Economic and Social Rights Across Time, Regions, and Legal Traditions:  
A Preliminary Analysis of the TIESR Dataset¹

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Abstract: Nearly all written constitutions in the developing world contain one or more economic and social rights. However, some rights are more commonly enshrined than others, and there is wide variation in terms of whether such rights are identified as justiciable – enforceable in a court of law – or merely aspirational. The most interesting variations occur along three dimensions: time, region, and legal tradition. Most constitutions are new, and the contemporary constitutional model affords greater standing to economic and social rights than the previous post-War model. There are significant regional differences in the relative prevalence of such rights, and some regions exhibit a clear regional norm with respect to economic and social rights. Finally, the constitutions of common law countries are significantly less likely to include economic and social rights, and to identify them as justiciable, than those of civil law countries. This article reports some of the initial findings of a new dataset measuring the constitutional entrenchment of economic and social rights.

Keywords: Economic Rights; Social Rights; Constitutions.

Economic and social rights (ESRs) guarantee rights to unionise, strike, and fair wages, and they promise access to housing, healthcare, education, and social security. Along with civil and political rights, they are enshrined in the Universal Declaration of Human Rights,² and they bind states signatory to the International Covenant on Economic, Social, and Cultural Rights (‘ICESCR’).³ In addition,

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many new democracies have included economic and social rights in their constitutions, committing their governments, at least rhetorically, to the progressive realization of minimum standards of social welfare.

The Toronto Initiative for Economic and Social Rights (TIESR) Dataset measures the presence, absence, and justiciability of seventeen separate economic and social rights in 136 constitutions in Asia, Africa, Europe, and Latin America.\(^4\) English versions of the constitutional documents were retrieved from Constitutions of the Countries of the World Online and from national government websites.\(^5\) The dataset is freely available online, and also includes data on constitutional commitments to a free market, expropriation, and ratification of the International Covenant on Economic, Social and Cultural Rights.\(^6\)

In the last thirty years, economic and social rights have gained widespread currency and legitimacy. The debate over whether such rights are justiciable seems largely to have been settled by case law.\(^7\) There is also an extensive scholarly literature on such rights, affording insight into the scope and effectiveness of econ-

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\(^4\) Effective June 2012, the TIESR dataset has been expanded to include data on 190 countries, including western Europe, North America, and the small island nations. This data is also available online, but is not analysed in this article. Specifically, the dataset codes the rights to: property; strike; join or form a trade union; a fair wage; rest and leisure; employment-derived social security; a healthy working environment; child protection; education; healthcare; social security; food and water; land; adequate housing; development; a healthy environment; and, environmental protection. In this chapter, we exclude the right to property from the analysis to sidestep controversy regarding whether or not it qualifies as an ESR. The right to property nevertheless appears in 95.9% of the constitutions in our dataset, making it the most universally entrenched ESR, if indeed it is an ESR.

\(^5\) Max Planck Institute for Comparative Public Law and International Law, 'Constitutions of the Countries of the World Online' (Oxford University Press no date).

\(^6\) The TIESR dataset is available online at [http://www.tiesr.org](http://www.tiesr.org). The dataset was independently coded by two researchers; any disagreements between the coders were settled by a separate panel. We nevertheless request that users assist in improving the data’s reliability by reporting mistakes/differences of interpretation by sending an email to contact@TIESR.org. A detailed description of coding procedures is outlined in: Courtney Jung, 'Coding Manual: A Description of the Methods and Decisions Used to Build a Cross-National Dataset of Economic and Social Rights in Developing Country Constitutions', (Report) 9 November 2010.

nomic and social rights in particular jurisdictions. Much of this literature is focused on those countries – including India, South Africa, and a handful of Latin American countries – that are leading the way in using courts and ESRs to alleviate the effects of poverty and improve human well-being.

The TIESR dataset is aimed at grounding this qualitative literature with quantitative data on the presence, absence, and formal justiciability of economic and social rights in contemporary constitutions. This dataset provides basic information about where such rights are constitutionally enshrined, which rights have become common (and which are still fairly rare), and where they are identified (in the constitution) as subject to judicial remedy. Although such constitutional status does not guarantee that citizens can in fact seek judicial remedy, it helps to characterise contemporary constitutional models, and identifies where constitutions afford economic and social rights equal status with civil and political rights. In more than one third of constitutions, those ESRs that are included in the constitution are formally identified as justiciable: enforceable through the domestic court system and subject to legal remedy. Another third identify most economic and social rights as aspirational principles. The remaining third include a mix of aspirational and justiciable rights.

With respect to ESR incorporation, constitutions exhibit significant variation along the dimensions of time, region, and legal tradition. Most of the world’s

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10 Justiciability is ultimately an interpretive construction. In India, for example, most ESRs are identified in the constitution as directive principles, and yet have been interpreted as justiciable. Other constitutions include justiciable rights that have been interpreted as non-justiciable. Whether rights are identified in the constitution as justiciable is not an indicator of whether they are in fact justiciable. But it is an indicator, as we argue, of their relative textual status.
constitutions were written after 1974, and the vast majority of these include a range of economic and social rights. Some of these rights are almost as common in contemporary constitutions as the usual panoply of civil and political rights. However, within the last 35-year period there has also been substantial variation. Constitutions written between 1974 and 1989 are more likely to include ESRs, and significantly more likely to identify them as justiciable, than constitutions written after 1990.

