HUMAN DIGNITY. Human dignity is a moral and social value. Examples of HD can be found in: Greek and Roman Antiquity; Renaissance and humanism; Rousseau and Kant; the Islamic and Catholic religion. Dignity is a core value of modern constitutionalism. The concept of HD is interesting to scholars because of its many employments (war, prostitution, immigration, people with disabilities, gender inequalities, etc.). Dignity is expressed on several levels: as an overarching political principle underlying the constitutional framework, as a central key for the interpretation and application of other rights and values, and as a fully-fledged enforceable right. Dignity also comprises the material preconditions of liberty and equality and becomes a source for social and economic rights. Yet, the concept is far from clear, and appears in a variety of forms. As a concept, it is also distinguished from other well-recognized human rights, it is sometimes absent, and is sometimes presented as drawing on a more state-centred rationale. The gradual move towards the positing of man at the centre, from the Renaissance to Kant, led to the modern concept of dignity as an inherent value of every human being; In law, dignity was, from its Roman beginnings, mainly directed to the social role and esteem due to persons on the basis of their status, office, or rank in a hierarchically structured society. This understanding ended only with the great revolutions of the late eighteenth century, aimed at granting all members of society the rights and dignities previously offered only to high-ranking individuals. 'Dignity' was thus a mechanism for upward equalization and was simultaneously couched in the notions of liberty and equality. Yet, dignity played no role in early modern constitutionalism, and is absent in the foundational documents of constitutionalism. Likewise, one would seek it in vain in the man constitutions that were enacted in the nineteenth century. It first appears in a few constitutions after World War I (Germany, Ireland, Brazil), in reaction to the social problems that were the heritage of the nineteenth century. Many have noted the vagueness of the concept. Indeed, no definition has been adopted in constitutions or elsewhere. Distinctions among different conceptions of dignity abound. Most notably, the distinction between dignity as an intrinsic element of the human person and dignity as the source of both state duties and the setting of constraints on the human person is set as distinction between 'dignity as empowerment' and 'dignity as constraint'. The distinction between dignity as absolute and inalienable and dignity as balanceable and subject to limitations roughly corresponds to the continental/ common law divide. **THE FORMAL RECOGNITION OF HUMAN DIGNITY.** Human dignity was recognized in 1945 in the Preambles to the Charter of the United Nations and the Constitution of UNESCO. In addition to their Preambles, the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights recognize the dignity of man in the context of some specific rights. Dignity is also central to international humanitarian law; common article 3 of the Geneva Conventions (1949) prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Limited recognition is found in the International Covenant on Economic, Social and Cultural Rights (1966), in which dignity is protected only in the context of education. Further, dignity appears only in Protocol 13 of the European Convention on Human Rights, concerned with the death penalty, recognized there as 'inherent' to all human beings. Several national constitutions dedicate a specific section or article to the recognition of human dignity and its protection. The mode of adoption and the extent of application of human dignity do not derive solely from the constitutional text. 'Human dignity' is not defined in many constitutions. Some constitutions—for example the constitutions of Germany, the Czech Republic, and Puerto Rico—recognize human dignity as absolute, referring to it as 'inviolable' or 'inalienable'. dignity and the aspects covered by it can be interpreted in a more individualistic or a more communitarian way. It is a matter of degree. Dignity is always concerned with the human being, the individual and his or her recognition as a value in itself, regardless of age, gender, class, capacities, merit, and the like. The scope will also vary depending on the understanding of dignity as an absolute or a relative right. 'Absolute' means that the right can neither be restrained nor weighed against other rights. If this is so, it seems inevitable that protection can only be invoked against the most severe encroachments. All minor encroachments may be classified as protected by other rights such as the right to physical integrity or to privacy. If dignity is but a relative right, the scope can be drawn more widely, since limitation or balancing is allowed. Furthermore, the range of the bill of rights may play a role. If important rights, such as equality in Israel, are not contained in the catalogue of rights, dignity may serve as a substitute. **THE RELATIONSHIP BETWEEN DIGNITY AND (OTHER) RIGHTS.** Every fundamental right can be said to have a dignity core. If rights collide, dignity is not on the side of one right only. The closer a state action that limits a fundamental right comes to the dignity core, the more weight this right will have in the balancing process. **HUMAN DIGNITY IN THE COURTS:**

MODELS OF CONSTITUTIONAL ADJUDICATION. The US Constitution contains no reference to human dignity. However, some continue to argue that human dignity, as a constitutional doctrine, is as foreign to the US system as it is to its sociological and historical ethos (Whitman). Yet several studies insist that the Supreme Court has used the concept since the mid-twentieth century, expanding its reliance by the turn of the century. One can support the argument that the concept of dignity, clearly within the judicial knowledge of US Justices, has been used as an interpretive tool for fleshing out other established rights and doctrines. A recent Supreme Court decision. refers to 'the concept of human dignity', a possible hint at future recognition of a legal doctrine, but further establishment of a fully-fledged principle is a matter for speculation. A similar stance can be found in some analyses of Israeli and British jurisprudence that preceded the adoption of texts of constitutional content. Support for the argument that US courts do no more than use 'dignity' in a discursive fashion can be found by comparing the use of the term in other systems that do not constitutionally recognize human dignity. Such is the case in Canada. Dignity has been used extensively to shape the contours of other, formally protected rights, albeit inconsistently and without the formulation of a discernible doctrine. The jurisprudence of the European Court of Human Rights (ECtHR) has developed in a similar fashion. In the absence of formal recognition, several early decisions sporadically used the phrase 'human dignity'. However, since dignity as such is not independently protected, it has been considered in conjunction with other rights, but has also been extensively linked with other rights. The absence of human dignity in the 1789 Declaration of the Rights of Man can be explained once dignity is recognized as a twentieth-century constitutional doctrine, but the lack of recognition in France's two post-war Constitutions requires further attention. Drafts of the 1946 Constitution granted dignity a central place, although not to the degree found in the German Basic Law, but the term was removed, to be replaced by a vague reference in the Preamble. Likewise, the 1958 Fifth Republic Constitution contains no reference to human dignity. In 1993, the Vedel committee proposed the inclusion of a provision explicitly protecting human dignity, but the reform was not introduced. Not long afterwards, however, both the Conseil Constitutionnel (CC) and Conseil d'État (CE) recognized human dignity as a principle embedded in the system, each of them within its competence. Most constitutions that recognize dignity as a distinct right subject the protection of human dignity to limits, typically embodied in a limitation clause. Although limitation clauses obviously reject the notion of an absolute right, the protection of human dignity may be extensive. A unique situation may arise when a constitutional document recognizes human dignity but fails to explicitly protect other human rights. In such cases, the system's express recognition of the centrality of dignity, supplemented by the vagueness of the provision may lead to judicial protection of such non-enumerated rights. Freedom of expression and freedom of religion have sometimes been declared protected, to a certain extent, by dignity. The model for full formal recognition of HD is the German system. Germany's post-war Constitution, the Basic Law of 1949, contains a guarantee of human dignity. Dignity thus becomes a basis for legislative duties. The guarantee of human dignity is considered a foundational principle, the basis of all that follows, the highest value within the system of constitutionally protected values. Dignity is therefore interpreted as an absolute right, the only one in the Basic Law. 'Absolute' means that it is neither subject to limitation nor to balancing. Any limitation of dignity is per se unconstitutional. In case of collision with other rights, dignity always trumps. The interpretation of dignity as an absolute right has, however, one obvious consequence: the scope of the right must be narrowly defined. **CONCLUSION.** Dignity draws its core meaning largely from the historical experience of totalitarian systems. Against the practice of those systems, the concept of dignity asserts that every human being has an intrinsic value independent of capacity or merit. Certain ways of treating humans, such as slavery, are incompatible with this value. Beyond its core meaning, the doctrine may vary in range and intensity of protection, from rhetorical use to extensive application of a fully recognized right. When legally recognized, dignity is a foundational norm from which other more concrete legal provisions flow or derive their meaning. As a foundational norm, dignity is necessarily abstract, its practical importance depending on the existence of further norms. The more that dignity is translated into concrete legal positions and embedded in an institutional framework, the less it will be relied upon as such in ordinary legal matters. The gap between norms and facts inevitably remains. The absence from a nation's constitution of a guarantee of dignity is no indicator of disregard of human dignity, just as its presence does not indicate compliance with the norm. But the existence of the guarantee offers a platform from which violations of dignity can be

rightfully condemned and attempts to justify such violations rejected. To that extent, it matters whether a constitution is based on human dignity or not.

THE LIMITS OF PUNISHMENT. Typically, the concept of human dignity plays an important role in limiting punishment, either in the form of an express constitutional guarantee of human dignity or as the implicit value underpinning guarantees such as the right not to be subjected to cruel, inhuman or degrading punishment. Other constitutional norms, such as the right to life and the right to bodily integrity, can also play a role.

