

## The Edward J. Bloustein Jurisprudence Lecture

### LEGAL ORIGINS AND HUMAN RIGHTS LAW

*Adam Chilton*<sup>\*</sup> & *Mila Versteeg*<sup>\*\*</sup>

*A widely studied topic in comparative law is the extent to which countries' legal origins—and especially whether they are a civil or common law system—are associated with the substance of their contemporary laws. We contribute to this line of research by using data from a range of sources to explore whether common law and civil law countries have different substantive legal commitments in an area where the enduring influence of legal origins remains unclear: human rights law. We specifically explore differences between common law and civil law countries along five dimensions. We find that, compared to countries with common law legal origins, countries with civil law legal origins enumerate more constitutional rights, ratify more human rights treaties, enumerate more citizen duties, and are more likely to have legal regimes that incorporate international human rights treaties into their domestic legal order.*

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<sup>\*</sup> Professor of Law & Walter Mander Research Scholar, University of Chicago Law School.

<sup>\*\*</sup> Henry L. & Grace Doherty Charitable Foundation Professor of Law; Director of the Center for International & Comparative Law; Director of the Human Rights Program; Senior Fellow at the Miller Center, University of Virginia School of Law.



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## INTRODUCTION

A widely studied topic in comparative law is the extent to which a country's legal origins—that is, whether its legal regime is based on common law or civil law—is associated with the substance of its contemporary laws.<sup>1</sup> For instance, the line of scholarship that put studying legal origins on the academic map was research by a group of scholars collectively known as “LLSV”—Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Robert W. Vishny.<sup>2</sup> Their initial research on the topic claimed that countries' quality of investor protections are heavily influenced by their legal origins.

But despite the widespread influence of this claim, subsequent research by Mark Roe and by Holger Spamann suggested that countries' legal origins are not actually associated with modern-day differences in the legal protections those countries offer investors.<sup>3</sup> In other legal areas, however, research on whether countries' legal origins are associated with contemporary differences in substantive laws has produced mixed results. For instance, research has suggested that

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<sup>1</sup> In addition to studying the relationship between legal origins and legal substance, a great deal of research has also studied the impact that legal origins have on their contemporary outcomes. *See generally* Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008). For instance, research has studied the impact that legal origins have on topics ranging from economic growth rates to transmission rates of HIV. *See* Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 503 (2001); Siwan Anderson, *Legal Origins and Female HIV*, 108 AM. ECON. REV. 1407 (2018).

<sup>2</sup> Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

<sup>3</sup> *See, e.g.*, Mark Roe, *Legal Origin, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006); Holger Spamann, *The “Antidirector Rights Index” Revisited*, 23 REV. FIN. STUD. 467 (2010).

countries' legal origins are associated with substantive differences in their foreign relations law<sup>4</sup> and property law,<sup>5</sup> but not with their current antitrust law.<sup>6</sup>

One area where the relevance of countries' legal origins to their contemporary legal commitments remains unclear is human rights law.<sup>7</sup> It has widely been observed that the common law-civil law divide is mostly irrelevant to human rights because the post-World War II period saw a convergence of human rights norms globally. For example, Wen-Chen Chang and Jiunn-Rong Yeh argue that, as a result of globalization, "the majority of nations in all parts of the globe share similar constitutions, which typically include a list of fundamental rights and freedoms," that, "are reflective of one another as well as of post-war international human rights documents."<sup>8</sup> Similarly, Ran Hirschl argues that "[u]nlike in comparative law generally ... classifying a given constitutional system within the 'legal traditions' or 'family trees for legal systems' ... is not common in ... comparative constitutional law ...."<sup>9</sup> Hirschl argues that this is because the "rise of

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<sup>4</sup> See Kevin Cope et al., *The Global Evolution of Foreign Relations Law*, 116 AM. J. INT'L L. 1, 3 (2022).

<sup>5</sup> See Anu Bradford et al., *Do Legal Origins Predict Legal Substance?*, 64 J. LAW & ECON. 207 (2021).

<sup>6</sup> See *id.*

<sup>7</sup> See, e.g., Paolo Carozza, *The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights*, 5 NOTRE DAME J. INT'L COMP. L. 153 (2015) (describing a divergence of common law or "Anglo" approaches and civil law-oriented "Latin" approaches within the Inter-American system).

