Mapping Constitutional Commitments on Sexual and Reproductive Health and Rights

A Global Survey

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1. INTRODUCTION AND OVERVIEW OF THE LEGAL FRAMEWORK

Sexual and reproductive health and rights (SRHR) have been increasingly recognized and developed in international human rights law. The UN human rights system has repeatedly confirmed that SRHR are human rights established in the core human rights conventions. Reproductive health was first enshrined under the right to health in the International Convention on Social, Economic and Cultural Rights (ICSECR)[2] and – according to General Comment No. 14 – bestows on individuals the freedom to choose if, when, how, and with whom to engage in sexual activity, as well as the right to access to contraceptive methods, information, goods such as contraceptive devices, and sexual and reproductive healthcare. General Comment

1 Acknowledgements: The authors wish to thank Ms. Annabel Weijer for her research assistance.

2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979 also made major contributions to protecting and promoting reproductive health and rights.

No. 22 (GC) by the Committee on Economic, Social and Cultural Rights (CESCR) builds on these developments and states that the right to reproductive health entails both »the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, over matters concerning one's body and sexual and reproductive health«, and the »unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health«.[3] Closely linked is the concept of sexual health, defined as »a state of physical, emotional, mental and social well-being in relation to sexuality«.[4]

In 1994, the International Conference on Population and Development (the Conference) transformed the discourse at the time from reproductive health and rights as a strategy to meet demographic targets and control population growth to a more comprehensive and positive approach to sexuality and reproduction, free from coercion, discrimination and violence.[5] The Conference forged the link between sexuality and health as human rights, where women's agency over their own bodies and sexuality was now intrinsically linked to their sexual and reproductive health.[6] In 1995, the Beijing Platform for Action[7] was the first declaration to embody the concept of sexual rights and expanded the definition to cover both sexuality and reproduction by upholding the right to exercise control over and make decisions about one's sexuality.

Furthermore, the Conference's Program of developed the notion of reproductive rights as embracing certain human rights that are already recognized in national laws, international human rights documents and other relevant UN consensus documents. Building on the notion that all human rights are indivisible, universal and interdependent – as noted at the World

3 E/C.12/GC/22, 2 May 2016, Context (I).

4 Ibid.

5 See generally Garita (2014), 1; Zampas/Gher (2008), 252.

6 Reichenbach/Roseman (2009), 11.

7 A/CONF.177/20 and A/CONF.177/20/Add.1, 1995. 189 governments at the Beijing Platform for Action recognized that social and cultural discriminations, gender inequalities, and the lack of information and services contribute to sexual and reproductive ill health.

Conference on Human Rights in Vienna[8] – the definition grounds these rights in binding international treaties that protect the right to life, liberty, security, health, self-determination, equality and non-discrimination, access to information, and the right to enjoy the benefits of scientific progress. Another of the many achievements of the Conference is the recognition of the responsibility of governments to legislate on the matter translating international commitments into national laws and policies.[9]

Earlier in the year 2016, the Committee of Economic, Social, and Cultural Rights (CESCR) extensively addressed states' legal duties to the right to sexual and reproductive health in its General Comment No. 22 in response to the continuing grave violations in practice and adopting a clear human rights based approach to matters of sexuality and reproduction. The General Comment affirms that the right to reproductive health is an integral part of the right to health[10] that has enjoyed longstanding recognition based on already existing international human rights instruments.[11] Among other issues, General Comment No. 22 recognizes abortions services as an integral part of the right to health (paras. 56–57) and notes that states have an obligation to repeal, eliminate laws, policies and practices that criminalize, obstruct or undermine an individual's or a particular group's access to health facilities, services, goods and information, including abortion (para. 35).

