rights have the potential to provide a foundation for more inclusive and effective protections, while protecting against backsliding. In particular, constitutional rights to: (1) social insurance, including income support during unemployment, illness and old age; (2) decent work, including the right to safe working conditions, adequate remuneration, limited working hours, the right to rest and paid leave; (3) nondiscrimination in all aspects of employment and (4) broad guarantees of equality or nondiscrimination for all marginalized groups can each

strengthen efforts to improve policies. Constitutional guarantees of social security, for instance, can offer a basis for protecting against cuts to critical programs and provide a foundation for more detailed labor and social insurance policies that extend coverage to all. Further, protections in these four areas are interrelated and mutually reinforcing. For example, strong protections for income support can enable low-wage workers to leave and/or refuse to accept jobs with unsafe or discriminatory working conditions; increasing workers' power to only accept decent work can in turn improve conditions and raise wages (Brodkin and Larsen, 2013). Likewise, constitutional protections against discrimination, alongside protections of decent work and social insurance, can shape norms in favor of equality and inclusion and provide a tool for realizing countries' commitments to uphold universal social and economic rights. Several key areas for potential impact in the context of the pandemic are explored briefly below.

Constitutions as protection against harmful austerity measures

An important role that constitutional rights to social insurance may play in the current moment is offering protection against efforts to dismantle social insurance programs as governments seek to tighten their budgets. While it is reasonable for governments to seek to identify spending cuts as their economies stagnate, by many accounts, the austerity measures of the past decade exacerbated the pandemic's health and economic consequences by leaving social and public health systems inadequately funded to respond to the crisis (Rajmil *et al.*, 2020). Consequently, constitutional rights to core social and economic protections like social insurance can not only strengthen countries' response to the current crisis, but provide a foundation for addressing the next.

Constitutions as a foundation for more detailed policymaking

Second, beyond protecting against regress, constitutional commitments to core principles can provide a foundation for more detailed legislation articulating states' commitments. As the economic fallout from COVID-19 continues, numerous countries are enacting new laws and policies to contain the crisis – and in a range of settings, the pandemic has spurred debate about whether existing constitutional and legislative protections for health and economic security are sufficient. In India, for example, a researcher at the Delhi High Court recently penned an op-ed calling for an enforceable right to health care, citing the constitution's aspirational language around health rights as a foundation (Rai, 2020).

A key objection to constitutionalizing labor and social security rights is that doing so will hamstring legislatures and limit flexibility in adopting labor policies that are responsive to economic shifts, including periods of large-scale unemployment. Likewise, if articulated in great detail, constitutionalizing aspects of social insurance has the potential to reinforce austerity measures rather than provide a foundation for countering them.

While both concerns are valid, these outcomes are not inevitable. Constitutional labor rights can be structured in ways that provide a meaningful foundation for more detailed policymaking without permanently enshrining specific thresholds or standards. Specifically, constitutional provisions that broadly guarantee decent conditions for workers and social insurance for those temporarily or permanently out of work, including during illness and old age, can create a framework for ensuring all are able to meet essential human needs. At the same time, the more detailed aspects of these rights are indeed likely best reserved for legislatures, which are often better positioned to respond dynamically to shifting economic conditions and evolving labor standards. For example, the standard length of the workday has changed in most countries over the past century and may continue to evolve. Likewise, the specific details of social insurance standards, such as retirement age, may shift with

improvements in national life expectancies. By establishing a set of principles that support decent work and a social safety net for all, however, constitutions can provide a mechanism for holding governments accountable for enacting legislation to fully implement these commitments.

Constitutions' role in shaping norms in favor of equality

Third, constitutional provisions broadly addressing equal rights have the potential to help shape norms in favor of equality and inclusion as economies recover. Likewise, constitutional protections against employment discrimination, particularly when designed to reach both public and private workplaces, can serve as a safeguard against the erosion of protections in ordinary laws, which are often easier to amend or repeal.

