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Constitutional Convergence and Customary International Law

Responding to Zachary Elkins, Tom Ginsburg, and Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 53 Harv. Int'l L.J. 61 (2012).

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In *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, Zachary Elkins, Tom Ginsburg, and Beth Simmons study the effects of post-World War II human rights texts on domestic constitutions, with a particular focus on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR).¹ After analyzing 680 constitutional systems compiled by the

* Law clerk, The Honorable John M. Walker, Jr. The opinions expressed herein are my own and should not be attributed to the U.S. Court of Appeals for the Second Circuit or any judge of the U.S. Court of Appeals.

¹ Zachary Elkins, Tom Ginsburg, and Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 53 HARV. INT'L L.J. 61 (2012).

Comparative Constitutions Project² to create a list of seventy-four constitutionally protected rights,³ the authors evaluate whether countries incorporate internationally codified human rights into their domestic constitutions, whether ratification of international agreements affects the probability of rights incorporation, and whether such incorporation increases the likelihood that countries enforce rights in practice.⁴

After tabulating the data and running random-effects models, the authors find “a significant upward shift in the similarity to the [Universal Declaration] among constitutions written after 1948,”⁵ leading them to conclude that the Universal Declaration acted as a “template” from which constitutional drafters could select rights.⁶ They also demonstrate—after controlling for the era and a state’s prior constitutional tradition—that post-1966 constitutions from states that ratified the ICCPR are more likely to include its codified rights in subsequent constitutions than non-ratifying states.⁷ Finally, relying on Freedom House’s civil liberties index, the authors conclude that human rights agreement ratification and constitutional incorporation is correlated with improved human rights practice on the ground.⁸

This ambitious project and its quantitative and qualitative findings are applicable to a wide range of international law scholarship. *Getting to Rights* offers new evidence relevant to convergence theory, provides empirical support for speculation on the effects of international agreements on domestic law, and determines that human rights are most effectively enforced when international and domestic law are applied in tandem. It also suggests a methodology for similar future research into the influence of supranational texts—such as the European, Inter-American, or African Conventions on Human Rights—on domestic constitutions.

² The Project “records the content of national constitutions as well as international instruments[] for all constitutions of independent nation-states since 1789.” *Id.* at 69. The authors considered a sample of 680 systems from the total 839 systems promulgated between 1789 and 2006, not including amendments. *Id.*

³ *Id.* at 72.

⁴ *Id.* at 64.

⁵ *Id.* at 77.

⁶ *Id.* at 81.

⁷ *Id.* at 87–88.

⁸ *Id.* at 63–64. This last conclusion is the most controversial. Unfortunately, however, and perhaps due to the grand scope of the article, the authors do not provide a thorough description of their methodology or an explicit consideration of all potential sources of bias and distortion. See Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 *Eur. J. Int’l L.* 171, 175–77 (2003) (noting potential distortions in the raw data collected by organizations like Freedom House); see also Rebecca Crootof, *Power in Numbers* (unpublished manuscript) (discussing common errors in empirical studies of the effects of human rights treaties). The lack of a detailed explanation in this Part makes the authors’ conclusion less convincing than it otherwise might have been.

From this garden of subjects, this response focuses on one offshoot: the consequences of the authors' data on rights convergence for customary international law theory. After briefly reviewing the definitions of customary international law and *jus cogens*, I discuss the potential implications of converging constitutionally protected rights. I then examine the authors' data in light of these hypotheses and conclude that, from this point forward, scholars who argue that certain norms have obtained customary international law or *jus cogens* status will have to address the *Getting to Rights* data. Due to the necessary brevity of this response, however, I leave more complete analyses of individual rights to others.