CAPITAL PUNISHMENT. Capital punishment has been practised by most societies throughout long historical periods. 2 However, in recent times, a growing number of states have dispensed with the death penalty. Not all Eastern European states have abolished capital punishment at constitutional level. However, Protocol 13 to the European Convention on Human Rights (ECHR) abolishes the death penalty for all crimes. Article 2 of the Charter of Fundamental Rights of the European Union also prohibits the use of capital punishment. The UN General Assembly in 2007, 2008 and 2010 adopted resolutions calling for a global moratorium on executions, as a step towards the eventual abolition of the death penalty.14 This would tend to reflect a prevailing majority against the use of capital punishment amongst the community of states. However, this tells only half the story. Although the majority of states do not currently practise the death penalty, over 60 percent of the world's population reside in states where executions do occur. Although the Eighth Amendment of the US Constitution prohibits the infliction of 'cruel and unusual punishments', the US Supreme Court has found that the death penalty is not per se cruel and unusual, although it may be so in particular circumstances. The US executes more people than any other liberal democracy. The only other countries in the Americas that practise capital punishment are St Kitts and Nevis and Cuba. While the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) prohibits capital punishment, there are, to date, only 73 state parties to the Protocol. The UN Sub-Commission on the Promotion and Protection of Human Rights and the Inter-American Commission on Human Rights have both maintained that the prohibition upon capital punishment for juveniles has become a ius cogens norm of customary international law.

CORPORAL PUNISHMENT. Judicial corporal punishment is considered inhumane and unacceptable in the constitutions of many countries. Examples are the constitutions of Poland and Kenya, and the Basic Law of Germany. Often, it is prohibited by way of ordinary law rather than constitutional measures, with restrictions being typically directed toward parental and scholastic corporal punishment rather than state-sponsored judicial corporal punishment. Judicial corporal punishment is entirely abolished in Western Europe. Indeed, judicial corporal punishment violates the essence of Article 3 ECHR, which protects the dignity and physical integrity of individuals. In the United States, no jurisdiction permits judicial corporal punishment. Corporal punishment may violate the absolute prohibition on **torture and any inhuman, cruel or degrading punishment or treatment**. States that have ratified the 1984 United Nations Convention Against Torture have a positive obligation to include provisions prohibiting torture in their municipal laws. In addition, the prohibition on torture constitutes a non-derogable norm of ius cogens, and is included in a host of other human rights treaties. As a result, the broad majority of states formally prohibit the use of torture as punishment, many of them in their constitutions. **Non-refoulement** entails the prohibition, in terms of the 1951 UN Convention Relating to the Status of Refugees, of sending, expelling, returning or otherwise transferring (refoulement) of a person (often a refugee) to 'territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' It is widely accepted that the prohibition of forcible return to face persecution constitutes a norm of customary international law. As a consequence, even states that are not party to the Refugee Convention must respect this principle. Outside the context of refugees facing persecution, non-refoulement also applies to protect persons who are under a threat to be returned to a country where they may face torture, inhuman, cruel or degrading treatment, or the death penalty. **DISPROPORTIONATE SENTENCES AND LIFE IMPRISONMENT.** Grossly disproportionate sentences are constitutionally prohibited in many jurisdictions. Generally, the proportionality test is derived from a prohibition on cruel, unusual, inhuman or degrading punishments and/or from a prohibition on arbitrariness in criminal procedure. The disproportion may be a function either of the type of sentence or its severity in relation to the seriousness of the offence. Some jurisdictions are, however, less enthusiastic about the idea that disproportionate punishments are unconstitutional. The United States is an example. Although there are US decisions supporting

the idea that the Eighth Amendment includes a proportionality test, it appears from recent US cases that outside the context of the death penalty, the courts will be very reluctant to find sentences grossly disproportionate. In those countries in which the concept of proportionality plays a greater role, it is a matter of controversy whether life sentences without the possibility of release are inherently excessive. **NON-RETROACTIVITY AND RELATED PRINCIPLES**. The principles of nullum crimen sine lege and nulla poena sine lege (no one may be convicted of a crime or subjected to a punishment except in accordance with previously established law) are fundamental principles of justice and they rule out retrospective criminal charges and punishments. They are enshrined in many constitutions51 and human rights instruments and have also been upheld as general principles of international criminal law. The non-retroactivity of (national) criminal law is not an absolute principle. There are a number of narrow but recurring exceptions. The most prominent modern exception is in respect of international crimes, particularly war crimes and crimes against humanity. The nonretroactivity of criminal law is not absolute, and that in extreme circumstances, usually connected with war, public emergencies or gross human rights violations, constitutional law may modify this general principle. Where there are overbearing emergency considerations or gross human rights violations at stake, courts and state institutions will seek to construe constitutions in order to permit a limited exercise of retroactive punishment. **CRIMINAL PUNISHMENT AND LEGAL PLURALISM.** A rather different kind of limit to punishment is the extent to which national constitutions make room for legal pluralism in the fi eld of criminal law. Latin America, with its large and often geographically isolated indigenous populations, provides some good examples of the constitutional recognition of customary practices of dispute resolution and social control. Such recognition was a response to growing demands for indigenous self-determination. The broad majority of Latin American states have ratified the 1989 Indigenous and Tribal Peoples Convention. This convention, also known as ILO 169, recognises in its preamble 'the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live'. In this case some states will regulate these matters at a constitutional level, while others will decide to regulate them with ordinary legislation. In addition certain states are neither parties to the ILO nor do they have any specific provision for such matters. **CONCLUSION.** A wide range of constitutional limits to punishment, covering issues related to the death penalty, corporal punishment and torture, life imprisonment and disproportionate sentencing, the principles of non-retroactivity and legality in criminal law and, finally, the way in which national constitutions may allow or limit legal pluralism in the fi eld of criminal law. In order to provide a meaningful comparative study, it was necessary to go beyond the texts of national constitutions that are often silent on many or even all of these issues. Judicial decisions and also ordinary laws were therefore consulted. With respect to many of the issues discussed, international human rights treaties or other international standards were shown to have a significant influence on the understanding of limits to punishment, also for the purposes of constitutionality.

FREEDOM OF RELIGION AND RELIGION-STATE RELATIONS. Because of the significance of religion at the level of society, religion is almost always a formative factor, or at least a source of influence that must be taken into account at the pre-constitutional moment when constituent power is exercised, and constitutions are written and adopted. Religion may be viewed as a positive social factor to be advanced and protected, as a negative or reactionary influence from which liberation is needed, as a hypothetical normative factor or, more typically, as a mixed set of influences that must be taken into account in shaping actual constitutional negotiations. From this perspective, the religious background is almost always part of the axiological and socio-political context within which constitutions are framed. One role constitutions play is to defi ne the extent to which the rights and structures of pre-existing religious and belief communities will be respected and/or limited within the legal order created by a constitution. Such considerations shape the constitutional framework for religious and belief communities, and the believing individuals that actually live under a constitutional order once it is adopted. Stated differently, constitutions typically defi ne the nature of the relationship of state institutions to belief communities and individual believers, and to determine whether the state's orientation in this regard is positive, negative, neutral, or, more typically, stratified and mixed in complex ways. Today, all countries have some measure of religious pluralism. Reflecting this reality, the overwhelming majority of constitutions provide explicit protection for freedom of religion. The scope

of the protection actually provided varies widely, however, from strong and reasonably effective guarantees for all, to mere lip service providing little or no effective protection in practice, particularly for new or unpopular groups. Much depends on the way religious freedom rights are balanced against competing rights and social interests, and on what limitations on religion are ultimately permitted. **'RELIGION OR BELIEF': SCOPE AND DEFINITION.** Constitutional provisions on religion can be broadly divided into those that single out a particular religion or religions for distinctive treatment and those that give equal standing to all religions.