<sup>8</sup> Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1165 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>9</sup> RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 233 (2014) (though Hirschl also notes that "legal tradition" still accounts for considerable differences in

supranational rights regimes and the emerging global canon of constitutional law ... are increasingly defying traditional common law/civil law distinctions.”<sup>10</sup> In the same vein, Lorraine Weinrib observes that the “post war paradigm” of constitutionalism is “a shared remedial project” that is “designed to protect equal citizenship and respect for inherent human dignity” and that this project “has broken down hitherto impermeable boundaries between separate sovereign legal systems and blurred hitherto sharp distinctions ... between constitutions based on common law and those based on civil law.”<sup>11</sup>

These claimed similarities between countries with common law and civil law legal origins are not limited to the text of their founding documents or treaties—it is also argued that they apply to judicial interpretations of their legal commitments. Many scholars argue that courts around the world use common tools to interpret rights, and are in dialogue with each other when doing so.<sup>12</sup> The result has been dubbed a “the rise of

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modes of constitutional “adjudication, reasoning, and foreign citation sources” but observes that “legal families cannot explain why constitutional jurisprudence in Germany, Spain, Israel, Canada, and South Africa looks increasingly similar”).

<sup>10</sup> *Id.*

<sup>11</sup> Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 89-90 (Suijt Choudhrey ed., 2007).

<sup>12</sup> See, e.g., Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L. J.* 819, 822 (1999); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 *OXFORD J. LEG. STUD.* 499 (2000); Anne Marie Slaughter, *A Global Community of Courts*, 44 *HARV. INT’L L. J.* 191 (2003).

world constitutionalism,”<sup>13</sup> “striking similarities,”<sup>14</sup> a “generic” constitutional law across different systems,<sup>15</sup> and a “global model” of judicial interpretation.<sup>16</sup> It is widely assumed that this shared project transcends the common law/civil law divide.

In contrast, other scholars argue that there are enduring differences in how common law and civil law countries approach human rights. Studying the content of national constitutions, some scholars have observed that civil law constitutions continue to embody a rights tradition that is more “statist” in nature than the common law rights tradition.<sup>17</sup> They observe that this statist conception of rights reflects “a more benign conception of the state,” as it views the state not as a threat to liberty but instead as a provider of social welfare and basic necessities.<sup>18</sup> In this vision of the state, the pursuit of

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<sup>13</sup> See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 771-72 (1997).

<sup>14</sup> Robert E. Goodin, *Designing Constitutions: the Political Constitution of a Mixed Commonwealth*, in CONSTITUTIONALISM AND TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 223 (Richard Bellamy & Dario Castiglione eds., 1996).

<sup>15</sup> David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 659 (2005) (“Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences, in response to shared theoretical and practical challenges. These commonalities are at points so thick and prominent that the result may fairly be described as *generic constitutional law*—a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction.”).

<sup>16</sup> KAI MOLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* (2015); See also Estefânia Maria de Queiroz Barboza & Katya Kozicki, *Common Law and Civil Law: Convergences Beyond a Written Constitution*, 40 CUESTIONES CONSTITUCIONALES 39 (2019).

<sup>17</sup> David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

<sup>18</sup> *Id.* at 1225. Law and Versteeg trace this observation to sociologist Boli-Bennet, who views individual rights as incorporative in nature; historically states granted rights to certain groups of citizens in exchange for those

welfare is seen as a joint goal “shared between the state and its citizens.”<sup>19</sup> The existence of this joint goal, in turn, means that these states feel more comfortable with a strong legal commitment to positive social welfare rights and other positive duties placed upon the state.<sup>20</sup> And because the state and its citizens jointly produce social welfare, systems that embody a statist tradition do not shy away from extending constitutional rights into the private sphere or placing constitutional duties directly upon private citizens.<sup>21</sup> The common law legal tradition, by contrast, has long been described as more “libertarian,” and reflects a vision of rights that is “heavily oriented toward protecting an individual’s interest in freedom from detention or punishment at the hands of the state,” while viewing the “judicial process as the primary instrument for

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citizens accepting state demands such as “regular taxation, trade duties, and gradual surrender of legal authority to the state.” He further observes that those states with more rights will also have more citizens duties. John Boli-Bennett, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970*, in GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES, AND NGO STRATEGIES 173, 174-75 (Ved P. Nanda et al. eds., 1981).

