
Justiciable and Aspirational Economic and Social Rights in National Constitutions

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I. Introduction

Economic and social rights (ESRs) promise access to housing, health care, education and social security, and guarantee rights to unionize, strike and fair wages. Along with civil and political rights, they are enshrined in the Universal Declaration of Human Rights and in most other key international and regional human rights regimes. Theoretically at least, they bind states that have ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).¹ The UN Development Program's *Human Development Report* has also adopted matrices of minimal standards of human well-being, most notably Amartya Sen's 'capabilities approach.'

The effect on national constitutions has been dramatic. Nearly all new democracies, and several established ones, have included some form of ESRs in their constitutions, committing their governments, at least formally, to the realization of minimum standards of social welfare. Almost all constitutions also include a generic protection of 'the right to life' or 'human dignity', either in lieu of, or in addition to, a set of concrete ESRs. More than three-quarters of the world's constitutions now contain at least one formally justiciable ESR, only 17 do not incorporate at least one justiciable or aspirational ESR, and the majority of constitutions include nine or more. Indeed, such rights are now so commonly enshrined that they may reasonably be seen as a defining characteristic of third wave constitutions.²

¹ See, in particular, Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations, 14 December 1990, E/1991/23; CESCR, General Comment No 9: The Domestic Application of the Covenant, 3 December 1990, E/C.12/1998/24.

² The 'third wave' of constitutions coincides with Huntington's 'third wave' of democratic transitions because new democracies write new constitutions. Like third wave democratic

The renaissance of ESRs is reflected in recent work that builds upon earlier conversations concerning the philosophical foundations of subsistence rights.³ More recent interventions have developed sophisticated accounts of how courts balance, and ought to balance, principled and pragmatic approaches to advance progressive notions of distributive justice,⁴ as well as comparative constitutional law scholarship that assesses judicial reasoning in several staple ESR judgments from South Africa, India or Colombia.⁵ However, a basic building block of this vibrant discussion is absent: a systematic description and analysis of the actual frequency, entrenchment and evolution of these rights in contemporary constitutions.

To be sure, ESRs are not constituted, interpreted or implemented in an institutional, ideological or political vacuum. Influences on their realization extend well beyond the constitutional domain, involving substantial redistribution of resources; policy drafting in complex, contentious areas with large numbers of stakeholders; and the deployment of substantial physical and human capital. The prospects for advancing ESRs in a given polity cannot be effectively analyzed in isolation from concrete fiscal

transitions, third wave constitutions were overwhelmingly written in the 1980s and 1990s. Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991).

³ See, e.g., Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: Princeton University Press, 1980); Amartya Sen, 'Equality of What?', in Sterling M. McMurrin (ed.), *Liberty, Equality, and Law: Selected Tanner Lectures on Moral Philosophy* (Cambridge: Cambridge University Press, 1987), pp. 197–216; Desmond S. King and Jeremy Waldron, 'Citizenship, Social Citizenship and the Defense of Welfare Provision' (1988) 18 *British Journal of Political Science*, 4, 415–443; Martha Craven Nussbaum and Amartya Sen (eds.), *The Quality of Life* (Oxford: Oxford University Press, 1993); John Rawls, *A Theory of Justice*, 2nd ed. (Cambridge, MA: Harvard University Press, 1999).

⁴ See, e.g., Mark V. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008); Katharine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012); Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); Brian Ray, *Engaging with Social Rights* (Cambridge: Cambridge University Press, 2016).

⁵ The canonical ESR judgments of the South African Constitutional Court are *Minister of Health and Others v. Treatment Action Campaign and Others* (No. 2), 2002 ZACC 15 (2002), *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 ZACC 19 (2000) and *Soobramoney v. Minister of Health* (KwaZulu-Natal), 1997 ZACC 17 (1997). Two often-cited examples of ESR jurisprudence by the Indian Supreme Court are *Olga Tellis v. Bombay Municipal Corporation*, [1985] 3 S.C.R. 545 (1985) and *Unni Krishnan v. State of Andhra Pradesh*, [1993] 1 S.C.C. 645 (1993). The go-to Colombian case is Judgment T-760/08 (2008).

realities, legacies of welfare provision, the historical influence of leftist political forces, public opinion on core matters of health care and education, or patterns of judicial behavior and executive-judiciary relations in that polity.⁶ In short, there are multiple paths and trajectories to the realization (or neglect) of ESRs, of which constitutionalization is only one aspect.

Nevertheless, the formal constitutional text must serve as the conceptual and empirical baseline for any further inquiry on ESRs and realities. A close look at it may help us address fundamental questions that have, by and large, gone unanswered. How common is the broad category of ESRs in constitutions around the world? Are there differences in the specific social rights that are guaranteed constitutional protection? What accounts for variation in the scope and nature of ESR constitutional protections across polities? These and other basic empirical questions prod the most fundamental elements of the social rights universe, yet they remain surprisingly underexplored and undertheorized. The future of ESRs depends, in part, on their constitutional status.

In an article published in the *American Journal of Comparative Law*,⁷ we provided empirically grounded answers to some of these questions. Based on a novel dataset that identified the status of 16 distinct ESRs in nearly 200 national constitutions at the start of 2013, we presented four main findings. First, we were able to assess the relative prevalence of different rights. Although ESRs have grown increasingly common in national constitutions, not all ESRs are equally widespread. Based on their prevalence, we identified four that are now standard features of new constitutions – education, health, child protection and social security – and four that are still relatively rare – housing, food and water, development and land. Second, constitutions accord ESRs different statuses, or strengths: of the 160 constitutions with at least two ESRs at that time, 26 contained only aspirational rights, 75 only justiciable rights and 59 a mixture of both.⁸ Third, legal tradition – whether a country has a

⁶ Ran Hirschl and Evan Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities', in Tom Campbell, Adam Tomkins and Keith Ewing (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford and New York, NY: Oxford University Press, 2011), pp. 207–228 at pp. 211–212.

⁷ Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *American Journal of Comparative Law*, 4, 1043–1098.

⁸ A given ESR is defined as 'justiciable' when the government can be taken to court for failing to guarantee the economic and social rights promised in the constitution, or when citizens have concrete legal recourse to ensure the fulfilment of their constitutional rights;

tradition of civil, common, Islamic or customary law – is a strong predictor of whether a constitution will have ESRs and whether those rights will be justiciable. Fourth, regional differences are also significant. ESRs are far more common, and far more often justiciable, in Latin America and the former communist states of Eastern Europe and Central Asia than they are in the rest of the world. Notwithstanding the wide prevalence of ESRs in national constitutions, there is still considerable variation in the frequency, status and distribution of such rights. Because the divergence reflects lasting determinants such as legal tradition and region, we predicted that it is likely to persist.

In this chapter, we analyze an expanded version of the Toronto Initiative for Economic and Social Rights (TIESR) dataset that identifies changes in the presence and formal justiciability of ESRs from 2000 to 2016. We measure patterns of convergence and polarization in ESR entrenchment along three axes: region, legal tradition and types of rights. Taken as a whole, our analysis reveals that recent constitutions and constitutional amendments continue the trend of including ESRs in the world's constitutions. In 2016, there are more constitutionally entrenched ESRs than ever before. ESRs are not only more present in constitutions but they are also more likely to be justiciable than ever before. As a result, certain ESRs have become standard features of constitutions and of constitutional jurisprudence, in many cases being accorded co-equal status with civil and political rights, while others are likely to remain largely declarative or aspirational in nature, with little impact on the actual realization of human well-being.

II. Data and Method

A. Data Collection

The data employed in this chapter builds on the TIESR database. That data presented a snapshot of the distribution of 16 ESRs as of January 1, 2013.⁹ As we have noted, it did not capture change over time. To address

usually a mechanism for judicial review enshrined in the constitution. The distinction is discussed in greater detail in Section II.B.