Most liberal democracies do not single out religions for preferential treatment in their constitutional documents or, if they do, it is commonly in acknowledgement of the historically or culturally relevant role of that religion. Older liberal constitutions, such as those of the United States and Australia, tend to extend constitutional protection only to 'religion'. Following the pattern established in international instruments, a number of newer constitutions extend protection to 'religion or belief', extending coverage to non-religious life stances. 8 For those states in which the Constitution refers only to 'religion' or 'religion or belief' rather than more specific religions, one question that arises is how these terms are to be interpreted for constitutional purposes. The question is notoriously difficult, and in some jurisdictions there is a fear that any attempt to define religion might itself be an inappropriate intrusion into religious matters. The concept of religion should be interpreted generously, not be limited to traditional religions and includes 'theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.' 9 This approach makes clear that freedom of religion or belief includes the right to embrace a wide range of traditional and non-traditional religions, and also the right to reject religion. No definition of religion or belief is likely to resolve all the complex borderline cases of groups or individuals who claim to be religious. Indeed, even the determination of how to defi ne a religion reflects constitutional values, with states that take a more liberal perspective likely to adopt wider definitions, and those that are more closely tied to a particular religious or political orthodoxy more likely to take a narrower view. **COMPARATIVE PERSPECTIVES ON RELIGION–STATE RELATIONSHIPS.** It is not possible to provide full elaboration of every possible relationship between religion and states and, indeed, these relationships shift over time in response to changing social, political, and economic factors. A few examples of relationships (A) where there is a strong, positive identification between a particular religion and the state; (B) where the state aims for some degree of neutrality with respect to religion; and (C) where the state is hostile to religion. (a) The current regime in Iran is probably as close as one gets to a pure theocratic state in the current global context. Established religions have taken many historical forms. Religious-status systems include arrangements such as those found in Israel, India, and a number of countries with significant Muslim populations, where many aspects of personal status, marriage, inheritance, and the like depend on the religious community to which one belongs. Endorsed or preferred religion regimes include countries that do not establish an official religion but give special constitutional recognition to one or a few traditional religions, typically because of their historical importance in the country. Many countries with a Roman Catholic background exhibit this pattern. (b) The middle range of the identification continuum includes various forms of cooperation, separation, and laïcité. Such constitutional arrangements reflect a commitment to the ideal of state neutrality in its various forms. These represent the dominant positions in modern constitutionalism. Cooperationist regimes maintain a posture of neutrality toward all religions, but openly cooperate with religious institutions in many ways, including providing or facilitating financial subsidies for various religious programs. Most of the countries of Europe, with the notable exception of France, exhibit cooperationist characteristics. Accommodationist regimes, in contrast, do not allow direct financial subsidization of religion but may allow conferring of indirect financial benefits such as tax exemptions and, more generally, are willing to accommodate conscientious claims by allowing exemption from ordinary laws under appropriate circumstances. Separationist regimes call for even stricter separation of religion and state institutions, and are less inclined to allow any special exemptions for religion. Approximately one-third of the nations on earth have separationist regimes. French laïcité is a particularly strong form of separationism, committed to secularism and a strong insistence that religion be confined to the private sphere. (c) There are also regimes that are hostile to religion, exercising strong regulatory control over them or even trying to eliminate religion outright. China provides a paradigmatic example of a secular control regime—allowing some space for religion, provided it is subject to strong state controls. **THE SCOPE OF RELIGIOUS FREEDOM PROTECTIONS.** The core domain of freedom of religion or belief is the realm of inner belief that is central to human dignity. Referred to as the forum internum, this domain has long

been held in constitutional theory and in human rights law to be absolutely beyond state regulation. The precise outer limits of the forum internum are contested, but appear to include the right to have or adopt a religion, as well as the right to change one's religion, and the right (if one so chooses) not to disclose one's religion. However the outer boundaries of internal forum rights are ultimately delineated, this sphere is quite narrow by comparison to the domain of external religious conduct, or what the international instruments refer to as 'manifestation' of religion.

LIMITATIONS ON RELIGIOUS FREEDOM. While protections for freedom of religion or belief are broad and fundamental, they are not unlimited except in the narrow domain of forum internum. As a practical matter, it is the determination of the limits that becomes the critical freedom of religion issue in most legal systems. No system gives people the right to behave in full compliance with their religious beliefs regardless of the harm this may cause. While some constitutions have a general limitations clause that applies to all human rights provisions (like Article 29 of the UDHR),28 others have provisions specifically tailored to religious freedom protections (like Article 18(3) of the International Covenant on Civil and Political Rights [ICCPR]). Either way, the basic features of limitation clause analysis are similar. The elements of what must be shown are stated well in Article 18(3) of the ICCPR: Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Under this provision, a state must first demonstrate that the particular limitation is 'prescribed by law.' One ground for restricting religious freedom that is common to most constitutional systems is interference with the rights and freedoms of others. Some religious traditional practices may collide with basic human rights. A common conflict of rights is between equality and religious freedom. **CONCLUSION: AREAS OF CURRENT CONTESTATION AND OPPORTUNITIES FOR FURTHER RESEARCH AND DISCUSSION.** In liberal democracies, questions about the appropriate role of religion in the public sphere are rising as both secularism and religious diversity increase. For some, the best way to deal with the conflicts between religious and secular world views, or between different religious views, is to keep religion in the private sphere and to maintain public debate as a non-religious realm. For others, such an approach privileges one approach (secular) above religious values and requires religious people to abandon their most deeply held beliefs as a price for entering the public sphere.

PROCEDURAL FAIRNESS GENERALLY. Procedural safeguards that regulate the exercise of power have historically played an important role in protecting rights to life, liberty and property. '[t]he history of liberty has largely been the history of the observance of procedural safeguards'. Nowadays, constitutional orders widely recognise the necessity of procedures for preserving the rights and freedoms of citizens and for preventing the abuse of power by governmental institutions. This trend has also been influenced by the increasing recognition, since 1945, of procedural rights in international human rights law. **THE ORIGINS OF PROCEDURAL FAIRNESS**. The concept of procedural fairness—also frequently referred to as natural justice or due process—is historically rooted in the English common law system; 'Due process' is more commonly used in the United States, where a due process clause is contained in the Fifth Amendment to the US Constitution. In the twentieth century, procedural protections took root in civil law jurisdictions, where many developed what is commonly called the 'rights of defence'. The proliferation of international and regional human rights conventions since World War II has witnessed an increased focus on the express protection of individual rights through procedural guarantees. Developments in public international law since 1945 have played a significant instrumental role in the spread of procedural guarantees in domestic constitutional and legal settings throughout the world, but those developments have not resulted in their harmonious adoption and there exist many variations between jurisdictions in the nature and scope to which those principles are both legally and constitutionally protected. **COMMON LAW ORIGINS.** In English common law, the rules of procedural fairness are viewed as manifestations of the rule of law. Procedural fairness requirements were first reflected in Clause 39 of the Magna Carta, adopted in 1215: No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. The phrase 'due process of law', repeated in the Fifth Amendment to the US Constitution, tends to imply a substantive distinction from the mere right to be treated 'according to law'. The principles of procedural fairness do not act as a direct limit on legislative power but 'as a basis for the evaluation of all laws'. At common law, procedural fairness is frequently used to describe a

set of principles that govern the exercise of executive power, whereas natural justice has traditionally been used in reference to procedural requirements attached to the exercise of power by courts and tribunals. Natural justice contains two basic rules, described as the rule against bias and the fair-hearing rule. Both rules are designed to ensure that the rights and freedoms of individuals are interfered with only in accordance with the law. In common law systems, procedural rights have historically been protected through judicial review by independent courts equipped with jurisdiction to award various remedies; in civil law systems, review occurs in specialised administrative courts. The principles of natural justice are susceptible to statutory erosion or modification. The common law system is now overlaid with the rules and principles contained in the ECHR. The common law principles of natural justice—now generally referred to as procedural fairness—have been extremely influential in other common law jurisdictions. However, constitutional differences have resulted in important differences in the protection of fundamental process rights. **THE US DUE PROCESS CLAUSE.** The due process clause in the US Constitution is contained in the Fifth Amendment, which provides that, '[n]o person shall be … deprived of life, liberty, or property, without due process of law'.12 This amendment applies to federal action; the Fourteenth Amendment extends the due process requirement to the states. The due process clause contained in the US Constitution extends to legislative as well as executive and judicial action. It has also been interpreted by the Supreme Court to protect substantive as well as procedural rights, requiring that governments appropriately justify interferences with an individual's fundamental rights. **THE RIGHTS OF DEFENCE IN CIVIL LAW JURISDICTIONS.** For many lawyers, the treatment of procedural issues highlights the differences between common and civil law jurisdictions. Whilst the droit administratif had been roundly criticised by Dicey in the 'Law of the Constitution', French administrative law displayed a healthy interest in procedural matters from an early period. In 1913, the Conseil d'État recognised an automatic right to a hearing before any judicial body. This decision was particularly important as the administration had set up a great many judicial panels for disciplinary matters and the regulation of specific professions (e.g. the medical profession). The landmark case stipulated, unsurprisingly, that applicants before such panels had a right to be heard at first instance and on appeal, even in the absence of any legislative requirement to do so. In 1944, the Conseil d'État asserted the existence of rights of defence (in this case, a right to a hearing) in relation to administrative decisions that imposed a sanction or that affected seriously and detrimentally an individual's position. French courts soon widened this obligation: today, all that is needed is a decision affecting someone adversely, considered on the basis of the individual's behaviour or actions. Furthermore, the rights of defence have received constitutional recognition by the Conseil constitutionnel. In a decision of 1987, the Conseil constitutionnel specified that the requirements of the rights of defence made it necessary for the decision of the competition council to be reviewed by the administrative courts. It explained that the impact and import of the decisions of the competition council were such that courts involved in reviewing those decisions needed to have powers of interim relief. It was held to be unconstitutional. The protection of the rights of defence and of process rights in general spread to other civil law countries, which commonly recognise and protect a large number of process rights through case law, legislation and constitutional provisions. **POST-WAR INTERNATIONAL DEVELOPMENTS.** Since World War II, procedural requirements have increasingly been reflected in international, regional and national human rights instruments and their development and adoption by nations has had a significant impact on domestic legal systems and the constitutional frameworks that govern them. Perhaps one of the most significant implications of the emergence of international and regional frameworks for human rights protection has been the expansion of the concept of procedural fairness to embody specific process rights held by individuals. The development of international legal principles around individual rights began with the adoption of the Universal Declaration of Human Rights in 1948. Article 10 of the UDHR provides as follows: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. The UDHR has since acquired a more authoritative status in customary international law and through its use as a model for virtually all subsequent conventions on human rights. The impact of international instruments on the development of modern constitutions has been significant. While some constitutional settings have been more resistant to the influences of international human rights law, the general trend worldwide has been to embrace or adapt the provisions of international law in new and revised constitutions. **THE CONSTITUTIONAL FOUNDATIONS OF PROCEDURAL FAIRNESS.** Procedural fairness originally was simply a principle of judicial