The legal obligations to respect, protect, and fulfil the right to sexual and reproductive health offered in General Comment No. 22 provide clear guidance to state parties using standardized terminology. According to the comment, the duty to respect requires states to refrain from interfering with individuals' right to exercise their sexual or reproductive health. Examples

8 A/CONF.157/23, 12 July 1993.

9 Cottingham et al. (2010), 551.

10 See also E/C.12/2000/4, 11 August 2000, paras. 2, 8, 11, 16, 21, 23, 34 and 36.

11 E/C.12/GC/22, 2 May 2016 the following documents as examples: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Article 12; Convention on the Rights of the Child (CRC), 1989, Articles 17, 23–25 and 27; Convention on the Rights of Persons with Disabilities (CRPD), 2006, Articles 23 and 25; See also A/54/38/Rev.1, chap. 1, 19 January–5 February 1999 and 7–25 June 1999, paras 11, 14, 18, 23, 26, 29, 31(b); CRC/C/GC/15, 17 April 2013.

include limiting or denying access to health services and information, such as laws or practices that criminalize abortion, limiting consensual sexual activities between adults, requiring third-party authorization for access to abortion or contraception, or excluding certain health services from publicly- or donor-funded programmes.[12]

Under the obligation to protect, states must protect individuals' right to sexual and reproductive health from interference by third parties.[13] Examples include protecting against private health clinics, insurance or pharmaceutical companies that impose practical or procedural barriers to health services.[14] States must introduce laws and policies that prohibit third parties from acting in a way that harms integrity or undermines the enjoyment of rights, such as ensuring adolescents have access to information about sexual and reproductive health, including family planning, that is appropriate for their age and regardless of their marital status.[15]

The responsibility to fulfil mandates states »to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health«.[16] States must take steps to ensure universal access to sexual and reproductive healthcare, and to guarantee care for survivors of sexual and domestic violence, 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.[17]

In spite of the development of the legal framework much progress must be made to realize SRHR in practice.[18] One important step in this direction

12 E/C.12/GC/22, 2 May 2016, para. 40–41.

13 Ibid., para. 42.

14 Ibid., para. 42–43.

15 Ibid., para. 43–44.

16 Ibid., para. 45.

17 Ibid., para. 47–48.

18 The Lancet Commission on Women and Health asserts that an estimated 225 million women have an unmet need for family planning, and every year, an estimated 75 million unintended pregnancies put women at risk of unsafe abortion. Furthermore, unsafe abortion is estimated to cause 47,000 maternal deaths

is the removal of the legal barriers[19] and to this end Gruskin demands »their identification, careful analysis and their subsequent modification – through laws, policies and regulations that are consonant with human rights«.[20] Showcasing the importance of the legal arrangements, the Lancet Commission on Women and Health emphasizes the need for »an enabling social, legal, and regulatory environment« to respond to women and girls' health needs and rights,[21] and the Commission on the Status of Women continues to demand that states strengthen their normative, legal and policy frameworks.[22] Both the removal of laws that obstruct the full realization of SRHR and the introduction of positive legal guarantees for these rights are needed.

Adopting domestic laws consistent with international standards is a demonstration of the government's commitment to realize SRHR. As a recognized indicator of such political will, legal codification may be the first step in improving the respect, protection and fulfilment of these rights in practice. Domestic constitutions are the most vital expressions of government responsibility and individual entitlements, and therefore one of the most deserving channels to endorse states' commitments to human rights. Constitutional law offers a frame for subsequent policies, programmes 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.[23] Legal recognition in constitu-

and 5 million maternal disabilities annually. Maternal mortality claims the lives of 289,000 women annually while complications during childbirth result in 5.8 million serious injuries every year. See generally Langer et al. (2015).

19 Gruskin et al. (2008), 591; E/C.12/GC/22, 2 May 2016, para. 49(a). See generally Kismödi et al. (2015).

20 Gruskin et al. (2008), 591.

21 Langer et al. (2015), 1178.

22 E/2016/27–E/CN.6/2016/22, 14–24 March 2016.

23 See generally Roa/Klugman (2014). See generally Hogerzeil et al. (2006). Pivotal cases such as the Treatment Access Campaign vs. 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 right to reproductive health can be.

tions can endure changes in government administrations and survive economic or social strife and ensure 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 SRHR[24] and, in this process, constitutional framers often seek inspiration from other jurisdictions or international law.[25] Our objective is to survey the language and concepts used to describe SRHR in the domestic constitutions from around the globe.

2. METHODOLOGY

Our study investigates whether and how SRHR are introduced into domestic constitutional law. In March 2015 (updated in April 2016) we searched the constitutions of 195 WHO member states on the Comparative Constitutions Project webpage for the key words: ›reproductive‹, ›reproduction‹, ›sexual‹, ›family planning‹, and ›abortion‹.[26]

After retrieving constitutional provisions, 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.

