

Constitutional Convergence in Human Rights?

The Reciprocal Relationship between Human Rights Treaties and National Constitutions

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Nearly two decades ago, Professor Louis Henkin (1990: ix) begins his magisterial *The Age of Rights* with a ringing claim of universality:

Ours is the Age of Rights. Human Rights is the idea of our time, the only moral-political idea to have received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today's 170 states—old states and new; religious, secular and atheist; Western and Eastern; democratic, authoritarian and totalitarian; market economy, socialist, and mixed; rich and poor, developed, developing and less developed. Human rights is the subject of numerous international agreements, the daily grist of the mills of international politics, and a bone of continuing contention among superpowers.

Henkin is partly responsible for articulating the conventional wisdom about the spread of rights. A common periodization and conceptualization scheme, sometimes attributed to Karel Vasak (1977), describes a "first generation" of negative liberties taking root in early British jurisprudence and the US and French constitutions. With the rise of industrial society, second generation or positive rights began to emerge. After World War II, in reaction to Nazi horrors, the international community articulated an expansive set of rights in the Universal Declaration of Human Rights (UDHR), a document that included both first and second generation rights as well as collective rights such as those to self-determination. Presumably, the UDHR in turn helped to inform the rights menu in subsequent national constitutions so that, as Henkin (1990: 17) put it "the international law of human rights differs little in content from many national systems of human rights law." So goes the story of the "triumph" of rights.

Henkin is surely right about the universality of the general concept of human rights, just as he is also correct to note that enforcement in practice lags far behind normative claims. We note simply that only nine constitutions since 1789 have neglected to incorporate *some* set of rights (see Table 2). But Henkin's historical observations, and the conventional wisdom that they embody about the spread of rights, raise as many questions as they answer.

Consider the following. The Third Amendment to the US Constitution of 1789 provides citizens with a right to be free from the obligation of quartering soldiers; the Second Amendment contains a right to bear arms. The former provision has been adopted in exactly one other constitution to our knowledge, the 1975 charter of the former US territory the Marshall Islands. The right to bear arms was borrowed in a number of Latin American constitutions in the early 19th century but is now virtually extinct, and was not contained in any of the international covenants. Perhaps unsurprisingly, Mongolia's right to pasture and Sweden's right to reindeer-herding have not been widely adopted by other countries. Conversely, virtually all

constitutions grant an explicit right to free movement (which is contained in the Universal Declaration and ICCPR), and a majority provide for the right of citizens not to be deported (which is not in the international instruments). Why is it that some rights have spread while others have not? Has there been any degree of convergence on the menu of rights?

A related question concerns the mechanisms of rights diffusion. We have some preliminary speculation on possible channels by which rights diffuse, but these patterns have not been subject to rigorous study and the precise mechanisms are far from clear. A key question for the present analysis is the role of the international instruments in this regard. Have the various declarations and treaties led to the adoption of their contents in national constitutions? Is there less diversity in rights in constitutions post-UDHR than pre-UDHR? Do regional patterns in the configuration of rights become less pronounced? Which countries followed the lead of these treaties? To what degree do states that had constitutions prior to the UDHR adapt compared to states that were born post-UDHR? And how have the international instruments themselves been constituted by national constitutional practice?

This paper uses a new dataset, the Comparative Constitutions Project (Elkins and Ginsburg), to explore the empirical underpinnings of the spread of rights. The CCP project, which is ongoing, seeks to analyze the contents of all national constitutions for independent states since 1789, along with selected international instruments.¹ We have identified 801 unique constitutional systems during this period, and have gathered data on roughly 2/3 of these.²

The paper proceeds as follows. First it reviews the conventional wisdom, showing that many writers have assumed convergence in the content of rights. There is, to date, little systematic evidence of convergence, nor much agreement on the mechanism by which convergence occurs. The paper then goes on to speculate about the different possible relationships between international and domestic mechanisms of rights enforcement. Finally, it provides descriptive evidence showing about the extent of convergence. The story it tells is more complex than a simple narrative of convergence. Some international instruments seem to have had an effect of helping states coordinate their bundles of rights, thus leading to greater levels of convergence. Others have not had this effect. The paper concludes with speculation as to the factors influencing this result.

Convergence: Prior Theory, Evidence and Mechanisms

There is no shortage of assertions about the universality of rights discourse. Some assert that national constitutional practice is converging under pressures of globalization (Tushnet 2008; Rahdert 2007: 561). Others assume that it already has done so. Weinrib (2006:89) for example,

¹ For more on the project see www.comparativeconstitutionsproject.org

² The sample for the present paper is roughly 550 of the world's 801 constitutions written since 1789.

identifies a postwar constitutional paradigm, developed in reaction to Naziism, in which equality and human dignity are central and in some ways superior to local history and culture. Rights discourse is inherently international in this view, and is instantiated in both national and international documents in much the same way.

There is much empirical and ideological debate on the impact of this development (Hathaway 2002; Landman 2005; Goodman and Jinks 2005; Simmons, forthcoming). Posner (2008: 1764-65) asserts that their adoption has had little impact.³ He speculates that the normative consensus, celebrated by Henkin in the quote opening this paper, reflects a consensus so shallow as to be meaningless. Hafner-Burton and Tsutsui (2006) as well as Hathaway (2002) argue that accession to international instruments does not lead to greater protection of rights on the ground. Others believe that the consensus is real and effective. Simmons (forthcoming) documents the gradual increase in ratifications over time, and argues, contra Hathaway and others, that ratification has a positive impact on practices for a subset of states (see also Landman 2005).

This paper is not concerned with the large and important debate on whether human rights commitments improve protection on the ground. Rather it focuses attention on an underexplored area, empirical documentation of the relationship between national and international norms. Most writing on human rights assumes that convergence has indeed occurred. Our brief discussion of the Third Amendment, however, suggests that some rights have not spread, leaving older constitutions as possible outliers. Exploring the patterns should prove useful. Ultimately, we would like to know what models, if any, influenced the adoption of the international instruments, and the extent to which those instruments have in turn influenced constitution drafters in their own efforts.

Origins and Spread

Few disagree with the notion that the human rights instruments are largely drawn from rights developed in the context of Western European constitutions. As Küng and Moltmann (1990:120) put it, "it was during the era of the Western Enlightenment that the formulations of human rights made their way into North American and European Constitutions, and it is through these constitutions that human rights have acquired world-wide recognition today." Yet smaller countries and non-western powers also contributed to the formation of international norms. Waltz (2001, 2002) demonstrates how many norms were pushed by smaller countries like Afghanistan and Saudi Arabia, and other non-Western powers like China pushed for inclusion of human rights in the UN Charter. Simmons (forthcoming) recounts the important role played by Lebanon's Charles Malik and China's Peng Chun in the formation of

³ He also argues that most international instruments focus on negative rights.

the text of the UDHR. Articles 22-27, which address socio-economic rights, were promoted not just by the Soviet bloc but Latin American, Asian and Middle Eastern countries (Waltz 2002: 444.) The Universal Declaration reflected the culmination of a long-standing international political movement (Waltz 2002: 439), and was not simply an imposition of powerful Western states.

In one recent contribution, Gardbaum (2008) compares the international instruments with a select set of domestic bills of rights, and finds significant similarities in terms of age, content and structure. Both levels, for example, allow certain rights to be qualified while a few are nonderogable. But his examination is general and does not include an examination of specific constitutions.

Perhaps the most thorough work to date on the actual spread of norms has been done by those associated with the World Society approach of Stanford sociologist John Meyer (Boli-Bennett and Meyer 1978; 1980; Ramirez 1987; Go 2003). In demonstrating constitutional convergence along a number of dimensions, including the rights of children and women's suffrage, these scholars argue that national constitutions "do not simply reflect processes of internal development," but rather "reflect legitimating ideas dominant in the world system at the time of their creation" (Boli-Bennett and Meyer 1978:805).

Mechanisms

The interesting – but often inscrutable – matter concerns the mechanism of diffusion. Certainly, convergence can occur from any combination of the many processes of interdependence that surface in discussions of policy adoption. Scholars have typologized this interdependence differently (e.g., Elkins forthcoming; Elkins and Simmons, 2005; Simmons, Dobbin, and Garrett 2008). Nonetheless, a central question is whether any purported convergence is rights is coordinated or not by international arrangements as opposed to being subject to a more horizontal, peer to peer, set of processes. In the former instance, we would expect convergence in the wake of international adoptions; in the latter, we would expect a more diffuse pattern.

In the human rights realm, Goodman and Jinks (2004) divide mechanisms into three categories: coercion, persuasion, and acculturation. Coercion occurs when states seek to encourage others to adopt norms, either through carrots or sticks. In the present context, this might occur when one state forces another to adopt a set of international or national human rights norms, either through constitutional imposition (Elkins, Ginsburg and Melton 2008). Persuasion is when one actor convinces another that norms are worth adopting, and involves a form of learning (Elkins and Simmons 2005). Acculturation, in contrast, occurs when actors internalize the idea that

norms should be adopted through some sort of “logic of appropriateness,” in March and Olson’s (1984) widely used phrase. In this sense it leans away from individual states as agents and examines a broader sociological structure as having concrete impact. Summarizing the earlier World Society literature, Goodman and Jinks (2004: 646-53) argue that these analyses demonstrate the important role of acculturation in both the spread of and impact of human rights. They note that neither wealth nor external pressure seem to be sufficient explanations of the spread of rights discourse. Rather, they suggest that acculturation of state actors is the primary mechanism by which rights spread. Constitutional rights and international rights share the same ideological origins, and the same experience of isomorphic diffusion which, in their account, bears little or no relations to conditions on the ground.

Goodman and Jinks speculate that such cultural processes might work in a number of ways. Government decision-makers might themselves be acculturated to adopt particular norms. This seems to be the implicit causal story associated with Anne-Marie Slaughters “government networks” of decision-makers who form the New World Order (2002). Alternatively, acculturation might occur through transnational interest groups that seek to change norms and behavior (Keck and Sikkink 1998). Finally, acculturation might occur at the level of the mass public, which then pressures leaders to adopt shared norms.

In another recent contribution, Law (2008) argues that competition for skilled labor in a globalized economy provides a mechanism for convergence in terms of rights protection. His argument is that high end workers prefer a package of policies that are protective of civil and political liberties, and so states competing for such workers will have to adopt rights.

Evidence from Drafting Exercises

Evidence to sort out these mechanisms is difficult to come by. We examined constitutional drafting and deliberation exercises for evidence in this regard, both in terms of the mechanisms of diffusion and the influence of international instruments. Ideally, one would like to be able to evaluate the relative weight, vis-à-vis a set of other considerations, that international norms had in the process of drafting constitutions. Unfortunately, such information is quite difficult to come by. Very few processes are accompanied by deliberations.

One does find occasional statements by those involved in constitutional drafting processes as to the importance of international devices. For example, in the recent drafting process unfolding in Nepal, Mathura P. Shrestha, a Nepali professor, health and human rights activist, peace process observer, Chair of Physicians for Social Responsibility Nepal (PSRN), and, according to the Asia Foundation, “major stakeholder” in that country’s constitutional transition, called for the adoption of international rights in the future Nepali constitution:

“The constitution should reflect the spirit and principles of international humanitarian laws, declarations and conventions, especially UDHR, International Covenant on Civil and Political Rights (ICCPR) 1976 and its optional protocols of 1976 and 1991; and International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976.”⁴

The South African Constitution is an oft-cited one that incorporates international law directly into the domestic constitutional order. The 1996 Final Constitution, Section 39(1), dictates that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. Section 233 dictates that a court must, when interpreting legislation, “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” Yet there are few records of the deliberations or drafting process indicating specific influence of the international documents.

The Indian Constitution reflected significant influence of the 1921 Constitution of the Irish Free State, which was distinctive among commonwealth constitutions in including a bill of rights. Rights were central to the thinking of Indian leaders (Rao 1968: 172). But because it was adopted nearly contemporaneously with the UDHR, we find no reference to the Declaration in the Indian deliberations.