review. Judicial adjudication or review is often used as a model when stipulating the hearing rights to be granted prior to an individual determination. Consequently, the principles of judicial independence and impartiality often play a role in the design of the procedure itself. The principle of human dignity plays a significant part in procedural fairness. It is common for process rights to be justified by courts or legislation by reference to a dignitarian rationale. The rule of law is also widely held to justify the requirement of procedural fairness; rules must be clear, accessible to citizens and adopted by transparent processes. The organisation of a hearing ensures that decision-making respects all these requirements. Further, by protecting legal certainty, the rule of law justifies the existence of the principle of procedural legitimate expectations. Procedural fairness is also increasingly seen as a way to foster participation in rule-making. The effectiveness of any participation rights relies heavily on the recognition and respect of transparency, another constitutional principle. Arguably, change or reform of any of these principles affects the content of procedural fairness and the degree to which it is constitutionally protected. **THE CONTENT OF PROCEDURAL FAIRNESS.** Procedural fairness is an idea pervading the whole of the decision-making process. A clear determination of the content is complicated by a perceptible transformation of procedural fairness to process rights. In both civil and common law jurisdictions, procedural fairness began with the demand for hearing rights when a somewhat detrimental decision was being made by a public body. In fact, the right of an individual to make oral or written submissions prior to the making of a possibly detrimental determination against them by a public body is widely recognised. Nowadays, many countries have chosen to codify their administrative procedure, defining the circumstances triggering these rights. To be fully effective, the right to hearing needs to be accompanied by other procedural safeguards; and procedural fairness generally carries with it a duty to provide reasons for the decision. A number of other procedural issues may affect the effectiveness of a hearing, including whether an individual has access to legal representation and sufficient preparation time. The organisation of hearing rights needs the determination of a wide range of procedural issues. The content of procedural fairness takes on a completely different complexion when one moves from individual determinations to legislative or general measures. When not backed by the constitution or legislation,49 courts have found it difficult to grant process rights to concerned individuals or interested associations in the context of rulemaking. However the process rights involved in rule-making are rooted largely in different constitutional assumptions than those underlying the right to a hearing or the rule against bias. With general or legislative measures, citizens want to participate in the determination of the content of the measure that holds an interest for them. In rule-making, process rights are strongly influenced by an ideal of participative democracy.54 In addition, these participatory rights can only be effective if concomitant constitutional principles are recognised too. Without a commitment to transparency, the involvement of citizens and their participation in rule-making cannot have much reality. **METHODS OF PROTECTING PROCEDURAL FAIRNESS.** The level of protection given to the rules of procedural fairness will also depend on the extent to which process rights are legally and constitutionally protected, and whether such rights are seen to limit the exercise of legislative power or not. The constitutional framework is therefore determinative of the extent to which procedural fairness, or due process, is both required and protected. **THE EXTENT OF JUDICIAL REVIEW**. In the United Kingdom the duty to afford procedural fairness is generally required of administrative decision-makers or those exercising public power and is enforced by the courts in the judicial review of administrative action. This common law tradition has now been supplemented by the ECHR, through the operation of the Human Rights Act 1998 (UK). As article 6 § 1 of the convention imposes the requirement of a fair and impartial tribunal, it is reasonable to argue that procedural fairness is granted quasi-constitutional protection in the United Kingdom. Constitutional courts review the constitutionality of laws and strike them down if they conflict with constitutional provisions or principles. There, what matters is the extent of the protection afforded to procedural fairness by the constitution. **THE AMBIT OF THE CONSTITUTIONAL PROTECTION.** While most constitutions protect some aspects of procedural fairness, few provide what could be labelled as complete protection. The majority of constitutions are strict on fair trial requirements for criminal litigation but often silent on administrative procedures. Constitutional documents may be (and are often) supplemented by the activism of courts. **LEGISLATIVE PROTECTION.** Procedural fairness can be protected efficiently even in the absence of constitutional recognition. it is perfectly possible to guarantee through legislation that appropriate mechanisms are in place for individuals to make representations before an adverse decision or to ensure that

representative associations and interested persons be consulted before the adoption of a legislative or general measure. Indeed, many countries across the world have codified their administrative procedure. And although the content of these codifications varies, they all enshrine key process rights. Even those countries still reluctant to adopt such codification have often needed to enshrine some process rights in legislation to ensure their effectiveness. Soft law may play an important role in establishing process rights. **CONCLUSION**. Although the origins of procedural fairness lie historically in English common law, its evolution over time has involved an increasing trend towards the express articulation of process rights in constitutional documents and in legislation. So much so that for many constitutional orders, procedural fairness is guaranteed by a complex and layered system of protection: constitutional provisions, legislation, case law and even treaty obligations all combine to guarantee process rights.

RIGHTS IN THE CRIMINAL PROCESS: A CASE STUDY OF CONVERGENCE AND DISCLOSURE RIGHTS. The subject of criminal procedure rights can be approached from many angles. Legal systems vary on whether and which rights they give, not only to criminal defendants but also to victims of crime, NGOs, prosecutors, witnesses, citizens, media and the public. Legal systems also vary on the legal status that criminal procedure rights have—as constitutional, international, statutory, common law or regulatory rights; on the nature and structure of these rights; and on how they are enforced. The defendant's constitutional right to disclosure or to obtain access to elements of proof collected by public officials may not be the most representative or important, but it illustrates some of the complexities and subtleties around the convergence thesis and the debate about rights in comparative criminal procedure. The spread of rights is not a simple movement of convergence, but rather a more complex process that achieves convergence while simultaneously maintaining existing divergences and creating new ones between common and civil law jurisdictions. Constitutional rights are seldom absolute. Law enforcement and national security considerations as another global converging force that has placed both explicit and implicit limits on constitutional rights to disclosure, especially in organized crime and terrorism cases. The differences among American, British, Canadian regulations concerning the right to disclosure cannot be explained in terms of legal traditions, but rather may depend on the contingencies of when these jurisdictions first recognized constitutional rights to disclosure as well as legislative responses to disclosure rights, including legislative assertion of competing rights on behalf of victims or other interests. Other jurisdictions may be influenced by these and other contingent factors. The recognition of rights within the criminal process emerges as complex. **THE CIVIL AND COMMON LAW DICHOTOMY AND RIGHTS IN THE CRIMINAL PROCESS.** In the common law tradition, criminal procedure is conceived as a dispute between two parties—prosecution and defence—before a passive umpire; while in civil law jurisdictions, criminal procedure is conceived as a unitary investigation run by impartial officials. Lay people in a horizontal relationship with each other (e.g., in the form of the jury) have historically been the crucial decision-makers in common law countries, while legal experts who are members of hierarchical public bureaucracies have dominated in civil law countries. These contrasting features are relative rather than absolute. They are reflected in actual criminal justice practices and have been, to a certain extent, internalized by institutions and individual actors in common and civil law jurisdictions. **THE RIGHT TO KNOW THE RESULTS OF THE INVESTIGATION RUN BY PUBLIC OFFICIALS.** The right to disclosure has not been explicitly included in constitutions and human rights instruments in either common or in civil law jurisdictions. Rather, courts and legislatures have held that this right is part of the concept of more general rights explicitly established in constitutional and human rights documents such as due process; the right to make full answer and defence that would itself be part of the right not to be deprived of liberty except in accordance with the principles of fundamental justice; the right to have adequate facilities for the preparation of one's defence; the right to a (fair and public) hearing; and the rights of defence. To the extent that both civil and common law jurisdictions have embraced the right to disclosure as a fundamental one, there has been convergence between these two types of jurisdictions at an important level. But the way this abstract concept has been adopted has reproduced pre-existing differences between these jurisdictions and created new ones. Disclosure rights: While in civil law jurisdictions it has been defi ned as the right to access the file, in common law jurisdictions the right has been defi ned as the right to disclosure or discovery of an open-ended list of items. Differences between civil and common law jurisdictions may also help explain the history of the right in each of these legal traditions. Given the centrality and weight that the written dossier

