

# 48. Economic and Social Rights

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## I. Introduction

Economic and social rights (ESRs) have been long regarded as the poor cousin of civil and political rights. Opposition to constitutionalizing ESRs has been manifold and persistent. Skepticism has stemmed from philosophical concerns about expanding the scope of fundamental rights,<sup>1</sup> resistance to the interference with free markets,<sup>2</sup> uncertainty on the justiciability of ESRs,<sup>3</sup> and democratic and institutional concerns about courts interfering with public policy.<sup>4</sup>

Yet, the tide has shifted. ESRs have gained greater acceptance among rights theorists, and historians have revealed the long ideational heritage of ESRs.<sup>5</sup> Judicially enforceable ESRs are now formally recognized in more than half of the world's constitutions. Some courts have also interpreted broadly worded constitutional provisions to protect ESRs even though the provisions do not explicitly mention ESRs.<sup>6</sup> Additionally, in 2008 a new complaint procedure was appended to the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>7</sup>

In light of the global growth in recognizing ESRs, Asia is somewhat of an exception. While South Asia was the site of early experiments in social rights adjudication, the rest of Asia is only outmatched by Arab states in its reluctance to recognize and adjudicate ESRs (and even the right to property). With its embedded mercantilist model of capitalism, Asia is the most conservative

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<sup>1</sup> Maurice Cranston, *What are Human Rights?* (Bodley Head 1973).

<sup>2</sup> David Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (Cato Institute 1998).

<sup>3</sup> E.W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) IX *Netherlands Yearbook of International Law* 69.

<sup>4</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346;

Lon Fuller, 'The Form and Limits of Adjudication', (1978) 92 *Harvard Law Review* 353.

<sup>5</sup> Amartya Sen, *The Idea of Justice* (Harvard University Press 2009).

<sup>6</sup> Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008).

<sup>7</sup> See Malcolm Langford et al.(eds), *The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights: A Commentary* (Pretoria University Law Press 2016). Indeed, in the last decade, the UN Committee on Economic, Social and Cultural Rights (CESCR) has felt relatively comfortable asking states why they have not made the Covenant rights judicially enforceable.

region in the world when it comes to the constitutional recognition of labor rights. Moreover, East and Southeast Asian courts have very limited powers to enforce ESRs. Asian countries are also reluctant to submit themselves to international oversight concerning ESRs. Yet, while Asia can be considered exceptional when one views the region as a whole, there is spatial and temporal variation within Asia. There are important differences among Asian states and their apex courts, and there have been significant expansions of ESR protections during various constitutional reforms.

This chapter begins with an analysis of the macro patterns regarding ESR recognition in constitutional texts (Section II) and in constitutional adjudication across Asia (Section III). It is followed by analysis of the variation within Asia (Section IV) and explanations for such heterogeneity (Section V). The chapter concludes with some thoughts on the impact of the constitutionalization and judicialization of ESRs rights in the Asian region.

## **II. Formal Constitutional Recognition**

This chapter adopts the Toronto Initiative for Economic and Social Rights (TIESR) methodology employed by Jung, Hirschl and Rosevear to determine the presence and formal strength of 16 ESRs in constitutional texts.<sup>8</sup> The data analyzed reflects the status of those rights in 25 Asian constitutions as of 1 January 2016. These rights can be divided into four groups. The first of these are six economic rights that relate directly to employment and are broadly contingent on engagement with the formal economy.<sup>9</sup> The second is a group of four ‘standard’ social rights, labelled such because of their relative prevalence in contemporary constitutions and their accrual to individuals on the basis of membership in a political community or humanity.<sup>10</sup> The third group

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<sup>8</sup> For a description of this methodology and a discussion of global and temporal trends, see 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’ 2014 <<http://www.tiesr.org>>; Courtney Jung, Ran Hirschl and Evan Rosevear, ‘Economic and Social Rights in National Constitutions’ (2014) 62 *American Journal of Comparative Law* 1043 (hereafter Jung, Hirschl, and Rosevear, *Economic and Social Rights*); Evan Rosevear, Ran Hirschl and Courtney Jung, ‘Justiciable and Aspirational ESRs in National Constitutions’ in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019) (hereafter Rosevear, Hirschl, and Jung, ‘Justiciable and Aspirational ESRs’).

<sup>9</sup> The rights to a fair wage, a healthy work environment, rest and leisure, employment-related social security, strike, and join or form a trade union (unionize).

<sup>10</sup> The rights to child protection, education, health, and social security.

is composed of two rights relating to the natural environment.<sup>11</sup> Finally, there are four ‘non-standard’ social rights<sup>12</sup> that have emerged more recently—and somewhat tentatively—in domestic constitutions, even though some are accorded broad recognition in international treaties.

Generally speaking, constitutionally entrenched ESRs come in one of two forms: (1) *aspirational* goals or directive principles that are meant to inform state policy or provide interpretive guidance; or (2) *judicially enforceable* guarantees, the violation of which, including the failure to realize, can be the subject of judicial inquiry and remedy. In determining the ‘strength’ of a constitutional ESR, the default condition was taken to be aspirational; positive evidence, whether explicit or implicit, was required for designating a right as judicially enforceable.

By way of example, Article 15 of the Constitution of Bangladesh stipulates that it is ‘a fundamental responsibility of the State to attain . . . the provision of the basic necessities of life, including food, clothing, shelter, education and medical care’ and Article 38 states that ‘Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order.’<sup>13</sup> These articles present several constitutionally entrenched social rights.<sup>14</sup> Yet, courts are only empowered to adjudicate rights in Part III of the constitution.<sup>15</sup> The right to join or form a trade union is judicially enforceable because it is located in Part III. In contrast, as various core social rights are outlined in Part II, they are not. This division is underlined by Article 8(2), which describes the rights in Part II as ‘principles’ and provides that they ‘shall not be judicially enforceable’.<sup>16</sup>

Asian countries exhibit a high degree of similarity in their formal recognition of ESRs through international treaties. As indicated in Table 1, 21 of the 25 countries surveyed have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>17</sup> but only one—Mongolia—has ratified the Optional Protocol to the ICESCR permitting the filing of individual complaints. Similarly, only two—Mongolia and Thailand—have ratified the Optional Protocol to

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<sup>11</sup> The rights to environmental protection and a healthy environment.