There are also important regional differences. Latin America and the former Soviet satellites and republics are the regions that are most likely to include economic and social rights in their constitutions. Such rights are most often justiciable in Latin America through the mechanism of *amparo*. Latin America, the former Soviet region, and the Arab States demonstrate sufficient internal consistency with respect to how their constitutions treat economic and social rights that they appear to reflect a regional model or norm. The constitutions of Asia and Sub-Saharan Africa, on the other hand, contain almost as much internal variation as the dataset as a whole, and cannot reasonably be identified as regions with respect to constitutional commitment to economic and social rights.

Legal traditions also correlate significantly with constitutional entrenchment of economic and social rights. The constitutions of common law countries are significantly less likely to include the so-called positive economic and social rights than the constitutions of civil law countries. The difference here is sufficiently striking to suggest that legal traditions may affect constitutional norms regarding rights, and that common law countries continue to generate more classically liberal constitutions that favour civil and political rights over economic and social rights. Countries that also have Muslim or customary law are even less likely than common law countries to enshrine ESRs.

I. The TIESR Dataset

This article analyses data on the presence, absence, and justiciability of economic and social rights in 136 constitutions. Economic and social rights are designed to

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11 *Amparo* is a remedy for the protection of constitutional rights, found mainly in Latin America and the Philippines, which allows individuals to seek remedy in cases where their rights have been violated. For a comprehensive discussion of this concept, see Allan R. Brewer-Carias, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press 2009).
protect human well-being and quality of life – their goal is to create either a minimum standard or roughly equal access to economic and social well-being. A large number of economic and social rights are identified in the ICESCR. This document includes the right to work, to form or join a trade union, to strike, to social security, to child protection, to food and housing, to healthcare, and to education. Yet it does not exhaust the total number of rights that can be found in contemporary constitutions, which may also include the right to water, land, a healthy environment, and environmental protection. The TIESR dataset’s rights catalogue was built iteratively, starting with a core of rights drawn from the ICESCR, and subsequently either adding rights, or amending the parameters of pre-existing rights, in response to their constitutional articulation.

Some of the rights we included in the dataset are controversial or require additional explanation. A right to education appears in two different ways: as a right to choose the education of your child (often the concern here is with secular or religious education); and, as a responsibility of the government to provide education. We coded only the latter as an ESR; the former is more aptly understood as a civil and political right to free choice. The right to land is normally qualified with reference to specific sectors of the population, most often indigenous peoples, and is largely absent outside of Latin America. The category of ‘social security related to employment’ includes such benefits as unemployment, severance pay, maternity leave, sick leave, and so on that rely on an underlying condition of employment. This right is distinct from social security, which includes programs that are based on a person’s status as a human being rather than as a worker, such as social insurance, welfare and food stamps.

The survey instrument12 used to collect the TIESR dataset was adapted from the template used by researchers in Elkins and Ginsburg’s Comparative Constitutions Project (CCP) to code the constitutions of the countries of the world.13 In comparison with the CCP, the aims of the TIESR project are quite limited; it codes only ESRs in extant constitutions. Yet, within these limits it is more expansive, in that it captures the constitutional status (or “strength”) of such rights – as justiciable, aspirational, or absent.

Some constitutions confer justiciable status on some or all ESRs, while others treat such rights as aspirational principles. Although the textual status of a right is no guarantee of its actual implementation, constitutional texts offer clues regard-

12 Jung, ‘TIESR Coding Manual’ (n 6).
ing the relative standing of particular rights, the scope of state responsibility, and the appropriate role of the law. The legal community has historically accorded secondary status to economic and social rights – in part because they believed such rights were not amenable to judicial review or enforcement. Older constitutions that included ESRs, such as the Indian constitution, identified them as directive principles of state policy.

Now, however, many constitutional texts identify ESRs as justiciable, according them equal status, at least on paper, with civil and political rights. Along with constitutional presence, constitutional status – either justiciable or aspirational – is another indicator of the contemporary standing of economic and social rights.

Nevertheless, whereas the presence or absence of individual rights is fairly straightforward, whether a constitution identifies a right as justiciable can occasionally involve a judgment call. Indeed, some constitutions are presumably designed to be vague on this question, leaving the relative standing of a right open to judicial interpretation. We define justiciability as a condition under which particular rights appear to be formally enforceable through the domestic court system, as manifest in the relevant constitutional text. Courtis specifies that justiciability entails ‘the possibility for alleged victims of violations of... rights to file a complaint before an impartial body, and request adequate remedies or redress if a violation is deemed to have occurred’. Mapulanga-Hulston notes further that the key factors in determining justiciability are ‘whether the right would be suited to determination in judicial proceedings, whether it vests an


enforceable right in the individual, and whether it lends itself to sufficiently specific obligations on the part of states'.

Many constitutions are clear that those rights identified as “fundamental” or “primary”, or listed in a particular section of the constitution, are judicially enforceable. Constitutions may explicitly distinguish between “fundamental” rights, which they identify as justiciable, and “directive principles of state policy”, which are aspirational. For example, the Albanian Constitution contains several ESRs that are subject to judicial review. However, those rights articulated in article 59(1), including the right to housing, are qualified by 59(2), which states that ‘fulfillment of social objectives may not be claimed directly in court. The law defines the conditions and extent to which the realization of these objectives can be claimed’. Historically, the distinction between justiciable and aspirational rights corresponded with a bifurcation between “civil and political” and “economic and social” rights. This is no longer the case, and it is now common to see ESRs grouped with “fundamental” rights and explicitly identified as justiciable.