24 Ginsburg et al. (2009), 201.

25 See generally ibid.

26 One potential limitation of our study concerns the search scope. Although our search terms could be considered narrow by some, we intentionally chose SRHR terms clearly articulated in international law. With this approach, it is possible our search did not detect constitutions that implicitly govern or 'catch' SRHR 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 SRHR. This is because the scope of our study was to understand how domestic constitutions address SRHR concepts elucidated under international law and recently affirmed by the CESCR in GC No. 22 (E/C.12/GC/22, 2 May 2016).

As mentioned above, the international legal framework underpinning SRHR is complex and grounded in different instruments. We use the definitions and notions outlined in the Introduction and apply the tripartite typology of states' obligations (respect, protect and fulfil) to categorize constitutional provisions for SRHR. In addition, we report the constitutional provisions mentioning specific concepts in SRHR namely family planning, abortion, access to education and other interlinked human rights. Melton et al. suggest that the scope of the constitutional text, such as whether it is focused by topic rather than using complex cross-referencing, and the use of once-only words for clarity and brevity, are of most importance for clear interpretation.[27] Therefore, we identify well-defined terminology and concepts in constitutional commitments in order to maximize their clarity and comparability between jurisdictions.[28]

3. RESULTS

We retrieved 32 constitutions that met our inclusion criteria. 28 domestic constitutions enabled at least one aspect of SRH; these laws were most often found in the pan-American (n=9 constitutions) and African (n=8) regions. Seven constitutions restricted SRHR and these were found in the African (n=3 constitutions), Western Pacific (n=2), European (n=1) and South-East Asian (n=1) regions.

3.1 Sexual Health and Rights

The state duty to respect the right to sexual health and sexual rights is conceptualized in a positive sense as the right to make decisions about one's sexual life and orientation (Ecuador) and the right to exercise sexual rights (Bolivia), and in a negative sense as the right to sexual integrity (Belgium, Bolivia) or a right to sexual safety (Ecuador). Bolivia's constitutions states

27 Melton et al. (2013).

28 Constitutional law scholars Elkins, Ginsburg, and Melton note that a lack of conceptual clarity in constitutional language can impair comparisons across jurisdictions. We minimized this risk by using standard concepts in SRH and applying the tripartite typology. Elkins et al. (2011).

»Women and men are guaranteed the exercise of sexual rights and their reproductive rights«.[29]

The most frequent state duty is the protection against sexual exploitation (Ecuador, Egypt, Brazil, Cambodia, Zimbabwe), sexual abuse (Colombia, DRC, Guinea, Timor-Leste, Malawi, Somalia), and sexual violence (DRC, Dominican Republic, Ecuador) or an obligation to punish such acts (Bolivia, Brazil, DRC, Malawi). Guinea's constitution protects youth from sexual exploitation or abuse.

Notably, in terms of the state's duty to respect and protect sexual and reproductive rights, Ecuador's constitution recognizes and guarantees the

»right to freely take informed, voluntary, and responsible decisions on *one's sexuality and one's sexual life and orientation*. The State shall promote access to the necessary means so that these decisions take place in safe conditions.«[30] [emphasis added, L.B.P./S.K.P.]

This provision in Ecuador's constitution respects the right of individuals to make decisions about their sexuality, freely and voluntarily, implying without coercion. It obliges the government to fulfil this right by promoting access to safe conditions in which these decisions can be made. Finally, the constitution of Ecuador was the only constitution to protect confidentiality about one's sexual life.

3.2 Reproductive Health and Rights

Four constitutions require the state to respect the right to reproductive health through the right to make decisions concerning reproduction (Ecuador, South Africa, Zimbabwe), or the right to reproductive health (Nepal). Ecuador's constitution specifies the right to take free, responsible and informed decisions about one's health and reproductive life and to decide how many children to have and also guarantees respect for the reproductive health of all workers.

The constitutions of Ecuador and Nicaragua provide for the protection of sexual and reproductive health. Ecuador's law mandates the »elimination

29 Constitution of the Plurinational State of Bolivia of 2009, Article 66.

30 Constitution of Ecuador of 2008 (amended 2011), Article 66.

of labour risks affecting reproductive health« and Nicaragua's law »grants special protection to the process of human reproduction«.