<sup>19</sup> Mila Versteeg & Erensu Altan, *Constitutional Duties*, 71 AM. J. COMP. L. (forthcoming 2023). Compare Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT’L J. CONST. L. 79, 90 (2003) (observing that systems that envision an active state are more comfortable with the horizontal application of human rights).

<sup>20</sup> See, e.g., Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in EUROPEAN AND U.S. CONSTITUTIONALISM 131 (Georg Nolte ed., 2005).

<sup>21</sup> Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 LAW & CONTEMP. PROBS. 223, 240 (2002); See Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L. J. 341, 352-59 (2006); Stephen Gardbaum, *Horizontal Effect of Constitutional Rights*, 102 MICH. L. REV. 387, 401-07 (2003).



providing that protection.”<sup>22</sup> At the most abstract level, some have observed that the civil law tradition reflects a different notion of the social contract, one that is more rooted in the ideals of Jean-Jacques Rousseau than those of John Locke.<sup>23</sup>

In this short contribution, we empirically explore whether countries’ legal origins are associated with differences in their approach to human rights law. We specifically explore differences between common law and civil law countries along five dimensions: (1) the total number of rights enumerated in their written constitutions; (2) the total number of human rights treaties they have ratified; (3) the total number of citizen duties enumerated in their written constitutions; (4) the status of international human rights law in their written constitutions; and (5) whether international treaties form part of their unwritten constitutions.

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<sup>22</sup> Law & Versteeg, *supra* note 17, at 1224. Compare MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 10-11, 16-46, 88-96 (1986) (contrasting “policy-implementing” judicial systems in the continental traditions, which tend to be hierarchically organized with “conflict-solving” judicial systems in the Anglo-American tradition, which are more naturally organized along “coordinate” lines); see also FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 54-56, 59-62 (Ronald Hamowy ed., 1960) (comparing the British tradition of liberty-empirical, unsystematic, evolutionary, and based on the jurisprudence of common law—and the French tradition of liberty—speculative and rationalistic).

<sup>23</sup> Compare Steven G. Calabresi & Gary Lawson, *Foreword: The Constitution of Responsibility*, 77 *CORNELL L. REV.* 955, 956-57 (1992) (“One should not expect our Constitution of 1787 to speak openly of citizen responsibilities, even of responsibilities that are more consistent with Western liberal traditions than some of the more extravagant obligations described in European or Communist constitutions. The American charter is a constitution of government rather than a constitution of society—unlike some of its twentieth century foreign counterparts which self-consciously seek to define the entire social fabric.”).

Our results reveal substantial differences in how common law and civil law countries have codified human rights law. In fact, we find large differences based on countries' legal origins across all five of the dimensions we explore. First, civil law countries have always enumerated a larger number of rights in their constitution and continue to do so. Second, they also enumerate a larger number of explicit duties for citizens in their constitutions. Third, they ratify more human rights treaties than common law legal systems. Fourth, these human rights treaties are directly incorporated into the domestic legal order. And fifth, in civil law systems, human rights treaties are not only more likely to be part of the domestic legal order, but they are also more likely to be a direct source of constitutional law. The remainder of this contribution introduces our data and then illustrates each of these five claims in turn.

Before doing so, it is important to note that our goal in this short contribution is to explore global patterns, not to make causal claims. That is, if we find that certain rights features are associated with the civil law or common law tradition, then it does not necessarily follow that these are *caused* by this tradition. Instead, it is certainly possible that there are other forces that are associated with both legal tradition and rights that might explain these patterns. We do not purport to offer a full explanation of what causes different stances toward rights protection. Our goal is a more modest one, which is to explore simple correlations between legal tradition and rights.

## I. SAMPLE AND DATA

For this analysis, we built a dataset capturing countries' legal origins and their substantive human rights commitments over time. To do so, we combined information from a variety

of sources. We started with our own prior dataset on constitutional rights, which includes country-year observations on constitutional rights for every internationally recognized, independent country that has been part of the international state system in the post-war period.<sup>24</sup>

We obtained data from La Porta, López-de-Silanes, and Shleifer on countries' legal origins.<sup>25</sup> Using their data, we coded countries as either having a common law or civil law legal system. Relying on their data reduced our sample to 184 countries. We also restricted our sample to 1950 to 2010 due to data availability for some of the variables we explore below. It is important to note that there is debate in comparative law scholarship about how best to classify countries' legal systems.<sup>26</sup> Perhaps the most used classification is simply dividing countries based on if they have common law or civil law legal systems. We follow this basic approach. That said, there is also disagreement about how best to classify countries into these simple categories. For instance, research by Klerman

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<sup>24</sup> ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 80-83 (2020). This dataset updated and expanded Versteeg's prior countries' constitutions. See Law & Versteeg, *supra* note 17, at 1187-90; Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014).