⁹ The rights tracked are those to a fair wage, a healthy work environment, rest and leisure, employment-derived social security, join or form a trade union, strike, child protection, education, health, social security independent of labour market participation, environmental protection, a healthy environment, development, food and water, housing and land.

that gap, we have expanded the temporal scope of the TIESR dataset to capture the formal constitutional status of ESRs – the law in books, *not* the law in action – in each year from 2000 to 2016, as in effect on January 1. In addition, we have updated the original dataset based on revised or new translations, reader-submitted corrections and our own review of the primary sources.¹⁰ The coding and data collection method for this project was substantively similar to that used for the initial version, described in detail elsewhere.¹¹ However, we briefly outline the process and challenges associated with its expansion and revision in the following text.

In May and June 2016, the existence and particulars of constitutional changes during the study period were sourced from three principal databases: *Oxford Constitutions of the World* (Oxford University Press), *World Constitutions Illustrated* (William S. Hein & Co.), and the Comparative Constitutions Project. A number of supplementary sources were also used. These included the University of Richmond School of Law's Constitution Finder as well as the websites of national legislatures and judiciaries. When possible, official or semi-official English translations (e.g., translations made available by a credible source such as a constitutional court) were used in the coding process. Where this was not possible, the relevant document was coded in the original language in collaboration with a translator.

One issue that should be taken into consideration in interpreting the data is the potential for systematic bias due to under-reporting of recent constitutional changes. Put simply, there is likely to be a lag, possibly a substantial one, between changes in the law and updates reflecting those changes in the sources we examined. Such lags may be random; however, to the extent they are not, our data may under-report recent global or regional trends in the constitutional entrenchment of ESRs. Because we find a general increase in the constitutional entrenchment of ESRs, particularly after 2010, any lag in reporting would most likely mean that the trend is more, not less, significant than our data suggest.

¹⁰ A revised version of the 2014 data and replication data for this chapter are available at www.tiesr.org (accessed 14 June 2018).

¹¹ See, Courtney Jung and Evan Rosevear, 'Economic and Social Rights in Developing Country Constitutions: Preliminary Report on the TIESR Dataset' (2011), www.tiesr.org (accessed 14 June 2018); see also Jung et al., 'Economic and Social Rights in National Constitutions'.

Table 2.1 *New Constitutions and Constitutional Amendments, Annual Averages*

	New Constitutions		Amendments	
	Count	STD	Count	STD
2000–2004	3.2	1.3	66.8	6.2
2005–2009	4.6	1.1	54.8	10.3
2010–2014	4.0	2.2	58.4	2.9
2015	3	.	60	.
2016	2	.	41	.
2000–2016	3.8	1.6	58.9	9.1

There is *prima facie* evidence of a delay in reporting constitutional changes, at least for the most recent year. Table 2.1 reports the number and standard deviation (where appropriate) of new constitutions and amendments in several different periods. Delayed reporting does not appear to be a concern for 2015,¹² as both the number of new constitutions and amendments are within one standard deviation of the overall average and the averages for each of the three five-year periods specified in the table. However, although the number of new constitutions for 2016 is not markedly different from the preceding years, the number of amendments is two-thirds that of the previous year and of the averages for the specified periods, suggesting the possibility that not all amendments had been recorded at the time the data was collected. However, random variation cannot be discounted.¹³

B. *Distinguishing Aspirational and Justiciable Status*

A principal feature of the TIESR dataset is that it identifies not only the presence but also the constitutional ‘strength’ of ESRs.¹⁴ Contemporary constitutions can and do entrench ESRs, along with rights more

¹² For the purposes of this study, 2015 refers to constitutional changes going into effect between 2 January 2014 and 1 January 2015, inclusive.

¹³ The number of amendments in 2016 is within (although only just) the generally accepted boundary of 1.96 standard deviations of the overall average, used in the determination of statistical significance. The small sample size ($n = 17$), however, threatens the validity of the necessary assumption of normal distribution.

¹⁴ Other datasets of note to scholars of economic and social rights include the Comparative Constitutions Project available at www.constituteproject.org (accessed

generally, as justiciable or aspirational.¹⁵ Although there can be textual ambiguity with respect to the formal legal status of rights, these distinctions are normally fairly clear.¹⁶ Most straightforwardly, some constitutions locate different rights in different sections of the constitution and clearly identify rights in those sections as aspirational or justiciable.

A constitution must include a mechanism of judicial review for a right to be coded as justiciable. At least with respect to ESR protections, judicial review mechanisms tend to take one or more of three forms in a given jurisdiction. In countries with a ‘diffuse’ system of judicial review, the issue of constitutionality is dealt with by the presiding justice at the trial level and is subject to appeal through the usual course. This procedure tends to be found in common law jurisdictions such as South Africa, which tend to have a relatively small, second-career judiciary. In many jurisdictions with a strong civil law influence, issues of constitutionality may be raised during the course of standard legal proceedings. However, should the judge determine that a legitimate controversy exists, the constitutional matter is referred to a specialist constitutional tribunal for authoritative pronouncement. Following the determination of the specialist tribunal, the matter is referred back to the originating court to be decided on its merits employing the tribunal’s decision as good law. Examples of jurisdictions employing this approach include Germany and Spain.¹⁷ A third method of judicial review relevant to ESR realization is the individual claim mechanism, commonly known as *amparo* or *tutela*, found in most Latin American countries. This type of procedure allows individuals seeking redress for alleged rights

13 June 2018) and the Social and Economic Rights Fulfilment (SERF) Index available at <http://serfindex.uconn.edu> (accessed 13 June 2018).

¹⁵ When referring to both aspirational and justiciable rights, we employ the term ‘present.’ The three-category metric we employ (absent-aspirational-justiciable) captures only one of several factors that influence the ‘strength’ of a constitutional right. A more fulsome, ‘law in action’, consideration of the issue would minimally incorporate the differences between strong-and weak-form review, the acceptability of resource-limitation justifications for non-realization and the existence and ease of invoking legislative overrides, states of emergency or amendment procedures. We thank Katharine Young for drawing our attention to this point.

¹⁶ James Melton, Zachary Elkins, Tom Ginsburg and Kalev Leetaru, ‘On the Interpretability of Law: Lessons from the Decoding of National Constitutions’ (2012) 43 *British Journal of Political Science*, 2, 399–423.

¹⁷ See, respectively, Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany: Third Edition, Revised and Expanded* (Durham, NC: Duke University Press, 2012); Joel I. Colón-Ríos, ‘A New Typology of Judicial Review of Legislation’ (2014) 3 *Global Constitutionalism*, 2, 143–169, at 149–150.

violations to petition courts directly, often without the need for legal representation.¹⁸ In such cases, a constitution must state that individuals have the power to initiate judicial review.

In cases in which the constitutional status of an ESR, or ESRs generally, was unclear, the default coding was aspirational; positive evidence was required for a determination of justiciability. The clearest example of such evidence was an explicit declaration of the role of the courts vis-à-vis constitutional rights of the type found in the 1992 Estonian Constitution:

Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional.

The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution.¹⁹

Some constitutions make the status of certain rights quite clear by explicitly affirming that individuals are able to bring allegations of rights violations and/or non-fulfilment before a judge or, in the alternative, stipulating that a particular clause, article or chapter may not serve as grounds for a legal proceeding. For example, Oman's Basic Statute of the State, 1996, makes provision for four ESRs – fair wage, social security, health and education. These are set out in chapter 2, "The Principles Guiding the Policy of the State."²⁰ These rights were coded as aspirational because of the title of the chapter in which they were located and the absence of any direct reference to the justiciability of these rights.