While constitutional rights have traditionally only applied against public actors, developments across countries suggest that constitutions' ability to reach the private sphere is expanding, particularly as private actors increasingly provide traditionally public services (Sullivan, 1987; Sajó and Uitz, 2005). These broader interpretations, alongside newer judicial mechanisms that increase access to justice against private actors who violate rights, have had implications for workers. For example, in Colombia, citizens can bring a court action called a *tutela* when their constitutional rights are infringed by a private actor in a position of authority over them. In 1994, a pilot successfully brought a *tutela* against the airline she worked for after she was denied health coverage for her miscarriage, which the Constitutional Court found was both discriminatory and a violation of social security protections (Morgan, 1999).

More broadly, constitutional equality provisions that unequivocally protect the equal rights of all – regardless of gender, race or ethnicity, migration status, SES, disability, sexual orientation, gender identity or other common grounds of discrimination – can provide the normative foundation for ensuring equal rights are prioritized as economies recover. In addition to their practical application, constitutions have an expressive function that communicates values on behalf of the state (Anderson and Pildes, 2000). Public opinion data also suggest that stronger protections for equality in constitutions may support broader public support for equal rights (Heymann *et al.*, 2020c, pp. 130–131, 144–145). In times of scarcity, affirming the equal worth and rights of every person is particularly critical.

Constitutions as mechanisms for protecting universal human rights

Finally, as countries' foundational legal documents, constitutions can be ideal instruments for translating commitments to uphold universal human rights into domestic law. A range of widely ratified treaties guarantee the rights to nondiscrimination and decent working conditions, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the rights to social security, an adequate standard of living, and safe and healthy working conditions for all. Similarly, the Universal Declaration of Human Rights (UDHR) – which is not a treaty *per se* but is considered binding as part of customary international law – guarantees “everyone” the rights to nondiscrimination, just and favorable working conditions, a “standard of living adequate for the health and well-being of himself and of his family,” and “the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Each of these rights is guaranteed “without distinction of any kind, such as race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.”

While international treaties recognize that providing benefits to all people regardless of citizenship creates a larger challenge for lower-resource countries, and the ICESCR states that “[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals,” the principle of progressive realization requires that countries devote the maximum available resources to realizing these rights universally. Further, low-cost steps and the guarantee of nondiscrimination are understood as immediate obligations. As the UN has clarified:

Governments shall take progressive measures to the extent of their available resources to protect the rights of everyone—regardless of citizenship—to: social security; an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions (OHCHR (2006)).

In other words, states cannot invoke the language of progressive realization to categorically refuse to provide material assistance to migrants and refugees – and more fundamentally, under the Universal Declaration of Human Rights, all countries are obligated to take steps to meet the basic needs of all within their borders.

This study

Despite the demonstrated and potential import of these rights, little research has examined the prevalence and impact of approaches to social protection and conditions of work in constitutions globally. This article provides the first assessment of the scope of protections for rights to income security, decent working conditions, overall equal rights and nondiscrimination in employment in the constitutions of all 193 UN member states, and analyzes how the share of constitutions adopting these rights has evolved over the past five decades. At a time of global economic instability and widespread unemployment, enacting and strengthening labor and social insurance rights in constitutions may provide a powerful tool to address poverty and inequality.

Methods

Data source

To assess the quality of constitutional protections that form the foundation for adequate income and decent work during economic and health crises, we created and analyzed a database of constitutional rights for all 193 UN member states [1] The database is based on the systematic review of national constitutions in force and as amended to May 2017. Constitutional texts were read in their entirety by a multidisciplinary, multilingual coding team fluent in English, French, Spanish, Arabic, German and many other languages. When no team members were fluent in the original language of the constitution, we relied on an official translation or translations provided by reliable secondary sources, such as International IDEA’s Constitution Building Program. We engaged the services of a translator when no team members had fluency and there were concerns about the quality of the translation. Using a codebook, two team members independently answered questions about each country’s constitution and then reconciled their answers to ensure consistency. The reconciled answers were entered into an access database.

Constitutions were obtained from official government websites, supplemented with Constitution Finder and other sources. For countries without a written codified constitution, we reviewed all laws considered to have constitutional status. Systematic analysis did not include case law due to the difficulty of obtaining case law for 193 countries and differences in the role and strength of case law across countries.

Variables

We constructed four main types of variables: (1) guarantees of income security, (2) guarantees of decent work, (3) prohibitions of discrimination at work and (4) broad approaches to equality or nondiscrimination for different groups.

