

# Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights

LUCÍA BERRO PIZZAROSSA AND KATRINA PEREHUDOFF

## Abstract

General Comment No. 22, issued in 2016 by the Committee on Economic, Social and Cultural Rights (CESCR), clarifies states' legal duties to respect, protect, and fulfill the right to sexual and reproductive health (SRH). Our study analyzes domestic constitutions around the world to investigate whether and to what extent the right to sexual and reproductive health is respected, protected, and fulfilled; to what extent these provisions are inclusive and non-discriminatory; and to what degree the interlinkages between this and other human rights are acknowledged. Of the 195 constitutions accessed, 27 enshrine sexual and/or reproductive health, and seven adopt restrictive approaches to this right. In the 27 constitutions, provisions most frequently enshrine respect of one's sexual health and family planning decisions, the protection of sexual health, and the provision of reproductive health care and family planning services (fulfillment). Most of the 27 constitutions fail to adequately respect reproductive health rights; to protect reproductive health, family planning, and abortion services from third-party interference; and to fulfill all dimensions of sexual health and access to abortion. Three of the 27 constitutions enshrine a universal right to SRH, and additional constitutions protect specific vulnerable groups (such as women, children) and/or restrict the scope of rights holders to couples. Among the 27 constitutions, nine explicitly link the right to sexual and reproductive health to the rights to education, science, and/or to make autonomous decisions about sexuality and reproduction. Our results can serve as a baseline measure to track constitutional reforms in pursuit of the realization of sexual and reproductive health and rights, and as building blocks for future lawmakers committed to realizing these rights through domestic legal reform.

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## Introduction

The right to sexual and reproductive health has been increasingly developed in international human rights law. The United Nations (UN) human rights system has repeatedly confirmed that this is a human right, first enshrined under the right to health in the International Covenant on Social, Economic and Cultural Rights (ICESCR).<sup>1</sup> The scope and content of the right to health was interpreted by the CESCR in General Comment No. 14 and specifically stated that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning as well as the right of access to appropriate health care services.

The International Conference on Population and Development (ICPD) (Cairo, 1994) transformed the discourse from reproductive control to meet demographic targets to a more comprehensive and positive approach to sexuality and reproduction, free from coercion, discrimination, and violence. ICPD forged the link between sexuality and health as human rights, where women's agency over their own bodies and sexuality are intrinsically linked to their sexual and reproductive health.<sup>2</sup> The Beijing Platform for Action (1995) was the first declaration to embody the concept of sexual rights, and expanded the ICPD definition to cover both sexuality and reproduction by upholding the right to exercise control over and make decisions about one's sexuality.<sup>3</sup> Among their many achievements, these documents recognized the duty of governments to legislate on the matter translating international commitments into national laws and policies.<sup>4</sup>

In 2016, the CESCR extensively addressed states' obligations to realize the right to sexual and reproductive health in its General Comment No. 22. This comment adopts a clear human rights-based approach and affirms that this right is an integral part of the right to health that has enjoyed long-standing recognition based on already existing international human rights instruments. General Comment No. 22 contains five innovative components; it:

1. adopts a life-cycle approach, reinforcing that the concept of sexual and reproductive health extends beyond the limits of "maternal health";
2. recognizes that the right to sexual and reproductive health is indivisible from and interdependent with other human rights;
3. rejects all forms of coercive practices related to this right;
4. promotes a gender-sensitive approach and recognizes that due to women's reproductive capacities, the realization of women's right to sexual and reproductive health is essential to the realization of the full range of their human rights; and
5. adopts an intersectional approach to the cross-cutting issues of equality and multiple discrimination in the design and execution of policies and programs.<sup>5</sup>

Despite these legal developments, much progress is needed to realize the right to sexual and reproductive health in practice. The Lancet Commission on Women and Health asserts that an estimated 225 million women globally have an unmet need for family planning, and every year, an estimated 75 million unintended pregnancies put women at risk of unsafe abortion.<sup>6</sup> Furthermore, unsafe abortion is estimated to cause 47,000 maternal deaths and 5 million maternal disabilities annually.<sup>7</sup> Maternal mortality claims the lives of 289,000 women annually while complications during childbirth result in 5.8 million serious injuries every year.<sup>8</sup>

Showcasing the importance of the legal arrangements, the Lancet Commission emphasizes the need for "an enabling social, legal, and regulatory environment" to respond to women and girls' health needs and rights, and the Commission on the Status of Women continues to demand that states strengthen their normative, legal, and policy frameworks.<sup>9</sup>