¹⁸ Alicia Ely Yamin, Oscar Parra-Vera and Camila Gianella, 'Colombia: Judicial Protection of the Right to Health: An Elusive Promise?', in Alicia Ely Yamin and Siri Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, MA: Harvard University Press, 2011), pp. 103–131 at pp. 107–108; Katharine G. Young and Julieta Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Law School Human Rights Journal*, 179–216 at 179; see generally, Allan R. Brewer-Carias, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of the Amparo Proceedings* (New York, NY: Cambridge University Press, 2008).

¹⁹ The Constitution of the Republic of Estonia, 1992 (as Amended to 13 August 2015), in *World Constitutions Illustrated*, II, s.15 (2015).

²⁰ The Basic Statute of the State, 1996 (as Amended to 19 October 2011) [Oman], in Ministry of Legal Affairs (trans.) *World Constitutions Illustrated* (2013).

Where a constitution stipulates clearly that some clauses may, and others may not, serve as grounds for legal claims, interpretation is uncontroversial. When a negative or affirmative clause was present for a particular right, this was taken as an exception to a general rule, and the rights not stipulated were presumed to be justiciable in the case of a clause specifying the non-justiciability of certain clauses and the reverse. For example, Article 19(10) of the Chilean Constitution states that

Basic education and secondary education are obligatory; the State must finance a gratuitous system with this objective, designed to assure access to it by all of the population. In the case of secondary education, this system, in conformity to the law, will be extended until 21 years of age has been reached.²¹

Viewed in isolation, the specificity and use of the imperative suggests the existence of a justiciable right to education. However, this is complicated by Article 20, which reads:

He who by cause of arbitrary or illegal acts or omissions suffers privation, disturbance [*peturbación*] or threat in the legitimate exercise of the rights and guarantees established in Article 19, Numerals 1, 2, 3 fifth paragraph, 4, 5, 6, 9 final paragraph, 11, 12, 13, 15, 16 concerning the freedom to work and to the right of freedom of choice and freedom to contract, and to what is established in the fourth paragraph, [and Numerals] 19, 21, 22, 23, 24 and 25, can on his own, or anyone on his behalf, resort to the respective Court of Appeals, which will immediately adopt the measures [*providencias*] that it judges necessary to re-establish the rule of law and assure due protection to the affected [person], without prejudice to the other rights which he might assert before the authority or the corresponding tribunals

The recourse of protection [*recurso de protección*] in the case of Numeral 8 of Article 19, when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or a specific person, can also proceed.²²

Accordingly, those ESRs outlined in the identified clauses – to a fair wage (art. 19(16)), to unionize (art. 19(19)), to a healthy environment and to environmental protection (art. 19(8)) – are coded as justiciable while those set out in the other subsections of Article 19 – to education (art. 19(10)), health (art. 19(9)) and social security (art. 19(18)) – are coded as aspirational.

²¹ Political Constitution of the Republic of Chile 1980 as codified by Supreme Decree No. 100 of 17 September 2005 as amended to Law No. 20.870 of 9 November 2015, in Adela Staines et al. (trans.), *World Constitutions Illustrated* (2015).

²² *Ibid.*

The 2005 Interim National Constitution of the Republic of the Sudan (which remains in force as of 2016) contains a similar clause:

Unless this Constitution otherwise provides, or a duly enacted law guarantees the rights and liberties described in this Chapter [Part I, chapter 2, “Guiding Principles and Directives”], the provisions contained in this Chapter are not by themselves enforceable in a court of law; however, the principles expressed herein are basic to governance and the State is duly-bound to be guided by them, especially in making policies and laws.²³

In contrast to the Chilean Constitution, however, the implicit default condition of constitutional provisions is justiciability. The justiciability of the majority of ESRs in the Sudanese Constitution is supported by Article 48, the last article of Part II (‘Bill of Rights’) of the document:

No derogation from the rights and freedoms enshrined in this Bill shall be made except in accordance with the provisions of this Constitution and only with the approval of the National Legislature. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State.

Thus, the rights to join or form a trade union, social security, child protection, health and education, which are found in Part II of the Constitution, are justiciable. In contrast, the rights to a healthy environment and environmental protection, set out in Part I, Chapter 2, are aspirational only.

III. Mapping the Terrain

ESRs are a defining characteristic of third wave constitutions written overwhelmingly in the context of the democratic transitions of the 1980s and 1990s. New data reveal that this pattern has continued into the present millennium. ESRs are more present, and more likely to be identified as justiciable, today than they were in 2000. Only four constitutions – those of Kyrgyzstan, Myanmar, Sierra Leone and Thailand – had fewer ESRs in 2016 than they did in 2000, while 51 constitutions had more.²⁴

²³ The Interim National Constitution of the Republic of the Sudan, 2005, in *Constitutions of the Countries of the World*, art. 22 (2005).

²⁴ Six countries – Afghanistan, Angola, Kyrgyzstan, Latvia, Myanmar and Thailand – had fewer justiciable ESRs and 48 had more.

Table 2.2 *Characteristics of the Average Constitution, 2000 and 2016*

	Age of Constitution	Years since Changed	Economic and Social Rights		
			Present	Justiciable	Aspirational
2000	24.0	7.4	7.0	4.4	2.5
2016	34.0	9.2	7.9	5.6	2.3
Change	9.9	1.8	0.9	1.2	-0.2

The average age of the world's constitutions increased at a fairly consistent rate of seven and a half months per year between 2000 and 2016 (see Table 2.2). Nevertheless, 64 new constitutions were promulgated in 46 different countries after 2000.²⁵ Twenty-five of those constitutions were in sub-Saharan Africa, twelve in the Middle East and North Africa,²⁶ and only two in Western Europe and North America.²⁷ Of the 14 countries that promulgated two or more constitutions after 2000, 7 were in sub-Saharan Africa.²⁸

Although the distinction between a constitutional amendment and a new constitution can be hard to draw,²⁹ we also found evidence of just more than 1,000 constitutional amendments, including 300 in Latin American constitutions, 248 in Western Europe and North American constitutions and 42 in Middle East and North African constitutions. Forty-seven countries made no amendments during the study period, another 38 made only one; 15 averaged at least one per year; and the top

²⁵ This includes explicitly interim or transitional documents put into place in Afghanistan, the Democratic Republic of Congo, Egypt, Iraq, Libya, Nepal, Somalia, South Sudan and Sudan. Although not intended to act as permanent constitutions, in practice these documents may be in place for a significant amount of time. For example, the current Sudanese constitution is the Interim National Constitution of the Republic of the Sudan, in place since 2005. There was also an interim constitution in effect in Somalia between 2004 and 2012 and another in Nepal from 2007 until quite recently.

²⁶ Half of these occurred in two countries: Egypt (4) and Iraq (2).

²⁷ Finland (2000) and Switzerland (2000). Regional classifications are discussed in more detail in III.e.

²⁸ The seven multiple-constitution countries in sub-Saharan Africa were Burundi, the Central African Republic, the Democratic Republic of Congo, Cote d'Ivoire, Niger, Somalia and South Sudan.

²⁹ For a discussion of this matter, see Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009), pp. 55–59.

three – Austria (43), Brazil (59) and Mexico (93) – accounted for roughly 20 percent of all constitutional amendments.

In this period, ESRs were added, and deleted, by both amendment and the promulgation of new constitutions. Forty-one of the ESRs that were added to constitutions after 2000 occurred in the context of a new constitution, while 29 were added by amendment.³⁰ Although ESRs were much more often added than deleted from constitutions, 19 ESRs were removed through the promulgation of new constitutions, while only six were removed by constitutional amendment.³¹ Put differently, two out of every three constitutions promulgated between 2000 and 2016 guaranteed at least one ESR that its predecessor did not. The fact that most ESR changes, particularly the removal of an ESR guarantee, occur via the promulgation of a new constitution rather than via amendment might also be interpreted to suggest that ESRs are taken seriously, at least as symbols, by legislators and their constituents.

