

One in Thirty

Protecting Fundamental Rights for the World's Migrants and Refugees

According to the United Nations, there were 258 million international migrants worldwide as of 2017—a number that has increased by over 100 million just since 1990.¹ The circumstances that compel migration are diverse. Some individuals and families leave their home countries due to war, violence, or persecution and discrimination. Others flee following natural disasters or because they were unable to obtain enough food or meet their basic needs in the countries where they were living. Some migrate for a chance to access better jobs and educational opportunities. For many, a combination of reasons motivates the weighty decision to leave home and start over in a new place.

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

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

MIGRATION IN CONTEXT: WHO MIGRATES AND WHY?

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

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

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

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

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

CONSTITUTIONAL APPROACHES AND IMPACTS

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

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

Access to Education

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

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

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

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

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

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

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

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

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

Strong Protections for Universal Education in International Law

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

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

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

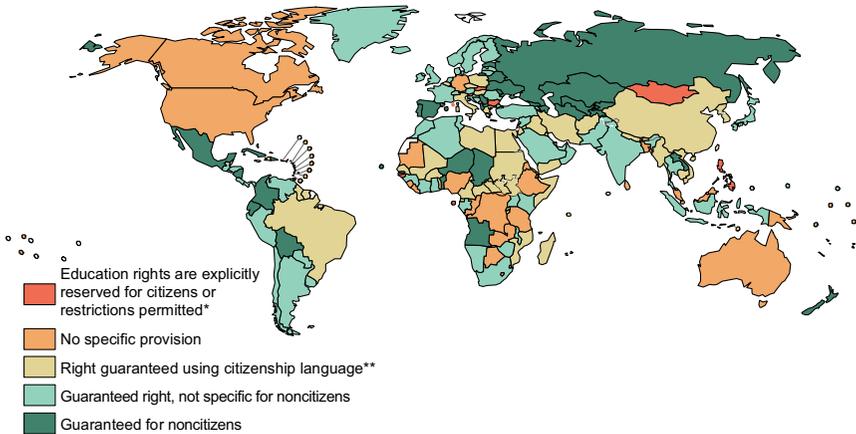
Opposition to migrant students' access to public education is often framed as an issue of resources. For overburdened or underfunded school systems, any increase in class size can feel like a strain on capacity. The question of costs may be especially pressing in countries with the highest percentage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

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

The Right to Education for Noncitizens in Constitutions

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

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



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

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

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

Access to Employment

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

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

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

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

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

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

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

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

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

Rights to Work and Nondiscrimination

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

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

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

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

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

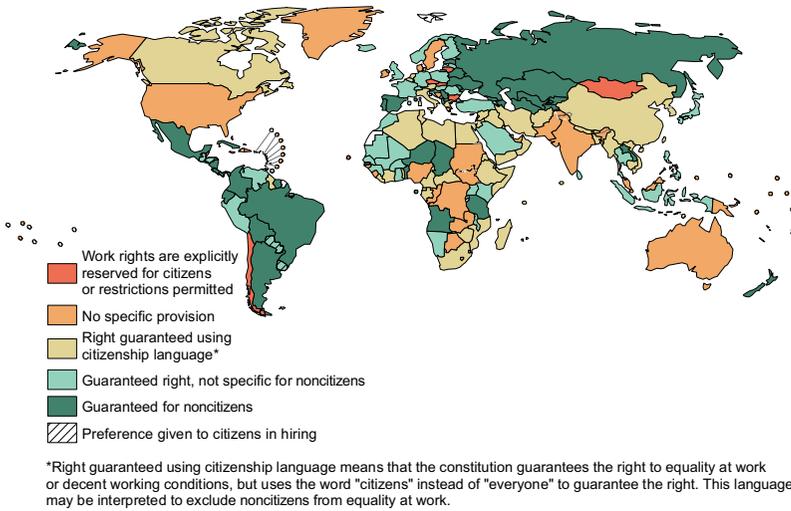
For many migrants, exposure to discrimination may continue even after citizenship has been gained. For example, in Greece, a draft presidential decree proposed in 2016 sought to prohibit naturalized citizens from enrolling in the Warrant Officers' School of the Fire Brigade Academy until at least a year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