Adopting domestic laws consistent with international standards is a demonstration of the government's commitment to realizing sexual and reproductive health and rights.<sup>10</sup> As a recognized indicator of these rights, legal codification may be

the first step in improving the respect, protection and fulfillment of these rights in practice. Domestic constitutions are the most vital expressions of government responsibility and individual entitlements, and therefore one of the channels best suited to endorsing states' commitments to human rights. Constitutional law offers a frame for subsequent policies, programs, and services to be executed. In many jurisdictions, constitutional law supports enforcement and redress in case of violations, and is a key success factor in strategic litigation for reproductive health.<sup>11</sup> Pivotal cases such as the *Treatment Action Campaign v. the South African Ministry of Health* seeking access to essential medicines to prevent the transmission of HIV from mother to child during childbirth, illustrate how forceful a constitutional protection of certain rights, and specifically reproductive health, can be.<sup>12</sup> Legal recognition in constitutions can endure changes in government administrations and survive economic or social strife, therefore ensuring a certain degree of consistency over time.

An estimated 20 nations replace or amend their constitution annually, presenting the opportunity to strengthen state commitments to sexual and reproductive health and right. In this process, constitutional framers often seek inspiration from other jurisdictions or from international law.<sup>13</sup> Our objective is to survey the language and concepts used to describe the right to sexual and reproductive health in domestic constitutions from around the globe. These constitutional texts may serve as building blocks for future lawmakers committed to realizing these rights through domestic legal reform.

## Methodology

We apply the human rights framework articulated in General Comment No. 22 to investigate whether and how the respect-protect-fulfill typology has been applied to constitutional rights to sexual and reproductive health; to what degree these are inclusive, non-discriminatory provisions; and to what degree the explicit interlinkages between these rights and other human rights are acknowledged.

## Analytical framework

The key terms 'reproductive health' and 'sexual health' serve as the backbone of our study. General Comment No. 22 defines reproductive health as the "freedom to make to make informed, free and responsible decisions," and "access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour."<sup>14</sup> Closely linked is the concept of sexual health, defined as "a state of physical, emotional, mental and social well-being in relation to sexuality."<sup>15</sup>

The legal obligations to respect, protect, and fulfill sexual and reproductive health offered in General Comment No. 22 provide clear guidance to state parties using standardized terminology. The duty to respect requires states to refrain from interfering with individuals' right to exercise their sexual or reproductive health. Examples include limiting or denying access to health services and information, such as laws or practices that criminalize abortion, limit consensual sexual activities between adults, require third-party authorization for access to abortion or contraception, or exclude certain health services from publicly or donor-funded programs.<sup>16</sup>

Under the obligation to protect, states must protect the right to sexual and reproductive health from third-party interference.<sup>17</sup> Examples include protecting against private health clinics, or insurance or pharmaceutical companies that impose practical or procedural barriers to health services.<sup>18</sup> States must introduce laws and policies that prohibit third parties from acting in a way that harms integrity or undermines the enjoyment of rights; for example, they must ensure that all adolescents, despite marital status, have access to age-appropriate information about sexual and reproductive health, including family planning.<sup>19</sup>

The responsibility to fulfill mandates that states "adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health."<sup>20</sup> States must take steps to

ensure universal access to sexual and reproductive health care, including emergency contraception and access to safe abortion services. States are required to provide comprehensive education about sexual and reproductive health for all and to take measures to eradicate social barriers that prevent individuals from autonomously exercising their right to sexual and reproductive health.<sup>21</sup>

In relation to the specific aspects of family planning and abortion, General Comment No. 22 recognizes abortion services as an integral part of the right to health and notes that states have an obligation to repeal or eliminate laws, policies, and practices that criminalize, obstruct, or otherwise undermine an individual's or a particular group's access to health facilities, services, goods, and information, including abortion.<sup>22</sup>