The increase of ESRs in national constitutions has been driven by increases in the entrenchment of justiciable, rather than aspirational, rights. With the exception of the right to rest and leisure, all 16 ESRs were more commonly found, and more commonly justiciable, in constitutions in 2016 than they were in 2000.³² Aspirational rights, in contrast, have become less common: four of six economic rights, all four standard social rights and three of four non-standard social rights were less likely to be identified as aspirational rights in constitutions in 2016 than they were in 2000.³³ Moreover, as indicated in Table 2.2, there were 0.9 more ESRs present in the average constitution at the beginning of 2016 than at the start of 2000, but 1.2 more justiciable ESRs; not only are they more

³⁰ This figure assumes ESR changes that occurred during a year in which a new constitution came into force were the result of that constitution. Because the data is annualized, however, it is possible that such a change occurred through an amendment that came into force during the same year.

³¹ In absolute terms, the ratio is 3.16:1; in terms of the probability of an ESRs being removed, 29.6 percent of new constitutions did so while 0.6 percent of constitutional amendments resulted in the removal of an ESR.

³² ESR subclassifications are outlined in III.A. The 0.5 percentage point decrease in the proportion of constitutions including the right to leisure is the result of an increase in the absolute number of constitutions coded in 2016 (194) as compared to 2000 (187). In absolute terms, the right became more common: it was present in 78 constitutions in 2000 and 80 in 2016.

³³ Data on the proportion of constitutions entrenching the individual rights in 2000 and 2016, as well as the percentage point change between the two, is presented in Table 2.5.

commonly entrenched in national constitutions but ESRs are also ‘stronger’ than ever before.

The movement toward formally stronger ESR guarantees is further evident in the global shift away from aspirational-only models of constitutional entrenchment. In earlier work we noted that the world’s constitutions were roughly evenly split between identifying all ESRs as aspirational, identifying all as justiciable and identifying some as justiciable and some as aspirational (mixed).³⁴ Our data indicate that the proportion of aspirational-only constitutions has declined, while the proportion of justiciable-only and, to a lesser extent, mixed-strength constitutions have increased.³⁵

A second notable trend is the substantial increase in the justiciability of the four standard social rights, each of which is now present in more than two-thirds of constitutions and justiciable in more than two-fifths.³⁶ There has also been substantial increase in the number of constitutions guaranteeing some form of environmental protection. Taken together, a justiciable right to a healthy environment and to environmental protection increased by 12.5 percentage points between 2000 and 2016, and at least one such right is now present in more than two-thirds of all constitutions, up from just more than one-half in 2000.

A. *Economic and Social Rights ‘Families’*

ESRs are typically conceived of as a single category of rights or, increasingly, separated into rights relating to labour regulation and organization, on the one hand, and a collection of general social welfare guarantees, on the other. A key aspect of ESR realization that has not yet received significant attention is the variation in the allocation of costs and benefits across different ESRs. Who bears the cost of realizing a right and who reaps the benefits will almost certainly play a significant role in shaping whether and how an ESR is realized. As a result, ESR entrenchment and realization will be significantly affected by the nature and relative capacities of labour, capital and the state in a given jurisdiction. So, too, will

³⁴ Jung et al., ‘Economic and Social Rights in National Constitutions’, 1049–1053.

³⁵ In 2000, 147 constitutions entrenched at least two ESRs, of those 34 (23 percent) contained only aspirational rights, 61 (41 percent) only justiciable and 52 (35 percent) one or more of each. In 2016, 159 constitutions entrenched at least two ESRs, 25 (16 percent) contained only aspirational ESRs, 76 (48 percent) only justiciable and 58 (38 percent) both.

³⁶ The rights to child protection, education, health and social security.

institutionalized norms about gender roles and family structure. Indeed, independent of discourse relating to constitutional obligations, there is a well-developed literature dealing with the political economy of the welfare state suggesting just such a relationship.³⁷

We previously disaggregated ESRs into four subcategories based on their frequency and logical congruence.³⁸ In contrast to ‘social rights’, we defined *economic rights* as those that vest in workers through their participation in the labour market.³⁹ With the exception of the right to join or form a trade union (which may also be conceived as a civil right derived from the right to free association), economic rights were present in fewer than half of the world’s constitutions in 2000 and have not increased significantly since.

We divided ‘social rights’ into three categories: environmental rights, standard social rights and non-standard social rights. The standard social rights are rights to child protection, education, health and social security. These four ESRs now appear in more than two-thirds of the world’s constitutions and are justiciable in at least 40 percent of all constitutions.⁴⁰ The right to education is now present in 81 percent of constitutions and justiciable in 59 percent. As a group, these rights were the most commonly enshrined in 2000 and, with the exception of environmental guarantees, the most likely to have been subsequently incorporated into national constitutions. We have argued that the standard social rights are so

³⁷ See, e.g., Gøsta Esping-Andersen, *Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990); Paul Pierson, ‘The New Politics of the Welfare State’ (1996) 48 *World Politics*, 2, 143–179; Julia O’Connor, Ann Shola Orloff and Sheila Shaver, ‘States, Markets, Families’, in Julia O’Connor, Ann Shola Orloff and Sheila Shaver (eds.), *States, Markets, Families: Gender, Liberalism and Social Policy in Australia, Canada, Great Britain and the US* (Cambridge and New York, NY: Cambridge University Press, 1999), pp. 223–238; Margarita Estévez-Abe, ‘Gendering the Varieties of Capitalism: A Study of Occupational Segregation by Sex in Advanced Industrial Societies’ (2006) 59 *World Politics*, 1, 142–175; Walter Korpi, ‘Power Resources and Employer-Centered Approaches in Explanations of Welfare States and Varieties of Capitalism: Protagonists, Consenters, and Antagonists’ (2006) 58 *World Politics*, 2, 167–206; with respect to the concept of concentrated benefits and diffuse costs generally, see Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, rev. ed. (Cambridge, MA: Harvard University Press, 1971). Jeff King’s contribution to this volume (‘The Future of Social Rights: Social Rights as Capstone’, Chapter 11) offers a detailed discussion of the relevance of the welfare state literature to the study of ESRs.

³⁸ Jung et al., ‘Economic and Social Rights in National Constitutions’, 1053–1055.

³⁹ Specifically, the rights to form or join a trade union, strike, leisure, a fair wage, a healthy work environment and employment-derived social security.

⁴⁰ See Table 2.5.

common because they are generally conceived as ‘investments in human capital’, a category of spending that was endorsed by the International Monetary Fund and the World Bank even in the era of the Washington Consensus.⁴¹

In contrast to the identification of standard social rights with investments, the rights we identified as non-standard social rights – the rights to development, food and water, housing and land – are often described as ‘subsidies.’ In the context of the neoliberal market reforms and ideology that formed the background to most third wave constitutions, *subsidies* refers to those goods that are deemed to be most efficiently accessed through the market. In this context a right to land may appear to directly threaten a right to private property.⁴² Similarly, an individual who is constitutionally entitled to housing and food has little incentive to take up unrewarding, poorly paid employment, exerting an upward pressure on wages.⁴³ The non-standard social rights were the least commonly entrenched in 2000 and were also least often added to constitutions after 2000, widening the gap between the ‘standard’ and ‘non-standard’ social rights. At the same time, the category of ‘non-standard’ social rights has grown less coherent since 2000 as the right to housing, which was already more common than the other rights in the category, has continued to grow, and is now present in more than 40 percent of constitutions. Each of the remaining non-standard rights

⁴¹ John Williamson, ‘What Washington Means by Policy Reform’, in John Williamson (ed.), *Latin American Adjustment: How Much Has Happened?* (Washington, DC: Peterson Institute for International Economics, 1990); Toke Aidt and Zafiris Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (Washington, DC: The World Bank, 2002), <http://go.worldbank.org/YE9DXK2X80> (accessed 12 June 2018); William Finnegan, ‘The Economics of Empire: Notes on the Washington Consensus’ (2003) 306 *Harper’s* 41–54. With respect to education in particular, see Jess Benhabib and Mark M. Spiegel, ‘The Role of Human Capital in Economic Development Evidence from Aggregate Cross-Country Data’ (1994) 34 *Journal of Monetary Economics*, 2, 143–173; Zarina Hussain, ‘How Lee Kuan Yew Engineered Singapore’s Economic Miracle’ *BBC News*, 24 March 2015, www.bbc.com/news/business-32028693 (accessed 12 June 2018).