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

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

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

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



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

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

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

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

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

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

Rights to Employment Benefits

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

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

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

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

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

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

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

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

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

Access to Health Systems

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

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

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

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

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

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

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

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

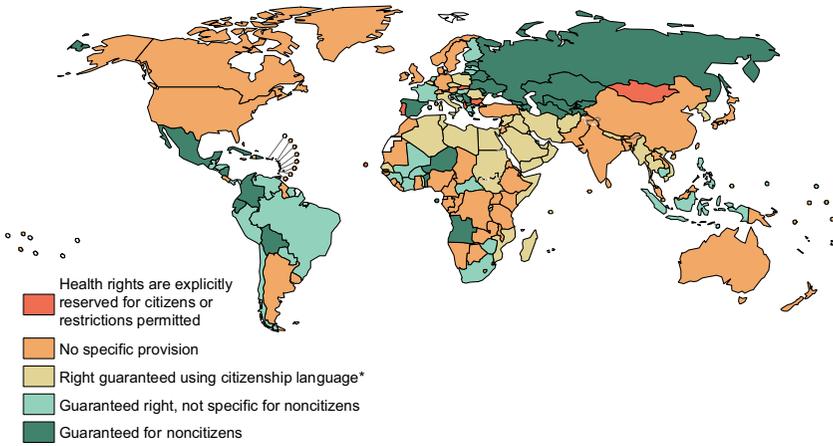
citizenship status are not uncommon, and some have been upheld as constitutional.⁷³ As discussed in more detail in chapter 10, guaranteeing access to health services requires an outlay of resources typically exceeding that required to protect civil and political rights. As a result, health rights have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

However, the evidence to support these arguments is slim.

First, while diverse factors drive migration to specific countries, many studies suggest that economic opportunity is a principal driver of destination choice,⁷⁴ while for economic migrants, family and social networks also play an important role.⁷⁵ Other factors that shape migrants' choices about where to settle include proximity⁷⁶ (especially for South–South migrants),⁷⁷ cultural and historical factors (including language barriers),⁷⁸ and social and political climates (including whether countries are perceived as welcoming to foreigners, and whether they have multicultural societies).⁷⁹ It is also important to note that some migrants make no choice at all about where they end up, especially refugees and asylum seekers, who may be at the whim of smugglers.⁸⁰

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

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



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

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

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

The Right to Health for Migrants and Refugees in Constitutions

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

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

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

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

LANGUAGE MATTERS: RIGHTS GRANTED TO ALL PERSONS VS. CITIZENS

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

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

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

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

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

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

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

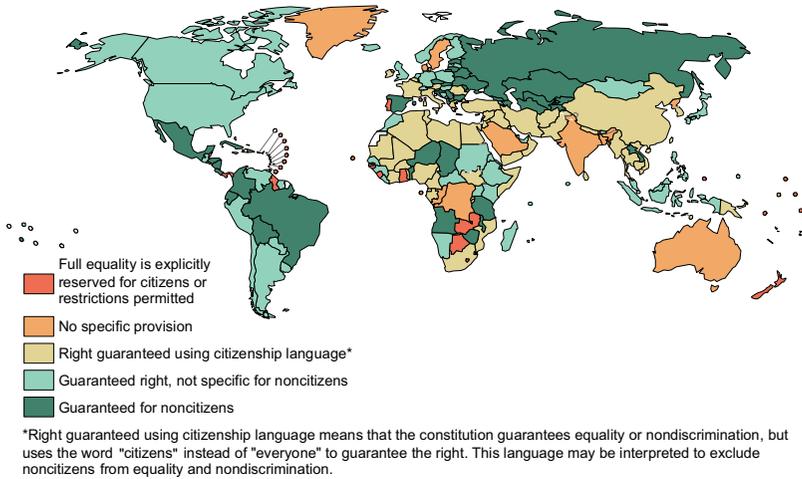
Nondiscrimination on the Basis of Citizenship

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

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

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

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



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

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

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

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

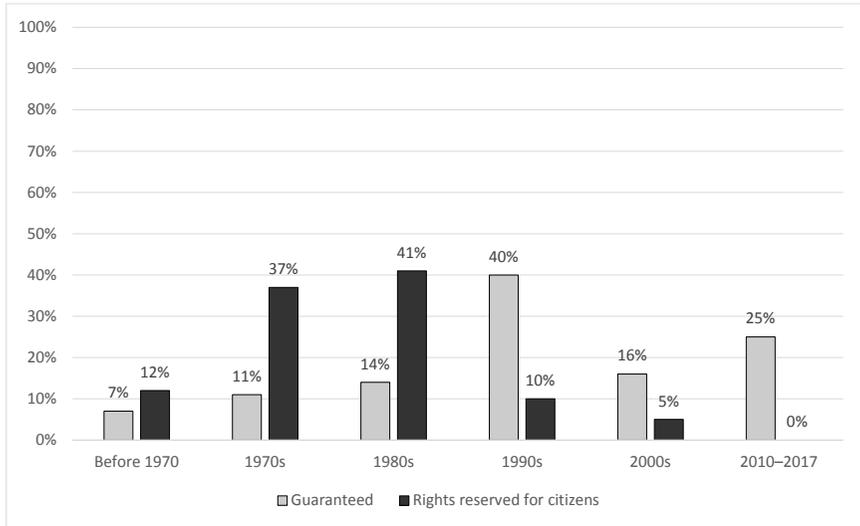


FIGURE 5. Explicit constitutional protection of equality or nondiscrimination for noncitizens by year of constitutional adoption