has had in civil law, it is not surprising that this right has a longer history in these jurisdictions as it would be almost impossible for the defence to meaningfully participate in the criminal process without knowledge of what the dossier contains. One can explain this later reception of the right by common law countries as a consequence of a conception of criminal procedure as a dispute resolution process run by self-interested parties rather than as an official process concerned with accuracy and administrative regularity. The idea that parties in the adversarial system are self-interested is not absolute and the later assertion of disclosure rights in the United States, England and Canada was also accompanied by assertions about the ethical responsibilities of prosecutors to ensure that justice was done and accurate results achieved at trial. Also the right to disclosure in common law systems has emerged primarily from case law. In contrast, disclosure in many civilian systems is based on explicit obligations in various Codes. Even as the systems converge towards greater disclosure rights, they do so in a manner that follows distinct legal methodologies, reflecting the respective bias of common law and civil law systems towards case-by-case adjudication and legislative regulation. The elements covered by the right also differ between civil and common law jurisdictions. In civil law jurisdictions the defendant's access to the dossier means, in theory, access to the whole investigation. Full access may be delayed until some specific point in the proceedings or in certain situations, but there is no question that the defendant will get access to the whole dossier at some point before trial. In common law jurisdictions the question has been framed as to whether disclosure should be complete or partial; and, if partial, what it should include. Framing the criterion as to what elements are material or favourable for the defence case has assumed that there is a separate defence case as opposed to one unitary investigation in which the defence participates as in inquisitorial systems. Consequently, the accused's right to disclosure in an adversarial system may depend in part on the specific defence presented by the accused. Another set of differences involves identifying who has the duty to disclose or give access. In civil law countries, the impartial official in charge of the investigation is the one who has to give access to it to the defence, at least in the first instance. This official may include not only the prosecutor but also the police and the court. In contrast, in common law jurisdictions, the prosecutor is the official primarily responsible for disclosing elements to the defence. In fact, disclosure is sometimes seen as a matter of prosecutorial ethics as well as legal entitlement. The role of the court in enforcing these duties in common law jurisdictions is limited to deciding controversial issues that the parties bring, not only because the court is generally not supposed to act on its own motion, but also because the court does not have enough information about the parties' investigations. This right did not spread from common to civil law jurisdictions. In fact, it was adopted by civil law jurisdictions earlier than common law ones, probably because the civil law institutional setting with its more formal approach to the pretrial stage made apparent the need to establish and expand this right once the defence was given a (more) prominent role in the adjudication of criminal cases. Civil law jurisdictions have given a broader scope to this right than common law ones as the former give earlier access to the defence to the whole investigation run by public officials. The broader scope of this right in civil law jurisdictions should also not be read as suggesting that civil law jurisdictions are more protective of defendant rights generally. **LAW ENFORCEMENT AND NATIONAL SECURITY CONCERNS AND THE RIGHT TO KNOW THE RESULTS OF THE INVESTIGATION.** Civil and common law jurisdictions have been subjected to somewhat similar law enforcement and national security pressure to limit the right's scope. These pressures have relied on the argument that there are elements of proof or information that the defendant should not get access to because it would jeopardize investigations (including those involving transnational co-operation); the safety or well-being of informants, public officials and potential witnesses; or efforts to prevent the commission of crimes. This argument has been raised especially, though not exclusively, in the context of organized crime and terrorism and reveals how pressures to limit rights can be a source of convergence with respect to those rights. Civil law countries have focused on how these rights can be accommodated within a dossier system that generally has had a weaker right to confrontation and crossexamination, operates without a general rule restricting the use of hearsay evidence, and is more accommodating of unsourced or only generally sourced material and anonymous witnesses. Common law systems have also faced similar pressures with respect to witness protection and the protection of intelligence from disclosure to the accused. But use of anonymous witnesses and intelligence has been more difficult for them, given restrictions on hearsay evidence and a stronger right to confrontation and cross-examination at trial. One common method that common law jurisdictions have used to limit disclosure obligations are public interest

immunity proceedings, which allow prosecutors to apply to judges for nondisclosure orders. **CONCLUSION**. While the different legal traditions still have an influence, both systems have embraced broader disclosure rights for those accused of crime. This convergence has occurred despite the absence of explicit provisions for disclosure rights in various constitutions. Although this convergence is important and belies simplistic dichotomies between rights-friendly common law democracies and more statist civilian systems, important differences remain. Although language and other barriers present challenges, comparative constitutional law should include comparisons across the common law/civil law divide and modern developments such as supra-national rights protections instruments and international developments such as the International Criminal Court will assist researchers in bridging the common law/civil law divide. The second axis of comparison is comparing disclosure rights of similar countries, Canada, the UK and the US. Such comparisons are a useful antidote to simplification and essentialization that may accompany more macro comparison of countries that have different legal traditions. comparative constitutional law may follow the path of a history of legal ideas and legal reform. Another approach would be to focus on events with global repercussions such as the increased emphasis on the prevention of terrorism since 9/11. This approach demonstrates both broad convergence in accepting limits on disclosure rights in the name of national security and witness protection, and continued divergence in the precise implementation of these limits on disclosure rights.

GENERAL PROVISIONS DEALING WITH EQUALITY. In 1776 the American Declaration of Independence stated as an evident truth that 'all men are created equal'. In 1789 the French Revolution proclaimed in the Declaration of the Rights of Man and of the Citizen that '[m]en are born and remain free and equal in rights'. Since then, equality has been a fundamental principle of constitutionalism. Equality is at the same time the most generally accepted principle and a highly controversial one. There is general agreement that all humans are endowed with the same basic human rights and dignity. Differentiation of rights, and especially political rights, is therefore no longer considered acceptable—yet it took some time to reach this consensus. Women, for example, were excluded from political participation for a long time after the revolutionary declarations of the late eighteenth century. Today, in constitutionalist democracies, there is general agreement that all citizens enjoy equal political rights, and that all men and women enjoy human rights equally. But beyond that general consensus, controversy starts. **EQUALITY BEFORE THE LAW AND EQUAL PROTECTION UNDER LAW.** The constitutional equality principle guaranteed equality before the law but not equal protection under the law. The guarantee of an equal application of the law remains an important aspect of constitutional equality provisions but increasingly the control of the lawmaker itself has become the main constitutional issue. This shift was of course possible only after judicial review of legislative action spread around the constitutional world. Increasingly, especially after World War II, the lawmaker came under scrutiny as to whether its products met constitutional equality standards. In many constitutional democracies today, an equal protection clause is in practice one of the most important vehicles for judicial review. **EQUAL PROTECTION AND DISCRIMINATION.** The concepts of equal protection under law and non-discrimination are closely related. Discrimination is, in principle, forbidden and can be justified only under exceptional circumstances, if at all. Every law by necessity treats those cases it covers differently from those it does not. 'all men are equal before the law but they are no longer equal after it'. Therefore, a general constitutional guarantee of equal protection can become a powerful tool for judicial control of the lawmaker in the hands of an activist court. Notably, courts that use it extensively are regularly accused of overstepping into the competence of the democratic lawmaker. **THREE BASIC CONSTITUTIONAL MODELS FOR EQUALITY.** Despite diverse approaches to apprehending equality and non-discrimination, three basic models dominate the domestic constitutional landscape: (1) constitutions containing only general equality provisions; (2) constitutions with only non-discrimination provisions; and (3) constitutions with general equality provisions and either general discrimination prohibitions or discrimination prohibitions on the basis of particular characteristics. Equality provisions like those contained in the Italian Constitution and the very similar one in Canada provide a good illustration. Semantically, they can be understood as mere prohibitions of discrimination. This is the case in Canada where the Canadian Supreme Court limits equal protection to 'discrete and insular minorities' who have suffered disadvantage due to a 'personal characteristic'. In Italy, on the other hand, in addition to the discrimination accorded to specific characteristics, the provision has been interpreted as a general equality rule on the basis of which the rationality