I. CUSTOMARY INTERNATIONAL LAW AND *JUS COGENS*

Under the classic or “traditional”⁹ theory of customary international law, a norm attains binding status if the general and consistent practice of states demonstrates that the norm is accepted as law by the world community.¹⁰ State practice provides evidence of custom, while *opinio juris*—the conviction that a norm is legally binding—states the “attitudinal requirement.”¹¹ The classical formation focuses on state action, invoking *opinio juris* only to distinguish between obligatory and customary practices.¹² Alternatively, under what some term the “modern”¹³ or “new”¹⁴ customary international law, some contemporary legal scholars argue for reversing the classical requirements by downplaying or entirely ignoring state practice and focusing instead on the existence of *opinio juris*.¹⁵

According to classicists, customary international law develops slowly through state practice; advocates of modern customary international law argue that it can arise almost instantaneously based on statements evidencing *opinio juris*.¹⁶ Under either methodology, norms are evaluated on a case-by-case basis, and there is little

⁹ Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001).

¹⁰ Statute of the International Court of Justice, art. 38(1)(b) (defining international custom “as evidence of a general practice accepted as law”); see also *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), 1969 ICJ Rep. 3, 44 (Feb. 20).

¹¹ J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000).

¹² Roberts, *supra* note 9, at 758.

¹³ John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1199–1201 (2007).

¹⁴ Kelly, *supra* note 11, at 454–55; Roberts, *supra* note 9, at 757.

¹⁵ See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 546 (1993).

¹⁶ Roberts, *supra* note 9, at 759.

agreement as to what constitutes *opinio juris*, state practice, and—by extension—the complete body of customary international law.¹⁷

Peremptory or *jus cogens* norms are distinct from other customary international law norms in that they do not permit derogation, even in times of emergency.¹⁸ Broad prohibitions against genocide, slavery, murder or disappearance, torture and other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systemic racial discrimination are generally recognized as *jus cogens* norms.¹⁹ As with other customary international law, however, there is no clear consensus on which rights or prohibitions have obtained *jus cogens* status²⁰—though that has not chilled scholars from promoting their pet norms.²¹

II. THE IMPLICATIONS OF CONSTITUTIONAL CONVERGENCE FOR CUSTOMARY INTERNATIONAL LAW

As noted in *Getting to Rights*, “constitutional commitments carry unique weight in terms of authority” for all countries.²² In democracies, constitutional provisions are legally enforceable and will trump other domestic laws and policies.²³ In autocracies, constitutions are used to advertise fundamental policies.²⁴ “For both democracies and autocracies, then, constitutions are used as *signals* of policy goals, expressing

¹⁷ Kelly, *supra* note 11, at 450 (arguing that “there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms”); Roberts, *supra* note 9, at 765–69 (outlining issues with identifying custom under either the traditional or modern approach).

¹⁸ See Vienna Convention on the Law of Treaties (“VCLT”), art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344, 8 I.L.M. 679 (“[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

¹⁹ See Restatement (Third) of Foreign Relations Law of the United States § 702 cmts. d–i, § 102 cmt. k. (1987).

²⁰ Under the Vienna Convention on the Law of Treaties, the International Court of Justice may be tasked with determining when a specific norm is peremptory, but the standards it must apply are not codified. See VCLT, *supra* note 18, art. 66(a).

²¹ For a humorous discussion of this habit, see Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!*, 6 CONN. J. INT’L L. 1 (1990).

²² *Getting to Rights*, *supra* note 1, at 82.

²³ *Id.* at 82–83.

²⁴ *Id.* (using China as an example).

fundamental values of the constitutional coalition” to both domestic and foreign audiences.²⁵

At least in democracies, where constitutional provisions express requirements that states are likely to believe they are obligated to uphold, they may serve as evidence of *opinio juris*.²⁶ The assumption that a constitutional provision represents *opinio juris* may be undermined, however, where a state adopts a norm as a result of coercion, as opposed to through persuasion or acculturation.²⁷

If the state actually enforces a constitutional provision, especially through legal proceedings, the provision may also codify state practice.²⁸ Looking to constitutions for evidence of state practice requires a more nuanced analysis than simply examining the text, however, as any given norm may not be uniformly applied.²⁹ To the extent that constitutions evolve from cultural identity and values, the understanding of what is protected or prohibited by a certain provision as a matter of law will likely vary from state to state. In one country, for example, the right to life may be understood to prohibit abortions; in another, it will not be relevant to that discussion. Additionally and alternatively, even if a specific right enshrined in a majority of constitutions protects the same activity as a matter of law—say, the presumption of innocence in criminal trials—that right may not be enforced in practice.