Eight constitutions include the explicit state duty to provide for reproductive healthcare. The constitutions of Fiji, Kenya, and South Africa indicate that everyone is entitled to access reproductive healthcare. In contrast, reproductive healthcare is limited in two instances to services and facilities »during reproductive phase«[31] (Nepal) or to »citizens and permanent residents«[32] (Zimbabwe). Paraguay's constitution requires special plans for reproductive health care for people with scarce resources.

3.3 »Family Planning« and Contraception

Five constitutions address family planning in terms of individual rights and three constitutions approach family planning as an individual responsibility in relation to population control.

The constitution of Paraguay determines the obligation to respect the right to reproductive health referring specifically to family planning in an article with the same title, by stating »the right of persons to freely and responsibly decide on the number and frequency of the birth of their children«.[33] The Brazilian constitution respects the right of couples to decide on family planning and prohibits »any coercion on the part of official or private institutions«.[34] In the same line, the constitution of Venezuela also emphasizes the decision of the ›couple‹.

No constitution addresses the protection of the right to family planning. A state duty to fulfil family planning is described as a »right to access family planning education, information and capacity«[35] (Ethiopia), and state guarantee of »full family planning services based on ethical and scientific values«[36] (Venezuela). Portugal's constitution offers a clear example

31 Constitution of Nepal of 2015, Article 51(j)3.

32 Constitution of Zimbabwe of 2013, Article 76(1).

33 Constitution of Portugal of 1976 (amended 2005), Article 67(2)d.

34 Constitution of Brazil of 1988 (amended 2015), Articles 226 and 7.

35 Constitution of Ethiopia of 1994, Article 35.

36 Constitution of the Bolivarian Republic of Venezuela of 1999 (amended 2009), Article 76.

of state responsibility to fulfil access to family planning information and methods:

»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«.[37] [emphasis added, L.B.P./S.K.P.]

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 in relation to national population control objectives in the constitutions of China, Vietnam, and Turkey.

3.4 Abortion

Three countries have specific constitutional provisions about abortion: Kenya, Swaziland and Somalia. Although the provisions frame abortion primarily in negative terms as ›unlawful‹,[38] ›illegal‹[39] or ›not permitted‹,[40] all laws recognise various grounds on which abortion may be allowed. The Swazi Constitution provides exceptions for abortions performed 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 foetal impairment. Moreover, this is not an exhaustive list as the provision leaves room for the parliament to incorporate new grounds in which abortion would be allowed. The Kenyan constitution also contains similar grounds in which abortion is permitted 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. In the same line – but with a more restrictive approach – the Somalian Constitution states that abortion will be permitted in cases of necessity, especially to save the life of the mother.

37 Constitution of Portugal of 1976 (amended 2005), Article 67, para. 2.

38 Constitution of Swaziland of 2005, Article 15(5).

39 Constitution of Somalia of 2012, Article 15(5).

40 Constitution of Kenya of 2010, Article 26(4).

3.5 Indivisibility and Interdependence with other Human Rights

The UN bodies have noted that SRHR are intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality.[41] In this regard, we mapped the constitutional commitments on SRHR looking for the explicit interlinkages between these rights and other human rights.

3.5.1 Autonomy and Freedom from Coercion

The Brazilian constitution recognizes that »couples are free to decide on family planning« and prohibits »any coercion on the part of official or private institutions«.[42] In the context of choices about family planning, Portugal's constitution introduces the duty to respect individual freedom when it comes to decisions on SRHR: »In order to protect the family, the state shall particularly be charged with: […] respect for individual freedom«.[43] Ecuador has included the provisions on SRHR in Chapter 6 of the Constitution that enshrines »Rights to freedom« and recognizes both the right to decide freely and voluntary on matters of sexuality and sexual life and orientation and about one's health and reproductive life and to decide how many children to have. The Constitution of Paraguay and Venezuela also place emphasis on this element.

3.5.2 Right to Benefit from Scientific Progress

In this regard, three of the constitutions analysed contain provisions reflecting the importance of this element. The Brazilian constitution clearly mandates that the state must provide educational and scientific resources for the exercise of SRHR. Paraguay formulates in its constitution that the state recognizes the right of persons to receive »education, scientific orientation,

41 For a more extensive analysis see United Nations Population Fund et al. (2014); Center for Reproductive Rights (2008), (2009), (2010) and (2013).