To ascertain justiciability, coders first identified where the right appeared in the constitution. Coders also considered the significance of language in determining justiciability. Some constitutions, for example, identified certain matters as a duty or obligation of the state. This phrasing is particularly common when it comes to environmental and child protection, which are often represented in such a manner rather than explicitly in the language of “rights”. In instances where the constitution included such language, and where provisions for judicial enforcement were also laid out in the constitution, we coded the variable as justiciable, even though the word “right” did not appear.

Additionally, in order for any right in a particular constitution to be coded as justiciable, the constitution must include an explicitly stated mechanism of judi-

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18 We use the terms “aspirational” and “directive” interchangeably. Although, strictly speaking, they may not be synonymous in all cases, it has not been possible to identify reliable differences in the way they are used across jurisdictions. Not all rights identified as “fundamental” are also justiciable, and some justiciable rights may appear in other sections of constitutions. Many constitutions do identify certain rights as “fundamental”, however, and are clear that fundamental rights are justiciable. In such cases, we used this information as a coding principle.
19 Specifically, the rights to form or join a trade union (art 50), strike (art 51), employment derived social security (arts 49.2, 52.2), child protection (art 54), education (art 57), healthcare (art 55), and social security (art 52.1) are justiciable elements of the Albanian constitution (‘Kushtetuta e Republikës se Shqipësisë [Constitution]’, 1998)
20 Ibid.
Constitutions that enshrine justiciable ESRs normally include provisions for individuals to make claims in court to demand the review of alleged human rights violations. Constitutions that include justiciable rights state (whether explicitly or implicitly) that individuals have the power to initiate judicial review. Where the standing of individuals was unclear, or did not exist, the researchers made a note of this and coded rights as “aspirational”.

These sorting criteria were first used to ascertain whether economic and social rights existed as a general category—with the same status, as justiciable or aspirational—within a constitution. Some constitutions have separate sections that list rights, and some have a neat distinction between civil and political, economic and social (and cultural) rights. However, many constitutions are not written in this manner, and rights are often scattered throughout a constitutional text. About one third of the constitutions in our dataset identify some ESRs as aspirational and others as justiciable. In other words, it was not possible to identify entire constitutions as “justiciable” or “aspirational”. Each right was therefore analysed separately, and coded according to the trichotomous categorisation outlined below and in Table 1 – as justiciable, aspirational, or absent.22

21 One anonymous reviewer suggested that ‘the requirement for an explicit mechanism of judicial review would mean that in the US (and in many constitutions patterned after the US constitution) even civil and political rights would be coded as non-justiciable. Is this coding rule leading to systematic under-counting of ESR in common law constitutions that take judicial review for granted?’ Happily, the answer is no. There are 38 constitutions in the dataset that have no justiciable rights at all. Not a single one of these is a pure common law constitution (according to the Juri-Globe classification). Three of the 38 (Bahrain, Qatar, and Yemen) are classified as civil, common, customary, and Muslim law countries. The rest are civil law or civil and Muslim or customary law countries. Although there are countries that treat rights that appear to be aspirational as justiciable, and countries that treat rights that appear to be justiciable as aspirational, common law countries do not appear more likely than civil law countries to exhibit the former tendency. The TIESR Dataset is limited to a study of constitutional text alone.

22 Constitutional clauses regarding expropriation (EXPR) and free markets (FMKT) were also coded in the dataset. However, both of these variables were coded dichotomously: as either absent or present. EXPR was not included in the current analysis as it was deemed to be a guarantee accruing to the state rather than accruing to individuals and as such did not fit with the general theme of the analysis, which relates to rights accruing to individuals in national constitutions. Similarly, it was felt that FMKT did not represent a specific right accruing to individuals, but rather described a particular form of economic organisation and as such also did not fit in with the focus of the current analysis. Further details regarding the coding criteria can be found in the survey instrument. Jung, ‘TIESR Coding Manual’ (n 6).
Using this coding framework, we found that the five most commonly enshrined ESRs are also the most commonly justiciable, albeit not in the same order (see Table 2). Whereas the right to education is the most commonly occurring ESR, appearing in 89% (121) of constitutions, the right to form or join a trade union is the most commonly justiciable, in 58% (79) of constitutions. Similarly, the four least common ESRs — the rights to housing, to food and water, to land and to development — were also least often justiciable. With the exception of the right to form or join a trade union, rights accorded to individuals on the basis of their status in the labour market—the rights to strike, social security related to employment, a fair wage, rest and leisure, and a healthy work environment—occur in roughly half of all countries (45%-60%) and are justiciable in roughly one third (29%-39%). These “worker’s rights” cluster in the middle in both columns (see Table 2) and, as we shall see below, are those that exhibit the greatest variation across region, time, and legal tradition.

### Table 1. Rights coding values

<table>
<thead>
<tr>
<th>Value</th>
<th>Label</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>‘Justiciable’</td>
<td>• The government can be taken to court for failing to guarantee the economic and social rights promised in the constitution.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Citizens have legal recourse to ensure the fulfilment of their constitutional rights; there is usually a mechanism for judicial review enshrined in the constitution.</td>
</tr>
<tr>
<td>1</td>
<td>‘Aspirational,’ or ‘Directive Principle of State Policy’</td>
<td>• Enumeration of constitutional rights intended to guide state policy and/or express ideals, but these are not binding. Directs government to take social welfare into account when making policy decisions, but creates no obligation to do so.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Citizens do not have legal recourse to ensure the fulfilment of their constitutional rights.</td>
</tr>
<tr>
<td>0</td>
<td>‘Absent’</td>
<td>• The item is not mentioned in the constitution: neither as a justiciable or aspirational right, nor as a directive principle.</td>
</tr>
</tbody>
</table>
Nearly every nation now possesses a written constitution, and the majority of these contemplate the judicial review of legislative action premised on a set of rights accorded to individual members of society. Of the 136 countries analysed in this article, all but 4 contain at least one economic or social right (ESR), while 116 contain 5 or more. Moreover, 91 constitutions contain a least 1 explicitly justiciable economic or social right. In short, the contemporary constitutional model tends to accord standing to economic and social rights to an extent rarely contemplated in earlier constitutions.23 The fact that such rights are often explic-
itly identified as justiciable also confirms earlier findings that the contemporary constitutional model includes a more expansive notion of the proper scope of the judiciary.