<sup>25</sup> Rafael La Porta et al., *supra* note 2. Their data further breaks down civil law systems according to whether they are within the French, German or Nordic tradition, but we simply combine these types of civil law traditions into a single civil law category for our analysis.

<sup>26</sup> See, e.g., Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 769-795 (2009) (discussing the development and listing all the main criticisms to the literature); John Reitz, *Legal Origins, Comparative Law, and Political Economy*, 57 AM. J. COMP. L. 847, 848 (2009) ("Comparatists working with more traditional, non-quantitative methods have vigorously critiqued this work, especially for the sweeping generalizations it employs in the classifying ....").

et al. shows that a binary distinction between common law and civil law countries results in the miscategorization of countries that have either mixed legal systems or Islamic legal systems.<sup>27</sup> Although we rely on data from La Porta to divide countries into either common law or civil law systems, our results are consistent when we use Klerman et al.'s more refined coding of countries' legal origins.<sup>28</sup>

To illustrate our sample, Figure 1 reports the total number of countries that had common law or civil law legal origins from 1950 to 2010. The figure reveals that there are substantially more civil law countries in the world than common law countries.<sup>29</sup> There were just 13 common law countries and 53 civil law countries in 1950, but there were 60 common law countries and 124 civil law countries by 2010 (note that the total number of independent countries in the world increased dramatically over the second half of the twentieth century).

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<sup>27</sup> Daniel M. Klerman et al., *Legal Origin or Colonial History?*, 3 J. LEGAL ANAL. 379 (2011).

<sup>28</sup> We specifically explored the robustness of our results while using the Klerman et al. coding of countries' legal origins and excluding countries with mixed or Islamic legal traditions. *See id.* When doing so, we found substantially similar results.

<sup>29</sup> Newly independent countries typically inherit the legal system from their former colonizer.

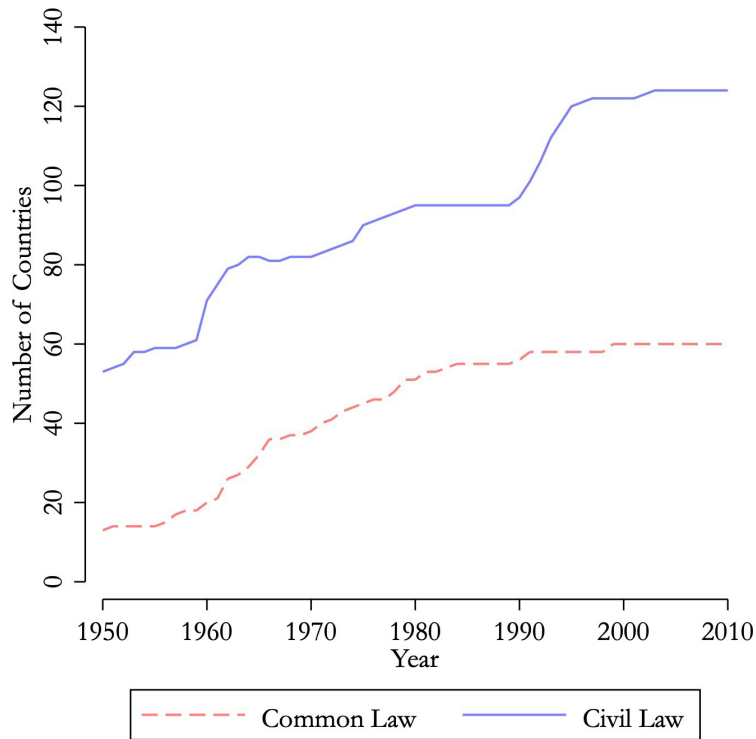
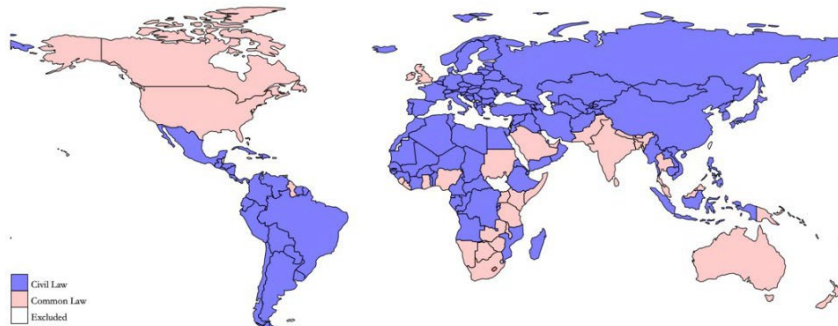
**Figure 1: Countries Over Time by Legal Origin**