42 Constitution of Brazil of 1988 (amended 2015), Article 226, para. 7.

43 Constitution of Portugal of 1976 (amended 2005), Article 67, para. 2.

and adequate services«.[44] The Venezuelan constitution notes that it is incumbent to the state to guarantee full family planning services based on ethical and scientific values. Furthermore, the constitutions of South Africa, Zimbabwe, and Ecuador enshrine the right of individuals not to be subjected to medical or scientific experiments without their informed consent.

3.5.3 Right to Access to Information and Education on SRHR

Several of the national constitutions have considered this element. The Brazilian constitution states that it is incumbent upon the state to provide educational and scientific resources for the exercise of these rights. The constitutions from Ecuador, Ethiopia, Paraguay, Portugal, and Venezuela recognize that education and information are *sine qua non* requisites for the effective enjoyment of SRHR. Notably, the constitution of Ethiopia innovates incorporating capacity.

3.5.4 Budget Allocation

Four of the constitutions have specific provisions related to budget allocation and all of them refer to reproductive healthcare. The Brazilian constitution states that the »government shall promote full health assistance programs for children, adolescents« and in order to do that there will be an allocation of a percentage of public health funds to assist mothers and infants.[45] The Constitutions of Fiji, South Africa, and Zimbabwe establish that the state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the rights set out in this section (right to health including reproductive health). It should be noted that the constitution of Fiji demands that if the state claims that it does not have the resources to implement the rights, it is the responsibility of the state to show that the resources are not available.

44 Constitution of Paraguay of 1992 (amended 2011), para. 61. »The State recognizes the right of persons to freely and responsibly decide the number and the frequency of the birth of their children, as well as to receive, in coordination with the pertinent organs[,] education, scientific orientation, and adequate services in the matter«.

45 Constitution of Brazil of 1988 (amended 2015), Article 227, para. 1.

4. DISCUSSION

4.1 Introducing the *Sexual* into Sexual and Reproductive Health and Rights

Although our results suggest that, compared to other SRHR concepts, sexual rights/health were widely enshrined in 24 constitutions, the majority of these references are negative prohibiting discrimination on the grounds of sexuality and/or recognizing a negative right to sexual health (i.e. to be protected from sexual offences). Most references to sexual health were found in constitutions from the Americas and Africa.

As noted by the literature on the topic, prior to 1993[46] sexuality – or the forbidden ›s‹ word – of any sort or manifestation was absent from human rights discourse. The Declaration of the World Conference on Human Rights in Vienna and the Declaration on Violence against Women represented a major turning point not only because they gained recognition of sexual violence as a human rights violation but also because they finally initiated ›the sexual‹ into human rights language.[47] The term ›sexual health‹ has now been given equal recognition as ›reproductive health‹ by the CESCR.

Only two constitutions in our study embody positive references to sexual rights, such as to freely make decisions about one's sexual life or to have access to sexual healthcare. We use the term ›negative‹ following Petchesky's observation that the emergence of the concept of sexual rights has only occurred from a negative approach, i.e. the abovementioned provisions expressing the right not to be the object of abuse or exploitation, in the corrective sense of combating violations. We concur with this opinion considering that the development of sexual rights needs to expand and move towards an affirmative concept. In this line, the WHO definition of

46 See generally Petchesky (2000); Girard (2007), Davis (2008). Petchesky ponders »why is it so much easier to assert sexual freedom in a negative way, and not in an affirmative, emancipatory sense? Why is it easier to reach a consensus on the right not to be abused, exploited, raped, trafficked or mutilated in one's body, but not the right to fully enjoy one's own body?« See Petchesky (2000), 88.