One of the most salient aspects of these constitutions is that they are new. Nearly 80% of the constitutions we analysed were written after 1974, and about two-thirds have been written since 1989. Most of the “old” constitutions have also been substantially amended in the last thirty-five years. The period between 1974 and 2010 nevertheless contains substantial internal temporal variation, which we tried to capture by organising the constitutions by date and dividing them into four distinct “eras”, based on broadly relevant global events and trends that could (hypothetically) have affected constitution drafting. In particular, we hypothesise that, with respect to ESRs, there may be relevant differences between constitutions drafted in the post-War period (1945-1973); in the “third wave” of democratisation (1974-1989); during the height of the Washington Consensus (1990-1999); and in the post-Washington Consensus era (2000-present).

As others have also noted, the average number of rights in a constitution has increased dramatically over time. This is also true of economic and social rights. Indeed, every constitution adopted since 1974 contains at least one ESR.

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23 Davis (n 14).
26 Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century (University of Oklahoma 1991).
28 Kerry Rittich argues that the post-Washington Consensus period includes contradictory imperatives. Ostensibly driven by a backlash against the Washington Consensus, IFIs have prioritised human rights, even though they continue to resist economic and social rights. At the same time, transactional freedom, property rights, and the entitlement to participate in markets have been elevated to the status of basic human rights. Kerry Rittich, ‘The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social’ (2004) 26 Michigan Journal of International Law 199–244.
shown in Table 3, constitutions drafted before 1974 contained an average of 6.8 ESRs, those drafted between 1974 and 1989 had an average of 9.7 ESRs.\(^{30}\) This initial increase was nevertheless subsequently followed by a slight, but consistent, decline over the next two decades. Although ESRs are much more common in contemporary constitutions than they are in “old” constitutions, they appear less frequently in those constitutions written during and after the period of the Washington Consensus (See Table 3). Constitutions written between 1990-1999 include an average of 9.5 economic and social rights, and those written after 2000 include an even lower 8.9 ESRs. This finding is somewhat surprising due to the regional effect that one might have expected from constitution drafting in the 1990s in the former Soviet states and in Latin America. All but one of the rights-heavy former Soviet constitutions were written in the 1990s; while seven of the twelve “new” (post-1974) constitutions in Latin America were written after 1990. When such rights did make it into constitutions written after 1989, they were also much more likely to be aspirational: non-binding guidelines for policy-making. The pattern of marked expansion followed by some contraction is more pronounced with respect to justiciable rights. Constitutions written after 1974 include an average of more than twice as many justiciable rights as those written before 1974; 18 of the 19 constitutions written in the 1974-1989 period, which are still in force, include at least one justiciable ESR.\(^{31}\) Regardless, the number of constitutions drafted without any justiciable rights increased significantly after 1989 (See Table 3).

### Table 3. Economic and social rights per constitution over time

<table>
<thead>
<tr>
<th>Era</th>
<th>Average (#)</th>
<th>Median (#)</th>
<th>No ESRs (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Present</td>
<td>Justiciable</td>
<td>Present</td>
</tr>
<tr>
<td>Pre-1974</td>
<td>6.8</td>
<td>3.1</td>
<td>8</td>
</tr>
<tr>
<td>1974-1989</td>
<td>9.7</td>
<td>6.5</td>
<td>10</td>
</tr>
<tr>
<td>1990-1999</td>
<td>9.5</td>
<td>5.7</td>
<td>10</td>
</tr>
<tr>
<td>2000-Present</td>
<td>8.9</td>
<td>5.5</td>
<td>8.5</td>
</tr>
<tr>
<td>Global</td>
<td>8.8</td>
<td>5.2</td>
<td>9.5</td>
</tr>
</tbody>
</table>

\(^{30}\) We refer to constitutionally enshrined ESRs in two ways: as justiciable and as present. The former refers only to those rights that meet the criteria for coding as “justiciable” that is outlined above, while the latter includes both justiciable and aspirationally enshrined rights.

\(^{31}\) The 1982 Chinese Constitution is the exception here; although it does, however, include 10 aspirational ESRs.
Aggregate trends, however, are only part of the picture. Specific rights also exhibit different patterns of variation. Worker’s rights,\(^\text{32}\) such as the right to form or join a trade union, tend to increase after 1973, but the frequency of their adoption in any form decreases in subsequent periods (particularly after 1999). Rights to housing, food and water demonstrate a similar pattern – increasing after 1973, only to then decline in prevalence. Rights to healthcare, education, child protection, and social security, on the other hand, show the same initial jump, yet without the subsequent decline. For those rights, the initial sharp increase is followed by a slight but steady proliferation (particularly after the millennium). Similarly, the rights to a healthy environment and to environmental protection have become increasingly entrenched over time.