The duties to respect, protect, and fulfill are intrinsically linked to states' immediate legal obligation to eliminate discrimination against individuals and groups in relation to sexual and reproductive health. Discrimination undermines individual autonomy in matters of sexuality and reproduction, and impairs one's equal access to the range of sexual and reproductive health information, goods, and services.<sup>23</sup> Although the principles of equality and non-discrimination are grounded in Article 2(1) of the ICESCR, General Comment No. 22 further emphasizes that equality between women and men is a cross-cutting objective that requires the removal of direct and indirect discrimination and the assurance of formal and substantive equality.<sup>24</sup> The comment mandates that tailored attention and greater resources are devoted to traditionally neglected groups in order to address systemic discrimination. Intersectional discrimination may disproportionately affect groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities, adolescents, LGBTI persons, and people living with HIV/AIDS. General Comment No. 22 also engages with the specific needs of intersex and transgender people in relation to their sexual and reproductive health.<sup>25</sup>

Furthermore, General Comment No. 22 recognizes that the right to sexual and reproductive

health requires states to address the underlying social determinants of health; it is indivisible from and interdependent with other human rights and cannot be achieved without the realization of this wider range of rights that are enshrined in ICESCR and other instruments.<sup>26</sup>

### *Search strategy*

Our study investigates whether and how the right to sexual and reproductive health is introduced into domestic constitutional law. In March 2015 and again in April 2016, we searched the constitutions of 195 member states of the World Health Organization (WHO) available on the Comparative Constitutions Project website for the key words 'reproductive,' 'reproduction,' 'sexual,' 'family planning,' and 'abortion.' We excluded provisions concerning the use of genetic or reproductive material; the economy and reproduction of material and immaterial conditions; the reproduction of art, culture, or sound; the protection and reproduction of the (natural) environment; the delegation of competences or jurisdiction of authority; and proceedings for sexual harassment or crimes.

Melton and colleagues suggest that constitutional text that uses once-only words and that is focused by topic rather than complex cross-referencing are most important for clear interpretation.<sup>27</sup> We minimized this risk by identifying well-defined terminology and concepts in the right to sexual and reproductive health within constitutional commitments in order to maximize their clarity and comparability between jurisdictions.<sup>28</sup>

We applied the tripartite typology to categorize constitutional provisions for the right to sexual and reproductive health and the specific concepts of family planning and abortion. We then analyzed these provisions through the lens of equality and non-discrimination, searching within constitutions for universally applicable provisions, special attention to vulnerable groups, language that restricts the scope of rights holders, and any acknowledgment of multiple discrimination. We also report on any explicit interlinkages in constitutions between the right to sexual and reproductive health and other human rights.



notable example of state responsibility to fulfill access to family planning information and methods (emphasis added):

*In order to protect the family, the state shall particularly be charged with: (d) with respect for individual freedom, **guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned.***<sup>30</sup>

Portugal's constitution charges the state with guaranteeing family planning through access to information and the means to act on that information.

Family planning resembles an individual obligation or duty towards national population control objectives in the constitutions of China, Vietnam, and Turkey.

### Abortion

Three countries have specific constitutional provisions about abortion: Kenya, Swaziland, and Somalia (see Table 1). Although the provisions frame abortion primarily in negative terms such as “unlawful,” “illegal,” or “not permitted,” all laws recognize various grounds on which abortion may be permissible.<sup>31</sup> No constitution recognizes the duty to protect or fulfill abortion services as a component of the right to sexual and reproductive health.

### Non-discrimination, equality, and multiple discrimination

Universal rights are explicitly enshrined in the constitutions of Fiji, Kenya, and South Africa, which recognize that everyone is entitled to access reproductive health care. In addition, the Bolivian constitution states that both “women and men are guaranteed the exercise of sexual and reproductive

TABLE 1. Overview of constitutional provisions for the respect, protection, and/or fulfillment of the right to sexual and reproductive health, family planning, and abortion.