⁴² In a comparison of economic and rights-based approaches to social rights, Varun Gauri notes that economists tend to view all ESRs as subsidies. See, Varun Gauri, ‘Social Rights and Economics: Claims to Health Care and Education in Developing Countries’ (2004) 32 *World Development* 465–477. Still, Williamson’s template of the Washington Consensus suggests that most international policy-makers distinguish between different types of government spending, Williamson, ‘What Washington Means’.

⁴³ See, e.g., Esping-Andersen, *Three Worlds of Welfare Capitalism*, pp. 9–32; Ann Shola Orloff, ‘Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States’ (1993) 58 *American Sociological Review*, 3, 303–328.

are still present in fewer than one-quarter of all constitutions. Although the justiciable right to food and water has nearly doubled since 2000, it is still only guaranteed in 16 percent of constitutions.

In short, not all ESRs are equal; some are much more common, and much more commonly justiciable, than others. The high levels of constitutional entrenchment and justiciability of the standard social rights has begun to blur the orthodox distinction between first- and second-generation rights that marked second wave constitutions and international human rights regimes.

B. Environmental Rights

Between 2000 and 2016, the fastest-growing rights were the rights to a healthy environment and environmental protection. In 2016, one or both of these rights was present in 68 percent of constitutions and justiciable in 42 percent, up from 53 percent and 29 percent, respectively, in 2000. Growing global awareness of and concern about climate change and its potentially devastating impacts almost certainly explain the growth in the number of constitutions entrenching some form of environmental right.⁴⁴ Less clear is the explanation for the clustering evident in the data.

When disaggregated according to region, Latin America, the post-communist states and Western Europe and North America played almost no role in the trend. The explanation for the first two regions is straightforward: near-complete prior buy-in. At the beginning of 2000, all but 5 of the 46 constitutions in the Latin American and post-communist regions contained some form of environmental right. With the constitutional entrenchment of justiciable rights to a healthy environment in Bolivia in 2003 and Romania in 2004, only three constitutions in these regions – those of Bosnia and Herzegovina, Estonia and Uruguay – did not contain at least one environmental guarantee in 2016. In contrast, while there was moderate early uptake in Western Europe and North America – roughly 40 percent presence and 20 percent justiciability in 2000 – there were almost no additional entrenchments through 2016.

⁴⁴ See, e.g., Intergovernmental Panel on Climate Change, Working Group I, Working Group I Contribution to the IPCC Fifth Assessment Report Climate Change 2013: The Physical Science Basis: Summary for Policymakers (2013), www.ipcc.ch/ (accessed 12 June 2018).

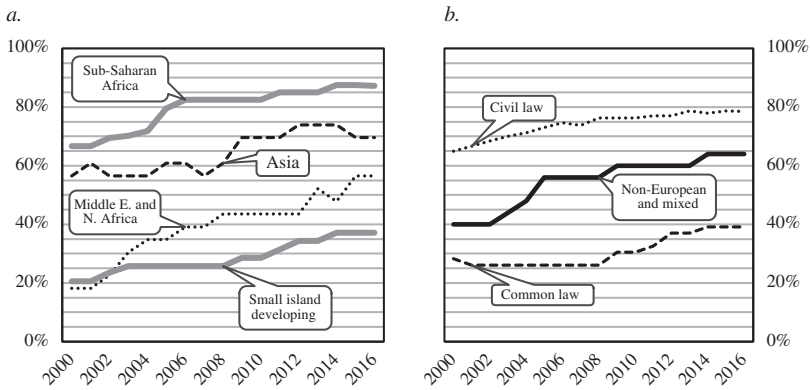


Figure 2.1 Presence of environmental rights. (a) Region and (b) legal tradition.

It is also notable that each of the 11 constitutions in the region that have constitutionalized some form of environmental guarantee is a civil law jurisdiction.⁴⁵

Several regional-temporal clusters are also evident. As shown in Figure 2.1 (a), between 2001 and 2004, the number of constitutions in Middle East and North Africa protecting environmental rights doubled with their incorporation into the constitutions of Bahrain, the Occupied Palestinian Territory, Qatar and Yemen. This was followed by their inclusion in four additional sub-Saharan African constitutions over the next two years – Burundi, the Central African Republic, Somalia and Swaziland – and two Asian countries in 2009 – Bhutan and Myanmar. There was also a gradual increase in the Small Island Developing States after 2008. In the Middle East and North Africa these regional trends were evident in attenuated form with respect to justiciable environmental rights. In this period Asia remained effectively static – with either two or three constitutions guaranteeing justiciable environmental protections throughout the relevant time frame.

Environmental protections were present in fewer than 30 percent of common law jurisdictions prior to 2009 (see Figure 2.1(b)), after which they began a gradual increase to about 40 percent, through the addition of rights to environmental protection in the constitutions of Bhutan, Myanmar, Kenya, Bangladesh and Fiji. Between 2002 and 2005 there was also a sharp increase in environmental protections in constitutions

⁴⁵ The common law countries in the region are Australia, Canada, New Zealand, the United Kingdom and the United States.

with Islamic and customary law traditions, as the constitutions of Bahrain, Qatar, Somalia and Afghanistan added environmental rights.⁴⁶

The sustained increase in the entrenchment of environmental rights is a gradual trend that has been driven by clusters of time and region-specific adoption, although sub-Saharan Africa has been a key driver throughout. One possible line for future inquiry would be attempting to link these region-specific clusters to a particular process of policy diffusion or focusing events such as drought or flooding that overcome the barriers to collective action generally associated with environmental regulation.⁴⁷ The common law aversion to justiciability of environmental rights is also notable. Prior to 2011 Uganda was the only common law jurisdiction to contain a justiciable environmental guarantee, although it has since been joined by Fiji, Jamaica and Kenya.

C. *The Right to Health*

Although the right to health is widely entrenched in national constitutions, it is also controversial.⁴⁸ In particular, critics worry that access to a right to health is often limited to those who need it least, particularly in the context of Brazil. In addition to the standard arguments against judicial review relating to democratic legitimacy and institutional

⁴⁶ Afghanistan had previously constitutionalized protection, but it was removed in 2002, the same year as Yemen incorporated a similar protection.

⁴⁷ Frank Dobbin, Beth A. Simmons and Geoffrey Garrett, 'The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?' (2007) 33 *Annual Review of Sociology*, 449–472; Matthew C. Nisbet, 'Communicating Climate Change: Why Frames Matter for Public Engagement' (2009) 51 *Environment: Science and Policy for Sustainable Development* 2, 12–23, 14; Joseph E. Aldy and Robert N. Stavins, 'Using the Market to Address Climate Change: Insights from Theory and Experience' (2012) 141 *Daedalus*, at 45.