<sup>12</sup> The rights to development, food and water, housing, and land.

<sup>13</sup> Constitution of the People’s Republic of Bangladesh, Arts. 15 & 38.

<sup>14</sup> Specifically, the rights to food and water, housing, education, health, and to join or form a trade union.

<sup>15</sup> Constitution of the People’s Republic of Bangladesh, Art. 102(1).

<sup>16</sup> It also states that they shall ‘be applied by the State in the making of laws,’ ‘be a guide to the interpretation,’ and ‘form the basis of the work of the State and of its citizens.’

<sup>17</sup> Bhutan, Brunei, and Singapore have not ratified, and Taiwan cannot.

the Convention on the Rights of the Child, which permits individual complaints concerning the rights of children, including ESRs. In other words, while there is widespread rhetorical recognition of the importance of ESRs in the region, there is little support for extra-national mechanisms designed to induce their realization.

At the domestic level, Asian countries' constitutions recognize an average of 7.4 ESRs, whether aspirational or judicially enforceable. This is roughly in line with the global average of 7.9. But this comparison masks two important features of Asian recognition. First, while the regional average of 2.8 judicially enforceable ESRs per constitution is the lowest of any of the major regions,<sup>18</sup> the average of 4.7 aspirational ESRs is the highest of any region. Second, there is substantial sub-regional variation. This is especially apparent when the constitutions are grouped into sub-regions along the lines of the standard UN geographic classifications of East Asia, Southeast Asia, and South Asia as they are in Table 1.<sup>19</sup> In *South Asian* constitutions, there is almost a regional consensus. These states incorporate a moderate to high proportion of the 16 ESRs as aspirational, and their constitutions contain few or no judicially enforceable economic and social rights. The one outlier is the Nepalese constitution, which guarantees a dozen ESRs, all but one of which are judicially enforceable. It is also notable that five of the seven South Asian countries can be considered common law jurisdictions, while a sixth—Sri Lanka—is a mixed common law and civil law system.<sup>20</sup>

In *East Asia*, two divergent approaches are evident. The constitutions of three countries—China and the two Koreas—contain a high number of ESRs, but they lack judicial enforceability. Another three jurisdictions—Hong Kong, Japan, and Mongolia—entrench a moderate number of ESRs, and all are judicially enforceable. The Taiwanese constitution is something of an outlier. It contains six of the possible 16 ESRs, but only the right to education is enforceable in courts.

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<sup>18</sup> The TIESR data groups countries into seven major regions: Middle East and North Africa, Post-Communist States, Latin America, Sub-Saharan Africa, Western Europe and North America, Small Island Developing States, and Asia.

<sup>19</sup> 'Standard Country or Area Codes for Statistical Use (M49 Standard)' 15 February 2018 <<https://unstats.un.org/unsd/methodology/m49/>> (United Nations Statistics Division 2018). Unlike the UN scheme, we have included Taiwan and excluded the Islamic Republic of Iran and the Special Administrative Region of Macau in our analysis.

<sup>20</sup> The seventh, Afghanistan, is considered an Islamic law jurisdiction.

Definable patterns of entrenchment are less patent in *Southeast Asian* constitutions. Variation is the only constant. Four countries’ constitutions—Brunei, Malaysia, Singapore, and Thailand—contain no ESRs. Three—Indonesia, Timor-Leste and the Philippines—incorporate a moderate to high number of judicially enforceable ESRs. Cambodia, Laos, Myanmar, and Vietnam occupy a middle space but exhibit very little similarity with one another or any other constitution in the sub-region.

### III. Judicial Recognition

Explicit recognition in a constitutional text is only one sign of constitutional acceptance of ESRs. Judicial interpretation is arguably as—or more—important. Judges have influence in three ways. First, they might *imply* ESRs into the constitution.<sup>21</sup> Second, in concrete cases, they must decide whether ESRs are *justiciable*.<sup>22</sup> Traditionally, courts declined to consider ESR claims on their merits because ESRs were deemed too vague, or courts worried about becoming too political. Third, courts must consider the *robustness* of the substance that attaches to ESRs. This assessment involves considering the breadth of the right, the legal standard for reviewing alleged violation of the right, or the strength of remedies.

*Table 1. Country Overviews*

	Economic & Social Rights			International Treaty Ratification			Varieties of Institutional Systems (VIS) <sup>23</sup>
	Aspirational (Number) <sup>24</sup>	Judicially enforceable (Number)	Domestic Jurisprudence	ICESCR	OP-ICESCR	CRC-OP III	
East Asia							
China	10	0	Low	Yes	No	No	State-Led
Hong Kong	0	4	None	Yes	No	No	Emergent LME
Japan	0	5	Low	Yes	No	No	Collab've (CME)
Mongolia	0	7	Low	Yes	Yes	Yes	State-Led

<sup>21</sup> In other words, courts might conclude that a constitution implicitly protects ESRs because of related rights provisions in the constitution (e.g., provisions concerning the rights to life and non-discrimination), constitutional principles or structure, or international treaties.

<sup>22</sup> Justiciability is an unusually protean term. It is deployed here to signify a threshold doctrine stating that a court cannot reach the merits of a case if it cannot identify manageable standards of review (functional requirement) and possesses sufficient democratic legitimacy and institutional competence for deciding the case (prudential requirement). See Laurence Tribe, *American Constitutional Law* (Foundation Press 2000). A justiciable rights claim is one that satisfies these criteria.