47 Petchesky (2000), 83.

sexual health – adopted by General Comment No. 22 – that requires a positive and respectful approach to sexuality and sexual relationships can provide a good starting point.[48]

4.2 »Couples« or »Individuals«? Universality and SRHR Right Holders

Determining the holders of SRHR proved to be a controversial undertaking. Debates about the right holders have evolved from the first reference to the ›family‹[49] in the Declaration on Population, to »all couples and individuals« by the World Population Plan of Action following the Bucharest Conference, in 1974.[50] Now, General Comment No. 22 clearly signals that »all

48 The WHO defines sexual health as »a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity«. It also states that »Sexual health 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.« And recognises that sexual health cannot be achieved and maintained without respect for, and protection of, certain human rights, that is, sexual rights. See WHO (2002).

49 One year later 18 more countries signed the declaration signalling the political acceptability of governmental policies to influence population control. This focus on restraining population growth grew out of widespread concern that the unprecedented pace and volume of population growth after 1950 was a serious threat to economic development, public health, and the environment. See generally Ashford (2001), 3.

50 The phrasing ›couples and individuals‹ was not in the original draft but was inserted as a new principle in the working group of the WPPA. See United Nations World Population Conference, PN-AAH-494, 1974. Furthermore, in global debates, the Holy See has voiced its disagreement with the term ›couples and individuals‹ and stated its own interpretation of the phrase as »married couples and the individual man and woman who constitute the couple«. According to the Holy See's position, no sexual and reproductive rights should be recognized and guaranteed to those outside the traditional heterosexual monogamous marriage. See for example Statement of the Holy See at the International Conference on Population and Development, A/CONF.171/13/ Rev.1, 5–13 September 1994.

individuals and groups should be able […] to exercise their rights to sexual and reproductive health without experiencing any discrimination«.[51]

The constitutions of Brazil and Venezuela afford the right to decide about family planning to ›couples‹, which restrict these to control procreation to two people in a heterosexual monogamous relationship.[52] This concept fundamentally clashes with the universality of human rights as it makes exclusions based on marital status and sexual orientation.

4.3 Decisional Autonomy and Freedom from Coercion in SRHR

Furthermore, despite substantial international traction for the legal recognition of women's agency over their own sexuality and reproductive function, China and Vietnam continue to apply a controlling constitutional provision to procreation. Moreover, the constitution from Turkey states that

»the State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to *ensure the instruction of family planning and its practice.*«[53] [emphasis added, L.B.P./S.K.P.].

51 E/C.12/GC/22, 2 May 2016, para. 22. Where reproductive health is defined as including »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« (ibid., para. 6).

52 The Brazilian constitution only affords protection to couples when it comes to their reproductive rights: »Based upon the principles of human dignity and responsible parenthood, couples are free to decide on family planning« and the constitutional definition of family specifically refers to the »stable union between a man and a woman«. Constitution of Brazil of 1988 (amended 2015), Article 226. 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«. Constitution of Venezuela of 1999 (amended 2009), Article 76.

53 Constitution of Turkey of 1982 (amended 2002), Article 41.

Provisions that subject the recognition of SRHR to its exercise in accordance with the government's demographic goals or in a manner that the government considers ›responsible‹, instrumentalizes human beings and their reproductive capacity as an object of population control. This approach has been widely criticized.[54] Greater emphasis on the individual right to decide on contraception in national constitutions may help curb discriminatory practices in which, for example, male partners must give express permission for a women to obtain contraception.[55]

4.4 Provision of Healthcare

Ecuador's constitution is notable as it includes several provisions for the state's duty to fulfil access to both sexual and reproductive healthcare:

»The State shall guarantee this right by means of economic, social, cultural, educational, and environmental policies; and the permanent, timely and non-exclusive access to programs, actions and services promoting and providing integral healthcare, *sexual health, and reproductive health*. The provision of healthcare services shall be governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency, effectiveness, prevention, and bioethics, with a gender and generational approach.«[56] [emphasis added, L.B.P./S.K.P.]

This language is a positive innovation for the provision of healthcare for several reasons. First, numerous commentators from the both the legal and health disciplines maintain that the phrase ›maternal health‹ is insufficient to adequately address the core issue of healthcare tailored to women's health and needs.[57] Instead, these commentators call for a holistic, lifecycle approach that addresses sexual and reproductive health – just as this provision in the Ecuadorian constitution has done – in order to capture the health needs of women at all life stages and regardless of whether they have born

54 Shalev (2000) 40. See also Aguirre/Wolfgram (2002).

55 See examples by Langer et al. (2015), 1173.

56 Constitution of Ecuador of 2008 (amended 2011), Article 32.

57 See generally Yamin/Boulanger (2013); Bustreo et al. (2013).

children.[58] Second, this provision considers 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‹) in relation to sexual and reproductive health programs and services.