III. Rights and Regions

Disaggregating the data by region also revealed interesting patterns of ESR entrenchment. We divided our cases into five regional categories, chosen on the basis of standard geographical conventions and/or historical linkages. The regions are Latin America, Sub-Saharan Africa, former Soviet satellites and republics, the Arab States, and Asia. Statistically, fifteen of the sixteen ESRs we measured show significant variation across regions.\(^\text{33}\) Three of the five regions we identified—Latin America, the former Soviet satellites and republics, and the Arab states—exhibit a high degree of internal consistency in the type and strength (justiciable or aspirational) of rights adopted. In these regions at least, it seems reasonable to talk about a regional model of ESR incorporation. In Sub-Saharan Africa, there is a high degree of internal variation with respect to ESR incorporation, which fol-

\(^{32}\) Specifically, the rights to strike, form or join a trade union, rest and leisure, have a healthy working environment, social security derived from employment, and receive a fair wage.

\(^{33}\) The exception was the right to development, which is absent in all but a few states. When cross-tabulated with region, all but the right to development (DEVT) return Cramers V values ranging between .275 and .454 that are statistically significant at the \(p<0.01\) level, rejecting the null hypothesis and demonstrating that regional variation is statistically significant (i.e. the regions we chose are supportive of systematic difference between regions). Cognisant of the notable difficulty in precisely interpreting this measure, we invoke it only as suggestive of meaningful regional difference and do not seek to advance particular claims about the strength of the associations. For a broader discussion of the issues surrounding the analysis of nominal data see, eg HT Reynolds, *Analysis of Nominal Data* (2nd edn, Sage 1984), Quantitative Applications in the Social Sciences.
lows no obvious pattern. Asia appears to be more appropriately divided into two or three sub-regions.34

Table 4. Economic and social rights per constitution by region

<table>
<thead>
<tr>
<th>Region</th>
<th>Average (#)</th>
<th>Median (#)</th>
<th>None (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Present</td>
<td>Justiciable</td>
<td>Present</td>
</tr>
<tr>
<td>Arab States</td>
<td>5.6</td>
<td>1.5</td>
<td>6</td>
</tr>
<tr>
<td>Asia</td>
<td>7.6</td>
<td>2.9</td>
<td>8</td>
</tr>
<tr>
<td>Former Soviet States</td>
<td>10.6</td>
<td>8.4</td>
<td>11</td>
</tr>
<tr>
<td>Latin America</td>
<td>12.4</td>
<td>9.2</td>
<td>13</td>
</tr>
<tr>
<td>Sub-Saharan Africa</td>
<td>8.3</td>
<td>4.4</td>
<td>8</td>
</tr>
<tr>
<td>Global</td>
<td>8.8</td>
<td>5.2</td>
<td>9.5</td>
</tr>
</tbody>
</table>

The Arab States region includes twenty-one constitutions,35 thirteen of which were adopted after 1989. All of the countries in this region, except Turkey, employ some form of ‘Muslim Law,’ either exclusively or in combination with civil law and/or common law.36 Constitutions in this region have the lowest average number of ESRs, in terms of both presence and justiciability. Three-quarters of Arab States’ constitutions contain no justiciable ESRs. Nevertheless, the post-2000 incidence of justiciable rights four per constitution is substantially higher than the previous average of less than one.37

Asia includes twenty-four constitutions,38 and a wide range of legal traditions. This region contains the largest proportion of “old” constitutions, with only thir-

34 In fact we tried to do this, but the Asian sub-regions had too few cases to allow for statistical manipulation. As it is, our regions are in general roughly the same size, with the exception of Sub Saharan Africa.
35 The twenty-one constitutions of Arab States region are Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates and Yemen.
36 For present purposes, “Muslim Law” is defined as ‘an autonomous legal system, which is of a religious nature and predominantly based on the Koran. In a number of countries of Muslim tradition, it tends to be limited to the laws relating to personal status, although personal status can be rather broadly defined’, Louis Perret and others, ‘World Legal Systems’, (2008) JuriGlobe Research Group <http://www.juriglobe.ca/eng/index.php> accessed 20 January 2011.
37 The 1974-1989 period does exhibit an average of eight justiciable rights per constitution, but this is derived from a single case, Iran’s 1979 Constitution, and can reasonably be considered an outlier.
38 Afghanistan, Bangladesh, Bhutan, Brunei, Cambodia, China, East Timor (Timor Leste), India, Indonesia, Japan, Laos, Malaysia, Mongolia, Myanmar, Nepal, North Korea (DPRK), Pakistan, Philippines, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, Vietnam.
teen adopted after 1974.\textsuperscript{39} Although as a whole Asia has no common legal or constitutional tradition,\textsuperscript{40} with regard to ESR incorporation, a few sub-regional clusters are identifiable. Bangladesh, Sri Lanka, Nepal, and Pakistan appear to have emulated the Indian constitutional model by enshrining a wide range of economic and social rights, predominantly as directive principles of state policy.\textsuperscript{41} Asia also includes three of the four countries with no constitutionally enshrined ESRs: Brunei, Singapore and Malaysia. Finally, there are a number of countries whose constitutions generally include the five most common rights, exclude all of the least common rights, and have a generally lower than average incidence of “worker’s rights”: Afghanistan, Indonesia, Japan, South Korea, Taiwan, Vietnam, Laos, and Bhutan.