	Respect	Protect	Fulfill
Right to sexual health	<p>Right to make decisions about one's sexual life and orientation (Ecuador, 2011, Art. 66[9])</p> <p>Right to exercise sexual rights ([women and men] Bolivia, 2009, Art. 66)</p> <p>Right to sexual integrity ([children] Belgium, 2014, Art. 22bis; Bolivia, 2009, Art. 15[I]; [students] Ecuador, 2011, Art. 347)</p> <p>Right to sexual safety (Ecuador, 2011, Art. 66[3])</p>	<p>Guard against sexual exploitation ([children and adolescents] Brazil, 2014, Art. 227; [elderly] Ecuador, 2011, Art. 38[4]; [children] Egypt, 2014, Art. 80; [children] Cambodia, 2008, Art. 48; [children] Zimbabwe, 2013, Art. 81)</p> <p>Protect against sexual abuse [children] Colombia, 2013, Art. 44; [children] Democratic Republic of the Congo, 2011, Art. 41; [youth] Guinea, 2010, Art. 19; [children] Timor-Leste, 2002, Art. 18(1); [women] Malawi, 2010, Art. 24[2]; [workers] Somalia, 2012, Art. 24)</p> <p>Protect against sexual violence (Bolivia, 2009, Art. 15[11]; [children and adolescents] Dominican Republic, 2010, Art. 56)</p> <p>State obligation to prevent, eliminate, and/or punish sexual violence or exploitation (Bolivia, 2009, Art. 15[III]; Brazil, 2014, Art. 227[4]; Democratic Republic of the Congo, 2011, Art. 15; [women, children, adolescents, disabled, vulnerable] Ecuador, 2011, Art. 66[3]; [women] Malawi, 2010, Art. 24[2]).</p> <p>Right to confidentiality about one's sexual life (Ecuador, 2011, Art. 66[11])</p>	<p>The state promotes access to the means to make decisions about one's sexual life and orientation in safe conditions. (Ecuador, 2011, Art. 66[9])</p> <p>The state shall guarantee permanent, timely, and non-exclusive access to programs, actions and services promoting and providing sexual health; the state shall be responsible for ensuring sexual health actions and services (Ecuador, 2011, Arts. 32 and 363)</p> <p>Priority and specialized care shall be received by persons in situations of sexual violence; the state shall provide special protection to persons who are doubly vulnerable. (Ecuador, 2011, Art. 35)</p>

	Respect	Protect	Fulfill
Right to reproductive health	<p>Right to make decisions concerning reproduction (Ecuador, 2011, Art. 66[10]; South Africa, 2012, Art. 12[2]; Zimbabwe, 2013, Art. 52)</p> <p>Right to reproductive health ([women] Nepal, 2015, Art. 38)</p> <p>Respect for reproductive rights ([all workers] Ecuador, 2011, Art. 332)</p>	<p>Special protection to the process of reproduction and during pregnancy ([women] Nicaragua, 2015, Art. 74)</p> <p>Eliminate labor risks affecting reproductive health (Ecuador, 2011, Art. 332)</p>	<p>State duty to provide for reproductive health care (Fiji, 2013, Art. 38; Kenya, 2010, Art. 43[1]; South Africa, 2012, Art. 27[1]; [citizens and permanent residents] Zimbabwe, 2013, Art. 76)</p> <p>State shall pursue policies to ensure access to necessary services and facilities during reproductive phase (Nepal, 2015, Art. 51[j][3])</p> <p>State duty to develop special plans for reproductive healthcare for the poor (Paraguay, 2011, Art. 61)</p> <p>The state shall guarantee permanent, timely, and non-exclusive access to programs, actions and services promoting and providing reproductive health; the state shall be responsible for ensuring reproductive health actions and services (Ecuador, 2011, Arts. 32 and 363)</p>
Family planning	<p>Right of persons to freely and responsibly decide on the number and frequency of the birth of their children (Paraguay, 2011, Art. 61)</p> <p>Right to decide on family planning (couples) (Brazil, 2014, Art. 226[7]; Portugal, 2005, Art. 67[2])</p> <p>Right to decide how many children to have (Ecuador, 2011, Art. 66[10]; [couples] Venezuela, 2009, Art. 76)</p>	<p>State prohibits any coercion on the part of official or private institutions with regards to family planning (Brazil, 2014, Art. 226[7])</p>	<p>Right to access to family planning education, information and capacity ([women] Ethiopia, 1994, Art. 35)</p> <p>Exercise the right to family planning through access to the information, methods, and means required (Portugal, 2005, Art. 67[2]; Venezuela, 2009, Art. 76)</p> <p>State must provide educational and scientific resources for the exercise of the right to decide on family planning (Brazil, 2014, Art. 226[7])</p> <p>State shall take measures to ensure the instruction of family planning and its practice (Turkey, 2011, Art. 41)</p> <p>Family planning is a responsibility of the state (Vietnam, 2013, Art. 40)</p>
Abortion	<p>Abortion is unlawful except on medical or therapeutic grounds to preserve life, physical health or mental health, in the case of rape, in the case of incest, or in the case of fetal impairment (Swaziland, 2005, Art. 15[5])</p> <p>Abortion is prohibited except when there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law (Kenya, 2010, Art. 26[4])</p> <p>Abortion is prohibited except in cases of necessity, especially to save the life of the mother (Somalia, 2012, Art. 15[5]).</p>	<p>None</p>	<p>None</p>