The post-Soviet Constitution of the Ukraine copied almost verbatim its list of rights and freedoms from the 1950 European Convention of Human Rights and Fundamental Freedoms (Wolczuk 2001: 233). The Ukrainian drafters did not seriously argue about the inclusion of a set of human rights in the constitution, though the conservative drafters briefly opposed any rights besides those of property. What is most interesting about the Ukrainian case is that the drafters selected the 1950 EC Convention rather than either producing their own list or relying on the UDHR or the Covenants. Their having chosen to do so might speak to the signaling function constitutional rights have in the international sphere – in the Ukrainian case, their desire to engage with Europe and turn away from Russia.

The drafting of the Constitution of the Islamic Republic of Iran provides an interesting perspective on a constitution that was written, at every step, to avoid influence of international

⁴ Shrestha appears to have been an observer and peripheral participant in the group that negotiated the Nepali peace settlement and constitution, but his citing international rights conventions in the above document occurred just in advance of the constitutional negotiations he participated in, not during them. “Writing a New Constitution for Nepal: Peoples [sic] Participation in the Process,” Downloaded November 21, 2008 from lists.kabissa.org/lists/archives/public/pha-exchange/docVRG21SZta8.doc.

bodies. In the discussion of non-constitutional rules, such as traffic laws, which the Koran and *sunna* are presumably neutral about, Ayatollah Beheshti proposed that it should be “sufficient that legislation be carried out ‘taking into consideration the restrictions imposed by the Book and Tradition.’ ” (Schirazi 1997: 249). But to this Ayatollah Montazeri countered that “the expression ‘taking into consideration’ might give rise to the misunderstanding that in addition to Islamic principles other[s]... were to be considered, such as those of international law or the UN International Charter of Human Rights” (Schirazi 1997: 249). Most states obscure their efforts to avoid giving effect to international rights covenants, but in the Iranian case there was a self-conscious desire to avoid international influences. Constitutional reconstruction efforts in Iraq and Afghanistan, in contrast, enshrined both Islamic principles and international human rights on the same plane.

Summary

To summarize, we find many expectations of convergence. We have relatively little systematic evidence that convergence has occurred. We also have much theoretical disagreement about the manner in which convergence occurs, and very little direct evidence from constitutional drafters. We now turn to a theory of the relationship between the international and domestic levels of rights protection to guide our empirical examination.

Substitutes, Supplements, and Duplicates

As mentioned above, there is relatively little explicit theorizing as to the relationship between international and national level adoption of rights. One first needs a theory of what roles international treaties serve for states. One simple way to think about the possible relationship between international and national level rights is as substitutes, supplements or duplicates. The model of “substitute” suggests that a right might be enshrined in one or the other level but not both; the models of “supplement” and “duplicate” suggest that some rights might be enshrined in both levels, with the “supplement” model suggesting complementary roles as opposed to redundancy.

Substitutes: First, one can imagine that international rights play a substitute function for domestic institutions (Ginsburg 2005). Here, the international instruments preclude the need for adoption at the domestic level, or vice versa. This might be because such adoption at a second level would be redundant or unnecessary. Certain kinds of rights, for example, might be primarily directed at foreigners and hence secured most effectively through international instruments. Few constitutions provide for a right to fair and equitable treatment of foreign investors, or the right to repatriate profits (the former Yugoslav Republics of Croatia and Macedonia seem to be the only examples). Such provisions are hardly necessary given the

extensive regulation of such matters in bilateral and multilateral investment treaties. Embedding such rights in national constitutions provides little additional value.

The empirical prediction here is largely of divergence between national and international sets of rights.

Interestingly, the Genocide Convention appears to be a substitute for national constitutional treatment of the issue. Only a handful of constitutions explicitly proscribe genocide or provide for meeting Convention obligations regarding extradition: Bosnia-Herzegovina 1995 (which includes the Convention as an appendix); Congo 2001 (Art. 10); Italy (Art 10); Malawi (Art. 17); Peru (Art. 37); Rwanda 2002; Seychelles 1993.⁵

Supplements: One might alternatively imagine that international articulation of rights plays a largely *supplementary* role for national level actors. For example, international instruments may specify goals with greater precision than local law; they may provide for supplementary enforcement beyond the boundary of the nation-state, by actors less likely to be locally captured or influenced; and they may communicate a kind of authority to convince skeptical local actors that rights are indeed universal. International rights may also constitute a signal to the international (and domestic) community that the state is indeed a “good type” likely to comply with limits on its power. For these functions, the national level reinforces the right by promising domestic articulation and enforcement of norms.

Gardbaum (2008) argues that the international level can provide gap-filling and supplementary rules for the domestic constitutional level. These supplements can be substantive in character; they may be geographic (reaching parts of the territory not obviously covered by domestic regulation, such as Guantanamo); or they may be personal, in the sense of providing coverage to those who might not otherwise be protected domestically, such as immigrants and alien. Supplements might be institutional as well. International bodies can provide precise definitions of rights violations for domestic actors, particularly in new states or new democracies without much experience in rights enforcement. Also, international agreements provide an easy way to “modernize” a state’s own rights infrastructure without the sometimes steep costs of undergoing constitutional revision. To the extent that rights serve as signals, enshrining them in both international and domestic instruments might influence the intensity of the signal, and so the two levels would supplement each other.

Another role that international instruments can play one of coordination. Suppose states agree in general that human rights are important, but on their own are unlikely to be able to agree on the set of rights to protect. An international listing of rights can help states resolve this

⁵ Arguably East Timor (2002) Art. 160 could be included, but it refers only to particular acts of genocide from 1974-1999 associated with the Indonesian occupation.

coordination problem by identifying certain rights as fundamental. The international level plays a role in communicating information to national actors about the perceptions of *other* states in this regard.

The empirical prediction here is largely one of convergence. One would expect that the international and domestic statements of rights would be largely overlapping, as states seek to fill gaps in their own articulation and enforcement of norms, and extend the coverage to other states.

Duplicates: Another possible relationship between international and domestic sources of rights is one of duplication. Here, a state might be willing to accede to an international instrument because it entails no further obligations than already incurred under the domestic legal order. Alternatively, a state that is party to an international covenant might add a similar set of rights to the domestic constitution because it is not very costly to do so. Theories of human rights accession that assert ratification is costless seem to imply that duplication is one possible outcome (Hathaway 2002; but see Simmons forthcoming.) The game theoretic notion of a pooling equilibrium captures the idea that all players have an incentive to send the same signal. One might also expect players to send the signal through multiple channels simultaneously.

Evidence

What evidence can be brought to bear on these questions? The Comparative Constitutions Project has been gathering information on national constitutions as well as international instruments. Here we present some preliminary empirical evidence. Our sample is 534 constitutional documents dating from 1789 onward. This represents the number for which we currently have data. Our coverage is better in the later period, including well over 90% of the documents adopted after World War II, but we have no reason to expect that our sample for the earlier period is systematically biased.

Rights in National Constitutions

The Appendix contains an extensive set of figures demonstrating patterns of rights adoption over time for several dozen different rights included in our survey. Table 1 illustrates this in summary form. For each of several dozen rights, we report its prevalence in the sample. Evidently, no rights are quite universal, at least across time. Freedom of expression, provided by 81% of constitutions historically, is the most prevalent right. On the other hand, a fair number of rights in the list are quite rare. For example, right to marriage for same sex couples has never been adopted (except in our survey instrument!) and nine others from our list are included in less than 10% of cases.

Historically, constitutions have on average included 21.9 rights from the inclusive list of 74 rights in Table 1.

Figure 1 provides the distribution this right count variable across 420 cases and Figure 2 shows a scatterplot of the counts across time. As expected, the number of rights in constitutions in newly written constitutions has increased over time – presumably, many constitutions are incorporating new rights while retaining older ones. However, the scatterplot shows a marked increase in the standard deviation in the number of rights over time. While many modern constitutions contain outsized rights sections, a fair number of them have rights sections no larger than those of the 19th century.

We also identify some cases at either extreme. First, a small handful of constitutions do not incorporate any rights, at least not directly (Table 2). At the other extreme, there are fifteen or so recent constitutions (all from developing countries) that provide over 45 rights each (Table 3). As for the international covenants, those that we coded include roughly 30 or so rights from our list (Table 4). As we saw from Figure 2, very few constitutions included this many rights prior to 1945, but some fairly progressive ones in Latin America did (Table 5).

Looking at the figures for particular rights in the Appendix, the most obvious result is the great divergence in patterns, both of current adoptions of particular rights and also their diffusion over time. Some rights, such as the right to free movement or the right to life, are nearly universal in national constitutions, and have become more popular over time. The right to torture and freedom from cruel and unusual punishment fit this category. The right to be free from corporal punishment, on the other hand, illustrates a different pattern, in which the right never takes off. Similarly, the right to bear arms remains at about the same (low) level of popularity over time. Apparently there is no universal agreement on the set of rights to be protected in national constitutions.

The temporal patterns are also of great interest. The conventional wisdom about the postwar spread of rights seems to be correct on one view. Most of the figures show an upward trend beginning around 1950. Some of these upward trends, however, are steeper than others.

In the Economic and Social areas, the postwar spikes are generally not very steep. The second generation rights, it seems, do expand coverage after the UDHR, but are not found in a majority of constitutions. We also observe some economic and social rights that emerge before the postwar boom. The right to join a trade union is more extensive and predates the right to strike, which surpasses 20% of constitutions only with the burst of post-socialist constitutions in the 1990s. Rights to property, of course are old, but it is somewhat surprising that constitutional commitment to intellectual property rights does not increase over time. This may reflect a paradigmatic “substitute” dynamic, wherein commitments are directed primarily at outside actors through treaty, and so there is no additional value to adding a commitment in the constitution.

Criminal procedure rights are classic “first generation” rights and observe steadier upward trajectories beginning in the 19th century. Some provisions, such as the rights to a fair trial, enshrined in Article 10 of the UDHR, and the presumption of innocence, enshrined in Article 11, seem to exhibit the sharp upward spike. The right to a public trial and to be free from *ex post facto law*, on the other hand, predates the UDHR, though they also exhibit upward trends. This suggests that the effect of the UDHR was greater in coordinating national norms with regard to a fair trial than a public trial. On the other hand, we also see an upward spike with regard to the right to counsel, (not contained in the UDHR) intensifying after its inclusion in the ICCPR.

The norm against torture seems to exhibit an interesting significant influence from the international instruments. Torture is prohibited by the UDHR and the ICCPR, but was mentioned in a minority of constitutional texts into the 1980s. In 1984, the Torture Convention came into force, followed by a large jump in the number of countries with constitutional prohibitions.

The only rights that truly appear universal at the end of the 20th century are a few of the classic first generation rights: freedom of religion, freedom of expression, freedom of assembly and association. Prohibitions on slavery and the right to privacy are also quite widespread. Rights of petition and freedom of the press are less widespread.

Similarity between covenants and constitutions

We can now compare the rights profiles among constitutions and international covenants. We do so by calculating, for each pair of documents, the percentage of rights that “match” between the two cases. We use the inclusive set of rights described above, excluding rights that are either highly consensual or very rare. The rationale for weeding is that such variables do little to help us differentiate constitutions and, moreover, they dilute the information provided by other variables.

The distribution of the similarity index is shown in Figure 3, with mean 0.64. This means that, on average, any two documents (constitution or international covenant) includes or excludes the same right in 64% of cases.

Consider now the similarity among international covenants (Table 6). There we see that, with one exception, the covenants are no more similar to one another than are any two constitutions with respect to rights. The one exception is the ICCPR-American HR pair. It appears that the American HR covenant followed the ICCPR menu quite closely. Only a few rights separate this pair of cases. By variable name (see Table 1 for label), they are: CULTRIGHT, JOINTRDE, CITREN, PROPRIGHT, SELFDET, NOMIL, ASYLUM, CENSOR. All the rest are either included or excluded in both documents.

Impact of international covenants on national practice

Let us turn now to the question of influence from the international documents on national practice? To what degree did national constitutions influence the covenants and vice versa? Which constitutions influenced or were influenced by the covenants? Which covenants were most influential?