The \textit{Former Soviet Satellites and Republics (FSSR)} include twenty-five constitutions\textsuperscript{42} which, with the exception of Hungary (1949), were all written in the context of post-1989 democratic transitions. To some extent, these constitutions exhibit a common pattern of ESR incorporation. Constitutions in this region tend to contain both workers’ rights and the more standard set of social rights,\textsuperscript{43} and they exclude rights to land, housing, food and water, and development. In this region, ESRs are also much more likely to be justiciable than aspirational. Nevertheless, despite their common heritage and the temporal proximity of their drafting, these constitutions are hardly uniform. Sadurski argues that the incorporation of economic and social rights in former Soviet constitutions was shaped by a tension between elite commitments to free-market reform and popular expectations regard-

\begin{itemize}
\item \textsuperscript{39} However, twenty-three constitutions (all but Japan) have been amended in some fashion since 1974, while seventeen have been amended post-2000.
\item \textsuperscript{40} Tom Ginsburg, \textit{Judicial Review in New Democracies: Constitutional Courts in Asian Cases} (Cambridge University Press 2003). Cabestan suggests that a number of factors, including colonialism, ‘forced openings,’ rejection of western domination, and Islam, have played important roles in differentially shaping the development of national legal systems in Asia, highlighting at least three major ‘types’ of law in the region: common law; Romano-Germanic law; and socialist law. Jean-Pierre Cabestan, ‘Constitutionalism and Western Legal Traditions in Human Rights in Asian Legal Systems: With a Special Focus on Chinese Legal Systems’ in Jorge Costa Oliveira and Paulo Cardinal (eds), \textit{One Country, Two Systems, Three Legal Orders: Perspectives of Evolution} (Springer Berlin Heidelberg 2009).
\item \textsuperscript{41} Iain Byrne and Sara Hossain, ‘South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan, and Sri Lanka’ in \textit{Langford (n 7)} 125–26.
\item \textsuperscript{42} The twenty-five constitutions of the \textit{Former Soviet Satellites and Republics} are Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.
\item \textsuperscript{43} Namely, child protection (CPRO), education (EDUC), healthcare (HLTH), and social security (SSEC).
\end{itemize}
ing the social welfare responsibilities of states. These conflicting imperatives were resolved differently, he argues, in each constitution-drafting process. The constitution of Bosnia-Herzegovina, written in 1995, is the consistent outlier in this group, with almost no ESRs. Conversely, the Serbian constitution of 2006 includes a wide range of justiciable economic and social rights.

Latin America includes twenty-two constitutions, and forms the most generally cohesive regional body of constitutions. Depending on the classification scheme, either nineteen or twenty of these constitutions emerge from civil law systems—Belize is a common law country, Guyana is mixed civil and common law, and Cuba’s legal system is considered by some to be socialist. Coupled with the prevalence of amparo, Latin American constitutions exhibit a pattern of strong ESR entrenchment. This region has the highest average and median aggregate numbers of both present and justiciable rights—with every right except the right to development present in more than 60% of the constitutions. The four “standard” social rights are particularly well represented: the right to education is present in every constitution and the rights to health, social security, and child protection are present (respectively) in twenty, nineteen, and eighteen of the twenty-two constitutions in the region. Even the four least common rights — to land, housing, food and water, and development — are significantly more common in Latin American than in any other region. Moreover, Latin America does not follow the general pat-

45 Sadurski, ‘Rights Before Courts’ (n 8)
46 In discussing the same broad region, Sadurski finds that nine constitutions in the region contain generous economic and social rights protections, six contain limited social rights protections although do include relatively strong protections of workers’ rights; three protect social rights reasonably well but offer few other protections; and two contain “very few at all”. This is somewhat at odds with our own findings. We suspect that the majority of the divergence is a result of constitutional changes subsequent to the publication of the volume. However, in at least one case (that of Georgia), our reading of the constitution is at odds with that of Sadurski, whereas he finds the Georgian Constitution to contain ‘very few’ economic and social rights, our analysis, on the other hand, finds ten justiciable ESRs in the constitution. ibid. 177–78; see, also Malcolm Langford, ‘Hungary’ in Langford (n 7) 250.
47 Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.
49 Perret and others (n 36).
tern of a marked increase in ESR protection after 1973. Instead, Latin American constitutions generally included at least some economic and social rights long before the contemporary period, starting with the Mexican constitution in 1917.51

Sub-Saharan Africa includes forty-four constitutions,52 with several interesting features. For example, nearly two-thirds of the constitutions in the region were promulgated in the 1990s, and three-quarters include some aspect of customary law. Nevertheless, this region has no common legal or constitutional tradition, and appears to exhibit as much internal variation as the sample as a whole does. At the same time, the African Charter on Human and Peoples' Rights, promulgated in 1981, recognises economic, social, and cultural rights at the same level as civil and political rights. Although the Charter has mostly generated litigation on civil and political rights, it is also an important source of emerging ESR jurisprudence in Africa.53 Through their membership in the Organization of African Unity, even countries with weak constitutional commitments to ESRs derive a justiciable obligation to protect such rights. This source of ESR incorporation is not measured by the TIESR Dataset.

Individually, the rights highlight the general patterns discussed above. When the Phi values are calculated by right by region, the constitutions of the Arab States are negatively associated with almost every right.54 There are relatively