<sup>23</sup> Stav Fainshmidt et al., ‘Varieties of Institutional Systems: A Contextual Taxonomy of Understudied Countries’ (2018) *Journal of World Business* 307 (hereafter Fainshmidt, ‘Varieties of Institutional Systems’).

<sup>24</sup> The counting of aspirational and judicially enforceable rights in this table is based on the number of rights explicitly mentioned in each jurisdiction’s constitutional text.

North Korea	12	0	None	Yes	No	No	-
South Korea	12	0	Low	Yes	No	No	Hierarch. Coord.
Taiwan	5	1	Low	No	No	No	Hierarch. Coord.
<b>Southeast Asia</b>							
Brunei	0	0	Unknown	No	No	No	-
Cambodia	4	4	Unknown	Yes	No	No	-
Indonesia	0	8	Moderate/High	Yes	No	No	State-Led
Lao PDR	7	0	None	Yes	No	No	-
Malaysia	0	0	Moderate	Yes	No	No	State-Led
Myanmar	3	2	None	Yes	No	No	-
Philippines	2	9	Moderate	Yes	No	No	State-Led
Singapore	0	0	Unknown	No	No	No	Emergent LME
Thailand	0	0	Unknown	Yes	No	Yes	State-Led
Timor Leste	0	12	Unknown	Yes	No	No	-
Vietnam	11	0	None	Yes	No	No	State-Led
<b>South Asia</b>							
Afghanistan	8	0	Unknown	Yes	No	No	-
Bangladesh	9	1	Moderate	Yes	No	No	State-Led
Bhutan	8	0	Unknown	No	No	No	-
India	9	2	High	Yes	No	No	State-Led
Nepal	1	11	High	Yes	No	No	-
Pakistan	8	2	Moderate/High	Yes	No	No	State-Led
Sri Lanka	8	1	Moderate	Yes	No	No	State-Led

The ‘domestic jurisprudence’ column in Table 1 provides an assessment of Asian apex courts’ recognition of constitutional ESRs based on volume of litigation. To be sure, this is a very rough and ready measure. Nonetheless, according to legal opportunity structure theory, judicial responsiveness to ESR claims should incentivize litigation.<sup>25</sup> Thus, litigation serves as an indicator of judicial recognition of ESRs.

Looking more closely at courts in the region, one sees that some courts have been *expansive*, transcending aspirational recognition by implying judicially enforceable ESRs. These courts have interpreted constitutional protections of the rights to life and discrimination as encompassing implicit protections of justiciable ESRs. The archetypal example is India. From 1978, the Indian Supreme Court, and some India state courts, drew on their constitution’s directive principles to enlarge the scope of the right to life.<sup>26</sup> They justified this stance on the basis that the right to life was the ‘most precious human right’ and ‘must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may ... enhance the dignity of the individual and the worth of the human person’.<sup>27</sup> During this period, the India Supreme Court also relaxed rules of standing and experimented with a wide range of remedies. In 1980, it ordered a municipality to fulfil its statutory duties to provide water, sanitation and drainage systems; from this followed four decades worth of constitutional cases on housing, food, labor, education, and health rights.<sup>28</sup> The Indian experience, however, should not be overstated. Indian courts have been bullish on social rights but deferential on economic rights such as labor, employment, and land rights.<sup>29</sup> Moreover, while the Indian model triggered similar jurisprudence in neighbouring Pakistan and Nepal, it has only been partly exported to other South Asian countries such as Bangladesh and Sri Lanka.<sup>30</sup>

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<sup>25</sup> See Chris Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9 *Journal of European Public Policy* 238.

<sup>26</sup> *Sunil Batra v Delhi Administration*, 1978 SC 1675.

<sup>27</sup> See *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802..

<sup>28</sup> *Municipal Council Ratlam v Vardhichand and Ors*, AIR 1980 SC 1622.

<sup>29</sup> S. Muralidhar, ‘India: The Expectations and Challenges of Judicial Enforcement of Social Rights’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 102.

<sup>30</sup> Iai Byrne and Sara Hossain, ‘South Asia: Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka’, in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and*

Other Asian courts, such as the Supreme Court of Philippines have evinced a *restrictive* posture toward ESRs. Despite implying some ESRs rights (e.g., the right to energy<sup>31</sup>), it has been rather reluctant in applying otherwise enforceable ESRs and hesitant in terms of developing strong remedies.<sup>32</sup> In *Basco et al. v. Philippine Amusements and Gaming Corporation*, the Court found that various rights ‘are merely statements of principles and policies. As such, they are basically not self-executing, meaning a law should be passed by Congress to clearly define and effectuate such principles.’<sup>33</sup> Another example is the Supreme Court of China. Between 2001 and 2008, it issued 27 decisions that directly applied constitutional rights, including the right to education in the *Qi Yuling* case.<sup>34</sup> However, in 2008, seemingly under political pressure, it invalidated its legal interpretation in all of those cases and decided that it did not have the power to engage in constitutional review.<sup>35</sup>

Finally, some courts are characterized by *incrementalism*. For instance, Indonesia’s constitution was amended in 2000 to include a chapter on human rights. It includes many of the rights contained in international human rights instruments, and the Indonesia’s apex court has gradually applied them in a number of cases.<sup>36</sup> One prominent area of focus has been the privatization of water services,<sup>37</sup> which resulted in five applications for judicial review in the 2000s. Initially the Constitutional Court confirmed that Article 28H guarantees the right to water,<sup>38</sup> but declined to find a violation on the grounds that Article 5 of Law No. 7/2004 met the constitutional standard. The privatization law did not remove government control over water resources and

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*Comparative Law* (Cambridge University Press 2008) 125; Malcolm Langford and Ananda Bhatteari, ‘Constitutional Rights and Social Exclusion in Nepal’ (2011) 18 *International Journal on Minority and Group Rights* 387.

<sup>31</sup> *Tatad v Secretary of the Department of Energy*, G. R. No. 124360 (5 November 1997) (Supreme Court of the Philippines).