of laws is scrutinized. Furthermore, these different textual solutions do not necessarily lead to the same consequences. A general equal protection provision might be construed narrowly so that it covers only cases that are treated as non-discrimination, and narrowly worded non-discrimination provisions can be extended by analogy. **GENERAL EQUAL PROTECTION**. One model of constitutional protection is a general equal protection provision, which must then be interpreted and applied by courts. A well-known example arises under the US Constitution, which provides a general equal protection mandate that is in turn juridically differentiated into sub-sections, ranging from rational basis to strict scrutiny. **COUNTRIES WITH NO GENERAL EQUALITY CLAUSE BUT PROTECTION AGAINST NON-DISCRIMINATION.** Some countries do not have a general equality clause but instead feature protection against discrimination or specific cases of unequal treatment.16 The Constitutions of Denmark and Norway, for example, restrict themselves to outlawing differential treatment that was historically important.17 This does not force the conclusion that equality is not a constitutional value. General prohibitions of discrimination lead to very much the same questions as are seen with general equal protection clauses: they require a differentiated approach to different classes of discrimination cases. Since the advent of World War II, a third model has increasingly become prevalent in constitutional protection which combines a general equal protection mandate with either a general non-discrimination prohibition or a discrimination proscription against enumerated classes of individuals. The reasons for the popularity of this model are similar to those informing the development of case law in which courts differentiate between different levels of scrutiny for a general equal protection clause and a general non-discrimination clause. Within countries that have only a general equal protection clause, the task of differentiating within identity classifications falls to judges while in this model the differentiation is already decreed by the constitution itself. That this model has become more widespread after World War II has its main reason in increased sensibility regarding discrimination, especially in the fi elds of race relations and gender. A second reason for the popularity of the general equality plus non-discrimination model is international law. Four human rights conventions specifically address discrimination against vulnerable persons and groups. General human rights conventions also outlaw discrimination.58 International human rights law increasingly influences the drafting of constitutions . Therefore it appears natural that when countries draft constitutions they will insert a general equality clause and also highlight those discriminations that are under international opprobrium. In Europe, the influence of European Union law is also important. The relationship between a constitution's general equal protection clause and its specific non-discrimination provisions presents a central question for comparative analysis. While the prohibition of discrimination binds all branches of government, the general order to treat people equally applies only to the administrative application of laws and is therefore of special importance for the exercise of administrative discretion. However, most countries that provide both general equality and non-discrimination provisions also bind the legislature, which makes it necessary to clarify the relationship between these two different approaches to equality. In countries that have only a general equal protection provision, case law regularly tends to be developed (as is the case of the United States) that creates different standards of scrutiny for different classes of unequal treatment. In countries that combine a general equal protection clause with a prohibition of enumerated discriminations, this task is not left to the courts but in principle undertaken by the constitution itself. General equal protection clauses are generally vague and cover many different situations such that even where the constitution has regulated some situations specifically, there may still be a need for a differentiated approach. **EQUALITY AND SOCIAL RIGHTS.** In the political and philosophical discussion about the principle of equality, the distribution of resources and the equality of living conditions take a prominent role. 75 In constitutional law, the question to what extent the state is constitutionally obliged to provide people with basic, comparable, or even equal living conditions is regularly treated not as a subject of general equality provisions but is instead referred to as specific guarantees of social rights or general social justice principles. Nevertheless, equality and social rights are closely related. In constitutional practice, equality provisions have an important role in controlling social security and welfare regulations. The linkage between equality and social rights is even stronger where the constitution itself guarantees the equal enjoyment of some rights, especially health and education or access to basic resources like clean water and sanitation. **RELEVANCE OF A GENERAL CONSTITUTIONAL EQUALITY PROVISION FOR COURTS AND ADMINISTRATION**. For those branches of government entrusted with the enforcement of the law a constitutional order to guarantee equality before the law is to a large extent identical with the rule of law. It is different, however, where an

administrative agency enjoys discretion. In this case, constitutional equality provisions become one of the most important principles for controlling the exercise of administrative discretion. The fact that equal protection under law is guaranteed by correctly applying the law leads to the question of whether any judgment that is wrong in fact or law is also a violation of the constitution. In theory this question can be answered in the affirmative, but in practice it creates no specific constitutional issue in countries with an integrated court structure. **HORIZONTAL APPLICATION**.

Open and direct racial discrimination by legislation has disappeared with the end of the apartheid system. But indirect social discrimination against minorities (or excluded majorities) unfortunately remains a problem in many parts of the world. Official discrimination in relation to ethnicity or gender has disappeared from constitutionalist democracies. This does not mean that the fight against social discrimination has become less important. Therefore, the horizontal application of non-discrimination provisions (i.e., their application in the relationship of private parties) is a vital part of any non-discrimination strategy. The horizontal application of general equality provisions, on the other hand, would interfere with basic freedoms. More generally, in some constitutional systems, powerful social actors who control the lives of other members of society are held to standards comparable to those applied to state actors.

SITES OF CONSTITUTIONAL STRUGGLE FOR WOMEN'S EQUALITY. Constitutionalism and citizenship have been historical paradigms to advance egalitarian, rights-based visions of political justice. Locating the birth of modern constitutionalism with the French and American Revolutions at the end of the eighteenth century, we realize that even in the West, where the liberal revolutions first led to the affirmation of rights-based constitutionalism proclaiming the 'freedom and equality in rights of men at birth', the word men had to be interpreted literally, and not simply as an expression of the generic use of the masculine terminology. Olympe de Gouges's affirmation that 'woman is born free and remains equal to man in rights', through which she intended revolutionary constitutionalism to start on a more sex-egalitarian track, was to remain a desideratum for many years. Political equality for women started to become a reality only at the turn of the twentieth century with access to suffrage. In some cases, this recognition triggered constitutional amendments 'to write women in'. The constitutional grounding of women's political equality was, at the time, understood to be compatible with the persistence of the denial of women's civil equality. In Western liberal democracies, it was not until after 1945 and, as a rule, not before the 1960s and 1970s that marriage and family law, regarded as the paradigmatic realms of tradition, were systematically reformed to ensure women's full equality with men. The full emancipatory potential of constitutional rights had to wait until women were recognized as equal citizens. This process of inclusion inherently limited the constitutionally enshrined understanding of human freedom and autonomy. Both post-WWII human rights law and constitutionalism, while including women as human rights holders, ignored for the most part that the rights they enshrined reflected and universalized the male condition. There's three different ways in which women have come to inhabit constitutionalism around the world: (1) the promise of the 'same rights as men' through the constitutional principles of equality and non-discrimination to assist in the process of ensuring women full civil liberties and marital equality; (2) the extent to which constitutions have become or failed to become a battlefield to assert women's specific rights claims. The 'female-only person' of the pregnant woman as a legal subject and whether her reproductive autonomy, including the right to have an abortion or to carry the pregnancy to term, has been constitutionally fought for and/or recognized; (3) constitutional debates around gender political quotas, describing constitutional processes to entrench parity democracy, moving the question of the constitutional incorporation of women beyond the rights debate and into the domain of the defining features of the democratic state and norm creation. **THE RIGHT TO BE TREATED LIKE MEN.** Constitutional recognition of formal equality enables women's litigation to request courts to affirm equal rights for women. This kind of litigation often began with women's claim to equal rights in the family, where women have traditionally been subordinated to men. Courts asserted equal rights of women in family-related matters by recognizing formal equality. These cases came into the Western courts as early as in the 1960s and 70s, reflecting secondwave feminism's attack on the patriarchal family model, and culminating in international norms such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which became effective in 1981. The need to accommodate women's distinct biology and statistically significant differential choices regarding the work/family balance, or to compensate for women's past and present disadvantages, have sometimes been seen

as justified deviations from formal equality, and sometimes as unjustified deviations with the potential to enshrine the very sex-based stereotypes that equality should abolish. Where even difference and egalitarian strands of feminism disagree, it would have been surprising to find agreement in male-dominated courts. **THE SEARCH FOR WOMEN'S RIGHTS: THE CONSTITUTIONALISM OF ABORTION.** Women's reproductive autonomy has rarely deserved explicit constitutional protection, and only as recently as the 1990s.17 Constitutional disputes surrounding abortion have been around only for about four decades. As late as the 1960s, abortion was not generally understood as presenting constitutional questions. Interestingly, constitutional decisions on abortion began in the West in an era coinciding with second-wave feminism's attack against the patriarchal family model. First in time was Roe v Wade, the 1973 US Supreme Court decision in which a pregnant woman and others challenged the constitutionality of a statute making it a crime to 'procure an abortion' except 'by medical advice for the purpose of saving the life of the mother' on the basis that this invaded a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Although the Court relied on a right to privacy. This right was recognized not to be absolute. Roe endorsed a framework banning state interference in the first trimester; allowing public powers to regulate abortion to protect the health and life of the pregnant woman after the first trimester; and, finally, to limit or even ban abortion after the point of viability. On June 24, 2022 the SCOTUS overruled Roe v. Wade (in the 6-to-3 ruling), eliminating the constitutional right to abortion after almost 50 years in a decision that will lead to total bans on the procedure in about half of the states. Later case law, rejected this scheme and replaced it with a doctrine whereby, so long as the law did not impose an 'undue burden' on the pregnant woman's decision whether to bear a child, the state could assert an interest in protecting unborn life throughout the term of a pregnancy, and not only after the first trimester. In Europe, the constitutionalization of abortion disputes led in the opposite direction, mostly because from the start the process was essentially one of reading the fetus, and not women, into mostly silent constitutions.18 That process was clearly influenced by the strong counter-mobilization of Catholic groups resisting women's reproductive rights in the name of the sanctity of life. The process of reading the fetus into the Constitution as either a rights bearer or embodiment of constitutional values that deserve constitutional protection became the norm in European abortion constitutionalism and was exported to other parts of the world. This model has entailed reading pregnant women out or, better, turning them primarily, constitutionally and reproductively speaking into duties (instead of rights) bearers, through a more or less explicitly articulated process of normalizing and naturalizing their motherly obligations. In contrast with the position in the West, constitutional litigation on abortion has not yet become the main site for Asian women to claim their reproductive rights. **BEYOND RIGHTS: WOMEN AND DEMOCRACY.** The question of women's disempowerment has come to the forefront in many parts of the world. Countries have explored gender quotas in electoral lists. In the Asian region, a few constitutions enacted after World War II contemplated quotas to enhance the political representation of disadvantaged groups as well as women, reflecting the commitment to substantive equality to combat the legacy of colonial stratification and subordination, and nation-building interests. In Western countries, gender political quotas entered the constitutional scene later, and often through litigation and constitutional amendment challenging dominant notions of general democratic representation and, for the most part, targeting women's political underrepresentation as something sui generis and conceptually distinct from the underrepresentation of other marginalized groups. In Europe, constitutional battles around gender political quotas had France, the cradle of liberal constitutionalism, as one of its main protagonists. In 1995 the Italian Constitutional Court,36 in 1997 and 1998 the Swiss Constitutional Court,37 and in 2000 the Colombian Constitutional Court38 all similarly struck down gender quota legislation and initiatives, showing that even when substantive equality mandates are constitutionally enshrined, as they are in Italy, Switzerland, and Colombia,39 the resistance against subverting the principle of general, free, and equal voting rights through quotas remains. Although much of the new wording introduced into constitutional texts suggests a substantive equality/equal opportunities framing, some of the reforms make explicit reference to democracy,44 underscoring that what is at stake is not just a question of granting women effective political rights but rather of ensuring women's empowerment as a way of tackling a democratic deficit and of disestablishing the sexual contract based on the gendered division of roles, which modern constitutionalism entrenched (see Rodríguez-Ruiz & Marin 2008). In this respect, probably the most interesting recent evolution is the growing awareness that the empowerment of women must take place in