⁴⁸ See, e.g., Gunilla Backman et al., 'Health Systems and the Right to Health: An Assessment of 194 Countries' (2008) 372 *The Lancet* 2047–2085; Jody Heymann, Adèle Cassola, Amy Raub and Lipi Mishra, 'Constitutional Rights to Health, Public Health and Medical Care: The Status of Health Protections in 191 Countries' (2013) 8 *Global Public Health*, 6, 639–653; Oscar A. Cabrera and Ana S. Ayala, 'Advancing the Right to Health through Litigation', in José M. Zuniga, Stephen P. Marks and Lawrence O. Gostin (eds.), *Advancing the Human Right to Health* (Oxford: Oxford University Press, 2013), pp. 25–38; Ebenezer Durojaye (ed.), *Litigating the Right to Health in Africa: Challenges and Prospects* (Farnham, UK: Ashgate Publishing, 2015); Matthew M. Kavanagh, 'The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes' (2016) 51 *Studies in Comparative International Development*, 3, 328–364.

capacity,⁴⁹ right-to-health litigation in Brazil has been criticized as being too individualized, resulting in a failure to address systemic concerns while simultaneously privileging middle and upper classes who are better able to afford lawyers and navigate the legal system.⁵⁰ Further criticisms have been levelled at the emphasis on expensive pharmaceuticals and treatments that, critics argue, come at the expense of basic and preventive care.⁵¹ Questions have also been raised about pharmaceutical companies' involvement in supporting the litigation.⁵² In response, defenders have argued that although the effect may be indirect, individualized litigation of the right to health has net positive and pro-poor effects.⁵³ That said, supporters and critics alike tend to agree that strategic litigation based on

⁴⁹ See, e.g., Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal*, 6, 1346–1406; Cass R. Sunstein, 'Against Positive Rights Feature' (1993) 2 *Eastern European Constitutional Review* 35–38; cf. Cass R. Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123–132.

⁵⁰ Octavio Luiz Motta Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 *Health and Human Rights Journal*, 33–45 at 34–35; Virgilio Afonso da Silva and Fernanda Vargas Terrazas, 'Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?' (2011) 36 *Law & Social Inquiry*, 4, 825–853 at 830; Daniel W. Liang Wang and Octavio Luiz Motta Ferraz, 'Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo' (2013) 10 *SUR – International Journal of Human Rights*, 18, 158–179.

⁵¹ Florian F. Hoffmann and Fernando R. N. M. Bentes, 'Accountability for Social and Economic Rights in Brazil', in Varun Gauri and Daniel M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York, NY: Cambridge University Press, 2008), pp. 100–145; Werner Baer, Antonio Campino and Tiago Cavalcanti, 'Health in the Development Process: The Case of Brazil' (2001) 41 *The Quarterly Review of Economics and Finance*, 3, 405–425. David Landau and Rosalind Dixon's 'Constitutional Non-Transformation? Socioeconomic Rights Beyond the Poor', Chapter 4, considers the Brazil case in the broader context of 'transformational' constitutions.

⁵² Marina Amaral de Ávila Machado et al. 'Judicialização do acesso a medicamentos no Estado de Minas Gerais, Brasil' (2011) 45 *Revista de Saúde Pública*, 3, 590–598; Vanessa Elias de Oliveira and Lincoln N. T. Noronha, 'Judiciary-Executive Relations in Policy Making: The Case of Drug Distribution in the State of São Paulo' (2011) 5 *Brazilian Political Science Review*, 2, 10–38 at 23; Orozimbo Henriques Campos Neto et al. 'Médicos, advogados e indústria farmacêutica na judicialização da saúde em Minas Gerais, Brasil' (2012) 46 *Revista de Saúde Pública*, 5, 784–790.

⁵³ Daniel M. Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12 *Perspectives on Politics*, 2, 375–393; Danielle Borges, *Individual Inputs and Collective Outputs: Understanding the Structural Effects of Individual Litigation on Healthcare in Brazil* (Abingdon, UK and New York, NY: Routledge, 2014).

the right to health in the early to mid-1990s was a key factor in Brazil's widely lauded response to HIV/AIDS.⁵⁴

Regardless of the redistributive impact of right-to-health litigation, however, the right has become more commonly entrenched in recent years. In 2000, 60 of the world's constitutions guaranteed a justiciable right to health and another 54 included it as an aspirational guarantee. In 2016, one fewer constitution contained an aspirational right to health, but 20 more contained a justiciable right. As was the case with ESRs generally, the likelihood and strength of entrenchment remained static in Latin America, the post-communist states and the advanced industrial democracies. The presence of the right to health increased by about 10 percentage points in Asia, the Middle East and North Africa and the Small Island Developing States, while the bulk of the change occurred in sub-Saharan Africa.

While overall increases in the presence of the right to health were relatively steady, the increases in justiciability were concentrated after 2010, as shown in Figure 2.2(a) and Figure 2.2(b). In sub-Saharan Africa, Kenya, Madagascar, Niger and Somalia all strengthened the right to health from aspirational to justiciable between 2011 and 2014, while the Central Africa Republic, Rwanda and Zimbabwe – countries that did not previously contain a right to health – added justiciable rights to health to their constitutions. Notably, the number of justiciable rights to health doubled, from three to six, in common law constitutions. Although small in absolute terms, the inclusion of the justiciable right to health in the constitutions of Sudan (2005), Nepal (2007) and Fiji (2013) may indicate a rejection of the general aversion to justiciable obligations by some common law jurisdictions. Whether these countries and the three that had a justiciable right to health in 2000 – Malawi, the Marshall Islands and Myanmar – share characteristics responsible for this shift warrants further investigation.

⁵⁴ Roger Raupp Rios, 'Legal Responses to the HIV/AIDS Epidemic in Brazil' (2003) 27 *Divulgação em Saúde para Debate* 228–238 at 230; Carlos André F. Passarelli and Veriano Terto Júnior, 'Non-Governmental Organizations and Access to Anti-Retroviral Treatments in Brazil' (2003) 27 *Divulgação em Saúde para Debate* 252–264 at 256; Matthew Flynn, 'Public Production of Anti-retroviral Medicines in Brazil, 1990–2007' (2008) 39 *Development and Change* 513–536 at 520; João Biehl et al., 'Judicialisation of the Right to Health in Brazil' (2009) 373 *The Lancet* 2182–2184 at 2183; Ferraz, 'The Right to Health in the Courts of Brazil', 34–35.

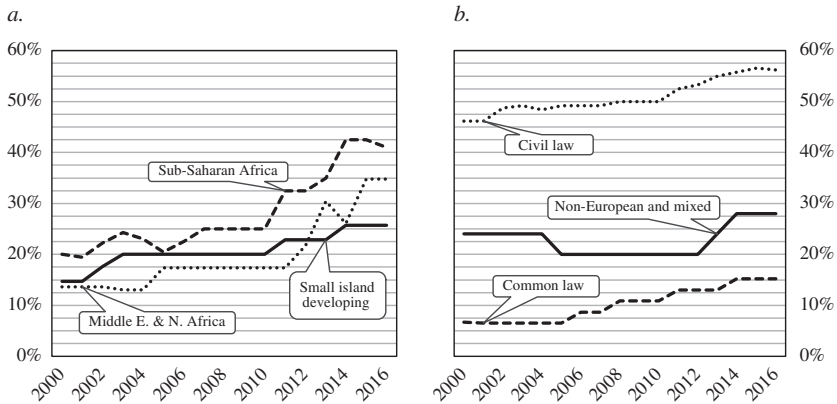


Figure 2.2 Justiciability of the right to health. (a) Region and (b) legal tradition.