Categorizing levels of protection.

No specific provision: Rights were categorized as no specific provision if the constitution did not explicitly address that right. This does not mean that the right was denied, just that the text did not specifically address.

Aspirational: Rights were categorized as aspirational if the constitution used nonauthoritative language or described the right as a state objective.

Guaranteed only to certain groups: Rights were categorized as guaranteed only to certain groups if the constitution unambiguously protected a right, but only for specific groups, such as guaranteeing that women shall have the right to the same remuneration as men.

Guaranteed generally: Rights were categorized as guaranteed if the constitution unambiguously protected a right, made it a state duty or obligation, or prohibited violations of a right using general language such as “all citizens” or “everyone.”

Income security. Our measures of guarantees of income security examined separately whether constitutions addressed income security during unemployment, old age, illness, disability, work injury, after the birth of a child or for families in need. In addition to the categories outlined above, we further distinguished among constitutions that explicitly addressed the circumstances (“specifically guaranteed”); constitutions that did not address the circumstances, but guaranteed a broad right to income security (“not explicit, but broad right to social security”); and constitutions that generally guaranteed income support to individuals who needed it (“not explicit, but guaranteed for cases of need or unable to work”).

Decent work. Our analysis of constitutional provisions to guarantee decent work included the right to safe working conditions, adequate remuneration, limited working hours, the rights to rest and paid annual leave.

Prohibitions of discrimination at work. Our analysis of prohibitions of discrimination at work included general prohibitions of discrimination at work, as well as in the specific areas of hiring, pay, working conditions, promotions, and terminations. We did not capture provisions that only applied to public sector employment. For these variables, we separately distinguished between countries that prohibited discrimination at work broadly for all workers without specifying based on what grounds (“guaranteed generally”) and those that limited the prohibition of discrimination to specific characteristics or groups (“guaranteed only to certain groups”).

Broad approaches to equality or nondiscrimination for different groups. We considered a constitution to take an approach to equality or nondiscrimination for a specific group if it (1) prohibited discrimination against the group, (2) guaranteed equal rights to the group, (3) guaranteed equality before the law for the group or (4) guaranteed overall equality for the group. We separately distinguished between group-specific guarantees (“guaranteed right”) and guarantees of equality for citizens generally, but not specifically for the group (“equality guaranteed, not specific to group”). We assessed these broad approaches to equality based on sex and/or gender, race/ethnicity, language, foreign citizenship, foreign national origin, religion, SES, disability, sexual orientation and gender identity.

Analysis

For each variable, we analyzed overall levels of constitutional protection. For summary measures, we assessed trends in constitutional protections over time. To assess changes in constitutional protections over time, we assessed the prevalence of protections by year of

constitutional adoption. Year of adoption is used instead of year of most recent amendment because most constitutional rights are added at the time of first passage and constitutions vary as to the difficulty of amendment. Additionally, older constitutions may be less likely to guarantee rights if they have already been addressed in legislation. All analyses were conducted in Stata 14.

Results

Income security

In the midst of COVID-19, income security during unemployment and illness is critical to ensure individuals and families can meet their basic needs. More than half of countries have made a constitutional commitment to income security that could be invoked during times of unemployment. Twenty-three percent of countries explicitly guarantee income support during unemployment (Table 1). An additional 16% of countries guarantee a broad right to social security without mentioning unemployment and 8% guarantee income support for individuals in need. Fourteen percent of countries aspire to provide income security during unemployment. Twenty-three percent of constitutions explicitly guarantee income security during illness.

Targeted income support may also be important to ensure security for individuals disproportionately affected by the pandemic or who are facing critical life transitions. Explicit constitutional protections are more frequent for the elderly (39%) and for persons with disabilities (29%), whereas fewer address support specifically for new mothers (16%), new fathers (3%), families in need (11%) or in cases of work injury (8%).

In settings of constrained resources, some constitutions explicitly protect social security rights in aspirational terms or subject to progressive realization. For example, Fiji's constitution obligates the state to "take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to social security schemes" (Art. 37).