The scatterplots in Figure 4 provide some initial answers to some of these questions. For each covenant, we plot the similarity between a given covenant and each of the 420 constitutions in the sample. A shift upward in the location of constitutions adopted after the year of the covenant indicates that constitutions are becoming more similar to the international instrument (and to each other). We observe this effect for the UDHR: a block of constitutions that are highly similar to the UDHR emerge immediately after the adoption of the Universal Declaration but not before. By contrast, the ICCPR is highly similar to a group of constitutions that were written in the several years prior to the covenant's adoption. Still, the ICCPR evidently remained influential for a group of constitutions afterwards as well, as one sees a cluster of more similar documents emerging thereafter. Both groups are listed in Table 7. Interestingly, however, there is a division in the post-ICCPR period with one group highly similar to the ICCPR and another substantial group showing no effect at all. This might be an issue of substitution versus duplication, something we can look at by incorporating the signing data into the analysis [which we intend to do in a subsequent version of the paper].

Looking now to the regional covenants, we see a pattern for the American Convention that looks similar to the ICCPR. But since the American convention and the ICCPR are highly similar and were adopted contemporaneously, it is hard to gauge the effect of the American Convention over and above that of the ICCPR. [One way would be to look only at Latin American constitutions and look specifically at the eight or so rights that distinguish the two covenants and whether or not they are prevalent in LA constitutions after 1970.] The African convention, for its part, shows absolutely no effect, even when we look only at African constitutions. In other words, African constitutional practice did not change with the adoption of a regional covenant [in contrast with Latin American or European practice.]

Conclusion

This paper is a very preliminary exploration of the convergence hypothesis. Based on a large sample of national constitutional practice, we observe several interesting results. First, international covenants are themselves diverse, being no more similar to each other on average than the median pair of constitutions in the sample. Second, relatively few rights are truly universal in national constitutional practice. The temporal and geographic patterns appear to

be far more complicated than the simple convergence story would have it. Third, notwithstanding the diversity, the UDHR and ICCPR do seem to have exerted some convergence pressure, in that we observe that constitutions adopted after the international instruments become more similar to the covenants than they were beforehand. For the ICCPR, this is qualified by the presence of some constitutions that do not become more similar.

This analysis raises many more questions than it answers. We do not yet have a sense as to whether the substitution, supplementary or duplication explains the patterns of similarity that we do observe. The analysis does, however, call into question simple stories of convergence around a core set of rights. Instead, what we see in the “Age of Rights” is a great expansion in the number and type of rights claims. These claims then become a veritable smorgasbord for national constitution-makers to choose from. We thus see the selection of rights continue to be very diverse.

REFERENCES

Blake, Richard Cameron. 1998. The World's Law in one Country: The South Africa Constitutional Court's Use of Public International Law. *South African Law Journal* 115: 668-84

Boli, John. 1978. Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970, in *Institutional Structure: Constituting State, Society, and the Individual*,

Boli-Bennett, John, and John W Meyer. 1978. The Ideology of Childhood and the State. *American Sociological Review* 43: 797-812

_____. 1980. Constitutions as Ideology, *American Sociological Review* 45: 525?

Dugard, John. 1996. The Influence of International Human Rights Law on the South African Constitution, *Current Legal Problems* 49: 305.

Elkins, Zachary. Forthcoming. Constitutional Networks, in Miles Kahler, ed., TITLE 43-63.

Elkins, Zachary and Beth Simmons. 2005. On Waves, Clusters and Diffusion: A Conceptual Framework. *Annals of the American Academy of Political and Social Science* 598 (1): 33-51.

Elkins, Zachary, Tom Ginsburg and James Melton. 2008. Baghdad, Tokyo, Kabul...: Constitution-making in Occupied States, *William and Mary Law Review* 49:1149-

Gardbaum, Stephen. 2008. Human Rights as International Constitutional Rights, 19 *European Journal of International Law* ___-___

Ginsburg, Tom 2005. *International Substitutes for Domestic Institutions*, *International Review of Law and Economics* 25: 107-

Go, Julian. 2003. A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000, *International Sociology* 18: 71-___

Goodman, Ryan and Derek Jinks. 2004. How to Influence States: Socialization and Human Rights Law. *Duke Law Journal* 54:621-

Keck, Margaret and Kathryn Sikkink. 1998. *Activists Beyond Borders*. Ithaca: Cornell University Press.

Küng, Hans, and Jürgen Moltmann. 1990. *The Ethics of World Religions and Human Rights*. London: SCM Press.

Landman, Todd. 2005. *Protecting Human Rights: A Comparative Study*.

- Law, David. 2008. Globalization and the Future of Constitutional Rights, 102 Nw. U. L. Rev. 1277.
- Maluwa, Tiya. 1994. International Human Rights Norms and the South African Interim Constitution 1993, 19 South African Yearbook of International Law (1993/4) 14.
- March, G. James., and John P. Olson. 1984. The new institutionalism: organizational factors in political life *American Political Science Review* 78: 734-749.
- Morsink, Johannes. 1999. *The Universal Declaration: Origins, Drafting and Intent*. Philadelphia: University of Pennsylvania Press.
- Posner, Eric. 2008. Human Welfare, Not Human Rights *Columbia Law Review* 108-1758-1801
- Rahdert, Mark C. 2007. Comparative Constitutional Advocacy. *American University Law Review* 56: 553-663.
- Ramirez, Francesco et al. 1997. The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990, 62 *Am. Soc. Rev.* 735-
- Rao, B. Shiva. 1968 *Framing of India's Constitution: A Study*.
- Schirazi, Asghar. 1997. *The Constitution of Iran, Politics and State in the Islamic Republic*.
- Simmons, Beth, Frank Dobbin and Geoffrey Garrett. 2008. *The Global Diffusion of Markets and Democracy*. New York: Cambridge University Press.
- Simmons, Beth. 2009. *Complying with the Law: The Case of International Human Rights Treaties* (2006)
- Slaughter, Anne-Marie. 2002. *The New World Order*. [Publisher]
- Tushnet, Mark. 2008. The Inevitable Globalization of Constitutional Law. Paper presented at workshop on separation of powers at "The Changing Role of Highest Courts in an Internationalizing World," sponsored by the Hague Institute on International Law, Oct. 23-24, 2008.
- Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier* 30:11, Paris: [United Nations Educational, Scientific, and Cultural Organization](#), November 1977.
- Waltz, Susan. 2002. *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights* *Third World Quarterly*, Vol. 23, No. 3 (June 2002) 437-448

Waltz, Susan. 2001. *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*. *Human Rights Quarterly*, 23: 44-72.

Weinrib, Lorraine. 2006. "The Post-War Paradigm and American Exceptionalism," in *The Migration of Constitutional Ideas* (Sujit Choudhry ed. 2006).

Wolczuk, Kataryna. 2001. *The Moulding of Ukraine: The Constitutional Politics of State Formation*.

FIGURES AND TABLES

Table 1. Inclusive set of rights from CCP (and proportion of constitutions providing them)

Label	Mean
EXPRESS: Does the constitution provide for freedom of expression or speech	0.83
FREEREL: Does the constitution provide for freedom of religion	0.8
ASSEM: Does the constitution provide for freedom of assembly	0.76
ASSOC: Does the constitution provide for freedom of association	0.76
OPINION: Does the constitution provide for freedom of opinion, thought, and conscience	0.73
FREEMOVE: Does the constitution provide for freedom of movement	0.67
PROPRGHT: Does the constitution provide for a right to own property	0.66
EXPOST: Does the constitution prohibit punishment by laws enacted ex post	0.62
PRIVACY: Does the constitution provide for a right of privacy	0.61
WOLAW: Does the constitution mention nulla poena sine lege or equivalent	0.6
HABCORP: Does the constitution provide for the right to protection from unjustified restraint	0.59
PETITION: Does the constitution provide for a right of petition	0.57
PRESS: Does the constitution provide for freedom of the press	0.5
PUBTRI: Does the constitution generally require public trials	0.47
LIFE: Does the constitution provide for a right to life	0.47
JOINTRDE: Does the constitution provide for the right to form or to join trade unions	0.45
TORTURE: Does the constitution prohibit torture	0.43
CRUELTY: Does the constitution prohibit cruel, inhuman, or degrading treatment	0.43
SLAVE: Does the constitution prohibit slavery, servitude, or forced labor	0.43
COUNS: Does the constitution provide the right to counsel if one is indicted	0.4
SOLISSUF: Jus soli citizenship	0.4
MIRANDA: Does the constitution give the accused a right to silence or protection from self-incrimination	0.38
OCCUPATE: Does the constitution provide for the right to choose ones occupation	0.38
CULTRGHT: Does the constitution refer to a state duty to protect or promote culture	0.37
PRESINOC: Is there a presumption of innocence in trials	0.36
CENSOR: Does the constitution prohibit censorship	0.33

CHILDPRO: Does the constitution guarantee the rights of children	0.3
ASYLUM: Does the constitution contain provisions for the protection of stateless persons	0.29
REMUNER: Does the constitution provide the right to just remuneration, fair compensation, etc.	0.28
LEISURE: Does the constitution provide for a right of rest and leisure	0.27
BUSINES: Does the constitution provide a right to conduct/establish a business	0.27
DOUBJEP: Does the constitution provide for the prohibition of double jeopardy	0.26
INTPROP: Does the constitution provide for intellectual property rights	0.26
CITDEP: Does the constitution grant the government the right to deport citizens	0.26
STRIKE: Does the constitution provide for a right to strike	0.25
PROVHLTH: Does the constitution mention a state duty to provide health care	0.24
HEALTHR: Does the constitution mention the right to health care	0.23
PREREL: Does the constitution provide for the right/possibility of pre trial release	0.21
RGHTAPP: Do defendants have the right to appeal judicial decisions	0.21
CAPPUN: How does the constitution treat the use of capital punishment	0.21
JURY: Does the constitution require a jury or any form of citizen participation in criminal trials	0.2
FALSEIMP: Does the constitution provide for the right to some redress in cases of false imprisonment	0.2
FAIRTRI: Does the constitution provide the right to a fair trial	0.2
MARRIAGE: Does the constitution provide for the right to marry	0.2
TRILANG: Does the constitution specify the trial has to be in a language of the accused	0.19
LIBEL: Does the constitution provide for the right of protection of one's reputation	0.18
INHERIT: Does the constitution provide for inheritance rights	0.18
SAFEWORK: Does the constitution mention the right to safe/healthy working environment	0.18
FNDFAM: Does the constitution provide the right to found a family	0.18
CORPPUN: How does the constitution treat the use of corporal punishment	0.18
STANDLIV: Does the constitution provide for a right to an adequate or reasonable standard of living	0.17
CHILDWRK: Does the constitution place limits on child employment	0.17

MATEQUAL: Does the constitution provide for matrimonial equality	0.17
SEPREL: Does the constitution contain an explicit decree of separation of church and state	0.16
EXAMWIT: Does the constitution provide for the right to examine evidence o	0.16
SPEEDTRI: Does the constitution provide for the right to a speedy trial	0.15
DEBTORS: Does the constitution forbid the detention of debtors	0.13
TRANSFER: Does the constitution mention the right to transfer property freely	0.13
SHELTER: Does the constitution provide for the right to shelter or housing	0.13
DEVLPER: Does the constitution provide for an individual's right to self development	0.13
PROVWORK: Does the constitution mention a state duty to provide work/employment	0.12
CITREN: Do citizens have the right to renounce their citizenship	0.1
FRECOMP: Does the constitution provide the right to a free and/or competitive market	0.1
SELFDET: Does the constitution provide for a people's right of self determination	0.1
HEALTHF: Does the constitution specify that healthcare should be provided at state expense	0.09
INFOACC: Does the constitution provide for an individual right to view government information	0.08
NOMIL: Is there a right to exemption from military service for conscientious objectors	0.08
JUVENILE: Does the constitution give juveniles special rights/status in criminal process	0.07
TESTATE: Does the constitution provide for a right of testacy, or the right to leave property to one's heirs	0.07
SCIFREE: Does the constitution provide for a right to enjoy the benefits of science	0.06
CONRIGHT: Does the constitution mention consumer rights or consumer protection	0.05
ARMS: Does the constitution provide for the right to bear arms	0.03
PRISONRG: Does the constitution require that the names of those imprisoned be recorded in a register	0.02
SAMESEXM: Does the constitution provide the right for same sex marriages	0