4.5 Reflections on Abortion

Bearing in mind that restrictions on abortion were codified in three African constitutions, it is interesting to note that the African human rights system was the first to regulate explicitly on the issue of abortion in a binding instrument. The »Maputo Protocol« is the very first treaty to recognize abortion, under certain conditions, as women's human right which they should enjoy without restriction or fear of being prosecuted.[59] Under Article 14 (2) (c) of the Maputo Protocol, states parties are called upon to take all appropriate measures to »protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus«.[60]

Both the constitutions from Kenya and Swaziland have placed such provisions in the Chapter that guarantees the right to life as a fundamental right. In Swaziland the provision on abortion is under Chapter III on Protection and Promotion of Fundamental Rights and Freedoms, Title15 on Protection of the Right to Life and in the Kenyan constitution it is regulated in Part 2 concerning Rights and Fundamental Freedoms, Article 26 on the right to life. This might be a reflection of the UN monitoring bodies' arguments that ground the discussion on abortion on the high rates of maternal mortality and a growing concern for the preventable deaths caused by unsafe abortions.[61] Differently, the constitution of Somalia has placed the

58 See generally Yamin/Boulanger (2013); Bustreo et al. (2013); Langer et al. (2015).

59 Zampas/Gher (2008), 250. See also African Commission on Human and Peoples' Rights (2014).

60 »Maputo Protocol« or Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

61 See more generally van Leeuwen (2007), 109–113.

article regulating abortion under Title II on Rights, Basic Personal Liberties And Limitations, Article 15 Liberty and Security of the Person.

4.6 Interdependence and Indivisibility

This survey shows that various constitutions have drafted clear interlinkages between SRHR and other human rights. In 1993 in the World Conference on Human Rights in Vienna[62] states agreed on the principles of indivisibility and interdependence among the different kinds of rights and their respective international conventions. The approach of the International Conference on Population and Development tying health outcomes to rights promotion and protection – is considered very innovative because it built on previously enshrined and widely accepted human rights, articulating ›reproductive rights‹ as already existing human rights applied to experiences related to reproduction.[63] General Comment No. 22 has also insisted on these characteristics noting that »[t]he realization of the right to sexual and reproductive health requires that states parties also meet their obligations under other provisions of the Covenant«.[64]

It has been noted that no government argued the right to health should not constitute a right during the drafting of the WHO Constitution, the Universal Declaration of Human Rights, or the International Covenant on Economic, Social and Cultural Rights.[65] However, the criticism stemmed from the fact that neither was it clear whose responsibility it was to realise the right to health, how this right would be realised, nor when this right had been satisfied.[66] Undoubtedly, issues of budget availability and allocation of resources are crucial for the achievement of the right to health in general and particularly SRHR. The inability of countries to carry out the International Conference on Population and Development Program has been hampered by developing countries' financial constrains to meet their obligations but also by developed states not meeting theirs.[67] Amnesty Interna-

62 Vienna Declaration and Programme of Action (1993).

63 Reichenbach/Roseman (2009), 9.

64 E/C.12/GC/22, 2 May 2016, paras. 9–10.

65 Davies (2010), 390.

66 Taylor (1992), 327.

67 Davies (2010), 394.

tional reports that in the ICPD+5 many countries and civil society organizations stressed their concerns about the impact of the financial crisis on implementation at the national level because of budget limitations in developing countries and reduced development assistance from donor countries.[68] Furthermore, it has been noted that funding shortfalls are a key factor explaining why most developing countries were unable to meet the health-related MDGs by 2015.[69] However, the international community met in July 2015 to developed the Addis Ababa Action Agenda on Financing for Development (AAAA) that should guide governments in their decision making processes around guide wide range of development issues.[70] Furthermore, the monitoring tools developed by the UNFPA and Centre for Reproductive Rights consider that an essential element to assess state compliance is the allocation of adequate budgetary resources.[71]

Furthermore, when austerity measures are adopted and states implement cuts in their budgets, evidence seems to indicate that SRHR – particularly SRHR of women – are the first ones to be adversely effected.[72] Shalev cites the example of Croatia in which the first type of medication to be cut off from state funding was contraception and abortion was the first medical act to be removed from the free health care services.[73] Legal recognition of SRHR and specific provisions regarding budget allocation contributes to these rights, endure changes in government administrations and survive economic or social strife and ensure a certain degree of consistency over time.