every sphere of male-dominated power, including, if necessary, the adoption of mandatory gender quotas in the corporate world. These promising signs point to the possibility that constitutional law may be coming to terms with the fact that both the formal and informal institutional arrangements of society tend to maintain existing distributive patterns, even after direct discrimination is eliminated, and that women have been excluded from some domains by the combination of formal institutional rules and informal social norms. Moreover, politics in general and the making and administration of the law, including constitutional law specifically, have been largely male-dominated fi elds of activity and have therefore often failed to prioritize the overcoming of formal and informal obstacles to women's equal enjoyment of rights. **CONCLUSION.** Eighteenth-century constitutionalism left women out simply because constitutions were conceived as instruments to affirm civil and political rights and freedom of some men in the public sphere and as against state interference. In contrast, women were supposed to inhabit the private sphere of the family, where constitutional rights did not apply and inequality was taken to be the natural expression of a hierarchical sex order. After World War II, constitutions came to recognize the principle of equality with its application to the relationship between the sexes. This has helped women in the fight for civil equality by challenging gender and sexual stereotypes that were typical of the separate spheres tradition. Meanwhile, the constitutional enshrinement of parity democracy should be read as an attempt to overcome the limits of the assimilationist equality model by making sure that women are included not only as rights holders but also as sources of norm creation in occupying the domains of social and political power, which has fared predominantly male.

RACE AND ETHNICITY DISCRIMINATION. Constitutional orders with written bills of rights appear to be converging in their approaches to racial and ethnic discrimination, with greater convergence occurring with respect to direct discrimination than indirect discrimination. Some constitutional orders require the state to enact positive measures to ameliorate the effects of racial and ethnic discrimination, but there is little evidence to date to suggest convergence on this approach. **DEFINING RACE AND ETHNICITY.** Societies have struggled to defi ne 'race' for centuries. The term 'race' is also sometimes used interchangeably with 'ethnicity.' To complicate considerations further, some ethnicities may all be considered to be within one race, and some ethnicities contain several races. In some countries, the concepts intertwine with religious faith as well. However defi ned, the law has been used historically to classify people on the basis of race or ethnicity. These determinations have resulted in some groups receiving privileged status under the law, directly or informally, and other groups being relegated to an inferior status. In the nineteenth century, European and American scientists and others attempted to classify human beings into different racial categories. Races were presumed to have distinctive mental, emotional, and moral characteristics as well as physical ones. Other laws or policies allocating privilege or discrimination on the basis of race, in the United States but also elsewhere, included: laws keeping blacks in slavery for perpetuity rather than a fi xed term, as was the case for whites; anti-miscegenation statutes hindering black–white intermarriage1 ; segregated public facilities and accommodations laws delineating 'colored' and white hotels, restaurants, rest rooms, schools, bus seats, and train cars; removal of Indigenous peoples from land desired by settlers; interning Japanese and Japanese Americans, but not other ethnic groups such as Germans or Italians, during World War II2 ; restrictive covenants preventing blacks from buying homes in white areas; and limitations on naturalized US citizenship to whites. Despite the lack of any biological foundation to the concept of race 4 and the contemporary rejection of the existence of natural racial hierarchies, discrimination on the basis of race persists throughout the world. What this suggests is that one's racial identity is not biologi cally constructed, but rather is socially, politically, and legally constructed by assumptions, beliefs, and practices that change over time and vary from nation to nation. As with race, ethnicity has been characterized in many ways. Although some regard ethnicity to be a relatively recent social category, the term is derived from the Greek word, ethnos, denoting 'others. An ethnic group generally consists of a set of people who share a sense of identity based on descent, language, religion, tradition, and other common experiences and practices including alphabet, food, music, clothing, and beliefs. As an example, within the US, there is the hyphenated identity notion of ethnicity including Irish-Americans, Chinese-Americans, Mexican-Americans and more. Groups of ethnicities may be referred to as an ethnicity, when it would be more accurate to refer to them in a panethnic fashion. For example, the term 'Asian Americans' can refer to people with connection to China, Japan, Vietnam, Cambodia, Thailand, and elsewhere in Asia. Black American or

African American may refer to people who are the descendants of slaves or it may refer to a broader group including people more recently from Africa or the Caribbean. 'Arab American' may refer to people from countries ranging from Morocco to Lebanon. 'Native American' or 'American Indian' may refer to several hundred different tribes, some recognized offi cially and some lacking recognition from the federal government. Each one of these tribes has its own standards for determining what percent of Indian 'blood' makes one a member of the tribe. People from various ethnicities are not always considered within the same racial group. Hispanic as a panethnic identifi er does not provide information about the races involved. There are Puerto Ricans who consider themselves white and others who clearly appear to be black. Many people think of Colombians as being of Spanish white stock mixed to various degrees with indigenous people. There are Afro-Columbians as well. Race and ethnicity also get intertwined with religion. One of the best historic examples involves people of the Jewish faith. In the nineteenth century, they were regarded as an inferior 'race' in the United States and Europe; they were not considered white. In the former Yugoslavia, genocide was committed against Bosnians who were Muslim, a distinct group from Serbian Orthodox or Catholic Croats. **RACIAL AND ETHNIC DISCRIMINATION: DIRECT AND INDIRECT.** Many modern constitutional orders have structural features that take into account the racial and ethnic composition of its citizens. Some have done so in a blatantly discriminatory manner. More common today are structural features that protect racial or ethnic minorities from majori tarian politics or seek to minimize the potential for racial or ethnic strife and confl ict. Some federal systems, such as Canada and India, vest legislative authority in subunits to confer a measure of autonomy on racial or ethnic minorities. Others, such as Mauritius, create incen tives for the creation of cross-cutting allegiances among citizens otherwise divided among racial or ethnic lines. Some constitutional orders, such as Belgium, vest minority rights in racial or ethnic communities to shield them from assimilative tendencies emanating from their broader political community. Others, such as Pakistan and Singapore, provide racial or ethnic communities guaranteed political representation in national political institutions. But many constitutions also vest individuals and groups with rights of equality before the law and equal protection of the law. In many of these jurisdictions, race and ethnicity feature prominently as markers of individual and group identity that the exercise of state power must respect in the name of equality. A constitution can thus prohibit direct or intentional forms of racial or ethnic discrimination, but it can also prohibit what is known as indirect or disparate impact discrimination on the basis of race or ethnicity. 6 Some constitu tions authorize ameliorative measures aimed at certain racial or ethnic communities. Others go so far as to require the state to enact such measures. **DIRECT OR INTENTIONAL DISCRIMINATION.** Many constitutions prohibit what has been referred to as direct or intentional discrimination on the basis of race or ethnicity. By 'direct discrimination,' we mean laws that distribute benefi ts and burdens on the basis of racial or ethnic difference. Modern equal protection jurisprudence in the United States is characterized by a three tiered approach to the review of legal classifi cations. Under the fi rst tier, known as strict scrutiny, courts will strike down any legislative classifi cation that is not necessary to achieving a compelling government objective. Strict scrutiny is applied to legislation that classifi es on the basis of race or alienage, and legislation that burdens certain fundamental interests. If the law is under- or over-inclusive, it will be struck down. Many have characterized this test as 'strict in theory, fatal in fact.' The second or intermediate tier of scrutiny is applied to classifi cations on the basis of gender. Legislation will not survive intermediate scrutiny unless the government can demon strate that the classifi cation is substantially related to an important societal interest. The third tier is known as minimal or rational basis scrutiny. The courts will uphold a law on this approach so long as the classifi cation is reasonably related to a legitimate government interest. Most laws regulating social and economic matters are reviewed and upheld by courts using this minimal level of scrutiny. However people could be discriminated on the basis of more than one identity simultaneously. Thus, for example, African American women may face discrimination as blacks, as women, and as black women. The law in the US is not set up for proper consideration of an intersectional claim. The potential plaintiff would have to choose whether she would prefer to sue as a black and claim strict scrutiny or as a woman and invoke intermediate scrutiny. In the modern era, however, such clauses are now more comprehensive than the US equality clause adopted in the mid-nineteenth century. Constitutions that prohibit direct discrimination on racial or ethnic grounds commit to a formal principle of equality requiring like cases to be treated alike, and to the proposition that race or ethnic origin should not count as a relevant difference in the exercise of state power. By invalidating legislative or