Figure 1 Distribution in the number of rights provided (N = 420 new constitutions)

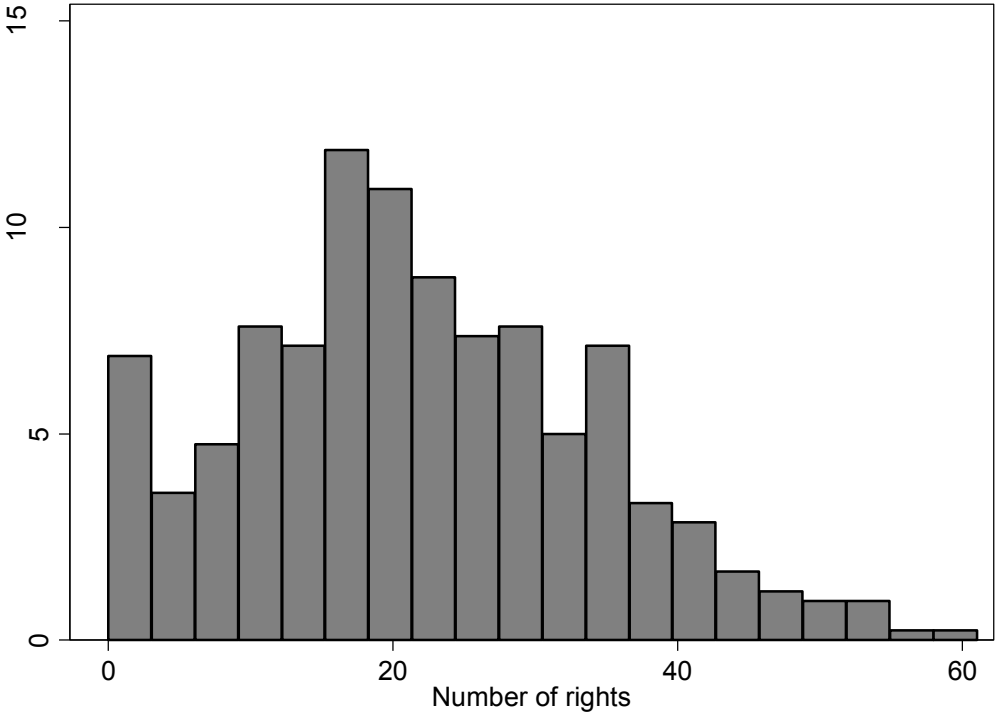


Figure 2 Number of rights provided, by year (n = 420 new constitutions)

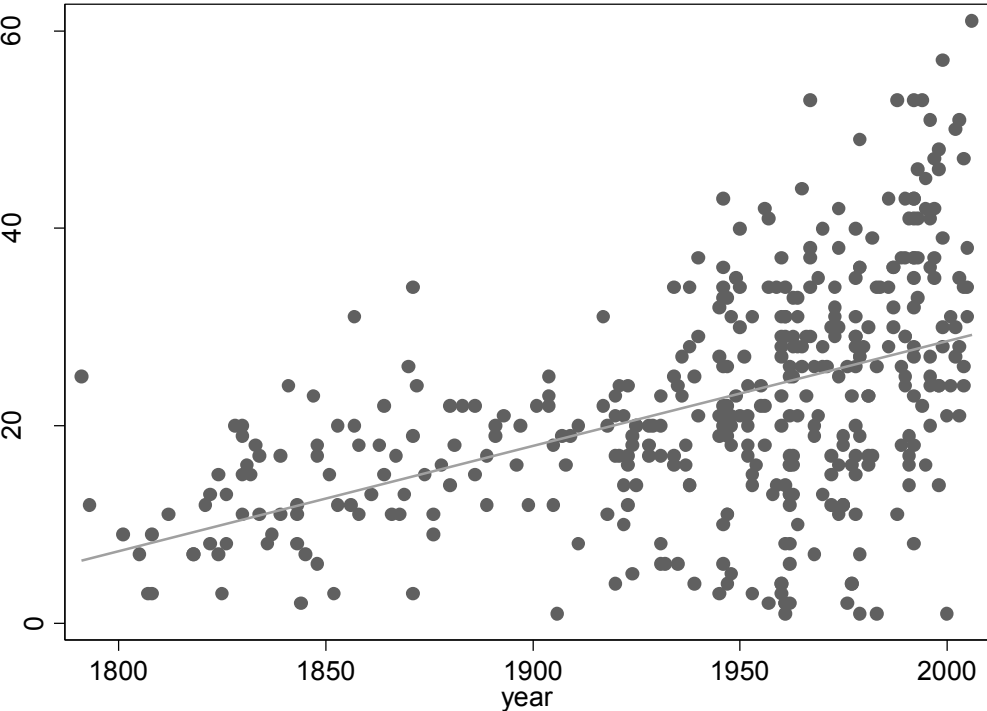


Table 2 Constitutions with no rights provided directly

Constitution
France_1875
Haiti_1811
Latvia_1922
Lesotho_1983
Malawi_1966
Mauritania_1985
Poland_1992
(Soviet Union)_1924
South Africa_1961
Thailand_1976

Table 3 Constitutions with over 45 rights provided

Constitution	Number of rights
Ecuador_1998	46
Russia (Soviet Union)_1993	46
Mozambique_2004	47
Poland_1997	47
Albania_1998	48
Peru_1979	49
East Timor_2002	50
Ukraine_1996	51
Yugoslavia (Serbia)_2003	51
Brazil_1988	53
Ecuador_1967	53
Ethiopia_1994	53
Paraguay_1992	53
Venezuela_1999	57
Yugoslavia (Serbia)_2006	61

Table 4 Number of rights provided in various covenants

Covenant	Number of rights
French Declaration of Rights_1789	13
African Charter on Human Rights_1981	30
ICPPR_1966	34
Universal Declaration of Human Rights_1948	34
American Convention on Human Rights_1969	36

Table 5 Constitutions with over 25 rights provided prior to 1946

Constitution	Number of rights
Paraguay_1870	26
Bolivia_1945	27
Honduras_1936	27
Bolivia_1938	28
Paraguay_1940	29
Mexico_1857	31
Mexico_1917	31
Guatemala_1945	32
Costa Rica_1871	34
Uruguay_1934	34
Uruguay_1938	34
Cuba_1940	37

Figure 3 Distribution of the Similarity Measure

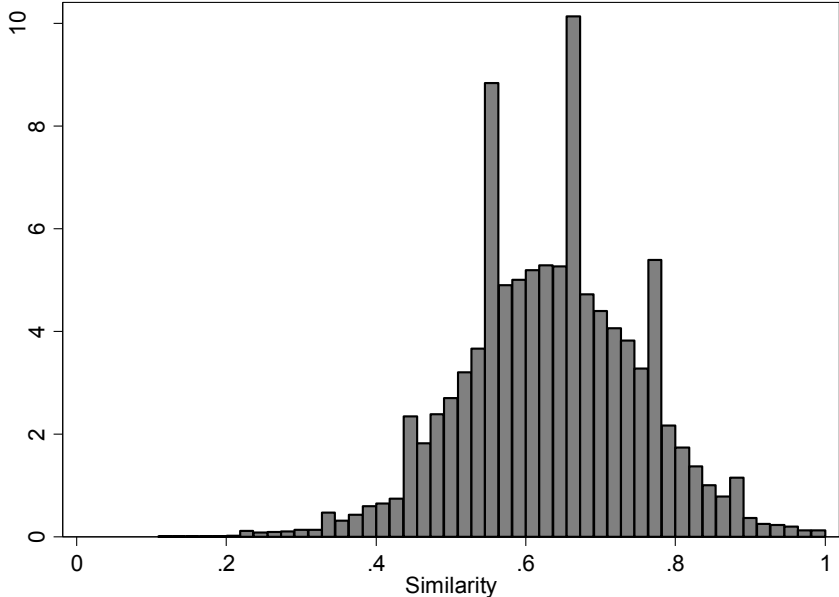


Table 6 Similarity in rights provision among covenants

	French Declaration of Rights, 1789	Universal Declaration of Human Rights, 1948	ICCPR, 1966	Amer. Conv. on HR, 1969	Afric. Charter on HR, 1981
French Declaration of Rights, 1789	---				
Universal Declaration of Human Rights, 1948	0.56	---			
ICCPR, 1966	0.55	0.67	---		
Amer. Conv. on HR, 1969	0.56	0.69	0.89	---	
Afric. Charter on HR, 1981	0.61	0.70	0.69	0.67	---

Figure 4 Similarity between national constitutions and particular international covenants