²⁵ *Id.* (emphasis in original); see also Daniel A. Farber, *Rights as Signal*, 31 J. LEGAL STUD. 83, 85–86 (2002).

²⁶ Interestingly, stable authoritarian states are more likely to make customary international law directly applicable in their constitutions than are stable democratic states. See Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 233 fig. 3.

²⁷ See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (arguing that states change their behavior with regard to human rights as a result of coercion, persuasion, or acculturation).

²⁸ See INTERNATIONAL LAW ASSOCIATION, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 18 (2000) (noting that the decisions of domestic courts should be considered state practice); see also M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069 (1999); Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MELB. J. INT'L L. 819, 820 (2012) (observing that the ICJ relied more heavily on national court cases as evidence of state practice than in previous decisions). Using court decisions as confirmation of state practice is fundamentally different from relying on court decisions attempting to identify state practice; the former are some of many types of evidence, while the latter are assessments that are often undermined by the fact that domestic courts tend to have a limited perspective and understanding of what constitutes state practice. See Kelly, *supra* note 11, at 506; Roberts, *supra* note 9, at 775.

²⁹ See, e.g., STATEMENT OF PRINCIPLES, *supra* note 28, at 21 (“For State practice to create a rule of customary law, it must be virtually uniform, both internally and collectively.”).

At least in broad strokes, however, one might expect that, as “[t]he international law of human rights and national constitutional law inspire and influence each other[, they will] become increasingly similar.”³⁰ In other words, to the extent that constitutional provisions constitute evidence of *opinio juris* or state practice, one would anticipate finding a rough correlation between converging constitutional rights and rights generally accepted as customary international law or *jus cogens*. While by no means conclusive, evidence of rights convergence—or the lack thereof—is relevant in evaluating whether a particular right has obtained customary international law status, though the domestic and international law may take turns at playing chicken and egg.³¹

In *Getting to Rights*, Elkins, Ginsburg, and Simmons have provided scholars with a wealth of information on which rights appear in modern constitutions—information with which proponents of certain norms having obtained customary international law status will have to grapple.

III. EXAMINING *GETTING TO RIGHTS*'S DATA

Of the rights examined in *Getting to Rights*, some “appear to be so central that almost nine of every ten contemporary constitutions include them.”³² These rights include freedom of religion (appearing in 88.9% of constitutions promulgated between 1949–2006, with an increase of 38.9% when compared with constitutions promulgated in 1789–1914); freedom of expression or speech (86.9%, +18.0%), freedom of assembly (85.7%, +36.5%), and freedom of association (87.4%, +44.0%).³³

Other rights protected in more than half of contemporary constitutions include the right to freedom of opinion, thought, and conscience (76.3%, +15.6%); the right to own property (75.1%, +25.9%); freedom of movement (74.9%, +20.8%); the right to privacy (72.9%, +25.4%); protection from unjustified restraint (71.4%, +29.6%); the prohibition of *ex post facto* punishment (70.9%, +14.3%); the right to form or join trade unions (69.4%, +65.3%); the right to counsel (64.0%, +52.5%); the mention of *nulla poena sine lege*—the legal principle that one cannot be punished for an action that is not prohibited by law—or some equivalent (63.7%, +9.6%); the right to life (60.3%,

³⁰ Louis Henkin, *Sibley Lecture, March 1994: Human Rights and State “Sovereignty”*, 25 GA. J. INT’L & COMP. L. 31, 40 (1995/1996).