D. Legal Tradition

The influence of a jurisdiction's legal system and the values that underlie it have been the subject of extensive debate.⁵⁵ The most prominent distinction has been drawn between common law and civil law legal traditions.⁵⁶ Most common law countries are former British colonies or territories. They are characterized by a relatively small number of second-career judges who settle legal controversies in an adversarial context and on the basis of the arguments and principles set down in previously decided matters. In

⁵⁵ See, e.g., Lawrence M. Friedman, 'Legal Culture and Social Development' (1969) 4 *Law and Society Review*, 1, 29–44; Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *The American Journal of Comparative Law* 707–760; Daron Acemoglu, Simon Johnson and James A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *American Economic Review* 1369–1401; Lawrence M. Friedman and Rogelio Pérez-Perdomo (eds.), *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford, CA: Stanford University Press, 2003); Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285–332; Emilia Justyna Powell and Jeffrey K. Staton, 'Domestic Judicial Institutions and Human Rights Treaty Violation' (2009) 53 *International Studies Quarterly* 149–174; Javier Couso, Alexandra Huneus and Rachel Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge and New York, NY: Cambridge University Press, 2010).

⁵⁶ See, e.g., Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CT: Yale University Press, 1986); John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. (Stanford, CA: Stanford University Press, 2007); Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008).

contrast, civil law jurisdictions have a more varied historical background. These systems tend to have a deeper judicial hierarchy as well as separate career paths for judges and lawyers. Judges usually play a more active, inquisitorial role in the settling of legal disputes, and usually frame their decisions in terms of theoretical coherence and formal logic. Overt reliance on previously decided cases tends to be minimal.

Citing the existence of substantial in-group variation as well as functional convergence, scholars have questioned the significance of the distinction between common and civil law legal traditions.⁵⁷ In terms of modification and ESR entrenchment, however, the distinction appears to remain significant. Constitutional change has disproportionately occurred in civil law jurisdictions: roughly two-thirds of countries are classified as civil law, but between 2000 and 2016 these jurisdictions accounted for approximately three-quarters of new constitutions and three-quarters of amendments.⁵⁸ There is also a stark distinction between civil and common law countries regarding ESRs. As shown in Table 2.3, constitutions in civil law countries are significantly more likely to include ESRs and also much more likely to make them justiciable.

Although there has been a general, and significant, trend toward ESR entrenchment, that trend is notably weaker in common law jurisdictions. In 2000, civil law constitutions averaged 8.5 ESRs, while common law constitutions averaged only 4.0 ESRs. ESRs were also more often added to constitutions in civil law countries between 2000 and 2016, widening the gap between the two systems. The difference between civil and common law constitutions is even more significant when it comes to justiciability and, again, that difference has grown over time. In 2016, civil law constitutions averaged 7.2 justiciable ESRs whereas common law constitutions averaged only 2.2 ESRs.

⁵⁷ See, e.g., Guangdong Xu, 'The Role of Law in Economic Growth: A Literature Review' (2011) 25 *Journal of Economic Surveys* 833–871 at 848; Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52–81.

⁵⁸ Of the 192 countries for which we have JuriGlobe classification data, 121 have a civil law tradition either solely or in combination with Islamic and/or customary law; 46 have a pure or partial common law tradition; 25 have either no common and civil law tradition or aspects of both, generally in combination with Islamic and/or customary legal influences. Louis Perret et al., *World Legal Systems* (2008), www.juriglobe.ca/eng/index.php (accessed 13 June 2018).

Table 2.3 *Characteristics of the Average Constitution by Legal Tradition, 2000 and 2016*

	Civil Law	Common Law	Non-European and Mixed ^a
<i>Age of Constitution (Years)</i>			
2000	23.6	27.7	19.5
2016	33.0	39.6	30.4
Change	9.5	11.9	10.9
<i>Last Amended (Years)</i>			
2000	6.6	8.4	9.0
2016	8.8	10.1	9.8
Change	2.2	1.7	0.8
<i>ESRs Present</i>			
2000	8.5	4.0	5.7
2016	9.4	4.7	6.8
Change	0.9	0.6	1.1
<i>Justiciable ESRs</i>			
2000	5.9	1.3	3.2
2016	7.2	2.2	4.1
Change	1.3	0.8	0.9
<i>Aspirational ESRs</i>			
2000	2.6	2.3	2.5
2016	2.2	2.5	2.7
Change	-0.4	0.2	0.2

^a Jurisdictions composed exclusively of one or both of Islamic and customary law, or incorporating elements of both common and civil law traditions, regardless of the influence of customary or Islamic law.

Whether these gaps are a result of different attitudes toward state intervention in the economy,⁵⁹ the relative importance of liberty and equality,⁶⁰ different priorities with respect to the resolution of the tension between certainty and justice in particular cases,⁶¹ or simply the greater age of common law constitutions, the widening gap between

⁵⁹ See, e.g., Friedrich A. Hayek, 'Freedom, Reason, and Tradition', in *The Constitution of Liberty* (1960) pp. 54–70; La Porta et al., 'The Economic Consequences of Legal Origins'.

⁶⁰ Pierre Birnbaum in M. B. Debevoise (trans.), *The Idea of France* (Cambridge: Hill and Wang, 2001).

⁶¹ Raoul C. Van Caenegem, 'The Mastery of the Law: Judges, Legislators and Professors', in *Judges, Legislators and Professors* (Cambridge and New York, NY: Cambridge University Press, 1987); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932).

common and civil law countries supports the hypothesis that civil and common law constitutions have, or are converging on, distinct norms of ESR entrenchment.

E. Region

Following various standard regional classifications, we divide the world into the following regions: Latin America, sub-Saharan Africa, Middle East and North Africa, Western Europe and North America, post-communist states (of Eastern Europe and the former Soviet Republics), Asia and Small Island Developing States. In earlier work we reported that Latin America and post-communist states were significant outliers in terms of entrenching the widest range of ESRs and identifying most of those rights as justiciable. Western Europe and North America rests at the other end of the spectrum. More recent changes in ESR entrenchment have shifted that pattern, bringing sub-Saharan Africa and the Middle East and North Africa closer to Latin America and the post-communist states.

In line with the global trend, the average age of constitutions in the Middle East and North Africa increased from 2000 to 2016, but the increase was less than half of the global average of almost ten years (see Table 2.4). In contrast to every other region but Asia, constitutional change – either through a new constitution or the amendment of an existing one – became more frequent. The region also saw an above average increase in ESR presence and the average number of justiciable ESRs more than doubled, driven primarily by changes in the new constitutions promulgated in the wake of the ‘Arab Spring’ in Egypt, Libya, Morocco and Tunisia.

As a whole, Asian constitutions remained relatively stable in terms of ESR guarantees. That apparent stability, however, masks a number of changes to individual constitutions. Between 2000 and 2016, Bangladesh, Bhutan, Indonesia, Laos and Vietnam added ESRs, while Afghanistan, Myanmar, Nepal and Thailand both added and removed them. In Asian constitutions, most new ESRs, as well as most old ESRs, are clearly identified as aspirational.

ESR protection in sub-Saharan African steadily increased throughout the period, with a notable jump in justiciable rights between 2010 and 2011. The increase is largely driven by changes to the Kenyan constitution, which went from entrenching only the right to join or form a trade union as justiciable to entrenching twelve justiciable rights,⁶² and a shift from aspirational to justiciable rights in Niger.

⁶² All but the rights to rest and leisure, employment-related social security, development and land were made justiciable in Kenya’s most recent constitution.

Table 2.4 Regional Constitutional Characteristics and Change, 2000 and 2016

	Middle East and N. Africa	Asia	Post-Communist States	Latin America	Sub- Saharan/Africa	W. Europe and North America	Small Island Developing
<i>Present</i>							
2000	5.2	6.8	10.5	12.4	7.8	4.9	3.7
2016	6.9	7.4	10.6	13.0	9.2	5.1	4.8
Change	1.6	0.6	0.2	0.6	1.4	0.3	1.2
<i>Justiciable</i>							
2000	2.0	2.1	9.4	11.2	3.4	2.9	2.1
2016	4.2	2.3	9.4	11.8	5.8	3.3	3.7
Change	2.3	0.2	0.1	0.6	2.4	0.4	1.5
<i>Aspirational</i>							
2000	3.3	4.7	1.1	1.2	3.9	1.9	1.5
2016	2.7	5.1	1.1	1.2	3.4	1.9	1.2
Change	-0.6	0.4	0.0	0.0	-0.6	-0.1	-0.4

The constitutions of the Small Island Developing States exhibited slightly above average increases in terms of both ESRs present and justiciable.