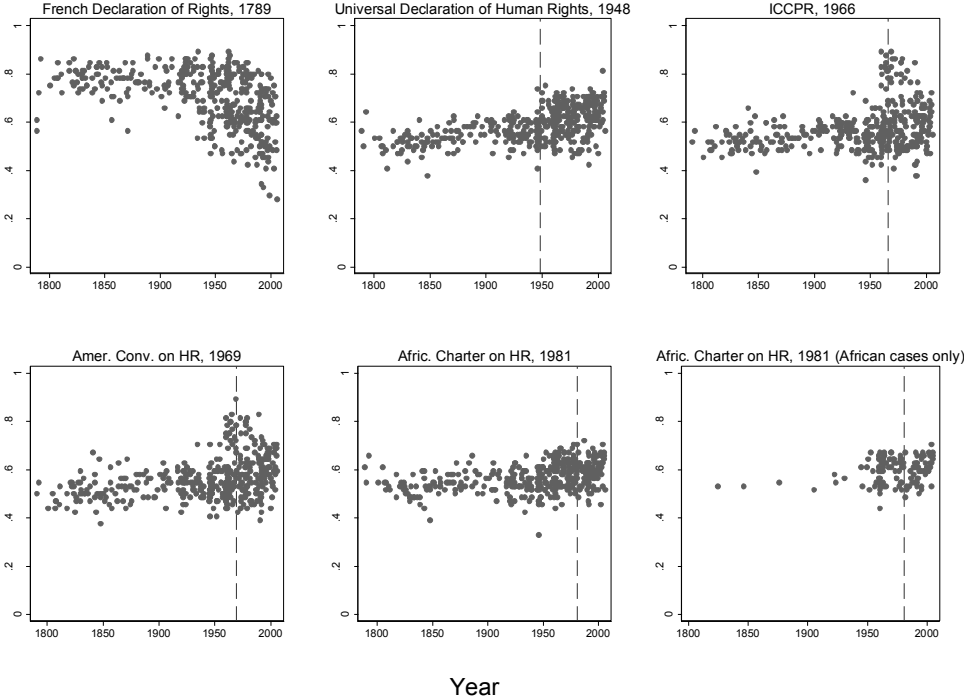


Table 7 Most similar to the ICCPR

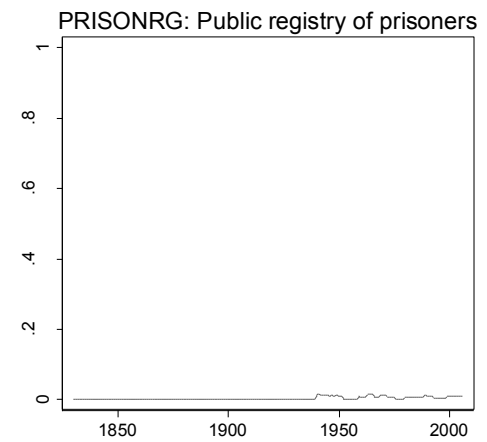
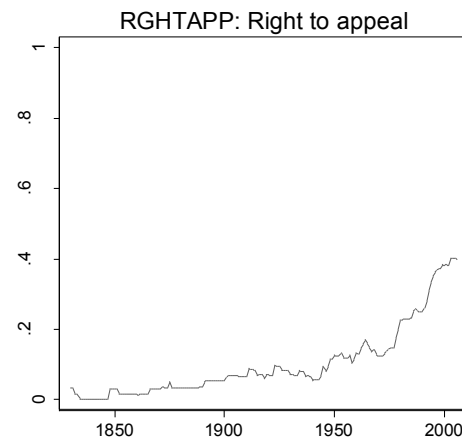
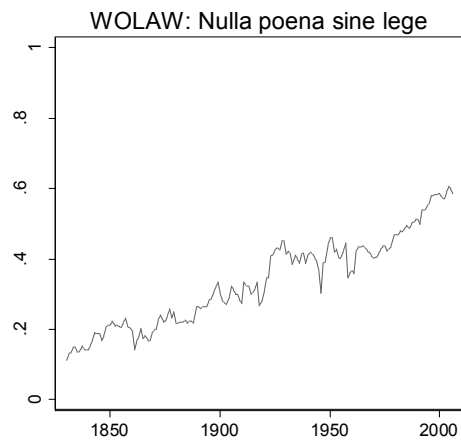
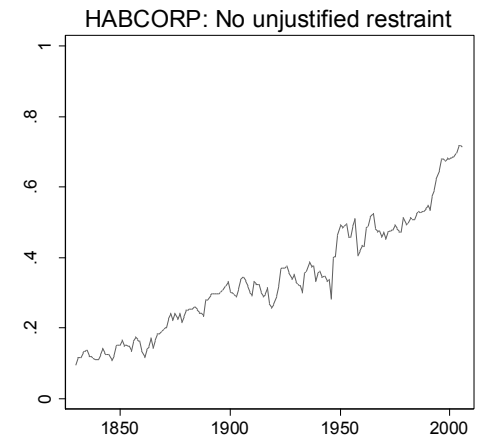
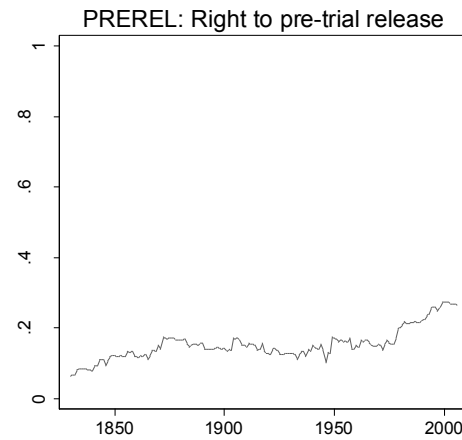
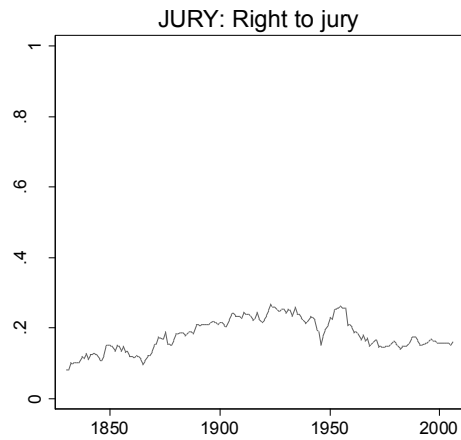
Constitution	Similarity
Comoros_1978	.703125
Gambia_1996	.703125
Sierra Leone_1991	.703125
Estonia_1992	.71875
Philippines_1935	.71875
Swaziland_2005	.71875
Uganda_1995	.71875
Congo, Democratic Republic Of (Zaire)_19	.734375
Cyprus_1960	.75
Nigeria_1978	.765625
South Africa_1993	.765625
Tuvalu_1986	.765625
Zimbabwe (Rhodesia)_1969	.765625
Antigua And Barbuda_1981	.78125
Lesotho_1966	.78125
Nauru_1968	.78125
Grenada_1974	.796875
Sierra Leone_1961	.796875
Solomon Islands_1978	.796875
St. Lucia_1978	.796875
Guyana_1966	.8125
St. Kitts And Nevis_1983	.8125
Zimbabwe (Rhodesia)_1965	.8125
Ghana_1969	.828125
Kenya_1963	.828125
Nigeria_1960	.828125
Nigeria_1963	.828125
Fiji_1990	.84375
Malawi_1964	.84375
Sierra Leone_1978	.84375
Tuvalu_1978	.84375
Gambia_1970	.859375
St. Vincent And The Grenadines_1979	.859375
Zambia_1973	.859375
Zambia_1964	.875
American Convention on Human Rights_1969	.890625
Cameroon_1960	.890625

Table 8 Least similar to the ICCPR (constitutions since 1960)

Constitution	Similarity
Azerbaijan_1991	.375
Saudi Arabia_1992	.375
Bulgaria_1971	.40625
Laos_1991	.421875
Mozambique_1990	.421875
Congo_1992	.4375
Pakistan_1973	.453125
Albania_1976	.46875
China_1975	.46875
Congo_2001	.46875
Mozambique_2004	.46875
Tanzania/Tanganyika_1961	.46875
Brazil_1967	.484375
Cameroon_1961	.484375
China_1978	.484375
Guatemala_1965	.484375
Guinea_1982	.484375
Mali_1974	.484375
Seychelles_1979	.484375
South Africa_1983	.484375
Vatican City_2000	.484375
Vietnam, Democratic Republic Of_1980	.484375

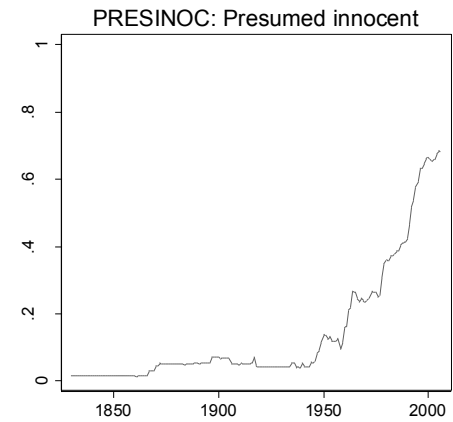
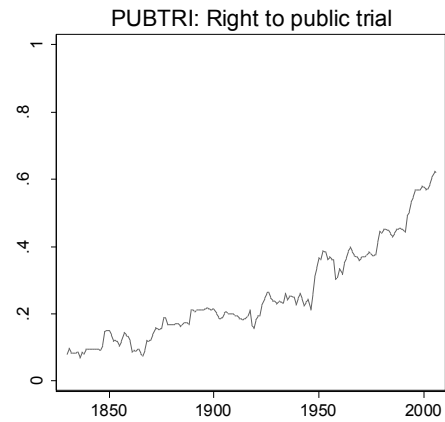
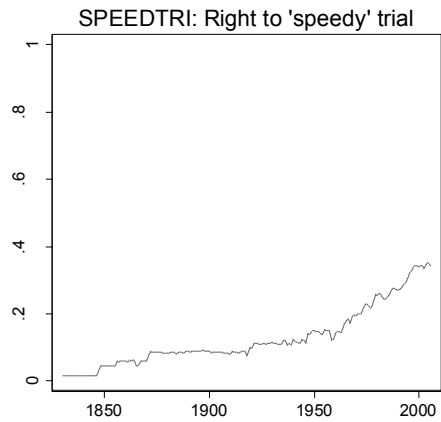
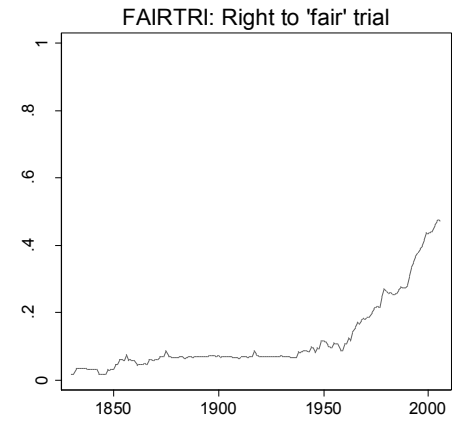
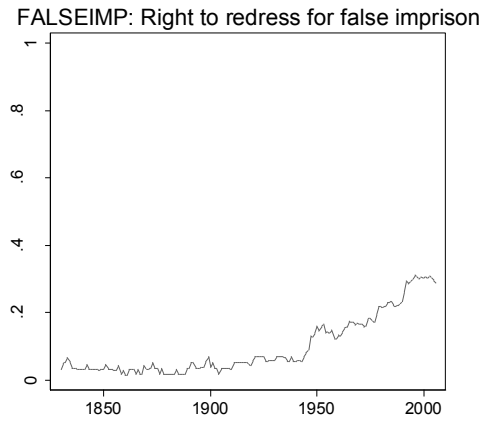
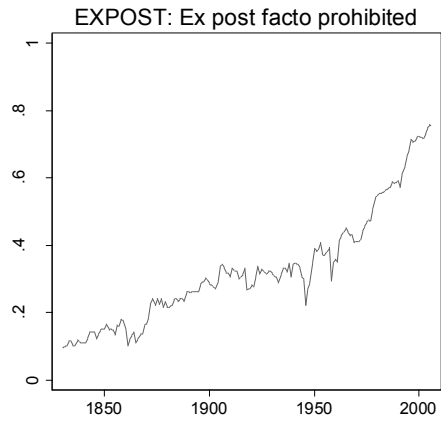
APPENDIX: CONSTITUTIONAL RIGHTS OVER TIME

Criminal procedures, Part I



Year

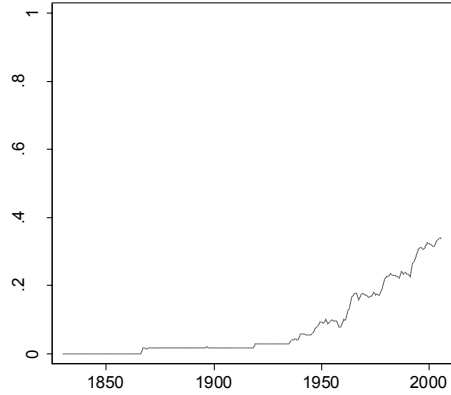
Criminal procedures, Part II



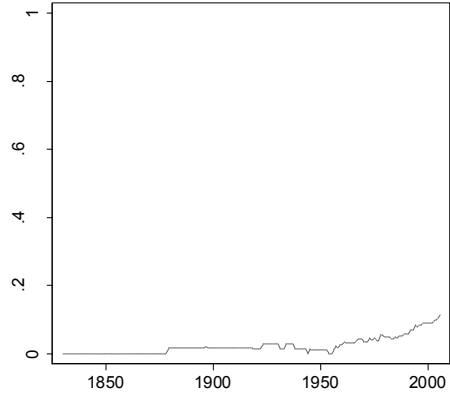
Year

Criminal procedures, Part III

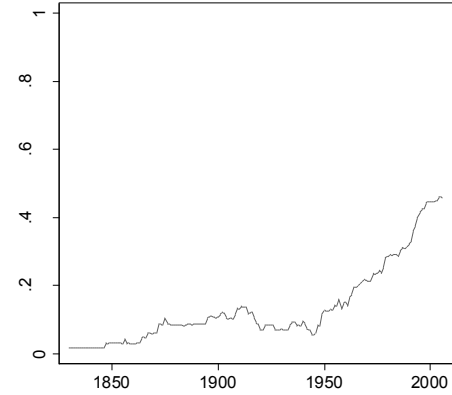
TRILANG: Right to trial in suspect's language



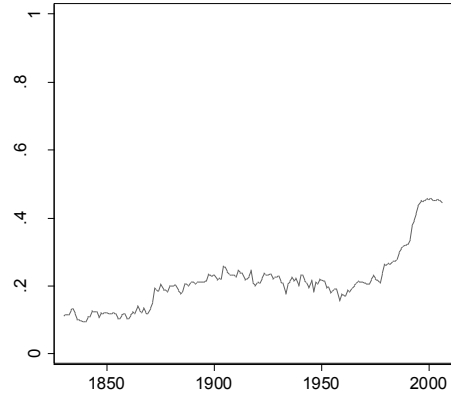
JUVENILE: Special trial rights for juveniles