<sup>32</sup> Diane Desierto, ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ (2009) 11 *Asian-Pacific Law & Policy Journal* 114.

<sup>33</sup> G.R. No. 91649, (S.C. May 14, 1991) (en banc) [37] [https://lawphil.net/judjuris/juri1991/may1991/gr\\_91649\\_1991.html](https://lawphil.net/judjuris/juri1991/may1991/gr_91649_1991.html)

<sup>34</sup> ‘*Qi Yuling*’, *Interpretation (2001) No. 25 Official Reply of the Supreme People’s Court on Whether the Civil Liabilities Shall be borne for the Infringement upon a Citizen’s Fundamental Right to Education*, (Supreme People’s Court of China).

<sup>35</sup> Zhushi [2008] 15 (Supreme Peoples’ Court of China).

<sup>36</sup> For a full overview, see Stefanus Hendrianto, ‘Indonesia’ in Malcolm Langford (ed), *Cambridge Handbook of Social Rights Jurisprudence* (Cambridge University Press 2021) (hereafter Hendrianto, ‘Indonesia’).

<sup>37</sup> See Nicola Colbran, ‘Piped Water in Jakarta: A Political, Economic or Social Good?’, in Malcolm Langford and Anna Russell (eds), *The Human Right to Water: Theory, Practice and Prospects* (Cambridge University Press 2017), 463 (hereafter Colbran, ‘Piped Water in Jakarta’).

<sup>38</sup> Constitution of Indonesia, Art. 28H.



services, nor the state's implied responsibility to regulate and manage.<sup>39</sup> Yet, after a new lawsuit in 2013, it annulled the law and, in 2017, specifically annulled the water privatization in the City of Jakarta.<sup>40</sup> Indeed, Hendriato concludes that the 'Indonesian Constitutional Court is an outlier because the Court has interpreted socio-economic provisions as an obligation for the state to ensure citizens enjoy their rights... and has often conflated the notion of socio-economic rights with state control over natural resources.'<sup>41</sup>

Other courts are difficult to categorize. The Constitutional Court of Taiwan has been active in advancing a range of constitutional rights but has so far only addressed one ESR. In a case concerning individual duties associated with the national health insurance program, the court applied the right to social security. The justices upheld Article 155 of the constitution, deciding that the 'government should be obliged to establish a social insurance system for the purpose of promoting social welfare and implementing a system of public medical service for the improvement of national health by providing extensive services for sanitation and health protection.'<sup>42</sup>

#### **IV. Asian Exceptionalism and Economic and Social Rights**

Beyond viewing ESRs as a general category, it is important to ask which types of ESRs are most frequently recognized. Focusing on formal recognition in constitutions, one finds patterns of Asian exceptionalism. An almost non-existent recognition of economic rights, especially trade union-related rights, is balanced against a generous recognition of social rights. This situation reflects the classic Bismarkian bargain of 1880s Germany, in which systemic denial of worker's organizational rights was compensated with the world's first social insurance system.<sup>43</sup> The model also neatly reflects the Asia's somewhat peculiar mercantilist model of political economy. Many Asian states balance an internationalist export-oriented sector with strong domestic state-corporate relations (in which governments are cautious about imposing strong economic rights) and a 'set of

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<sup>39</sup> Constitutional Court decision no. 058-059-060-063/PUU-II/2004.

<sup>40</sup> Colbran, 'Piped Water in Jakarta' (n 39).

<sup>41</sup> Hendrianto, 'Indonesia' (n 38).

<sup>42</sup> Jou-Juo Chu, 'Global Constitutionalism and Judicial Activism in Taiwan' (2008) 38 *Journal of Contemporary Asia* 515.

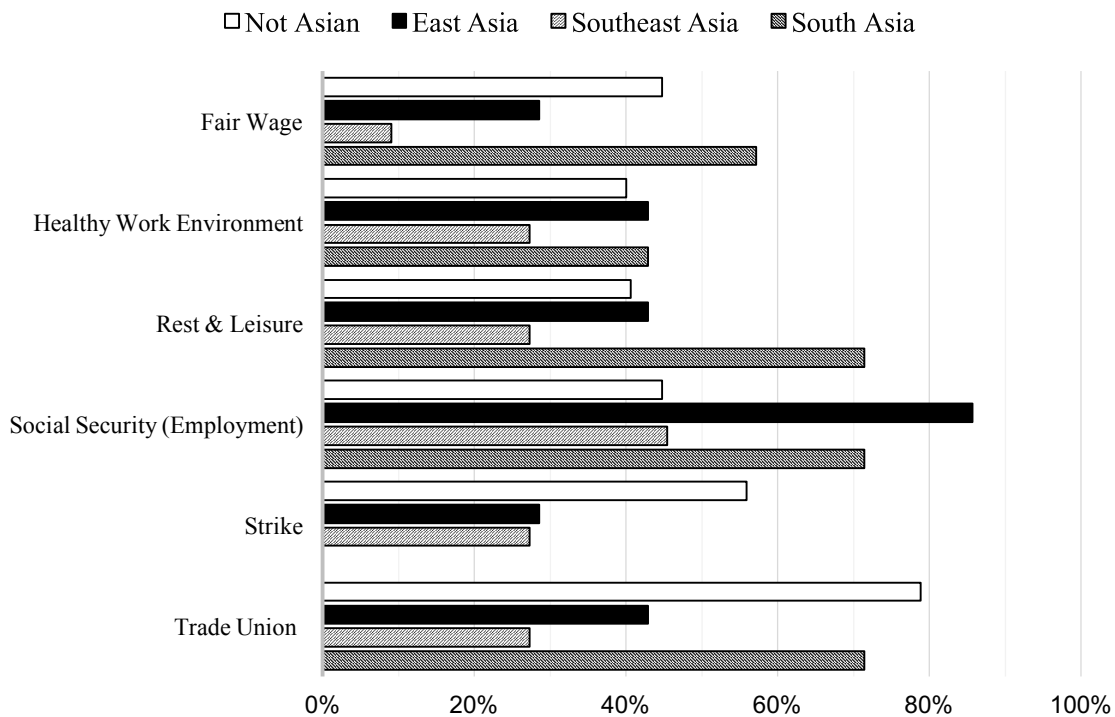
<sup>43</sup> Gosta Esping-Andersen, *Three Worlds of Welfare State Capitalism* (Princeton University Press 1990)

public policies to ensure that side payments from the more efficient export sectors facilitate a broad set of alliances between the two segments of the dual economy’ (namely, social rights).<sup>44</sup>