51 Carozza (n 48).
53 Danwood Mzikenge Chirwa, 'African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Langford (n 7).
54 We used Phi to measure the associations between individual ESRs and both region and legal tradition. This measure is similar to the "goodness of fit" test based on the calculation of Chi-Square, only it eliminates the variations in magnitude that occur as a result of sample size by standardising the results, thus providing a more consistent and comparable measure. If the relationship is found to be significant, the null hypothesis that the two variables are statistically independent is rejected. This means that there is a statistically significant association between the two variables. Statistical significance does not, however, mean that an association is meaningful. The number reported in the cell, the Phi coefficient for that particular relationship, is what indicates the strength in this case. Using the example of the relationship of French Legal Tradition and the right to strike: 39.2 % (0.392*100) of the variation in the presence of the right to strike can be derived from the value of the French legal tradition variable (or the reverse). In other words, if we assume (for the present) that there is some kind of non-spurious relationship between the two, we can explain about 40 % of the change in the value of one variable with the value of the other variable.
fewer significant associations between ESRs and Asian constitutions, but those that are significant are all negative. Sub-Saharan Africa displays almost no directional associations, and both the former Soviet states and Latin America exhibit positive correlations. Put simply, ESRs are least likely to be found in the constitutions of Arab States, somewhat more likely to be found in those of Asian countries, most likely to be found in Latin American constitutions, and fairly common in Former Soviet Republics. The former Soviet region is slightly more likely than any other region to have justiciable economic rights, but the distance from Latin American constitutions is not great. Justiciable economic rights are less common in Sub-Saharan Africa, and rare in Asia and the Arab States.

IV. Rights and Legal Traditions

There appear to be two dominant frameworks for classifying legal tradition. The first, developed by the JuriGlobe project, identifies four types of legal tradition: civil law, common law, Muslim law, and traditional or customary law. The second, advanced by La Porta and others, is a system of classification based on “legal origin” derived from commercial legal practices. This scheme includes five categories: common, French civil, German civil, Scandinavian, and socialist. Legal tradition refers to the rules, practices, and norms of law and legal reasoning that exist in a particular jurisdiction. It is not the same as constitutional tradition, and, although it is reasonable to expect the former to influence the latter, the degree of that influence is likely to vary depending on any number of extra-legal circumstances.

The TIESR Dataset reveals that civil law countries are significantly more likely to include economic and social rights than common law countries. It has been suggested that the correlation between civil law traditions and economic and social rights is an effect arising from the fact that the developing world (which is mostly civil law) is leading the way with respect to ESR entrenchment. While this is true, our data indicate that, even within the developing

55 Perret and others (n 36).
56 La Porta and others (n 50). However, our analysis excluded the Scandinavian and German legal traditions, of which there were (respectively) zero and three instances in this iteration of the TIESR data.
57 Classified according to the JuriGlobe system. Perret and others (n 37).
58 This reasonable interpretation was proposed by an anonymous reviewer of this paper.
world, constitutions in civil law countries are significantly more likely to entrench economic and social rights than those in common law countries.

Donald Kommers has argued that because common law countries endorse the principle of judicial review, they tend to have stronger rights protections than civil law countries. The latter, he argues, tend to reject US style judicial review on the principle that the twin commitments to generality and the service of the commonweal, which underpin civil law, are best served through national assemblies, which are the source of all law. This finding, which focused exclusively on civil and political rights, highlights important differences in the ways economic and social rights are advanced and entrenched. Our data indicates that economic and social rights are not only more prevalent but significantly more likely to be identified as justiciable in the constitutions of civil law countries.

<table>
<thead>
<tr>
<th>Right</th>
<th>Civil Law, n=112</th>
<th>Common Law, n=35</th>
<th>Customary Law, n=57</th>
<th>Muslim Law, n=34</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Present</td>
<td>Justiciable</td>
<td>Present</td>
<td>Justiciable</td>
</tr>
<tr>
<td>FRWG</td>
<td>.220</td>
<td>.238</td>
<td>(.254)</td>
<td>(.299)</td>
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<tr>
<td>TRDU</td>
<td>.183</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>STRK</td>
<td>.498</td>
<td>.330</td>
<td>(.479)</td>
<td>(.298)</td>
</tr>
<tr>
<td>LEIS</td>
<td>-</td>
<td>.232</td>
<td>(.292)</td>
<td>(.224)</td>
</tr>
<tr>
<td>HWRK</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>SSEM</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>(.208)</td>
</tr>
<tr>
<td>SSEC</td>
<td>-</td>
<td>.264</td>
<td>(.279)</td>
<td>-</td>
</tr>
</tbody>
</table>

59 Donald P Kommers, 'Judicial Review: Its Influence Abroad' (1976) 428 The Annals of the American Academy of Political and Social Science 52–64. Conceptually, the centralised judicial review function of constitutional tribunals in civil law legal traditions has been seen as fulfilling the role of a “negative legislature”. As such, while it may be perceived as legitimate for such a court (although not the ordinary or lower courts of the jurisdiction) to disallow a statute for violating the constitution, the idea of such a court taking a positive legislative role, for example the imposition of fiscal obligations in the pursuit of rights realization, has traditionally been seen as illegitimate. Victor Ferreres Comella, ‘Courts in Latin America and the Constraints of the Civil Law Tradition’ (2010) 89 Texas Law Review 1967–1975; Hans Kelsen, ‘Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution’ (1942) 4 The Journal of Politics 183–200.

60 Nevertheless, Langford also argues that ‘social rights jurisprudence is almost always significant in those jurisdictions that have developed robust judicial or quasi-judicial review for civil and political rights’, Langford, ‘The Justiciability of Social Rights’ (n 7) 10. Full or part common law systems are nevertheless much more likely to include ESRs than part Muslim and customary law states. See n 54 for a discussion on the statistical method.
The general trend is that full or part civil law jurisdictions are the most likely to have constitutions with ESRs in them, and most likely to identify those rights as justiciable. The two regions of the world that most commonly entrench ESRs (Latin America and the former Soviet region) are also overwhelmingly civil law jurisdictions, suggesting that the regional effect is driven by a common legal tradition. Within Latin America, where there is a strong regional norm of ESR entrenchment, the two common law and part common law countries – Belize and Guyana – are notable outliers, with very few economic and social rights. Besides legal tradition, the regional effect may also be driven by the diffusion of ideas and policies through epistemic communities, common perceptions regarding the requirements of global competition, and the tendency of countries to copy neighbouring or regionally influential constitutions.61

Unlike that of the JuriGlobe project, La Porta’s classification framework is exclusive—a country can only be positively coded in one category. This results in markedly fewer civil law jurisdictions. Nonetheless in the two generally analogous

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categories — French/civil and UK/common — the directions of association are in agreement across both systems. Unsurprisingly, the socialist legal tradition also shows evidence of a positive relationship with ESRs (with the exception of the right to land).