LEGEND: Provision (country, year of constitution adoption or amendment, article). Rights-holders are universal unless otherwise specified in brackets before the country name.

rights,” and that “everyone, in particular women” have the right to be free from sexual violence.<sup>32</sup>

The constitution of Ecuador addresses multiple discrimination as “persons who are doubly vulnerable,” however, this is noted only in the context of priority care for people in situations of sexual violence.<sup>33</sup>

### *Special consideration for maternal health*

The constitution of Ecuador identifies the state’s responsibility to ensure sexual and reproductive health actions and services, especially during pregnancy, childbirth, and the postpartum period. Motherhood and maternal health are afforded special protection under the constitutions of Paraguay and Venezuela. The constitution of Nicaragua provides for special protection to women during pregnancy and also provides for paid maternity leave.

The Ethiopian constitution regulates sexual and reproductive health and rights under its “rights of women” provision. This provision acknowledges the country’s historical legacy of inequality and discrimination and provides for affirmative measures to counter it. In this regard, it provides that “to prevent harm arising from pregnancy and childbirth and in order to safeguard their health women have the right of access to family planning, education information and capacity.”<sup>34</sup> Nepal’s constitution adopts a similar approach that notably states: “Every woman shall have the right relating to safe motherhood and reproductive health.”<sup>35</sup> Among one of the most inclusive constitutions, Nepal’s law does not limit the right to reproductive health to women of a certain age, reproductive capacity, or marital or citizenship status, as other constitutions have done.

### *Rights of other vulnerable groups*

Multiple constitutions recognize the specific needs of vulnerable groups, including the impoverished, children and youth, the elderly, and workers. Paraguay’s constitution requires the government to develop special plans for reproductive health care for people with scarce resources. Eight constitutions refer to children as a key population whose rights should be protected, but only with regards to

protection against sexual exploitation, abuse, or violence. The constitutions of Brazil, the Dominican Republic, and Guinea explicitly protect the sexual rights of adolescents and youth, in this case from sexual exploitation or abuse. Ecuador’s constitution addresses the right of the elderly to be protected from sexual exploitation. Somalia’s constitution refers to the protection of workers, especially women, against sexual abuse, whereas Ecuador’s constitution guarantees respect for the reproductive health of all workers and mandates the “elimination of labour risks affecting reproductive health.”<sup>36</sup>

It is notable that these provisions address specific vulnerable groups such as women and children, who have historically been viewed as requiring the protection of the law. The right to sexual and reproductive health requires a lifecycle approach that encompasses the needs and vulnerabilities inherent to all life stages, including the youth and older people who were scarcely addressed in the constitutional provisions. Moreover, recognizing children’s right to protection of their sexual health is a noble commitment; however, it does not justify failing to address the rights of youth—who assert their sexuality more actively than children—to the respect, protection, and fulfillment of their sexual health. Constitutional framers genuinely seeking to capture the entire spectrum of sexual and reproductive health rights for these and other groups will consider multiple layers of discrimination—not only age and gender but also race, disability, and sexual orientation—and will place equal emphasis on respecting, protecting, and fulfilling these entitlements.

### *Restricting rights to couples*

The constitutions of Brazil and Venezuela afford family planning rights to couples, which is limited to two people in a heterosexual monogamous relationship. The Brazilian constitution only protects the rights of heterosexual couples to reproduction, stating: “couples are free to decide on family planning.”<sup>37</sup> “Family” specifically refers to the “stable union between a man and a woman.”<sup>38</sup> In the same line, the Venezuelan constitution states that “couples have the right to decide freely and responsibly how many children they wish to conceive.”<sup>39</sup> An

exclusive focus on heterosexual monogamous relationships fundamentally clashes with the universality of human rights as it makes exclusions based on marital status and sexual orientation.