Altogether, a majority (54%) of constitutions guarantee some aspect of income security, indicating that income support during temporary or permanent unemployment is a widespread commitment. Whereas a third (37%) of constitutions adopted before 1970 guarantee some aspect of income security, nearly two-thirds (62%) of those adopted from 2010 to 2017 do so (Table 2).

Decent work

Fundamental guarantees of decent work are especially critical during pandemics and other major health crises. Nearly one-third of constitutions (31%) guarantee the right to safe working conditions (Table 3). The Dominican Republic's constitution, for instance, mandates that every employer "guarantee to their workers conditions of safety, sanitation, [and] hygiene [and an] adequate work environment" (Art. 62(8)).

Slightly more constitutions address the rights to rest (36%) and adequate remuneration (32%). Less than a quarter address the rights to limited working hours (24%) and paid leave (24%).

These rights have become more prevalent over time. While just 27% of constitutions adopted before 1970 guarantee workers some aspect of decent work, 71% of those adopted between 2010 and 2017 do so (Table 4).

Nondiscrimination in employment

A growing number of constitutions address discrimination in various aspects of employment, including pay, working conditions, hiring decisions, promotions and terminations. Eleven

	Unemployment	Old age	Illness	Disability	Work injury	Maternity	Paternity	Families in need
No specific provision	76 (39%)	60 (31%)	71 (37%)	68 (35%)	78 (40%)	78 (40%)	81 (42%)	76 (39%)
Aspirational	27 (14%)	32 (17%)	28 (15%)	29 (15%)	27 (14%)	24 (12%)	27 (14%)	27 (14%)
Not explicit, but guaranteed for cases of need or unable to work	15 (8%)	3 (2%)	14 (7%)	7 (4%)	26 (13%)	19 (10%)	29 (15%)	23 (12%)
Not explicit, but broad right to social security	31 (16%)	23 (12%)	36 (19%)	33 (17%)	46 (24%)	42 (22%)	50 (26%)	45 (23%)
Specifically guaranteed	44 (23%)	75 (39%)	44 (23%)	56 (29%)	16 (8%)	30 (16%)	6 (3%)	22 (11%)

Table 1.
Constitutional
protection of income
security during
different
circumstances

percent broadly prohibit employment discrimination (Table 5). Likewise, 16% prohibit discrimination in employment against certain groups or aspire to nondiscrimination in employment generally. The Constitution of Burkina Faso, for instance, prohibits discrimination “in matters of employment and of remuneration founded notably on sex, color, social origin, ethnicity or political opinion” (Art. 19).

In addition, 19% mandate equal pay for equal work, while 10% guarantee this right to certain groups or aspire to equal pay for workers. For example, Ethiopia’s constitution provides that “Women workers have the right to equal pay for equal work” (Art. 42(1)(d)). The principle of equal pay for equal work is foundational. However, a significant portion of persisting pay gaps is attributable more to gender or racial/ethnic segregation in the labor market than disparate pay for the same job (World Economic Forum, 2017). Further, industries in which women and racial/ethnic minorities are overrepresented are often under-remunerated, relative to the value they contribute to the economy. Accordingly, equal pay for work of equal *value* provides a stronger standard for advancing equity. Some constitutions, such as Guyana’s, articulate this stronger protection: “Every citizen has the right. . .to equal pay for equal work or work of equal value,” (Art. 22).

Finally, 9% of constitutions universally prohibit discrimination in hiring, as do 3% in promotions, 6% in working conditions and 10% in terminations. This specificity is important given that women, marginalized racial or ethnic groups, and people with disabilities are commonly overrepresented in lower-level positions and underrepresented in management, which speaks to the need for equal rights in opportunities to advance in the workplace as well

Table 2.

Constitutional protection of income security in any circumstance by year of constitution adoption

	All years	Before 1970	1970–1979	1980–1989	1990–1999	2000–2009	2010–2017
No specific provision	89 (46%)	26 (63%)	16 (59%)	10 (45%)	20 (33%)	8 (42%)	9 (38%)
At least one aspect guaranteed	104 (54%)	15 (37%)	11 (41%)	12 (55%)	40 (67%)	11 (58%)	15 (62%)

Table 3.