administrative distinctions that rely on race or ethnic difference to distribute benefi ts or burdens among citizens, constitutional commitments to formal equality possess the potential to secure the same rights and privileges to all, regardless of race or ethnic difference. They thus stand as potentially powerful constitutional instruments to combat laws that withhold legal rights from some citizens on account of their race or ethnicity. Formal equality, however, does not require the state to seek to ameliorate the historical disad vantages that confront some racial and ethnic minorities; such measures would in fact run counter to the proposition that neither race nor ethnic origin should count as a relevant difference in the exercise of state power. Equality provisions that simply prohibit direct discrimination on these grounds therefore do little to remedy the social and economic conse quences of past injustices infl icted on racial or ethnic minorities or their ancestors. **INDIRECT OR DISPARATE IMPACT DISCRIMINATION.** Many constitutions therefore complement provisions that require the state to treat individuals and groups equally regardless of their race or ethnicity with provisions that advance substan tive equality. One such instrument is the prohibition of what has been referred to as 'indirect discrimination' or disparate impact discrimination on the basis of race or ethnicity, meaning laws or policies that rely on apparently neutral provisions or criteria that have the effect of unjustifi ably disadvantaging people on account of their race or ethnicity. Constitutions that prohibit indirect discrimination on racial or ethnic grounds move toward a substantive conception of equality by recognizing that apparently equal treatment can entrench racial or ethnic disadvantage. The indirect discrimination doctrine has developed on a regional basis in Europe. The European Court of Justice (ECJ) created the doctrine of disparate impact on the basis of Article 119 of the Treaty of the European Community. Europe has applied the indirect effects notion to a broader array of 'races' than the United States. For example, in DH and Others v The Czech Republic, the Grand (Appellate) Chamber of the European Court of Human Rights found the doctrine applied to a case involving the Czech Roma. Nearly 70 percent of these children were placed in special and inferior schools for mentally disabled although they made up only 5 percent of the primary age pupils.19 The equality clause of the European Convention on Human Rights was violated in a de facto school segregation situation even though there was no discriminatory intent. **AMELIORATIVE MEASURES.** Another instrument that advances substantive equality is a constitutional provision permitting the state to distinguish on the basis of racial or ethnic difference to ameliorate historical disadvantages faced by racial or ethnic minorities in society. There are numerous examples of provisions that authorize what, in the United States, is referred to as 'affirmative action.' Affi rmative action is, therefore, authorized by the Constitution and, consequently, authorities may invoke race or national origin or any other 'suspicious' category 'not to exclude certain people or groups or to perpetuate inequalities, but rather to reduce harmful effects of social behaviors that have placed this same people or groups in unfavorable conditions.' **POSITIVE OBLIGATIONS.** Some states also impose positive obligations on the state to take measures to ameliorate racial or ethnic discrimination in society.

AFFIRMATIVE ACTION. Affi rmative action refers to a range of governmental policies designed to foster greater oppor tunities for racial and ethnic groups that have traditionally been victims of discrimination. These policies are also frequently extended to women and to individuals who have suffered from socio-economic disadvantage. Affi rmative action has generally been less controversial when based on class or gender instead of race. Affi rmative action policies have taken the form of quotas for members of previously disadvantaged groups, preferential weighting of appli cants for employment and university admissions and governmental pressure to increase recruitment of members of groups that have long suffered from discrimination. In some nations affi rmative action takes place against a background of previous histories of formal, legally mandated discrimination against non-white groups. In other nations affi rma tive action occurs in the absence of a history of formal legal discrimination. In such nations there are often nonetheless very real histories of racial discrimination and stigmatization of and often very strong patterns of racially linked class disadvantage (Cottrol). Affi rmative action policies are found in a diverse set of nations in the modern world. Affi rmative action frequently creates constitutional and judicial dilemmas in the nations that have or contemplate such policies. By the end of the twentieth century, and especially after the fall of South Africa's apartheid regime in 1993, the principle of the equality of all citizens before the law had become a virtually universal constitutional norm. A strict reading of the equality principle that is found in most modern constitutions would argue that applications for employment or university admissions be judged without regard to race, ethnicity, gender, or a nation's previous history of

discrimination. Yet such a strict adherence to the equality principle would allow entrenched patterns of social, economic and, in some cases, political inequalities to continue, not taking into account either historic disadvantage, or the very real persistence of discrimination against traditionally disfavored groups. It is accepted in international law that the principle of equality [do]es not require absolute equality or identity of treatment but recognizes relative equality ie, different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary and the onus of showing that particular distinctions are justifi able is on those who make them. The principle of equality before the law does not mean absolute equality but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.

RIGHTS OF NON CITIZENS. The historical development of constitutional rights of non- citizens can be divided into three periods. In the late eighteenth century, constitutional rights were not limited to a state's citizens because of the infl uence of the natural rights doctrine. Thereafter, in the nineteenth and early twentieth centuries, constitutional rights came to be limited to citizens (or subjects) because of the nationalistic spirit of this time.1 Finally, after 1945, constitutional rights have again extended beyond citizens because of the human rights renaissance and the infl uence of international human rights treaties. Shortly after World War II, non citizens' rights have come to be more clearly defi ned in relatively new constitutional laws. Currently, constitutional interpretation of the rights of non- citizens can be divided into two types: 1) 'word- oriented', and 2) 'nature- oriented'. In 'word- oriented' countries such as Germany, linguistic interpretation according to the founders' will comprises the starting point, and then evolutive interpretation adjusts to social developments. In 'nature- oriented' countries such as Japan and South Korea, linguistic interpretation of the 'national' rights clause is not the starting point, and comparative constitutions or international human rights law are more important for understanding the nature of rights that can be applicable to non- citizens. It is often stated that civil and political rights are fi rst- generation rights, while economic, social and cultural rights are second- generation rights. Indeed, citizens in constitutional states were fi rst given civil, then political and fi nally social rights. However, non- citizens have obtained access to the same rights in another order and not to the same degree (Hammar, 54). Non- citizens were fi rst given most civil rights under the principle of the legal state (Rechtsstaat); then social rights were guaranteed to permanent or regular residents based on the principle of the welfare state; but some political rights are limited to citizens (nationals) in accordance with the principle of democratic state or national sovereignty. Furthermore, some economic rights such as the right to choose an occupation are not guaranteed to certain non- permanent residents, while cultural rights such as the right to enjoy one's own culture are signifi cant for non- citizens. In addition to the general constitutional law framework for the rights of non- citizens, the specifi c guarantees of family reunifi cation and asylum law are important.

THREE TYPES OF NON- CITIZENS AND THEIR RIGHTS. the state of non-citizens' rights in most countries 6 can be categorized into three groups: permanent residents, other regular residents and irregular residents. Non-citizens pass through the immigration control gate for entry permission fi rst, and receive most civil rights and partial social rights as regular residents. Second, after staying for a designated period, regular residents pass through the gate for permanent residency, and receive more stable rights in the fi elds of residential, employment and social rights. Third, permanent residents may choose to naturalize and obtain full rights including political rights as citizens. In some European countries, irregular migrants tend to be asylum seekers but in other places they work clandestinely without seeking asylum. In the US Supreme Court, the distinction between resident aliens and undocumented aliens is important (Bosniak 2006, 49 f). As to social rights, minimum rights such as emergency medical care are available to irregular residents in most countries. However, in practice, most social rights are limited. Economic rights such as the right to unionize are guaranteed to irregular workers in many countries. Cultural rights such as the right to education at public schools are guaranteed to undocumented children.10 With respect to political rights, irregular residents may have liberty of political expression, but clandestine migrants know that their public appearance may lead to deporta tion. Irregular residents do not have voting rights, even in countries where local voting rights for permanent (or long- term) or privileged (such as EU citizens) foreign residents are granted.