These results corroborate the historical challenge and controversy around determining who is entitled to sexual and reproductive health and rights. Debates about who the rights holders are have evolved from the first reference to the “family” in the 1966 Declaration on Population to “all couples and individuals” in the 1974 World Population Plan of Action.<sup>40</sup> General Comment No. 22 clearly signals that all individuals and groups enjoy the right to sexual and reproductive health free from discrimination.<sup>41</sup>

### *Indivisibility and interdependence with other human rights*

Five constitutions (Brazil, Portugal, Ecuador, Paraguay, and Venezuela) refer specifically to the importance of making free and autonomous decisions regarding the exercise of the right to sexual and reproductive health. For example, Ecuador has included the provisions on the right to sexual and reproductive health in Chapter 6 of the constitution that enshrines ‘rights to freedom.’ This intrinsic relation with the right to freedom refers both to the right to decide on matters of sexuality and sexual life and orientation and to the right to health and reproductive life. Related to these examples are the constitutions of South Africa and Zimbabwe, which enshrine the right to make decisions on matters of reproduction as an element of the right to bodily autonomy.

Access to information and education in relation to sexual and reproductive health were cited in domestic constitutions, reflecting the interrelation between the right to health and the rights to education and to enjoy the benefits of scientific progress and its applications (known as the ‘right to science’). While the interdependence between the rights to health and education have received much attention, information and education about health and related technologies also falls within the scope of the lesser-known right to science. The UN Special Rapporteur in the field of cultural rights has underscored that the “rights to science and to cul-

ture should both be understood as including a right to have access to and use information and communication and other technologies in self-determined and empowering ways.”<sup>42</sup> It is notable that domestic constitutions articulate these interlinkages. For example, the Brazilian constitution mandates the state to provide educational and scientific resources for the exercise of the right to sexual and reproductive health. Paraguay’s constitution recognizes the right of persons to receive “education, scientific orientation, and adequate services.”<sup>43</sup> The constitutions of Ecuador, Ethiopia, Paraguay, Portugal, and Venezuela recognize that education and information are essential prerequisites for the effective enjoyment of the right to sexual and reproductive health. Notably, the constitution of Ethiopia innovates incorporating capacity building.

### Discussion

Our study shows that the right to sexual and reproductive health is not universally respected, protected, and fulfilled in domestic constitutions. Of the 27 constitutions that recognized any aspect of this right, they most often addressed the respect of decisions about one’s sexual health and family planning, the protection of sexual health, and the provision of reproductive health care and family planning services (fulfillment). Explicit constitutional references to abortion served to prohibit the service unless a series of narrow exceptions apply. Major shortcomings still exist in most constitutions in relation to the universal recognition and respect of reproductive health rights, the protection of reproductive health, family planning, and abortion services from third party interference, and the fulfillment of all dimensions of sexual health and access to abortion. Few provisions are explicitly universal for all individuals and groups, whereas many provisions protect vulnerable groups or lifecycles such as women, motherhood, and children, and some text even restricts the scope of rights holders. The constitution of Ecuador addresses multiple discrimination only in the context of sexual violence. Various constitutions draw explicit interlinkages between the right to sexual and reproductive health

and the rights to education, science, and to make decisions freely and responsibly in matters of sexuality and reproduction.

### *Introducing the 'sexual' into the right to sexual and reproductive health*

Following the major turning points catalyzed by the Declaration of the World Conference on Human Rights in Vienna and the Declaration on Violence Against Women, General Comment No. 22 gives equal recognition to 'sexual health' and 'reproductive health.'<sup>44</sup> WHO's definition of sexual health—subsequently adopted by General Comment No. 22—requires "a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence."<sup>45</sup> WHO recognizes that sexual health cannot be achieved and maintained without respect for, and protection of, certain human rights, that is, sexual rights. However, our results show that although references to sexual health are frequently found in constitutions, the majority of these references are negative, expressing the right to not be the object of abuse or exploitation, in the corrective sense of combating violations. Importantly, only the constitution of Ecuador moves toward an affirmative concept of sexual rights, such as the right to make decisions freely about one's sexual life and to have access to sexual health care.

### *Decisional autonomy and freedom from coercion*

Only five constitutions refer explicitly to the right to make free and responsible decisions about one's sexual and reproductive health. However, despite substantial international traction for the legal recognition of women's agency over their own sexuality and reproductive function, we identified that the constitutions of China, Vietnam, and Turkey maintain restrictive approaches to issues of reproduction. The constitution of Turkey states that (emphasis added) "the State shall take the necessary measures and establish the necessary organization to [...] ensure the instruction of family planning and