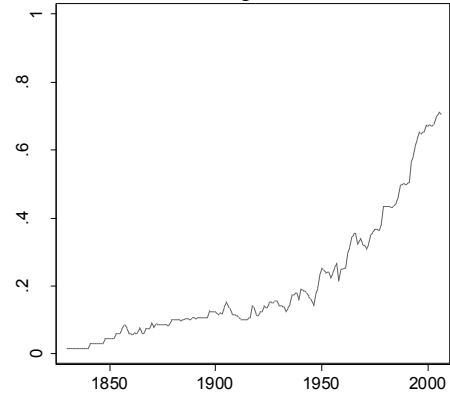
DOUBJEP: Multiple trials prohibited



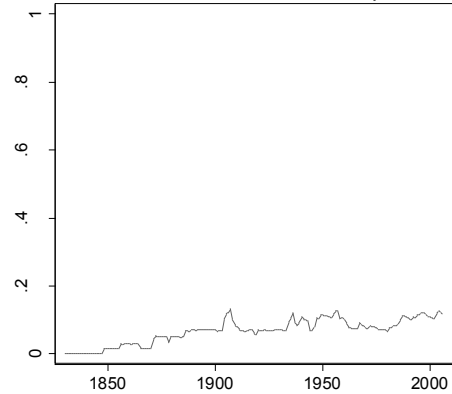
MIRANDA: Freedom from self-incrimination



COUNS: Right to counsel



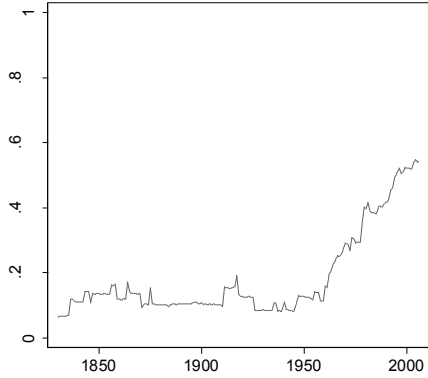
DEBTORS: Detention of debtors prohibited



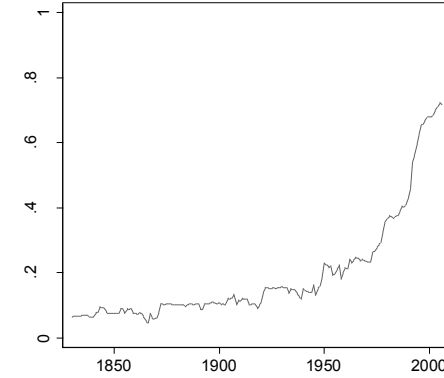
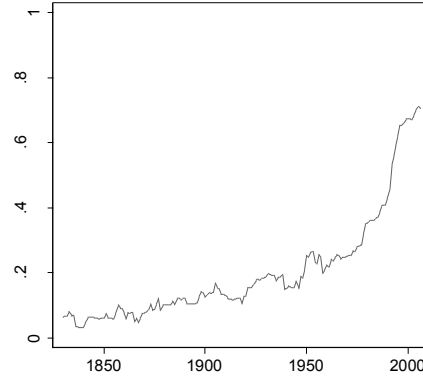
Year

Criminal procedures, Part IV

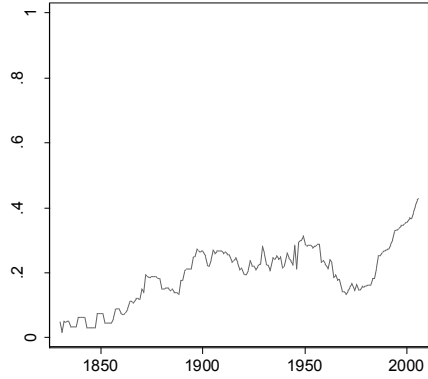
EXAMWIT: Right to examine/face witnesses



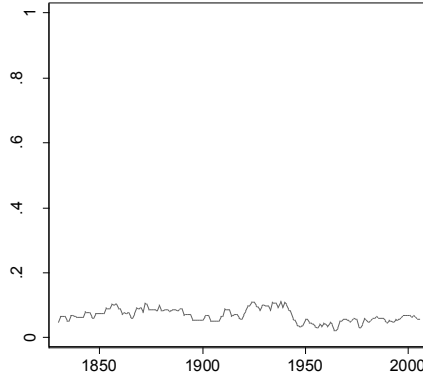
TORTURE: Freedom from torture CRUELTY: Freedom from cruel, inhuman, or degrading treatment



CAPPUN: Capital punishment prohibited

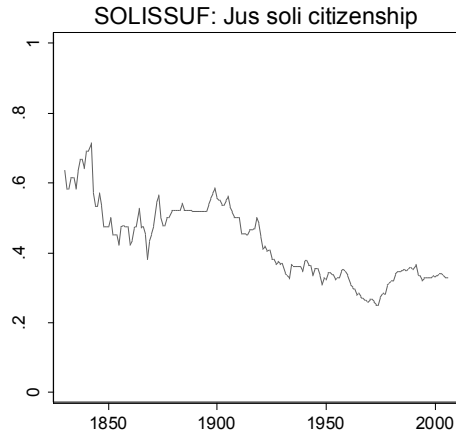
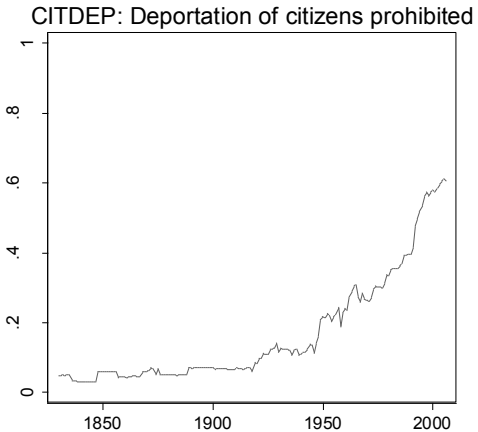
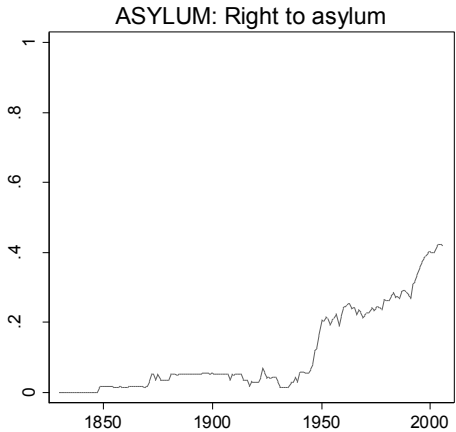
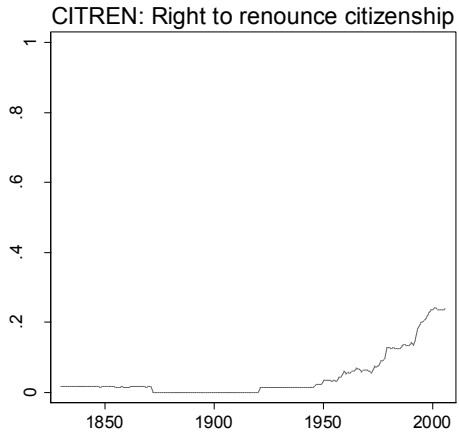


CORPPUN: Corporal punishment prohibited



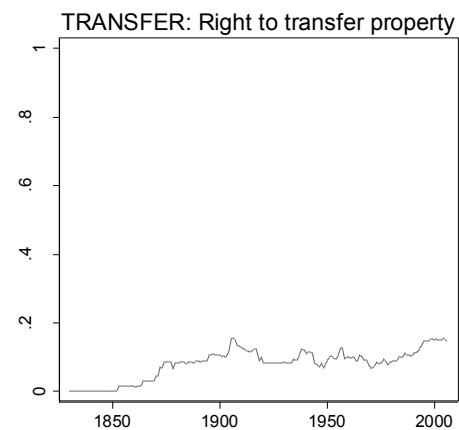
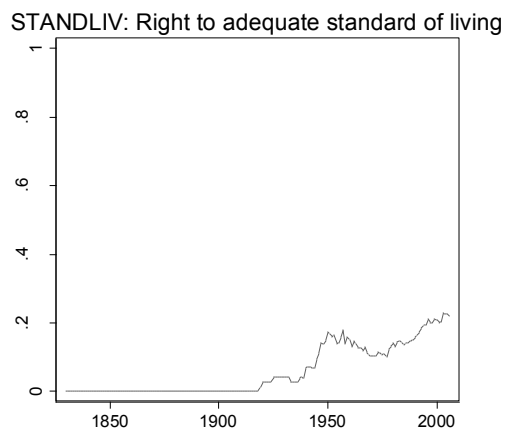
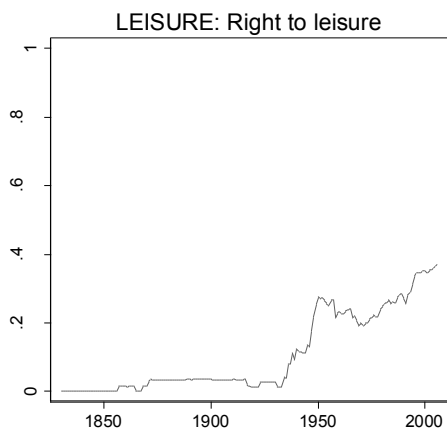
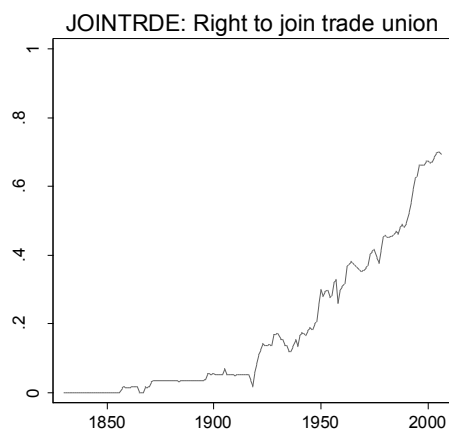
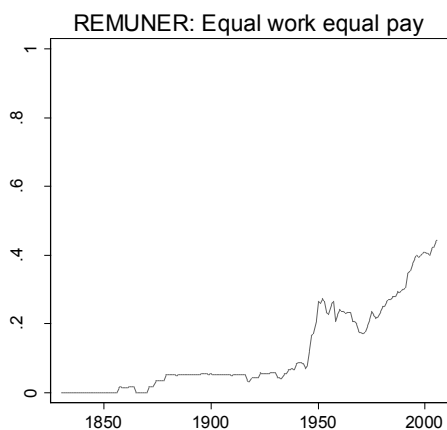
Year