Constitutional protection of decent work

	Adequate remuneration	Safe working conditions	Limited working hours	Rest	Paid leave
No specific provision	118 (61%)	122 (63%)	144 (74%)	117(61%)	142 (74%)
Aspirational or guaranteed only to certain groups	13 (7%)	12 (6%)	3 (2%)	6 (3%)	4 (2%)
Guaranteed generally	62 (32%)	59 (31%)	46 (24%)	70 (36%)	47 (24%)

Table 4.

Constitutional protection of decent work by year of constitution adoption

	All years	Before 1970	1970–1979	1980–1989	1990–1999	2000–2009	2010–2017
No specific provision	97 (50%)	30 (73%)	19 (70%)	8 (36%)	25 (42%)	8 (42%)	7 (29%)
At least one aspect guaranteed	96 (50%)	11 (27%)	8 (30%)	14 (64%)	35 (58%)	11 (58%)	17 (71%)

equal opportunities to get in the door. Having at least one protection against discrimination has become more prevalent in constitutions adopted in the 1980s and later, although progress on including these protections appears to have stagnated (Table 6).

Importantly, while some courts have interpreted constitutional protections against employment discrimination to encompass private workplaces, a few constitutions address the private sphere directly, or use broad language that could easily support an interpretation of its application to both public and private employment. Colombia's constitution broadly provides that "[w]omen cannot be subjected to any type of discrimination" (Art. 43). The Bolivian constitution states that the government will guarantee women "the same remuneration as men for work of equal value, both in the public and private arena" (Art. 48).

Broad equality and nondiscrimination

There is substantial variation in constitutional guarantees of equality and nondiscrimination across groups. Constitutions most commonly guarantee equal rights on the basis of sex and/or gender (85%), followed by religion (78%) and race/ethnicity (76%) (Table 7). Guarantees were lowest based on gender identity (3%), sexual orientation (5%) and citizenship (22%).

There is a trend of increasing protections among more recently adopted constitutions. For example, whereas only 54% of constitutions adopted before 1970 guarantee equality based on sex, all constitutions adopted from 2000 to 2017 do so. Similarly, while overall guarantees of equality or nondiscrimination for persons with disabilities are low (27%), these have greatly increased. Only 12% of constitutions adopted before 1970 guarantee equality for persons with disabilities, compared to 71% of those adopted from 2010 to 2017.

Discussion

Summary of findings

While social and economic rights were uncommon in the constitutions of a century ago, today, protections of the rights to social insurance and decent working conditions are

	General prohibition of discrimination at work	Equal pay for equal work	Hiring	Promotions	Working conditions	Terminations
No specific provision	141 (73%)	137 (71%)	172 (89%)	181 (94%)	178 (92%)	166 (86%)
Aspirational or guaranteed only to certain groups	30 (16%)	20 (10%)	4 (2%)	7 (4%)	4 (2%)	7 (4%)
Guaranteed universally	22 (11%)	36 (19%)	17 (9%)	5 (3%)	11 (6%)	20 (10%)

Table 5.
Prohibition of discrimination in different aspects of work

	All years	Before 1970	1970–1979	1980–1989	1990–1999	2000–2009	2010–2017
No specific provision	123 (64%)	36 (88%)	21 (78%)	11 (50%)	33 (55%)	8 (42%)	14 (58%)
At least one aspect guaranteed	70 (36%)	5 (12%)	6 (22%)	11 (50%)	27 (45%)	11 (58%)	10 (42%)

Table 6.
Constitutional protection from discrimination in any aspect of work by year of constitution adoption