³¹ *Compare Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (1980) (citing provisions in foreign constitutions as evidence of customary international law), with Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167, 169–70 (noting that “[t]he very fact of convergence [between international and foreign law] might be the effect of a norm of international law on domestic legal systems”).

³² *Getting to Rights*, *supra* note 1, at 72.

³³ *Id.* app.

+36.5%); the presumption of innocence in trials (60.3%, +54.6%); the prohibition of torture (58.0%, +29.3%); the prohibition of cruel, inhuman, or degrading treatment (57.7%, +32.3%); the requirement of public trials (57.7%, +24.1%); some reference to a state duty to protect or promote culture (52.6%, +49.3%); and freedom of the press (53.4%, +9.1%).³⁴ As is evident from these figures, in addition to appearing in a majority of modern constitutions, certain of these rights have also recently increased dramatically in popularity.

With the exception only of the right to counsel, each of the rights that appear in a majority of modern constitutions is included in the Universal Declaration.³⁵ It is unclear if these rights have obtained binding customary international law status or if they remain optional obligations which states may elect to assume. As noted above, constitutional texts alone will not be sufficient evidence of *opinio juris* or state practice, either because constitutional provisions are not binding law in some countries or are not enforced equally. Nonetheless, certain rights' majority status or evidence of their relatively recent popularity may bolster arguments that they are well on their way to becoming binding customary international law. This data may be of particular relevance in responding to those who highlight sporadic but dramatic violations of human rights as evidence of a lack of state practice.³⁶

Although almost every right has increased in prevalence since its introduction, few are close to universal: "The vast majority of rights . . . have penetrated fewer than half of contemporary constitutions and appear to be optional constitutional features."³⁷ This finding will need to be addressed directly by those scholars who argue that any of these majority-minority rights—such as the right to health care (appearing in 38.3% of contemporary constitutions), the right to a safe or healthy working environment (26.6%); limitations on child employment (21.1%), or the provision of special rights for juveniles in criminal proceedings (a mere 10.9%)³⁸—constitute customary international law.

Of particular interest are those rights that failed to gain traction. The *Getting to Rights* data suggests that "rights, once introduced, generally spread across countries and

³⁴ *Id.*

³⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 3, 5, 9, 10–13, 17–20, 22, 23, 27 (Dec. 10, 1948). Elkins, Ginsburg, and Simmons link the right to counsel's success to its inclusion in the ICCPR. *Id.* at 73.

³⁶ See Roberts, *supra* note 9, at 777 (arguing that the understanding of state practice should be broadened to include, *inter alia*, patterns of obligations being observed as well as evidence of obligations being breached).

³⁷ *Getting to Rights*, *supra* note 1, at 72.

³⁸ *Id.* app.

maintain their [aggregate] popularity.”³⁹ Nonetheless, certain rights declined in popularity, sometimes significantly. From constitutions promulgated in 1789–1914 to those promulgated in 1949–2006, the following rights experienced notable decreases in popularity: the right to citizenship based on being born within a state’s jurisdiction (*jus soli* citizenship) (-28.5%); the right of petition (-26.9%); the prohibition on the use of corporal punishment (-24.9%); the prohibition on censorship (-23.5%); the requirement of a jury or any form of citizen participation in criminal trials (-22.6%); intellectual property rights (-18.4%); the prohibition of slavery, servitude, or forced labor (-8.2%); the right to bear arms (-6.8%); the right to transfer property freely (-3.5%); the right or possibility of pretrial release (-2.1%); the right of testacy, or the right to leave property to one’s heirs (-0.8%); and the right of the accused to silence or protection from self-incrimination (-0.5%).⁴⁰

These negative or flat trajectories are not necessarily the result of certain rights being written out of constitutions by subsequent drafters. A right’s declining popularity might also be a side effect of a greater number of constitutions in later periods. Alternatively, as modern constitutions are more likely to incorporate international human rights by reference,⁴¹ their drafters may have felt that explicitly detailing certain rights would be needlessly repetitive.⁴² Of course, another possibility is that these rights simply lost their import,⁴³ and therefore a greater percentage of drafters in the later periods decided against including rights that other countries—and sometimes a majority of countries⁴⁴—had once considered constitutionally necessary. Any scholar arguing that one of these rights has obtained customary international law status will now need to provide a convincing argument explaining the right’s declining popularity in domestic constitutions.