National Identity Provisions



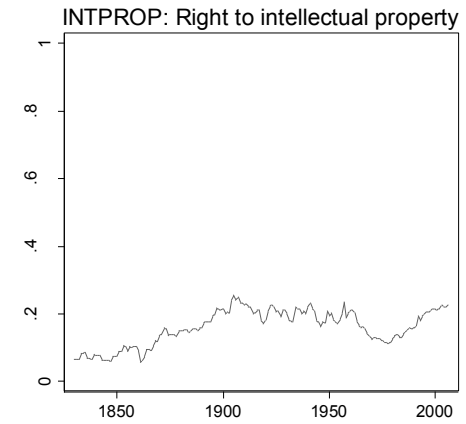
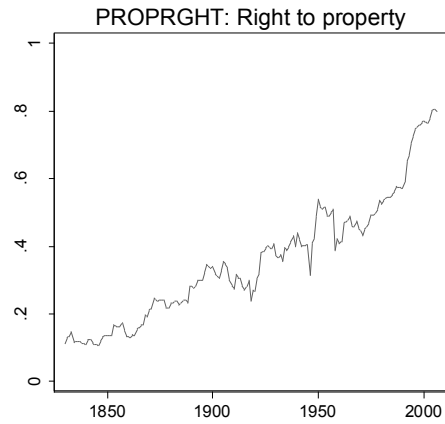
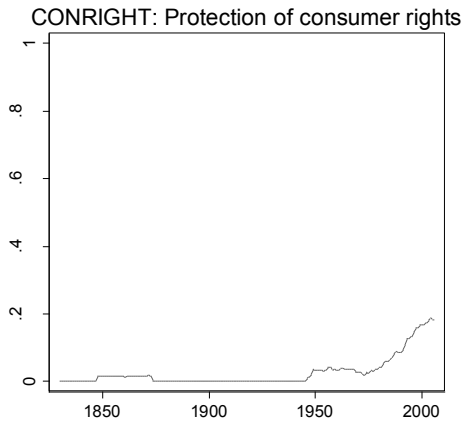
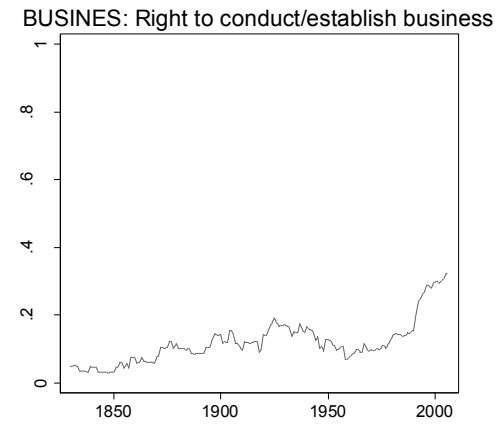
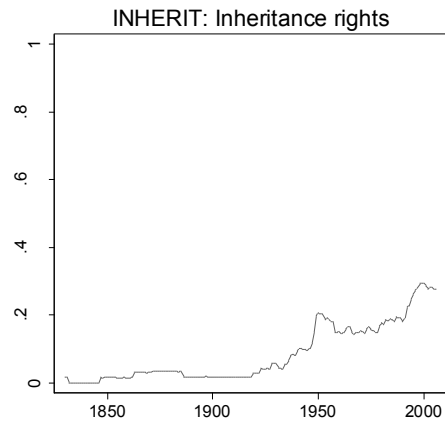
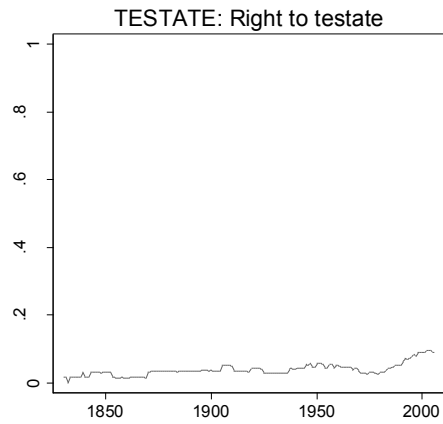
Year

Economic Rights, Part I



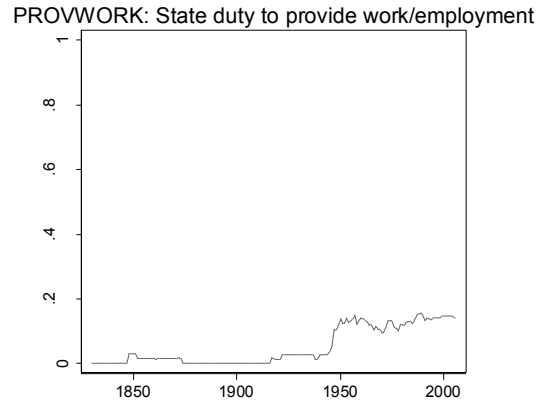
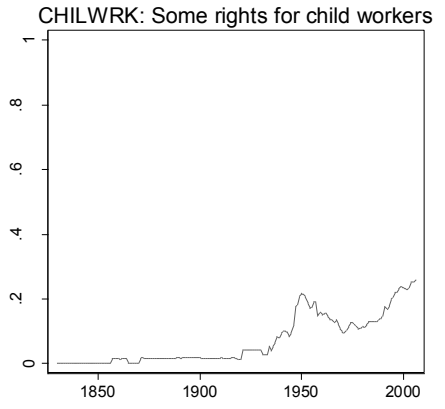
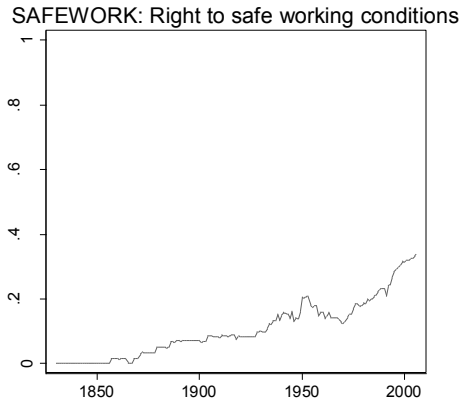
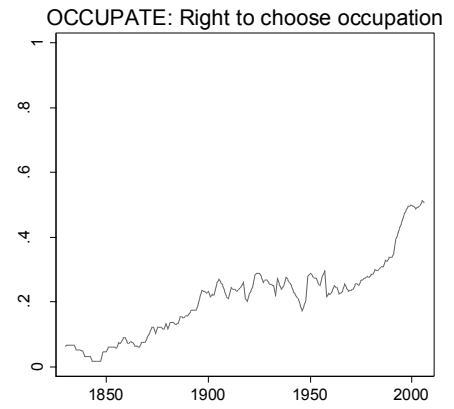
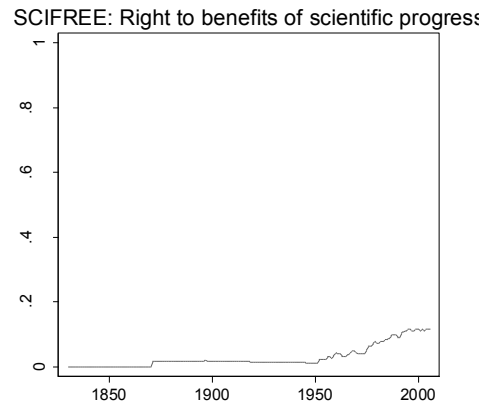
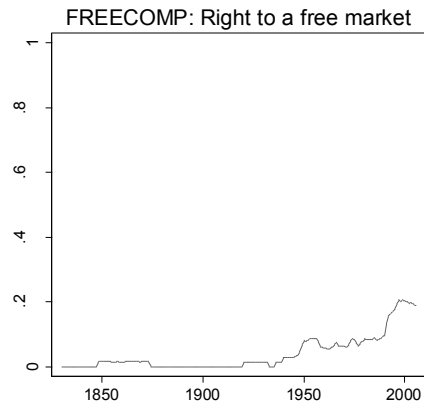
Year

Economic Rights, Part II



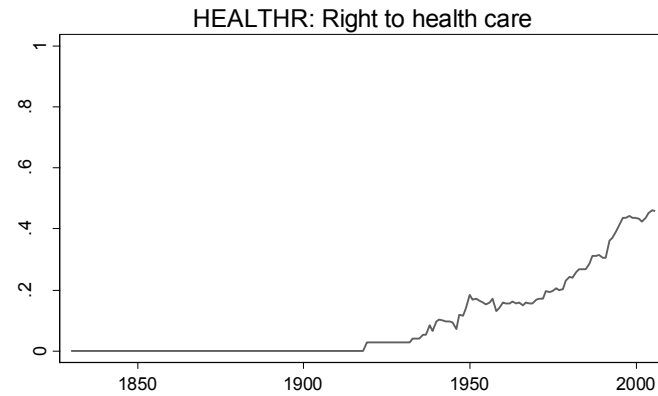
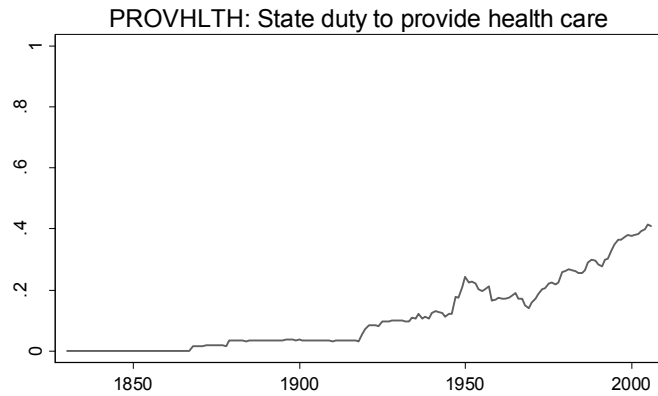
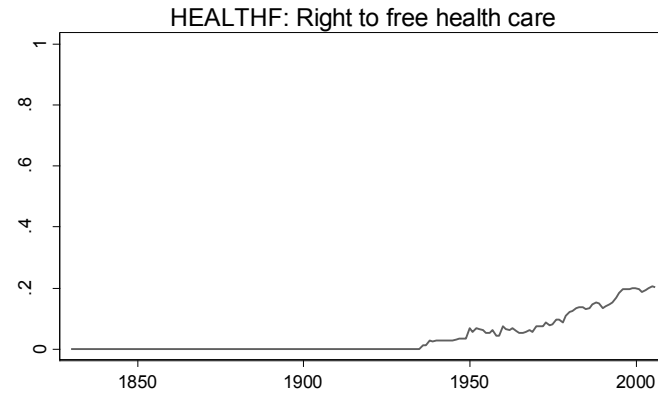
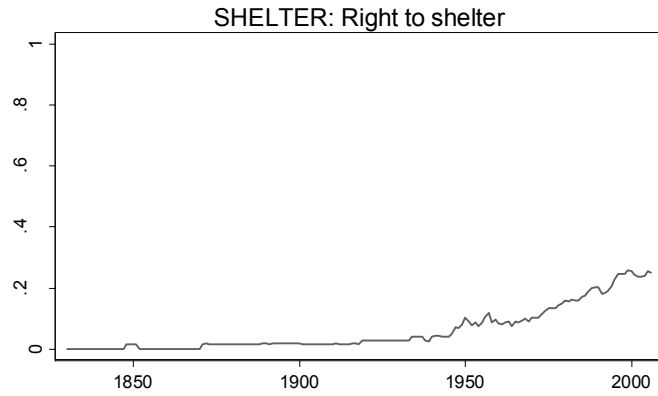
Year

Economic Rights, Part III



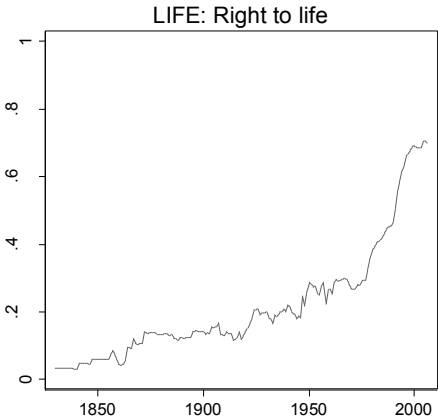
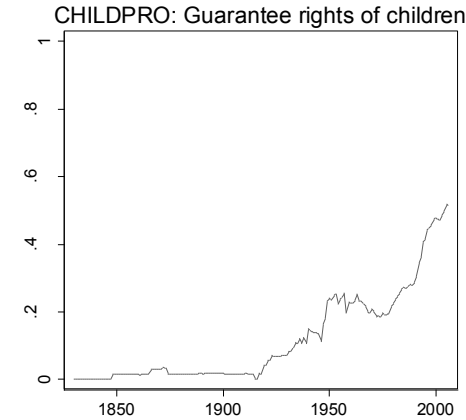
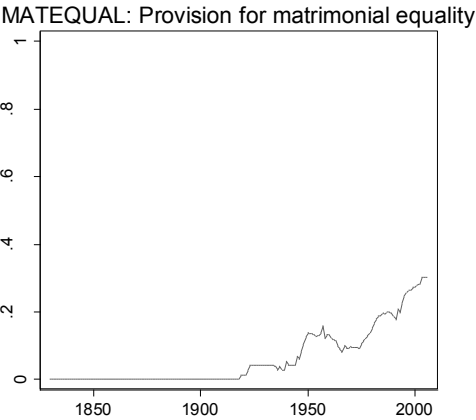
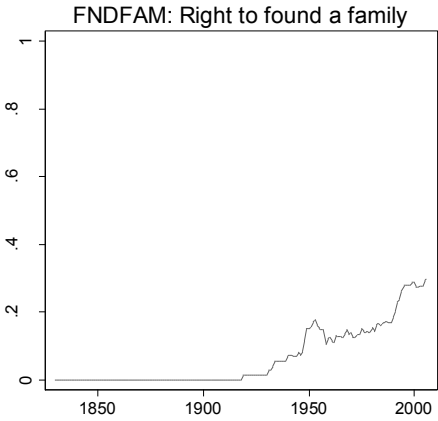
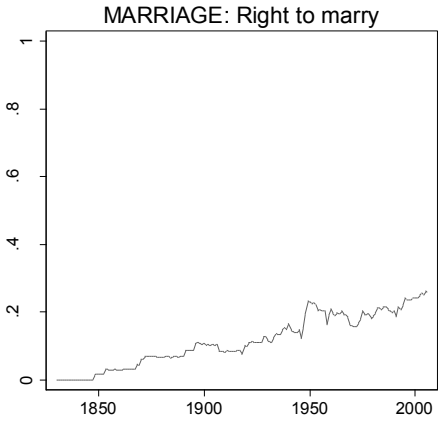
Year