In contrast to the increased ESR protections in the other four regions, constitutions in the post-communist states, Latin America and Western Europe and North America remained relatively stable throughout the period. With respect to the first two regions, this can be attributed to preexisting high levels of ESR constitutionalization, leaving relatively little room for expansion. The constitutions of Western Europe and North America, which were already least likely to include ESRs, exhibited almost no change.

IV. Conclusion: Convergence and Polarization

ESR entrenchment is a defining characteristic of third wave constitutions, and new data confirm that this trend continues. In 2016, there were more constitutionally entrenched ESRs than ever before. ESRs are not only more commonly included in newer constitutions but they are also more likely to be formally identified as justiciable.

We note both convergence and polarization among rights. The traditionally sharp distinction between first- and second-generation rights has been attenuated by the growing tendency to enshrine both, often side by side, in national constitutions. Most constitutions that enshrine ESRs along with civil and political rights do not distinguish among them according to such labels. Thus, we find some evidence of convergence among 'rights' as a whole.

Nevertheless, not all ESRs are equal, in the sense that some are much more common, and much more commonly justiciable, than others. New constitutions and constitutional amendments since 2000 have made the gap between different ESR 'rights clusters' more pronounced. The rights we identified as 'investments in human capital' – education, health, child protection and social security – were the most commonly enshrined rights in 2000, and they are also more likely to have been added by constitutional amendment since 2000. All four of these rights are now present in at least two-thirds of all national constitutions. These rights are also much more likely to be justiciable in 2016 than they were in 2000.

Rights to a healthy environment and environmental protection have also increased disproportionately since 2000. Like 'investments in human capital', environmental rights are now present in more than two-thirds of national constitutions. They are also significantly more likely to be identified as justiciable in 2016 than they were in 2000.

Other rights, however, remained relatively static. On average, ‘economic rights’ were present in fewer than half the world’s constitutions in 2000, and they did not grow significantly between 2000 and 2016. Those rights we identified as ‘subsidies’ had the lowest incidence of entrenchment in 2000 and remained relatively uncommon in 2016. Within this group, however, the rights to housing and food and water were more commonly added to constitutions than the rights to development or land, with the effect that this ‘cluster’ is no longer really collecting around a common norm. Whereas a right to housing is now present in 42 percent of constitutions, a right to land is present in only 14 percent. Table 2.5 provides a summary of these developments.

More broadly, constitutional norms around ESRs are also undergoing processes of convergence and polarization. Civil law constitutions have been significantly more likely to entrench ESRs than common law constitutions, and recent changes confirm the distinction. Recent constitutional amendments adding ESRs have also been more common in civil law constitutions, making the ESR gap between civil and common law constitutions starker. New data support the hypothesis that civil and common law constitutions have distinct norms around ESR entrenchment. Recently, however, a small number of common law jurisdictions have begun to contravene the de facto common law antagonism toward the constitutionalization of so-called positive rights.⁶³ Of particular note are the increases in the justiciable rights to health and environmental protections in these jurisdictions since 2006 and 2010, respectively. Whether this is attributable to specific influences on these geographically diffuse countries or the start of a broader trend – perhaps in these two particular areas, perhaps with respect to ESRs generally – remains to be seen.

We also observe growing regional convergence and polarization. In this century, new rights have often been added through amendments to existing constitutions, but most new rights were added through the promulgation of new constitutions in Africa and the Middle East. Most notably, constitutions written in the wake of the Arab Spring overwhelmingly enshrined ESRs. These trends suggest that, although Latin America and the post-communist countries continue to be outliers in terms of the

⁶³ Drawing too clean a distinction between ‘negative’ and ‘positive’ rights is problematic, see, e.g., Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York, NY: W.W. Norton, 1990). We use the term here as it is commonly employed: as representing a distinct class of ‘positive’ rights that compel state expenditure of resources to ensure the realization of an individuals’ rights in contrast to ‘negative’ rights that prohibit state action that interferes individuals’ autonomy.

Table 2.5 *Economic and Social Rights Entrenchment, 2000 and 2016*

	Aspirational			Justiciable			Present		
	2000	2016	Change ^a	2000	2016	Change ^a	2000	2016	Change ^a
<i>Economic Rights</i>									
Fair Wage	12.3%	10.3%	-2.0%	28.3%	32.5%	4.1%	40.6%	42.8%	2.1%
Healthy Work	12.3%	12.4%	0.1%	21.4%	27.3%	5.9%	33.7%	39.7%	6.0%
Leisure	13.4%	13.4%	0.0%	28.3%	27.8%	-0.5% ^b	41.7%	41.2%	-0.5% ^b
Employment Soc. Sec.	16.6%	13.4%	-3.2%	28.9%	33.5%	4.6%	45.5%	46.9%	1.5%
Strike	10.7%	7.2%	-3.5%	34.2%	43.8%	9.6%	44.9%	51.0%	6.1%
Trade Union	12.8%	7.7%	-5.1%	59.9%	66.5%	6.6%	72.7%	74.2%	1.5%
<i>Standard Social Rights</i>									
Child Protection	22.5%	17.0%	-5.4%	36.9%	50.5%	13.6%	59.4%	67.5%	8.2%
Education	27.3%	22.7%	-4.6%	49.2%	58.8%	9.6%	76.5%	81.4%	5.0%
Health Care	28.9%	27.3%	-1.6%	33.7%	42.8%	9.1%	62.6%	70.1%	7.5%
Social Security	27.8%	26.3%	-1.5%	33.2%	42.8%	9.6%	61.0%	69.1%	8.1%
<i>Environmental Rights</i>									
Environmental Protection	23.5%	26.8%	3.3%	23.5%	32.0%	8.4%	47.1%	58.8%	11.7%
Healthy Environment	10.7%	13.9%	3.2%	24.1%	35.6%	11.5%	34.8%	49.5%	14.7%
Pooled ^c	23.4%	25.7%	2.3%	29.3%	41.8%	12.5%	52.7%	67.5%	14.8%
<i>Non-Standard Social Rights</i>									
Development	7.0%	5.7%	-1.3%	8.0%	11.9%	3.8%	15.0%	17.5%	2.6%
Food and Water	7.5%	8.8%	1.3%	8.0%	15.5%	7.4%	15.5%	24.2%	8.7%
Housing	16.6%	16.0%	-0.6%	18.2%	26.8%	8.6%	34.8%	42.8%	8.0%
Land	5.9%	5.7%	-0.2%	7.5%	8.3%	0.8%	13.4%	14.0%	0.6%

^a Percentage point increase or decrease between 2000 and 2016.

^b This decrease is the result of an increase in the absolute number of constitutions coded in 2016 (194) as opposed to 2000 (187); the right to rest and leisure was present in 78 constitutions in 2000 and 80 in 2016.

^c Presence or justiciability of either or both environmental rights.

number of justiciable rights they enshrine, the rest of the Global South, including sub-Saharan Africa, the Middle East and parts of Asia, is converging toward the norms established in those regions. The low number of ESRs initially enshrined in the older constitutions of Western Europe, North America and the Antipodes, coupled with the almost complete absence of any recent constitutional amendments adding ESRs in those regions, puts the 'West' increasingly out of step with emerging constitutional norms surrounding ESR entrenchment in the rest of the world.