*its practice.*"<sup>46</sup> These types of provisions subject the recognition of the right to sexual and reproductive health to its exercise in accordance with the government's demographic goal(s) and in a manner that the government considers 'responsible.' This approach instrumentalizes an individual's reproductive capacity to control population growth.<sup>47</sup> In doing so, these provisions contravene the state obligation to respect by interfering with an individual's freedom to control his or her own body and ability to make free, informed, and responsible decisions.<sup>48</sup> Greater emphasis in national constitutions on the individual right to decide on contraception may not only deter state intervention in matters of reproductive autonomy but may help curb discriminatory practices in which, for example, a male partner must give express permission for a woman to obtain contraception.<sup>49</sup>

### *Coherence between robust constitutional text and domestic policy*

The constitution of Ecuador offers a robust example of how the respect-protect-fulfill framework can be fully integrated into constitutional commitments. First, the constitution of Ecuador adopts a holistic, lifecycle approach that addresses sexual and reproductive health and captures the health needs of all people at all life stages and regardless of whether they have borne children.<sup>50</sup> It extends beyond the limits of 'women' and 'mothers' as rights holders or the narrow entitlement to maternal health.<sup>51</sup> Second, Ecuador's constitution recognizes sexual and reproductive rights both from a negative perspective (protection against sexual violence and guaranteeing sexual safety) and a positive view (right to freely make informed, voluntary, and responsible decisions on one's sexuality, one's sexual life and orientation, health and reproductive life, and to decide how many children to have). It is the only constitution to protect confidentiality about one's sexual life. Notably, the constitution obliges the government to fulfill these rights by promoting access to safe conditions in which decisions about sexuality can be made free from coercion. Third, provisions concerning sexual and reproductive health care

consider the human rights elements of availability ('permanent, timely'), accessibility ('non-exclusive,' 'universality'), acceptability ('interculturalism,' 'with a gender and generational approach'), and quality ('quality,' 'effectiveness,' 'bioethics').<sup>52</sup> Fourth, most of these provisions are universal and some are tailored to vulnerable groups including the elderly and students. The constitution recognizes the need for prioritized care to people who are 'doubly vulnerable' in situations of sexual violence.

However, caution must be exercised to ensure the effective translation of and coherence between constitutional law to domestic policy. The case of Ecuador makes for a good example of this phenomenon where, despite the robust constitutional protection of the right to sexual and reproductive rights, the enjoyment of these rights is hampered by contradictory (secondary) domestic law and inadequate health services. A chronic lack of access to modern contraceptive methods and age-appropriate information and education contributes to high rates of pregnancy among adolescents and drives the demand to terminate unwanted pregnancies.<sup>53</sup> Against this backdrop, domestic law criminalizes abortion—with very few exceptions—resulting in devastating health consequences for women: 18% of maternal deaths between 1995–2000 were due to unsafe abortion.<sup>54</sup> Therefore, further work is needed to translate the constitutional provisions and the international obligations into lived reality for the residents of Ecuador.

### *Tension between the constitutional rights to life and to sexual and reproductive health*

Curiously, the 2011 amendment to the constitution of Ecuador introduced robust provisions on sexual and reproductive health while maintaining a provision adopted in the 1980s that recognizes and guarantees life from the time of conception.<sup>55</sup> The tension between the protection of life from conception and the right to sexual and reproductive health has been addressed by General Comment No. 22—and many other UN bodies. The General Comment explicitly recognized the obligation of the state to provide safe abortion, guarantee the

availability of these services, and remove all barriers to access, including repeal of all laws that criminalize or restrict access to abortion.<sup>56</sup> Moreover, a new General Comment on the Right to Life is being drafted and the available version follows the same line as General Comment No. 22, stating that even though states parties may choose to limit access to abortion, this cannot result in violation of other rights under the ICCPR, including the right to life of pregnant mothers and the prohibition on exposing them to cruel, inhuman, and degrading treatment or punishment.<sup>57</sup> Therefore, in accordance to the international obligation of the state, such constitutional provisions shall be repealed and cannot ground a total ban on abortion. These regulations shall maintain legal exceptions for therapeutic abortions necessary for protecting the life of mothers, *inter alia* by not exposing them to serious health risks, and for situations in which carrying a pregnancy to term would cause the mother severe mental anguish.<sup>58</sup>

### *Limitations*

One potential limitation of our study concerns the search scope. We intentionally chose terms from the right to sexual and reproductive health that are clearly articulated in international law. It is possible that our search did not detect constitutions that implicitly govern or 'catch' the right to sexual and reproductive health in provisions for other, related rights. For example, constitutions enshrining a right to health could include reproductive health in their scope; however, our study did not include any related rights that are not expressly framed around sexual and reproductive health, nor did it include indirect drivers or factors that influence the right to sexual and reproductive health, such as provisions on child marriage/age of consent or violence against women. This is because the scope of our study was to understand how domestic constitutions address these concepts elucidated under international law and recently affirmed by the Committee in General Comment No. 22.