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

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

Restrictions on Other Rights

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

Freedom of Movement

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

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

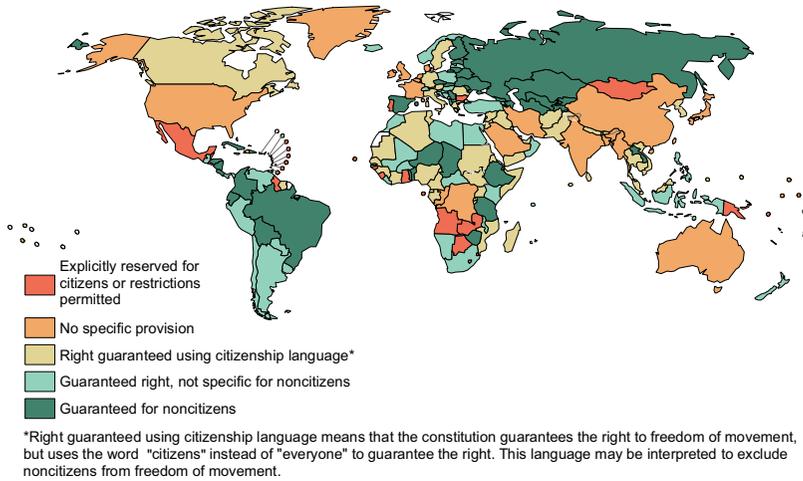
For example, Zambia's constitution broadly guarantees equal rights for all by using the term "every person in Zambia" in its provision on fundamental rights and freedoms.⁹⁸ However, its provision on nondiscrimination stipulates that the prohibition of discrimination does not apply "with respect to persons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

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

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

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

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



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

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

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

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

Rights to Due Process

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

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

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

ADDRESSING STATELESSNESS

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

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

The Practical Consequences of Statelessness

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

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

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

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

While the situation in the Dominican Republic has received global attention, the enshrinement of the exclusionary citizenship provision within its constitution has been retained, even following a second series of reforms in 2015. Interestingly, the constitution does guarantee that foreigners have “the same rights and duties as nationals” within the Dominican Republic, subject to certain exceptions¹²⁶—but the lack of an explicit protection on the base of statelessness has left thousands of residents’ futures uncertain.

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

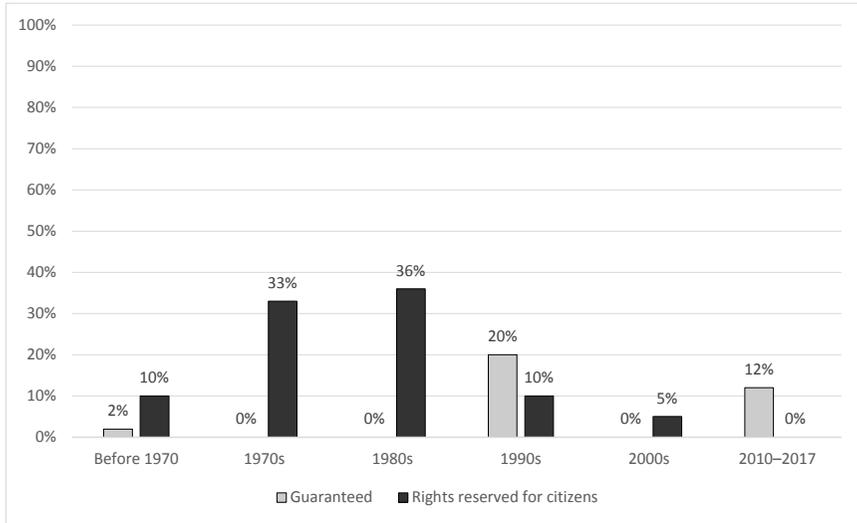


FIGURE 6. Explicit constitutional protection of equality or nondiscrimination for stateless persons by year of constitutional adoption

THE ABILITY TO EXERCISE RIGHTS

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

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

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

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

CONCLUSION

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

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

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

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