Figure 2 further explores our data by mapping countries in the sample as of 2010 based on their legal origins. It shows that common law countries are concentrated in North America, South Africa, East Africa, Southeast Asia, and Oceania. In contrast, civil law legal regimes are dominant in South America, West Africa, and North Africa, and across continental Europe and Asia. Figure 2 illustrates that, quite predictably, it would be a mistake to assume that the countries that have a given legal origin are in some way randomly distributed around the world.

**Figure 2: Countries by Legal Origins**



## II. RESULTS

We now use this data to explore the differences in how common law and civil law countries have codified protections for human rights. Specifically, we explore how these legal traditions correlate with the number of enumerated constitutional rights (Part II.A); the number of human rights treaties ratified (Part II.B); the number of enumerated citizen duties (Part II.C); the status of international law in the domestic legal order (Part II.D); and whether human rights treaties are incorporated into the constitution (Part II.E).

### *A. Constitutional Rights*

The first question we explore is whether there is a difference in the number of rights that common law and civil law countries enumerate in their written constitutions. Law and Versteeg have previously shown that civil law systems both enumerate more rights overall and are also more likely to enumerate rights of a “statist” flavor.<sup>30</sup> Specifically, they found

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<sup>30</sup> Law & Versteeg, *supra* note 17.

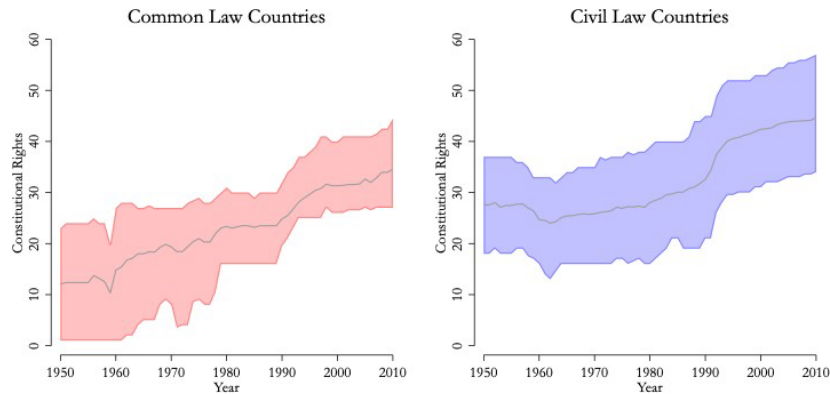
that civil law countries are more likely to have social and economic rights in their constitution, as well as rights relating to the family and marriage that extend the state's role into the private sphere.<sup>31</sup>

We revisit the relationship between legal origins and enumerated constitutional rights using updated data.<sup>32</sup> Figure 3 plots the mean number of constitutional rights out of 87 possible rights for common law countries and civil law countries respectively. The bands denote the 25<sup>th</sup> and 75<sup>th</sup> percentiles. It shows that common law countries always had fewer rights. They start with an average of 12.1 rights in 1950 (p25 = 1 | p75=23), and then have 34.6 in 2010 (p25 = 27 | p75=44.5). By contrast, civil law countries started with an average of 27.6 rights in 1950 (p25 = 18 | p75=37), and then have 44.7 in 2010 (p25 = 34 | p75=57). Put more simply: on average, civil law countries have 29% more rights enumerated in their constitutions than common law countries.

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<sup>31</sup> *Id.*

<sup>32</sup> CHILTON & VERSTEEG, *supra* note 24, at 80-83 (describing the ways Versteeg's constitutional rights data was updated for our 2020 book).