Finally, and oddly, it appears as though *jus cogens* rights are relatively underrepresented in modern constitutions. The right to protection from unjustified restraint and the

³⁹ *Id.* at 72.

⁴⁰ *Id.* app.

⁴¹ Ginsburg et al., *supra* note 26, at 209 (noting that “the proportion of constitutions incorporating customary international law in the domestic legal order doubled from the pre-1914 to the post-1944 periods”).

⁴² For example, of 283 constitutions adopted in or after 1945, 69 mentioned and 24 specifically incorporated the Universal Declaration. *Id.* at 208 fig. 1.

⁴³ Elkins, Ginsburg, and Simmons hypothesize that the decline in these rights’ popularity may be attributable to their exclusion from the Universal Declaration. *Getting to Rights, supra* note 1, at 81. However, they acknowledge that some of these rights were already declining in popularity prior to the 1948. *Id.* at 81 n.67.

⁴⁴ The majority of constitutions promulgated between 1789 and 1914 included the right to petition (73.8%); the right to *jus soli* citizenship (59.0%); and the prohibition of slavery, servitude, or forced labor (50.8%). *Id.* app. None of these rights appeared in the majority of constitutions promulgated between 1949 and 2006. *Id.*

right to a speedy trial (which relate to the prohibition of prolonged arbitrary detention) appear in 71.4% and 24.3% of modern constitutions, respectively.⁴⁵ The right to life (which might be equated with the prohibition against murder) appears in only 60.3% of contemporary constitutions; the prohibition of torture appears in only 58.0%; the prohibition of cruel, inhuman, or degrading treatment in only 57.7%; and the prohibition of slavery, servitude, or forced labor in less than half—merely 42.6% of post-1949 constitutions.⁴⁶ The requirement that the names of those imprisoned be recorded in a register (which relates to the prohibition on disappearance) appears in only 2.0% of modern constitutions.⁴⁷ Prohibitions of genocide and systemic racial discrimination do not appear in the authors’ “comprehensive” list of rights at all.⁴⁸

Some might argue that modern constitutions’ silence on these theoretically peremptory norms undermines their *jus cogens* status, as it demonstrates that they are not universally accepted. Others might respond that these rights’ relative absence highlights their strength, insofar as they are so broadly accepted that there is no need to mention them in constitutional texts. A constitutional prohibition against genocide, for example, seems somewhat superfluous. Meanwhile, many constitutions may not explicitly forbid slavery or disappearances despite accepting the prohibitions as peremptory norms, possibly because those states do not have a history of such actions.⁴⁹

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Elkins, Ginsburg, and Simmons are not the first to remark upon the absence of human rights protections in domestic constitutions.⁵⁰ Unlike previous scholars, however, the *Getting to Rights* authors have made a concrete contribution to legal academia by creating a comprehensive data set detailing which rights are included in domestic constitutions and how each right’s popularity has changed over time. Regardless of whether he or she adheres to the classical or modern theory, a future scholar wishing to argue that a particular right has obtained customary international law status will need to confront and discuss this hard data.

⁴⁵ *Getting to Rights*, *supra* note 1, app.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 72, app.; *see also id.* at 74 (“These seventy-two rights represent any right from the list of seventy-four in

the Appendix that has been included in at least five percent of constitutions at any given time since 1789.”). The *Getting to Rights* data highlight the intent of the original constitutional drafters and does not take constitutional amendments that fail to completely overhaul a constitutional system into account. *Id.* at 69.

⁴⁹ *See, e.g.,* Anthony A. D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47, 54 (1995/1996).

⁵⁰ *Id.* at 53.