	All years	Before 1970	1970– 1979	1980– 1989	1990– 1999	2000– 2009	2010– 2017
Sex and/or gender	165 (85%)	22 (54%)	24 (89%)	20 (91%)	56 (93%)	19 (100%)	24 (100%)
Race/ethnicity	146 (76%)	20 (49%)	21 (78%)	16 (73%)	53 (88%)	17 (89%)	19 (79%)
Religion	150 (78%)	23 (56%)	22 (81%)	15 (68%)	52 (87%)	16 (84%)	22 (92%)
Socioeconomic status	114 (59%)	14 (34%)	11 (41%)	7 (32%)	50 (83%)	12 (63%)	20 (83%)
Disability status	52 (27%)	5 (12%)	3 (11%)	2 (9%)	16 (27%)	9 (47%)	17 (71%)
Language	85 (44%)	8 (20%)	7 (26%)	5 (23%)	38 (63%)	9 (47%)	18 (75%)
Foreign national origin	115 (60%)	18 (44%)	20 (74%)	13 (59%)	38 (63%)	12 (63%)	14 (58%)
Foreign citizens	42 (22%)	3 (7%)	3 (11%)	3 (14%)	24 (40%)	3 (16%)	6 (25%)
Sexual orientation	10 (5%)	4 (10%)	1 (4%)	1 (5%)	1 (2%)	2 (11%)	1 (4%)
Gender identity	5 (3%)	2 (5%)	0 (0%)	0 (0%)	0 (0%)	2 (11%)	1 (4%)

Table 7.
Constitutional
guarantees of equality
or nondiscrimination
by social group and
year of constitution
adoption

widespread. Over half the world's countries take some approach to guaranteeing income security. While just 37% of constitutions adopted before 1970 include relevant language, 62% of those adopted from 2010 to 2017 do so. Likewise, half of constitutions protect at least some aspect of decent work, and these provisions are more than twice as common in constitutions adopted from 2010 to 2017 compared to those adopted before 1970.

Similarly, constitutional protections against discrimination are increasingly widespread. The likelihood that a constitution explicitly guarantees equal rights at work has grown substantially: just 12% of constitutions adopted before 1970 prohibit discrimination in at least one aspect of employment, compared to 42% of constitutions adopted from 2010 to 2017. A substantial majority of constitutions guarantee overall equal rights on the basis of sex, race/ethnicity and religion. All constitutions adopted since 2000 protect equal rights regardless of sex or gender, compared to just 54% of those adopted before 1970. Equal rights guarantees on the basis of disability, race/ethnicity, religion and SES are also far more common in more recent constitutions.

Yet across each area – income security, decent work, nondiscrimination at work and broadly – critical gaps remain. Less than a third of constitutions guarantee the right to safe working conditions, while less than a quarter guarantee income protection during illness or unemployment, respectively. As COVID-19 triggers mass job loss and creates grave risks for workers in public-facing positions, gaps in these three protections are particularly concerning.

Moreover, despite substantial progress on equal rights guarantees in recent decades, some groups of workers receive minimal protections. Just 27% of constitutions guarantee equal rights regardless of disability and just 22% do so regardless of citizenship status, while a mere 5% prohibit discrimination based on sexual orientation and 3% do so for gender identity. Meanwhile, just over a third of constitutions take any approach to protecting equal rights specifically in the context of employment. Further, far more is needed to ensure these protections extend to the private sphere.

Insights from emerging and past case law

Strengthening rights and addressing basic needs. While it is too early to comprehensively evaluate how these provisions will shape countries' COVID responses, some recent case law

suggests that constitutions are already playing an important role in how countries address the pandemic's impacts on workers and poverty risks. For example, in the UK, lawyers brought a case on behalf of the eight-year-old son of a migrant care worker in April, seeking access to the housing and child benefits provided to citizens and highlighting the risks to public health if migrant families were excluded (Taylor, 2020). Citing the government's responsibilities to ensure "the most basic needs of any human being" under the Human Rights Act – which is considered part of the UK constitution – the Court ruled in the boy's favor (*R (W, a child) v Secretary of State for the Home Department*, 2020). That same month in Malawi, the High Court issued an injunction against the government's COVID restrictions after a civil society group brought a case arguing that "imposing lockdown without providing for social security interventions to marginalised groups in Malawian society violated the "directory" principles of national policy set out in Section 14 of the 1994 Malawi Constitution" (Kathumba & Ors v The President & Ors, 2020; Nolan, 2020). In India in May, the Andhra Pradesh High Court ordered the government to provide material assistance and transportation home to Indian migrant laborers who had been working in other parts of the country, citing the constitution's protections of equality, freedom of movement and the right to life (*K. Ramakrishna vs. UOI and ors*, 2020). And in South Africa, the High Court in Gauteng issued a ruling in mid-July ordering the government to provide a free meal to schoolchildren despite the lockdown, based on their constitutional rights to "basic nutrition, shelter, basic health care services and social services," among others (*Equal Education and Others v. Minister of Equal Education*, 2020).