**Figure 3: Constitutional Rights by Legal Origins**

### *B. Human Rights Treaties*

If civil law legal systems feel more comfortable enumerating a large set of constitutional rights that pose far-reaching obligations on the government, we may likewise expect that they also commit to more human rights treaties. For instance, many human rights treaties impose broad obligations upon the government to provide social welfare (i.e., the ICESCR) and to regulate many areas of private life (i.e., the CEDAW).<sup>33</sup> Such legal commitment might be more consistent with the civil law approach to human rights than the common law approach.

To explore this question, we collected data on how many of six major human rights treaties countries have ratified: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention for the Elimination of all Forms of

<sup>33</sup> BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).



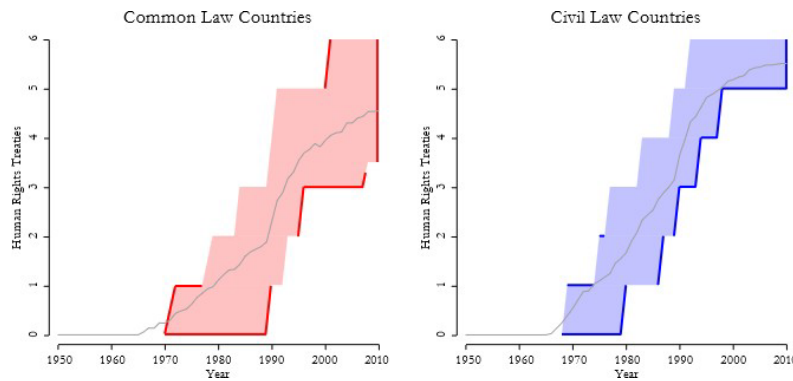
Racial Discrimination; the Convention for the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture; and the Convention on the Rights of the Child.<sup>34</sup>

Figure 4 reports results showing the number of human rights treaties ratified by common law and civil law countries over time. The data reveals that common law countries had ratified an average of 0.85 human rights treaties in 1977 (p25 = 0 | p75=1.0), and they had ratified an average of 4.6 by 2010 (p25 = 3.5 | p75=6). (Note that in 1977, only three treaties were open for ratification.) In comparison, civil law countries had ratified an average of 1.3 treaties in 1977 (p25 = 0 | p75=3.0) and ratified an average of 5.5 human rights treaties in 2010 (p25 = 5 | p75=6). Although the number of treaties open to ratification has changed over time, the data reported in Figure 4 reveals that, throughout this period, civil law countries signed more human rights treaties than common law countries.

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<sup>34</sup> We use data on human rights ratification from Adam Chilton & Eric Posner, *Treaties and Human Rights: The Role of Long-Term Trends*, 81 L. & CONTEMP. PROB. 1 (2018). It is worth noting that there are other international treaties related to human rights, but our focus on these six is consistent with other research. See, e.g., SIMMONS, *supra* note 33.

**Figure 4: Major Human Rights Treaties Signed by Legal Origins**



### C. Citizen Duties

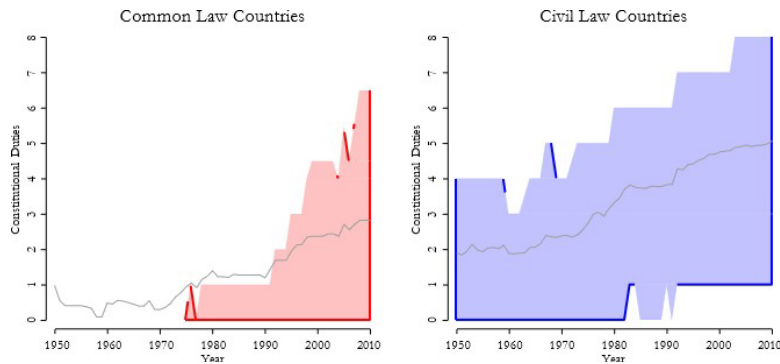
As noted, civil law systems may have a more statist conception of rights, which views the production of social welfare as a joint enterprise between the state and its citizens. In this conception, the “social contract” might include more duties for the state and citizens alike.

In prior research, Mila Versteeg and Erensu Altan found that citizens’ duties are common in national constitutions, and that there is a relationship between duties and the civil law tradition.<sup>35</sup> Figure 5 confirms this impression. Common law countries started with an average of 1 duty in their constitution in 1950 (p25 = 0 | p75=0), and then they had an average of 2.8 duties in their constitution by 2010 (p25 = 0 | p75=6.5). In contrast, civil law countries start with an average of 1.9 duties in their constitution in 1950 (p25 = 0 | p75=4), and then they had an average of 5.1 duties in their constitution by 2010 (p25

<sup>35</sup> Versteeg & Altan, *supra* note 19.