### 1. Economic rights

Turning first to economic rights, the average contemporary constitution in the world contains 3.0 of the six *economic rights*, of which 2.3 are judicially enforceable. In comparison, the 25 countries that comprise the Asian region contain an average of 2.3 economic rights, of which only 0.9 are judicially. As shown in Figure 1, however, there is significant intra-regional variation.

Figure 1. Presence of Economic Rights (% of Constitutions)



Parsing the sub-regions, Southeast Asian constitutions are among the least likely in the world to incorporate economic rights. Five of the eleven—Brunei, Malaysia, Myanmar, Singapore, and Thailand—contain none, and only four—Cambodia, Indonesia, the Philippines, and Timor-Leste—contain judicially enforceable ones. Indeed, constitutions in Southeast Asia are less than

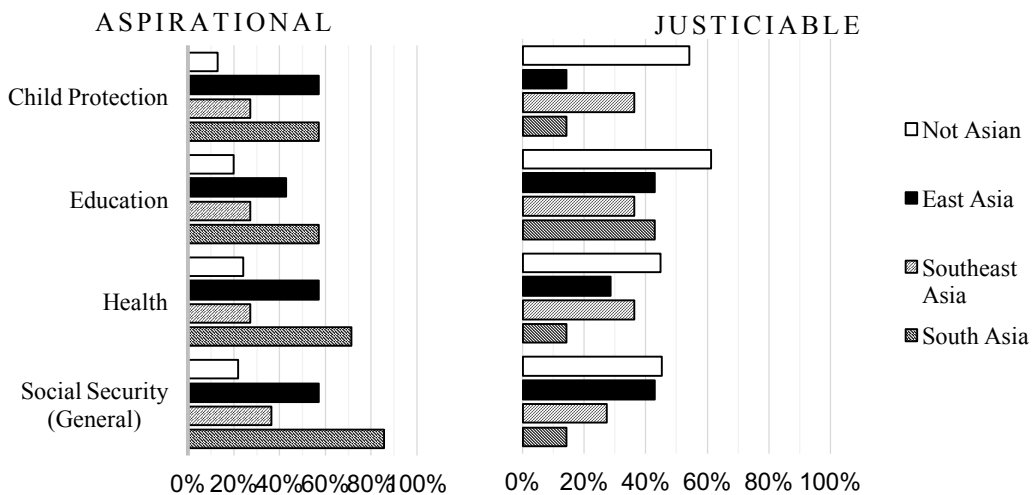
<sup>44</sup> Kanishka Jayasuriya, ‘Embedded Mercantilism and Open Regionalism: The Crisis of a Regional Political Project’ (2003) 24 *Third World Quarterly* 339.

half as likely to contain a right to join or form a trade union as any other non-Asian region. In contrast, South Asian constitutions are significantly more likely than the average constitution to incorporate each economic right, with one notable exception: the right to strike is completely absent from the sub-region’s seven constitutions. It should also be noted that aside from the right to join or form a trade union, which is predominantly judicially enforceable in the rare instances it is recognized, economic rights in the region are almost exclusively aspirational. East Asian constitutions are less likely than most other regions to contain judicially enforceable economic rights, with only three of the seven constitutions containing any at all.

## 2. Social rights

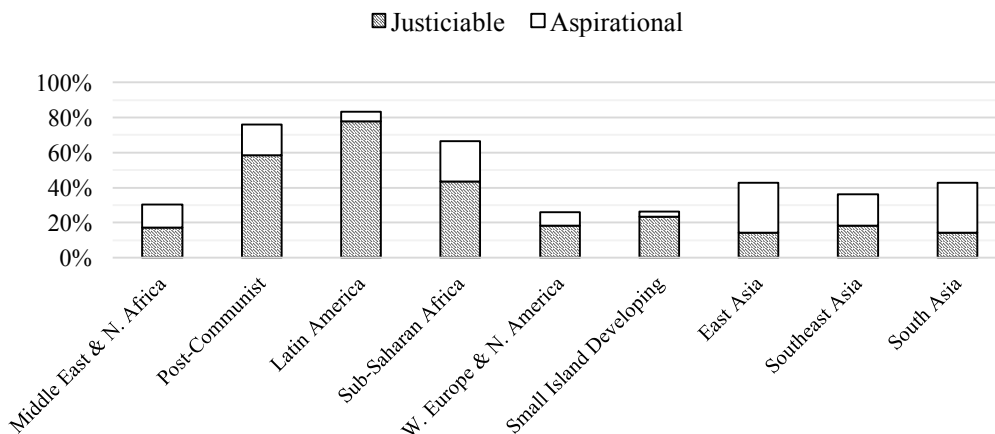
There is similar intra-regional variation in the constitutional entrenchment of the four *standard social rights*, as reflected in Figure 2. East and South Asian constitutions are well above the global average in terms of standard social rights guarantees, although they predominantly incorporate them as aspirational rights only. In fact, each of the four rights is present in at least 70% of both sub-region’s constitutions and the rights to education and social security are present in all South Asian constitutions. In Southeast Asia, constitutions are much less likely than in the rest of Asia to contain standard social rights overall and in aspirational form. Southeast Asian constitutions are more likely to contain judicially enforceable standard social rights than the constitutions from other Asian sub-regions, but they are still below the global average.