Further, even before COVID, constitutional provisions addressing social insurance, basic needs and decent working conditions were having impact for expanding coverage of marginalized groups. For example, in *Khosa and Others vs Minister of Social Development and Others*, two Mozambican refugees who had been living and working in South Africa for decades successfully asserted their rights to an old age pension, based on the constitution's guarantee of social security to "everyone" rather than to "citizens" (2004). In addition to extending retirement benefits to permanent residents, the ruling established eligibility for childcare grants regardless of parents' nationality; advocates estimated the decision would affect at least 250,000 people (ESCR-Net, 2006). In Argentina, the Supreme Court ruled in 2004 that a 1995 workers' compensation law was unconstitutional both due to the inadequate redress it provided for injured workers and the inadequate liability imposed on employers (*Aquino, Isacio vs Cargo Servicios Industriales S.A.*, 2004). The court based its ruling primarily on Article 14 of the constitution, an expansive labor rights provision that requires the government to "grant the benefits of social security, which shall be of an integral nature and may not be waived."

Limited empirical research also suggests that social and economic rights in constitutions, particularly when they are strongly worded, may support the adoption of laws and policies in relevant areas. For example, in a study of 195 constitutions, Minkler and Prakash (2017) found a negative association between enforceable social and economic rights (including all of those enumerated in the UDHR) and poverty, leading the authors to conclude that "constitutional provisions framed as enforceable law provide effective meta-rules with incentives for policymakers to initiate, fund, monitor and enforce poverty reduction policies." Similarly, in a study of 174 countries, Heymann *et al.* (2014) found that countries that constitutionally guaranteed free education were more likely to have corresponding national policies.

Still, past case law also suggests that more targeted approaches may be necessary for reaching all marginalized workers. For example, court interpretations have varied when it comes to whether social insurance rights extend to domestic workers. In Colombia, for example, a 1995 Constitutional Court ruling held that a provision in the labor code that established a lower level of unemployment benefits for domestic workers was

unconstitutional, based on the constitution's protections of equality and decent work ([Sentencia C-051/95](#)). However, in Costa Rica, the Constitutional Court found that a labor law establishing longer work days for domestic workers (12 h) than established for all workers in the constitution (8 h) was not unconstitutional ([Sentencia No. 03150](#)), reasoning that their exclusion was permissible because the relevant constitutional article permitted "exceptions" established by the legislature. In addition, the court drew a distinction between domestic work and other types of informal work like agriculture, summarily claiming that domestic work presents an "exceptional situation." Likewise, the Guatemalan Constitutional Court ruled against domestic workers seeking to equalize their working hours, reasoning that they did not perform "continuous work" throughout the day ([Blofield, 2012](#), p. 52).

To establish a stronger guarantee, a very small number of constitutions, including those of Brazil, Mexico and El Salvador, address domestic workers directly in their provisions on rights relevant to work and work quality. In many contexts, given the historic exclusion of domestic and other informal workers from full equal rights, more detailed legislative reforms will likely be necessary to advance equality ([Blofield, 2012](#)). Nevertheless, the intended universality of constitutional rights can create a foundation for advocacy, litigation, and additional legislative and policy reform to strengthen labor protections for the tens of millions of domestic workers around the world.

Protecting access to health care and other essential public services. COVID-19 has simultaneously placed health care systems and national budgets under great pressure. Yet maintaining access for all to health care is essential. With respect to protecting against cuts to health and other public programs, case law applying a constitutional right to health during prior recessions provides some insight. For example, Portugal's constitution guarantees the right to universal health care and specifies that the government must fulfill this right through a national program, which became the National Health Service (NHS) ([Peláez, 2017](#)). After the legislature moved to eliminate the NHS in 1984, the Constitutional Court cited this provision to reject the reform, reasoning that: "The constitutional tasks imposed on the State as a guarantee for fundamental rights, consisting in the creation of certain institutions or services, do not only oblige their creation, but also a duty not to abolish them once created" ([Decision \(Acórdão\) N° 39/84](#)).