= 1 | p75=8). Put another way, the data in Figure 5 reveals that civil law constitutions enumerated 82% more individual duties than common law constitutions.

**Figure 5: Constitutional Duties by Legal Origins**



*D. Status of International Treaties in Domestic Law*

Another distinguishing feature of civil law systems is that they tend to be monist with respect to international law, which means that human rights treaties directly penetrate the domestic legal order without further implementation. Although the usefulness of the monist-dualist distinction is debatable, Kevin Cope, Pierre Verdier, and Mila Versteeg have found that the civil law tradition profoundly affects how countries deal with international law in their domestic legal order.<sup>36</sup> They observe that in the United Kingdom dualism fits well with the tradition of parliamentary sovereignty: if parliament is sovereign, then treaties should not be able to override

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<sup>36</sup> Cope et al., *supra* note 4.

legislation.<sup>37</sup> By contrast, in civil law systems, monism fits well with the doctrine of the hierarchy of sources.<sup>38</sup> The doctrine is associated with Hans Kelsen, who argued that every legal order can ultimately be traced back to a basic norm.<sup>39</sup> Kelsen argued that dualism was logically impossible because there must be a single source of authority for all law, but dualism requires more than one basic norm.<sup>40</sup> As the civil law and common law traditions spread, so did these basic stances towards international law; and Cope et al.'s key finding is that this difference remains to this day.

Figure 6 confirms this finding. Using data from Cope et al. on whether treaties apply directly in the international legal order after an inspection of various legal sources,<sup>41</sup> Figure 6 reports the portion of countries that have a monist system of international law. Figure 6 reveals that almost no common law countries are monist systems, while most civil law systems are monist. For instance, the share of common law countries with monist systems was 0.11 in 1950 (p25 = 0 | p75=0), and the share of common law countries with monist systems was still 0.11 by 2010 (p25 = 0 | p75=0). In contrast, the share of civil law countries with monist systems was 0.73 in 1950 (p25 = 0 | p75=1), and the share of civil law countries with monist

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<sup>37</sup> See Paul Craig, *Engagement and Disengagement with International Institutions: the U.K. Perspective*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 393, 394 (Curtis A. Bradley ed., 2019).

<sup>38</sup> See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007).

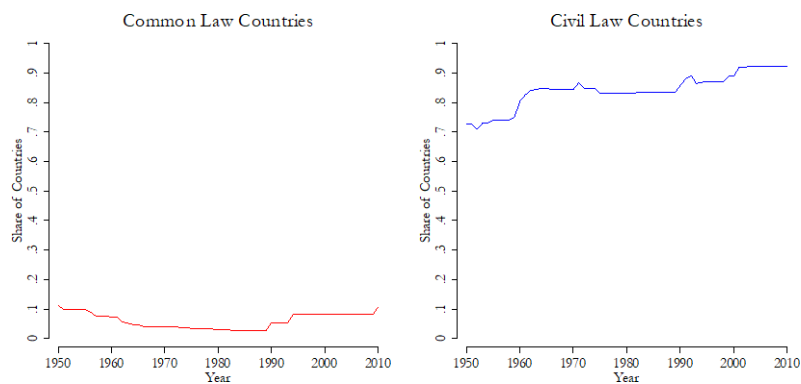
<sup>39</sup> See generally HANS KELSEN, PURE THEORY OF LAW 8 (1934).

<sup>40</sup> See Hans Kelsen, *Sovereignty and International Law*, 48 GEO. L. J. 627, 629 (1960).

<sup>41</sup> Cope et al., *supra* note 4. This analysis reduces our sample from 184 countries to 101. Of these 101, 37 are common law and 64 are civil law.

systems grew to 0.92 by 2010 (p25 = 1 | p75=1). These results reveal that civil law countries’ far-ranging set of citizens’ rights is likely to emanate both from international law and constitutional law. They further indicate that rights from these different sources—domestic and international law—will likely interact in important ways, as both apply to citizens in the domestic legal order.