We have no clear hypothesis regarding the correlation between ESRs and civil law countries or the seeming reluctance of common law countries to incorporate ESRs into their constitutions, even in the contemporary (ESR-friendly) era. Nevertheless, coupled with the earlier research that found a positive correlation between rights protection and common law countries, our data suggests that common law countries are not rights-friendly per se, but that they tend to endorse judicially enforceable guarantees which limit government activity, and have been more reluctant than civil law countries to embrace the so-called positive rights. This finding generally corroborates Law and Versteeg’s characterisa-

<table>
<thead>
<tr>
<th>Table 6. Legal Tradition with Economic and Social Rights: La Porta.</th>
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<tbody>
<tr>
<td><strong>French, n=67</strong></td>
</tr>
<tr>
<td>Present</td>
</tr>
<tr>
<td>FRWG</td>
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<tr>
<td>TRDU</td>
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<td>STRK</td>
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<td>HENV</td>
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<td>ENVP</td>
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— sig. <.05 * sig. <.01 ** sig. <.001
tion of common law countries as “libertarian”. Common law countries appear more likely to endorse a particular conception of rights as individual protections from state intervention, rather than state obligations toward citizens. On the other hand, civil law jurisdictions, long considered hostile to the judicial imposition of obligations on legislators, are at least formally supportive of a role for the judiciary beyond that of a negative legislator, and they are more likely than other legal systems to entrench justiciable positive rights claims.

V. Conclusion

The TIESR dataset identifies the constitutional presence, absence, and justiciable-ability of ESRs. This data can be used to conduct research into the transformation of constitutional texts, changing conceptions of the appropriate scope of the judiciary, the evolving legitimacy of economic and social rights, and contemporary conceptions of the scope of state responsibility, contemporary constitutional models, the relationship between such rights and neoliberal economic policy, and the effect of such rights on human well-being. To these ends, the dataset was designed to disaggregate as much as possible in two directions.

First, it includes seventeen different economic and social rights, where other datasets include only five or six, or subsume three or four different rights under one category. By including the full range of ESRs, we are able to establish which particular economic and social rights are proliferating and which are still relatively rare. Indeed we found that there is such wide variation in the incorporation of different ESRs that it seems unreasonable to think of them as a coherent category. While some ESRs are practically universal, others are still rarely enshrined in national constitutions. By merely counting how often they appear in constitutions, we are able to disaggregate the universe of ESRs into three distinct ‘families’ of rights: standard social rights (which are very common), non-standard social rights (which are quite rare), and worker’s rights (which vary the most significantly across constitutions). The five standard social rights are education, healthcare, trade union, child protection, and social security. The four non-standard

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62 Law and Versteeg (n 29).

63 This trend is observable in both legal classification schemes. Under the Juriglobe scheme, those countries with a full or partial civil law tradition average 5.8 justiciable ESRs per constitution, while those without such a tradition have an average of 2.3. Under the LaPorta and others classification the trend is attenuated but still apparent: constitutions in jurisdictions with French legal origins average 5.7 justiciable ESRs and those without average 4.6.
social rights are housing, food and water, land, and development. Worker's rights include leisure, healthy work environment, strike, and fair wage.

Second, we can tell where they are spreading. Although it is true that constitutions written in the last thirty-five years are much more likely to include ESRs than the post-war constitutions, there is still a wide variation that reveals interesting patterns. ESRs are most common in Latin America and the former Soviet region, and least common in the Arab States and parts of Asia. Constitutions written between 1974 and 1989 include a higher average number of rights than constitutions written after 1990. Constitutions in civil law countries are significantly more likely than constitutions in common law countries to include ESRs. Constitutions that include some aspect of Muslim or customary law are least likely to include ESRs.

Third, the dataset attempts to establish the constitutional status of each individual right: as either absent, aspirational, or justiciable. Whether rights are practically justiciable depends in (large) part on factors beyond the constitution alone. Nevertheless, constitutional texts offer a variety of insights regarding the contemporary status of ESRs. Even if constitutionally entrenched justiciability does not guarantee legal remedy, it may reveal where economic and social rights have formally co-equal status with civil and political rights in the constitution. Since ESRs have long been considered subordinate to civil and political rights, their comparative standing within a constitution – as justiciable, like most civil and political rights, or merely aspirational – may tell us as much about their relative contemporary status as measuring their mere presence or absence. We acknowledge that constitutional texts are not a sufficient indicator of the extent to which economic and social rights are respected or implemented in particular countries, but we argue that they are a good indicator of the relative contemporary standing of such rights, and of the legitimacy of the judiciary.

The dataset itself offers little in the way of conclusive evidence regarding the effect of constitutionally entrenched economic and social rights on human well-being. However, because it provides such a detailed account of the status of every right in most constitutions, it can be used in conjunction with other data to measure the impact of specific rights and the relevance of textual distinctions regarding justiciability on human well-being. Such data puts researchers in a position to explore whether a rhetorical commitment to rights and justiciability signals an actual commitment to human welfare.