Figure 2. Nature of Standard Social Rights, (% of Constitutions)



As Figure 3 indicates, Asian constitutions sit roughly in the middle of the regional groups with respect to the likelihood of including the right to a healthy environment in some form. However, they are substantially less likely than almost any other region to make it judicially enforceable.<sup>45</sup> As is generally the case, the right to environmental protection is somewhat more prevalent than the right to a healthy environment in the constitutions of each of the three Asian regions. The higher prevalence is particularly marked in South Asia, where the right to environmental protection is not judicially enforceable but is aspirational in six of seven constitutions (though many South Asian courts have applied environmental rights liberally in practice).

*Figure 3. Right to a Healthy Environment, (% of Constitutions)*



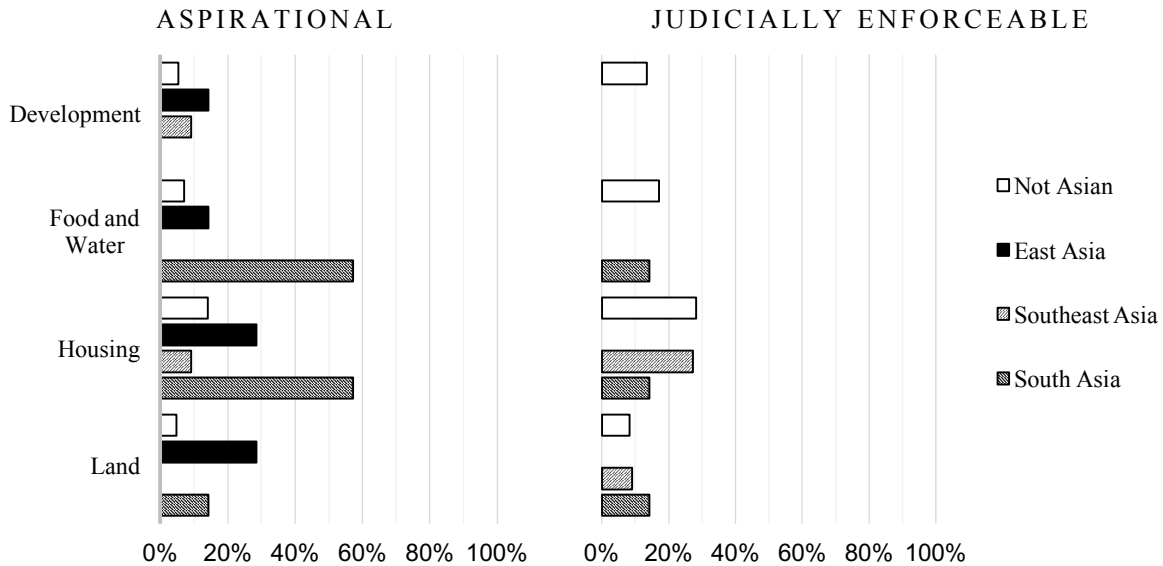
Non-standard social rights, especially enforceable ones, are relatively rare in constitutions outside of Latin American. It is therefore unsurprising that judicially enforceable rights to development, food and water, housing, and land are completely absent from Southeast Asian constitutions. Indeed, only four constitutions in Asia entrench any rights of this type.<sup>46</sup> One does find, however, a strong presence of aspirational non-standard social rights in South Asian constitutions (as reflected in Figure 4). In fact, the rights to food, water, and housing are more

<sup>45</sup> Southeast Asian constitutions are marginally more likely to include the right as a judicially enforceable guarantee than the in the Middle East and North Africa.

<sup>46</sup> Indonesia (housing), Nepal (all but development), Philippines (housing and land), and Timor-Leste (housing).

likely to be present in South Asian constitutions than in constitutions of any other region except Latin America.

Figure 4. Presence of Non-Standard Social Rights, (% of Constitutions)



## V. Correlates of Economic and Social Rights Entrenchment

This section briefly explores some possible explanations for the variation in ESRs among Asian constitutions. The analysis in this section focuses on three potential explanatory factors: the age of a constitution, the country’s legal origins, and the country’s economic model.

### 1. Age of Constitutions

It is generally understood that, all else being equal, the more recent a constitution, the more rights—including ESRs—it is likely to contain.<sup>47</sup> In terms of average constitutional age, Asia is largely in line with the global average, as shown in Table 2. There is, however, significant sub-regional variation. East Asian constitutions are older and less frequently amended than those of South and Southeast Asia; conventional wisdom would thus suggest that East Asian

<sup>47</sup> See e.g., David S Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 California Law Review 1163; Colin J Beck, Gili S Drori and John W Meyer, ‘World Influences on Human Rights Language in Constitutions: A Cross-National Study’ (2012) 27 International Sociology 483; Rosevear, Hirschl and Jung (n 1).

constitutions are less likely to contain rights. This is not, however, the case in actuality. Similarly, were constitutional age the determinative factor, South and Southeast Asian constitutions ought to incorporate roughly similar numbers of ESRs. But, Southeast Asian countries lag behind both of the other sub-regions (although they are slightly more likely to entrench judicially enforceable rights). A roughly similar pattern is evident when one considers the length of time since a constitution's most recent amendment. Overall, it appears that within Asia the age of a constitution is not particularly relevant to the likelihood it contains ESRs.

*Table 2. Constitutional Age and Economic and Social Rights Prevalence*

	Years Since Constitution		Economic & Social Rights		
	Into Force	Last Amended	Aspirational	Judicially Enforceable	Present
Asia	36.1	11.5	4.7	2.8	7.4
East Asia	45.9	22.9	5.6	2.4	8
Southeast Asia	32.0	9.4	2.5	3.2	5.6
South Asia	29.4	3.7	7.3	2.4	9.7
Global Average	33.9	9.2	2.3	7.9	5.6
Excluding Asia	33.7	8.9	2.0	8.0	6

## **2. Legal Origins**

Building on comparative legal scholarship and a new-institutional approach to understanding economic development, Rafael La Porta and his collaborators have suggested a connection between countries' legal systems and their economic performance.<sup>48</sup> According to 'legal origins theory', a legal origin or tradition is conceptualized as a 'style of social control of economic life (and maybe of other aspects of life as well)'; the civil law tradition is concerned with conditioning private interactions such that they are in the public interest, while the common law is concerned with resolving disputes within a notionally unconditioned private sphere.<sup>49</sup> To

<sup>48</sup> See e.g., Rafael La Porta and others, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113; Rafael La Porta et al., 'The Quality of Government' (1999) 15 *Journal of Law, Economics, and Organization* 222; in terms of comparative law and legal classification, see Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law, Vol. I* (3rd edn, Clarendon Press 1998).