An additional limitation inherent in our study is that terminology in domestic constitutional law

may undergo divergent interpretation and application than the standards agreed in international law. This phenomenon inevitably limits the potential impact of the constitutional provisions identified in our study.

### *Future steps*

Although the global community has endorsed the right to sexual and reproductive health in the ICPD and Beijing Plan of Action, the global development agenda has until now skirted around the issue of reproductive health and rights. Yam-in and Boulanger emphasize that if sustainable progress is to be made in women's health then initiatives inclusive of sexuality and reproduction are needed to address the core issue of women's empowerment.<sup>59</sup> Now, considerable attention is given to reframing women's health around sexual and reproductive rights that consider a life-cycle approach independent of reproductive capacity. In a broader development perspective, realizing the right to sexual and reproductive health are also among the key objectives of the Sustainable Development Goals (SDGs) and direct references to the human rights treaties encompassing the right to sexual and reproductive health are found in the targets themselves.<sup>60</sup> In July 2017, the High Level Political Forum conducted a thematic review of SDGs 3 and 5 that showed only modest progress since 2015. The achievement of these goals demands much further work requiring—among other things—that states ensure equity; fulfill, protect, and promote human rights and gender equality; and secure adequate and sustained financing and investment in scientific research and innovation.<sup>61</sup> The Global Strategy for Women's, Children's, and Adolescents' Health (2016–2030) has as a key objective to “expand enabling environment” where the right to health and well-being can be achieved, specifically by removing barriers to the enjoyment of rights and by promoting gender equality.<sup>62</sup> Our results can also serve as a baseline measure to track any legal reform achieved in national constitutions in the pursuit of the SDGs related to the right to sexual and reproductive health.

Future research should examine the trans-

lation of domestic constitutional law to domestic policy. One important component of implementing law and policy in practice is sufficient and sustainable financing. Enshrining a state responsibility to invest in reproductive health may prove an encouraging strategy to give effect to these rights, which has been a notorious challenge especially in times of austerity. For example, funding shortfalls are a key factor explaining why most developing countries were unable to meet the health-related Millennium Development Goals (MDGs) by 2015.<sup>63</sup> Also, the monitoring tools developed by the Centre for Reproductive Rights consider that the allocation of adequate budgetary resources is an essential element to assess state compliance with their commitments.<sup>64</sup> Moreover, the right to sexual and reproductive health is the first to be adversely affected by state budget cuts in response to austerity measures.<sup>65</sup> Shalev cites the example of Croatia in which contraceptives were the first type of medication to lose state funding and abortion was the first medical act to be removed from the free health care services.<sup>66</sup> Future research can be directed to whether and how the legal recognition of the right to sexual and reproductive health and specific provisions regarding budget allocation can not only support the realization of these rights but also their ability to withstand changes in government administrations or economic or social strife.

### *Key recommendations for domestic law*

Constitutional law, as all domestic law, should conform to a human rights approach to protect and promote the right to sexual and reproductive health. Specifically, committed governments should expressly respect, protect, and fulfill these rights for all individuals without discrimination.

First, barriers to the full enjoyment of the right to sexual and reproductive health and rights should be removed from constitutional law. In line with General Comment No. 22, governments should end the codification of coercive practices in family planning and restrictive approach to abortion in constitutional law. Second, the right to sexual and reproductive health should be framed in a manner that is sensitive to the different needs of

men and women, intersex and transgender people, and to their needs at different stages in their life cycles. Both sexual health and reproductive health deserve equal protection and promotion under constitutional law. This includes the right to make informed decisions free from coercion about one's sexuality and one's reproduction, and the right to access health care for sexual and reproductive needs, including contraception, access to comprehensive sexuality education, and safe abortion services. Furthermore, it is crucial to incorporate the paradigm of rights enshrining sexual and reproductive rights. Third, it is important to reaffirm the indivisibility and interdependence of the right to sexual and reproductive health with other human rights. Our article provides examples of existing constitutional text that may be considered by future constitutional framers and governments truly committed to realizing the right to sexual and reproductive health.

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