Social and Cultural Rights, Part I



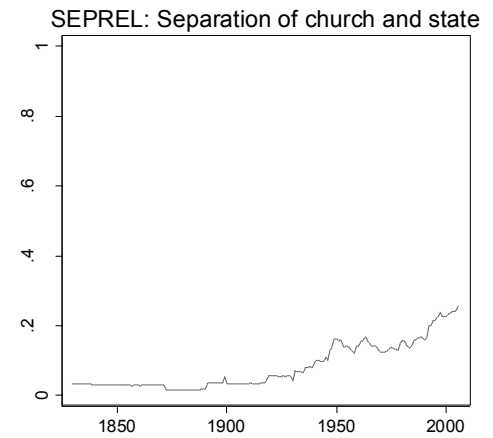
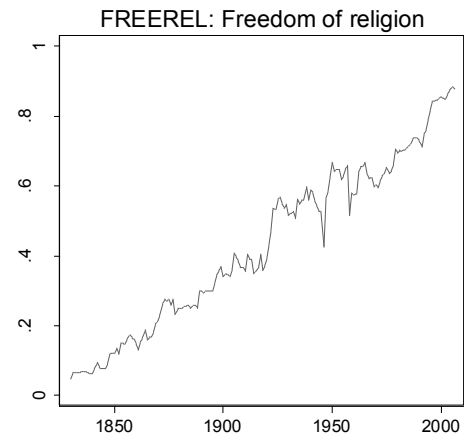
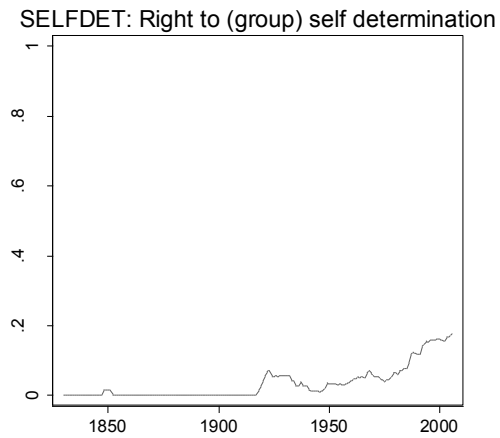
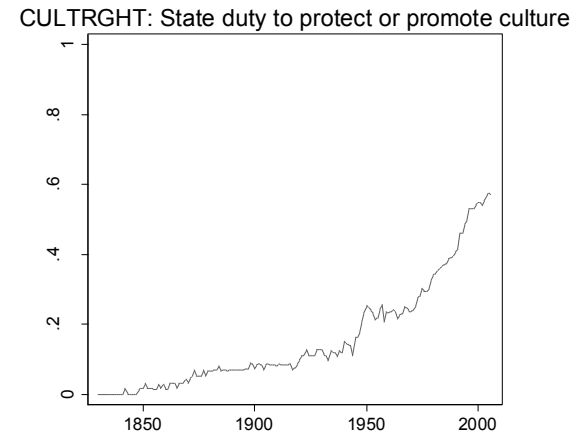
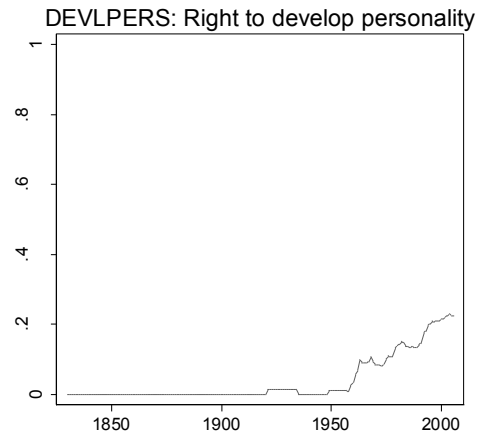
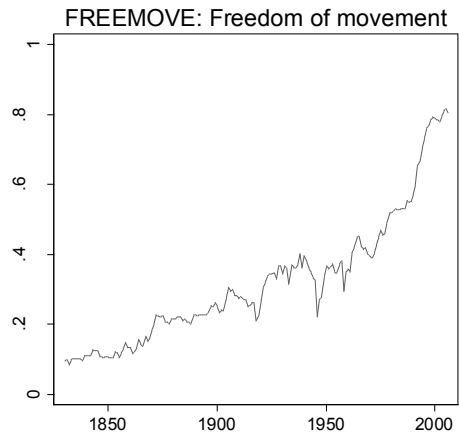
Year

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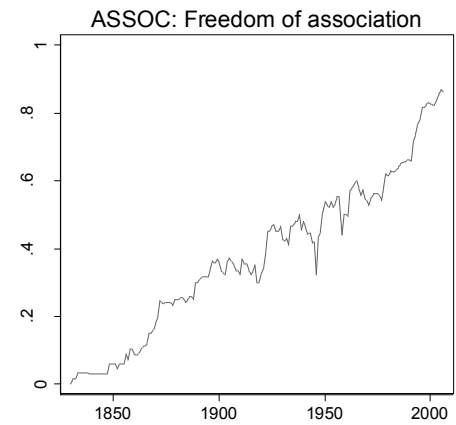
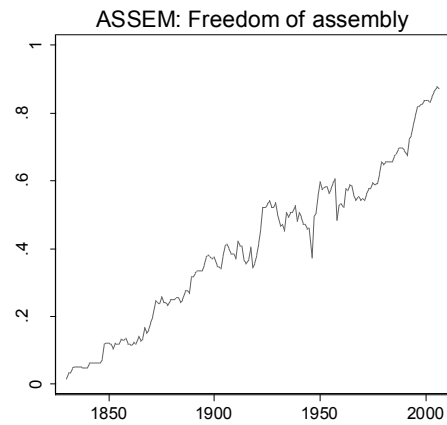
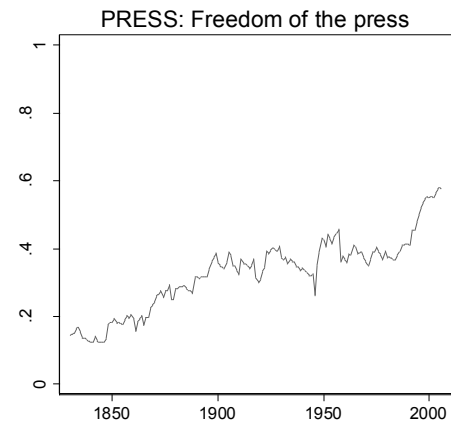
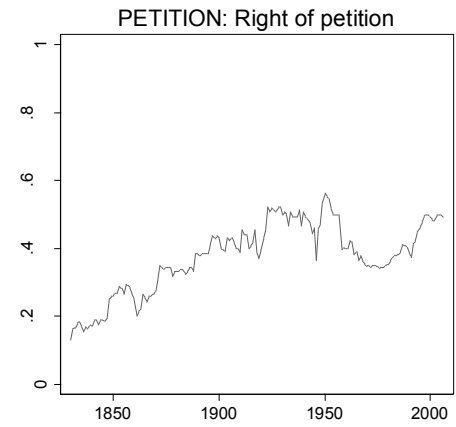
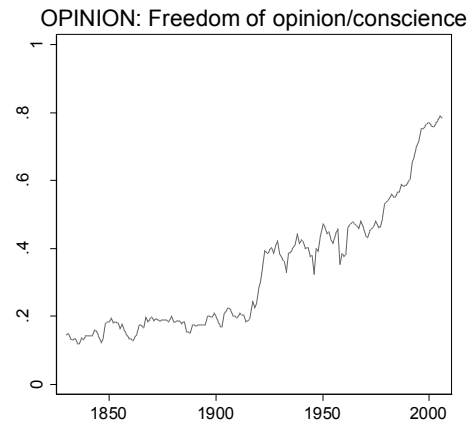
Year

Social and Cultural Rights, Part III



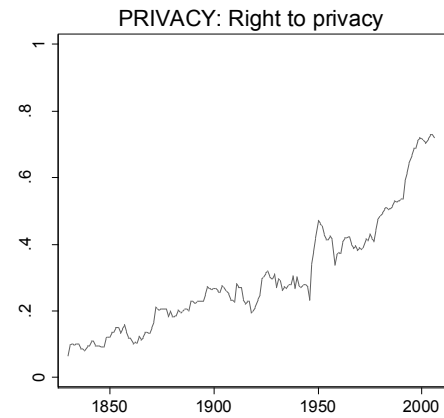
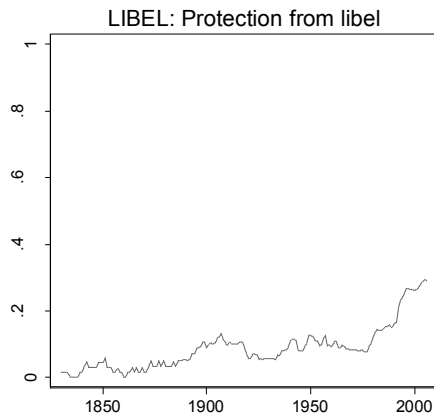
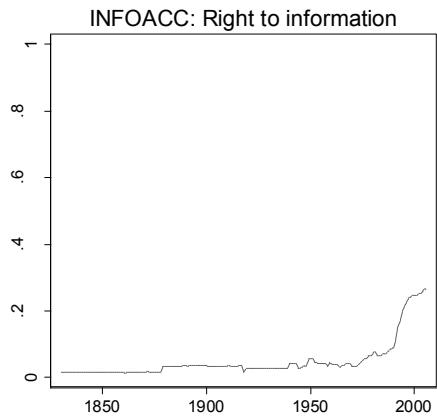
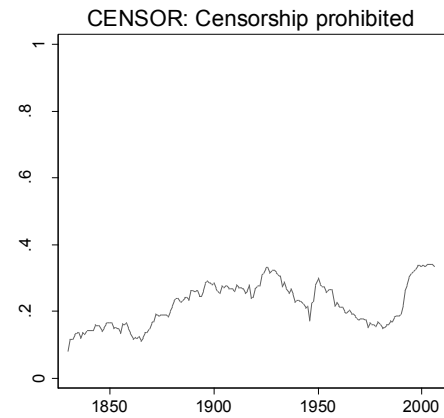
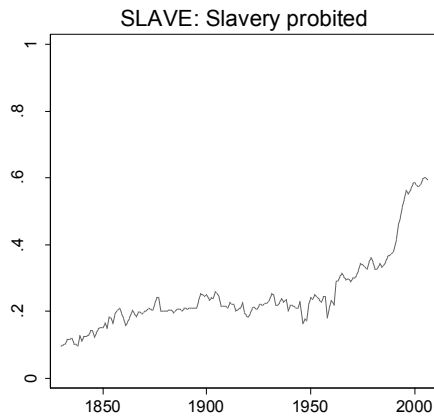
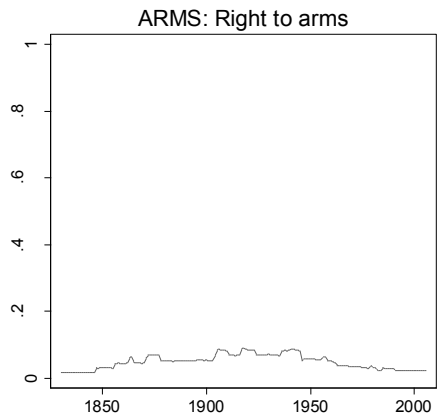
Year

Civil and Political Rights, Part I



Year

Civil and Political Rights, Part II



Year