<sup>49</sup> Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285, 286; this theory is not without its critics, see e.g., Daron Acemoglu, Simon Johnson and James A Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *American Economic Review* 1369; Daron Acemoglu, Simon Johnson and James A Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation: Reply' (2012) 102 *American Economic Review* 3077.

the extent that a country’s constitution reflects the country’s legal origin, civil law jurisdictions ought to be more likely to entrench ESRs than their common law counterparts. Globally, this is the case.<sup>50</sup> It is also the case in Asia, although there is notable sub-regional variation.

*Table 3. Economic and Social Rights by Legal Tradition*

	Aspirational			Judicially Enforceable			Present		
	Common	Civil	Socialist	Common	Civil	Socialist	Common	Civil	Socialist
East Asia	{0.0}	5.7	7.3	{4.0}	2.0	2.3	{4.0}	7.7	9.7
Southeast Asia	0.0	[1.0]	6.3	0.0	[8.5]	1.5	0.0	[9.5]	7.8
South Asia	7.2	{8.0}	-	2.8	{0.0}	-	10.0	{8.0}	-
Asian	3.9	4.5	6.7	1.9	3.8	1.9	5.8	8.3	8.6
Non-Asian	2.0	2.1	1.4	2.9	6.9	9.1	4.8	9.1	10.6

- no observations, { } single observation, [ ] two observations.

Table 3 reports the average number of aspirational and judicially enforceable ESRs per constitution as well as the total number present in Asia, its sub-regions, and the rest of the world grouped according to legal origin. Although the four types of civil law—French, German, Scandinavian, and Socialists—are often collapsed to produce a common/civil dichotomy, this chapter keeps socialist-origin jurisdictions separate because they comprise an analytically interesting category.

Asian constitutions as a group are broadly in line with global trends in terms of ESR presence. Asia is, however, notably different with respect to the strength of ESRs. Globally, aspirational ESRs are much less common than judicially enforceable ESRs. In Asia, the reverse is true, and this is something that cuts across legal traditions: ESRs are much more likely to be aspirational than judicially enforceable in Asia.

Asian constitutions do appear to reflect broader trends concerning a connection between ESR presence in a country’s constitution and the country’s legal origins. At least rhetorically, the constitutional systems in civil law jurisdictions, particularly those with a history of socialist rule, have taken a more active role regarding the well-being of their citizens and the structuring of their economies. In contrast, common law jurisdictions are less likely to constitutionalize such

<sup>50</sup> Jung, Hirschl, and Rosevear, ‘Economic and Social Rights’ (n 1) 1056-1057.

guarantees. The one exception is Hong Kong, which has four judicially enforceable ESRs—both variants of social security as well as the rights to strike and to join or form a trade union. More notable, however, is the high number of aspirational rights in South Asia’s six common law jurisdictions. The variation in entrenchment patterns across the sub-regions suggests that while legal origin plays an important role in shaping constitutional design, it is not the only relevant factor.

### 3. *Economic Models*

The past decade has seen a significant expansion of research on institutional design and approaches to economic production in Asia. Based on earlier work focusing on the OECD,<sup>51</sup> this research seeks to identify patterns of institutional arrangements that characterize countries’ approaches to production, and it asserts a correlation between institutional design and economic performance. This research identifies clusters of economic models based on a wide variety of qualitative and quantitative measures such as education, employment relations, social capital, social welfare policies, industrial policy, corporate governance, financial systems, and contract enforcement.

There are several classification schemes employed by researchers working in this area.<sup>52</sup> For present purposes, this chapter focuses on the Varieties of Institutional Systems (VIS) framework developed by Fainshmidt and his collaborators because it is a recent, well-articulated classification scheme that offers the most extensive coverage of Asian economies.<sup>53</sup> According to the VIS approach, there are three types of economy with at least two examples in Asia.<sup>54</sup> The State-

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<sup>51</sup> In particular, Richard Whitley, *Divergent Capitalisms: The Social Structuring and Change of Business Systems* (Oxford University Press 1999) <[http://link.library.utoronto.ca/eir/EIRdetail.cfm?Resources\\_\\_ID=1045220&T=F](http://link.library.utoronto.ca/eir/EIRdetail.cfm?Resources__ID=1045220&T=F)> accessed 15 February 2018; and, Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001).

<sup>52</sup> E.g., Frank B Tipton, ‘Southeast Asian Capitalism: History, Institutions, States, and Firms’ (2009) 26 *Asia Pacific Journal of Management* 401; Xiaoke Zhang and Richard Whitley, ‘Changing Macro-Structural Varieties of East Asian Capitalism’ (2013) 11 *Socio-Economic Review* 301; Richard W Carney, ‘Varieties of Hierarchical Capitalism: Family and State Market Economies in East Asia’ (2016) 29 *The Pacific Review* 137; Michael A Witt and Gordon Redding, ‘Asian Business Systems: Institutional Comparison, Clusters and Implications for Varieties of Capitalism and Business Systems Theory’ (2013) 11 *Socio-Economic Review* 265; Michael A Witt and others, ‘Mapping the Business Systems of 61 Major Economies: A Taxonomy and Implications for Varieties of Capitalism and Business Systems Research’ (2018) 16 *Socio-Economic Review* 5.