Likewise, in the Czech Republic, the government introduced "user fees" for prescriptions, hospital stays and emergency care in 2008, alongside pharmaceutical copays. In 2013, however, the Constitutional Court ruled that the new fees violated Article 31 of the constitution, which provides that "Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law" ([Alexa et al., 2015](#)). Additionally, in countries including Bulgaria, Ukraine and Lithuania, top courts have found that efforts to impose new fees or privatize parts of the public health system violated constitutional health rights ([Murauskiene et al., 2013](#); [Lekhan et al., 2015](#); [Dimova et al., 2018](#)).

Advancing equality and inclusion. Finally, with regards to norms around equal rights, some case law suggests equality provisions are already making a difference. For example, in Nepal, the Supreme Court ordered the government to provide free coronavirus testing to individuals living below the poverty line ([Nepal24Hours, 2020](#)). In South Africa, a case is underway to ensure that students with disabilities have adequate PPE and other essential accommodations to return to schools safely once they reopen. While it remains to be seen whether constitutional provisions prohibiting employment discrimination will be deployed to similar effect, past examples from a range of countries show the potential of these provisions for ending employment discrimination against broad classes of people. In Colombia, for example, the constitution's guarantees of gender equality and the right to "choose a profession or occupation" provided the basis for ending a ban on female applicants to the country's naval academy, which preceded a series of reforms over the following decades

(Judgment No. T-624/95). Similarly, in India, two court cases in the 1970s and 1980s challenged the exclusion of married women from particular industries and positions, with individual challenges of injustice leading to structural change (C.B. Muthamma vs Union of India; Maya Devi vs State of Maharashtra).

Limitations

This study focuses on protections for rights clearly articulated in constitutional texts. While we examine the impacts of these provisions through examples of case law, we do not systematically capture how courts interpret their constitutions to recognize rights not explicitly enumerated in the text, which may be particularly consequential in common law countries where past court decisions significantly affect future interpretations. For example, in some countries, the “right to life” or “right to dignity” has been found to encompass more specific rights around working conditions and social security (Jackson, 2004; Glensy, 2011). Nevertheless, this more ambiguous wording offers less consistent protection than explicit rights to social insurance, decent working conditions and nondiscrimination (O’Mahony, 2012). Consequently, we contend that the text of constitutional provisions matters, even in countries where top courts have broad latitude to expand on those rights. To more consistently and transparently protect human rights, countries should enact employment-specific provisions that clearly apply to both the public and private sectors.

Areas for future research

This study suggests a range of areas for future analysis. First, to better understand the role of constitutional rights broadly, further research is needed around effective implementation, including what types of access to justice mechanisms, mechanisms shaping the judiciary and factors external to the courts – such as the engagement of civil society – support greater implementation of rights across countries.

Second, it would be valuable to examine how details of the constitutional approaches countries take to decent work, income support and nondiscrimination affect the more detailed laws and policies typically enacted to realize these commitments, and affect long-term economic outcomes. For example, universal and means-tested income support programs can have markedly different impacts; previous research has shown that highly means-tested programs may stigmatize beneficiaries, which undermines both their reach and their political support. Future studies should examine to what extent constitutional design choices influence legislative choices about the design, coverage, and framing of both income support programs and other areas of labor and social policy.

Conclusion

COVID-19 represents the greatest health and economic crisis of our lifetimes – yet it will not be the last. During the past 20 years alone, there have been four major global public health threats: severe acute respiratory syndrome, Middle East respiratory syndrome, H1N1 and now COVID-19. As a result of global travel, climate change and deforestation, the rate at which zoonotic diseases are affecting humans is increasing. To both respond to the current pandemic and prepare for the next, countries need to adopt strong legal protections for the right to an adequate income during unemployment, illness and other times of need; the right to decent work, including safe working conditions; and the right to be free from discrimination, both generally and in the specific context of employment. As both practical tools and norm-setting documents, constitutional protections of these rights can provide a powerful foundation for ensuring their universal coverage.

Note

1. For more details on our methodological approach to classifying constitutional rights, please visit <https://www.worldpolicycenter.org/topics/constitutions/methods>

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