68 Amnesty International (2012), 9.

69 Singh et al. (2009), 7.

70 For a general overview of the financial aspects of SRHR see International Planned Parenthood Federation (2015).

71 See generally Centre for Reproductive Rights/United Nations Population Fund (2013).

72 Shalev (2000), 50.

73 Ibid.

4.7 A Gender Sensitive Approach

General Comment No. 22 demands a gender sensitive approach to SRHR, specifically where »[g]ender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles«.[74] The Bolivian constitution states that both »women and men are guaranteed the exercise of sexual and reproductive rights«[75] and that »everyone, in particular women«[76] have the right to be free from sexual violence. The Ecuadorian constitution states that the state bears the responsibility to ensure SRHR actions and services, especially during pregnancy, childbirth and postpartum. 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 paid maternity leave.

The Ethiopian constitution places the regulation of SRHR under the ›Rights of women‹.[77] The provision acknowledges a historical legacy of inequality and discrimination in the country and provides for affirmative measures to counter this. 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«.[78]

Nepal's Constitution also adopts a similar approach and is notable in that it states: »Every woman shall have the right relating to safe motherhood and reproductive health«.[79] 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, marital or citizenship status as other constitutions have done. However, the abovementioned constitutional provisions fail to include men's right to reproductive health.

74 E/C.12/2000/4, 11 August 2000, para. 25.

75 Constitution of the Plurinational State of Bolivia of 2009, Article 66.

76 Ibid., Article 15.

77 Constitution of Ethiopia of 1994, Article 35.

78 Ibid., Article 35(6).

79 Nepal, PART 338, Rights of Women, para. 2.

It's important to clarify that the adoption of a gender sensitive approach does not entail the recognition of rights exclusively for a particular group of individual, but to recognise the unavoidable gender specific challenges.

4.8 Future Steps

Although the global community has endorsed the interrelationship between sexual rights and health and rights in the Conference and Beijing Plan of Action, the development agenda has historically skirted around the issue of SRHR until now.[80] Currently, considerable attention is given to reframing women's health around sexual and reproductive rights that consider a life-cycle approach independent of reproductive capacity.[81] The most recently adopted *2030 Agenda for Sustainable Development* also includes goals and targets to be achieved in the area of sexual and reproductive health.[82] In a broader development perspective, SRHR is also among the key objectives of the Sustainable Development Goals (SDGs) and direct references to human rights treaties on SRHR are found in the targets themselves. 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 wellbeing can be achieved, specifically by removing barriers to the enjoyment of rights and by promoting gender equality.[83]

80 The MDGs have been criticized for failing to address women's rights as a fundamental determinant of women's health, and deliberately focusing on maternal health rather than sexuality and reproduction. Yamin/Boulanger (2013) emphasize that initiatives inclusive of sexuality and reproduction are needed to address the core issue women's empowerment needed if sustainable progress is to be made in women's health.

81 See generally Langer et al. (2015).

82 A/Res/70/1, adopted by the UN General Assembly in September 2015, which contains Goal 3: Ensure healthy lives and promote well-being for all at all ages and Goal 5: Achieve gender equality and empower all women and girls.

83 See generally Kuruvilla et al. (2016).

4.9 Key Recommendations for Future Constitution Builders

Constitutional law, as all domestic law, should conform to a human rights approach to protect and promote SRHR. Specifically, committed governments should expressly respect, protect, and fulfil SRHR for all individuals without discrimination.

First, barriers to the full enjoyment of SRHR 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 approaches to abortion in constitutional law. Second, the right to SHR should be framed in a manner that is sensitive to the different needs of men and women, 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 healthcare for sexual and reproductive needs, including contraception and safe abortion services. Furthermore, it is crucial to incorporate the paradigm of rights enshrining sexual and reproductive rights. This article provides examples of existing constitutional text that may be considered by future constitutional framers and governments truly committed to SRHR.

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