<sup>53</sup> Fainshmidt, ‘Varieties of Institutional Systems’ (n 23).

<sup>54</sup> A fourth category, Collaborative or Coordinated Market Economy (CME), has a single example: Japan.



Led category is the largest in the region. Economies of this type are characterized by relatively low GDP, weak education, and the suppression of labor unions. They are also likely to be predatory states. Looking at the constitutions of countries with such economies, one might expect few or no economic rights guarantees, particularly a lack of rights relating to unionization and striking. Low levels of education and low per capita GDP also suggest a dearth of guarantees for standard social rights, particularly the right to education.

Hong Kong and Singapore are considered Emergent Liberal Market Economies (LMEs). This model is characterized by high levels of education, some industrial unionization but with limited capacity, high levels of government effectiveness, and a largely regulatory approach to the exercise of state power. As such, one might expect a constitutionalized right to education as well as at least some standard social and economic rights, although the latter are likely to be aspirational only.

There are also two Hierarchically Coordinated economies: South Korea and Taiwan. Economies of this type tend to have relatively high per capita GDP and decent levels of education. They also tend to adopt a developmental state approach. As such, one can reasonably expect high levels of investment in human and social capital development, suggesting the likelihood of constitutionalized rights to education, health, and child protection, as well as measures targeted at mitigating poverty to foster the development of a skilled and productive workforce. However, as the state has adopted somewhat of a paternal role, it is unlikely that these rights will manifest in judicially enforceable form.

The constitutions of the Hierarchically Coordinated countries appear to reflect their economic model. Both Korea and Taiwan guarantee all four standard social rights—child protection, education, health and social security. The two constitutions contain 12 and 6 ESRs, respectively, all but one of which is aspirational.<sup>55</sup> The Emergent LME constitutions only accord somewhat with expectations. Between the two constitutions, there is only one standard social right—a judicially enforceable right to social security in Hong Kong—in either constitution. Singapore has no ESRs at all, Hong Kong has four—both social security rights and the rights to unionization and to strike—all of which are judicially enforceable. ESR entrenchment in the State-

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<sup>55</sup> The right to education in the Taiwanese constitution is judicially enforceable.

Led economies is largely contrary to expectations. The near-total absence of a right to strike comports with expectation (although the right to unionize is entrenched as judicially enforceable in nearly half of the constitutions). However, the right to education is present in more than three-quarters of constitutions in the State-Led economies, and the average constitution contains roughly three economic and three standard social rights.

Two matters warrant further consideration related to the seeming lack of conformity between economic institutions and constitutionally entrenched rights. The first is the possibility of strategic ratification of international human rights instruments and constitutional entrenchment of the treaties, wherein constitutionalized rights are not respected in practice—the so-called ‘cheap talk’ hypothesis.<sup>56</sup> Some large-N studies have supported this theory, finding no significant effects from the ratification of treaties or domestic entrenchment.<sup>57</sup> Yet, others have found the reverse or suggested that causal mechanisms of rights protection are complex and conditional.<sup>58</sup> In the absence of civil society organization or where the political regime is authoritarian, human rights treaty ratification is unlikely to have a positive effect and may even make matters worse.<sup>59</sup> Moreover, a strong civil society is also associated with post-ratification improvement in a country’s human rights record.<sup>60</sup> In addition, domestic institutional factors are likely to impact realization of rights. For example, Kavanagh found that once democracy, inequality, urbanization, and political violence are accounted for, the constitutionalization of the right to health is associated with a statistically significant improvement in under-5 mortality as well as the majority of health service delivery and expenditure indicators.<sup>61</sup>

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<sup>56</sup> Wade M Cole, ‘Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices’ (2013) 92 *Social Forces* 165.

<sup>57</sup> Oona A Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935; Avi Ben-Bassat and Morri Dahan, ‘Social Rights in the Constitution and in Practice’ (2008) 36 *Journal of Comparative Economics* 103; Christian Bjornskov and Jacob Mchangama, *Do Social Rights Affect Social Outcomes?* (Aarhus University 2013).

<sup>58</sup> Beth Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press 2009).

<sup>59</sup> Eric Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’ (2005) 49 *Journal of Conflict Resolution* 925.

<sup>60</sup> Epp (n 29); Keck and Sikkink (n 29); Emilie M Hafner-Burton and Kiyoteru Tsutsui, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (2005) 110 *American Journal of Sociology* 1373.

<sup>61</sup> Matthew M Kavanagh, ‘The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes’ (2016) 51 *Studies in Comparative International Development* 328.

Second, it should be noted that while economic classification largely reflects historical circumstances—ranging from colonization to education policy—constitutions, particularly those in developing countries, are generally prospective documents, seeking to articulate a series of goals rather than codify a set of pre-existing conditions. Indeed, this is one possible—perhaps even probable—explanation for the relatively high proportion of aspirational rights in the region. That being said, the degree to which such provisions represent empty rhetoric, well-intentioned promises unlikely to be realized, or policy goals taken seriously is a matter which requires further investigation.

## **VI. Conclusion: The Effects of Constitutionalising ESR**

The patterns of constitutionalizing ESRs in Asia are diverse and, at times, exceptional. Courts in South Asian states such as India, Pakistan, and Nepal were early leaders in judicially enforcing ESRs while East and Southeast Asian states have been strongly reluctant to permit their judiciaries to follow suit. The most distinctive traits in the region are the reluctance to recognize core workplace rights—such as the rights to strike or fair wage—and a general hostility to international oversight of ESRs. These traits apply almost regardless of the constitutional system’s sub-region, legal tradition, economic system, and age. In most but not all Asian countries, it is social rights rather than economic rights that have been given the most recognition in constitutional texts and jurisprudence. However, it is notable that the stronger democracies in Asia are more open to both international review and domestic judicial review regarding ESRs. In this sense, the generally positive trend of democratization in Asia – for example in Indonesia, Malaysia, and Nepal— could point to an enhanced role for constitutionalizing and judicializing ESRs.