**Figure 6: Countries that are Monist by Legal Origins**



*E. Status of International Treaties as Part of Small-c Constitutions*

Civil law countries are not only more likely to incorporate human rights treaties directly into their domestic legal order, but they also are more likely to make them part of their body of constitutional law. In prior work, we attempted to document the sources of law that can be considered part of a country’s body of constitutional law—which is also known as their “small-c constitution.”<sup>42</sup> To explore this question, we surveyed

<sup>42</sup> Adam Chilton & Mila Versteeg, *Small-c Constitutional Rights*, 20 INT’L J. CONST. L. 141 (2022).

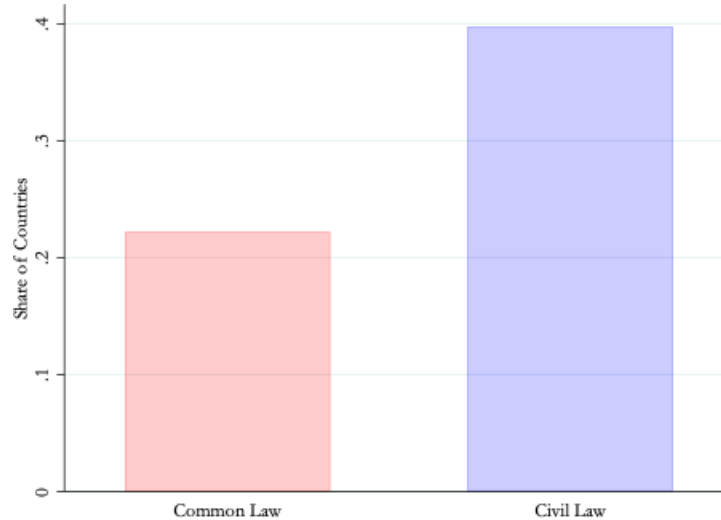
experts from over 100 countries to identify the core sources of small-c constitutional law in their country, including judicial decisions, organic laws, and treaties. This research revealed that the only significant difference between common law and civil law countries in the legal sources that are part of their small-c constitutions is whether they incorporate international treaties into their constitution.

Figure 7 reproduces this data for 119 countries for which we have this data.<sup>43</sup> The results show that the share of common law countries where the experts said international treaties are a source of constitutional rights in constitutional law (i.e., part of the small-c constitution) is 0.22. By comparison, the share of civil law countries where the experts said international treaties are a source of small c constitutional rights is 0.40.

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<sup>43</sup> Unlike the other measures of human rights law we explore in this contribution, this variable is not available as a time-series. We thus analyze it as at a single moment in time. Additionally, of the 119 countries in this sample, 36 are common law countries and 83 are civil law countries.

**Figure 7: Countries with International Treaties as a Source of Small-c Constitutional Rights**



Of the countries where international treaties are a source of small-c constitutions, in some of them, the constitution itself indicates that human rights treaties are part of the domestic legal order.<sup>44</sup> In other countries, courts have established this through doctrines like the “constitutional block” doctrine.<sup>45</sup> Regardless of how international treaties have become sources of these countries’ small-c constitutions, international treaty rights and constitutional rights are of equal status in these systems. This, in turn, can result in the international human

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<sup>44</sup> See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93 (1991) (Colom.); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [CBRV] art. 23 (1999) (Venez.).

<sup>45</sup> Manuel Eduardo Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a *lus Commune**, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA 235, 236-238, 240-244 (Armin von Bogdandy et al. eds., 2017).

rights system and the domestic constitutional order being intertwined.

## CONCLUSION

There have been competing predictions in the academic literature about whether common law and civil law countries took different approaches to codifying human rights, and whether these differences are enduring. We explored this question empirically using five different data sources on how human rights are incorporated into countries' higher-order laws. Across all five data sources, we found notable differences between common law and civil law countries. In short, compared to countries with common law legal origins, countries with civil law legal origins enumerate more constitutional rights, ratify more human rights treaties, enumerate more citizen duties, and are more likely to have legal regimes that incorporate international human rights treaties into the domestic legal order as well as the constitution.

However, it is important to make two caveats about our results. First, as noted, we do not explain whether countries' legal origins directly cause these differences. Second, we do not claim that these differences in the de jure codification of human rights law actually translate into differences in the de facto respect for human rights. For instance, even though civil law countries may have adopted more human rights into their higher-order laws, they may not have better track records respecting those rights. Future research should consider exploring both of these unanswered questions about the relationship between legal origins and human rights.