10

Inequality and Asymmetry in the Making of Intellectual Property a Constitutional Right

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INTRODUCTION

As the "highest normative act of the state,"[1] a constitution is a unique national product that defines a set of commitments relating to preserving a country's "shared collective existence."[2] Constitutions serve as the basic scripts that enable countries and their citizens to be bound by values and principles that define their social and political construction. The recent "rise of world constitutionalism"[3] resulted in fundamental changes to the unique constitutional culture of many countries, irrespective of their ability to enforce these changes. The inclusion of intellectual property as a socio-economic right in the formal constitutions of many countries of the world provides a striking example of these changes and questions the role of

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[1] Benedikt Goderis & Mila Versteeg, *Transnational Constitutions*, *in* Social and Political Foundations of Constitutions 103, 120 (Denis J. Galligan & Mila Versteeg eds., 2013); Ran Hirschl, *The Political Economy of Constitutionalism in a Non-Secularist World*, *in* Comparative Constitutional Design 164, 174 (Tom Ginsburg ed., 2012); Zachary Elkins, Tom Ginsburg & James Melton, The Endurance of National Constitutions 85 (2009); Mila Versteeg, *Unpopular Constitutionalism*, 89 Ind. L.J. 1133, 1136 (2014).

[2] Beau Breslin, From Words to Worlds: Exploring Constitutional Functionality 5 (2009).

[3] Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997).

constitutions as "uniquely national products."[4] Similar to other "legal norms that are exported and imported across borders,"[5] intellectual property laws have been transplanted into the systems of many countries without making necessary changes to align them with the local culture and legal environment. This includes constitutionalizing intellectual property as a basic socio-economic right as early as 1801, as well as ordinary intellectual property legislation.

The process of constitutionalizing intellectual property rights highlights absurdities associated with unequal and asymmetrical power relations within the politics of intellectual property. The findings in this chapter expose the inherent conflicts between international legal harmonization and unbalanced trade powers in intellectual property constitutionalism and how these conflicts affect the most defining document of a nation – the constitution. These findings confirm the "naïve assumption that ideological adherence in constitutions has automatic and immediate effects,"[6] and introduce a new layer to contemporary discourses on the design processes of effective intellectual property regimes. Various ideological motivations explain the reasons behind constitutionalizing intellectual property as a fundamental socio-economic right. These motivations impact conceptions of constitutional autonomy and the preservation of global cultural diversity and question the intuitive assumption that the constitutional protection of a particular right will secure protection on the ground. Recent empirical research has dealt with this proposition and finds that "the poorer a country's human rights record, the greater the number of rights that its constitution tends to contain."[7] This research also finds that there is a negative correlation between constitutionally recognized rights and the level of actual rights protection.[8]

The first section demonstrates the gap between the mere existence of a constitutional equality provision and its application on the ground and presents the three core objectives of the chapter. The second section focuses on intellectual property and examines how inequality is a defining concept in intellectual property that can be articulated in many forms. The third section takes intellectual property and inequality one step further, discussing intellectual property constitutionalism and highlighting the lack of scholarly attention to intellectual property in formal constitutions and the implications. The fourth section demonstrates the incorrect

[4] Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 Int'l Rev. L. & Econ. 1 (2014).

[5] Gregory Shaffer, *Transnational Legal Ordering and State Change*, *in* Transnational Legal Ordering and State Change 1, 5 (Gregory Shaffer ed., 2013).

[6] John Boli-Bennett & John W. Meyer, *Constitutions as Ideology*, 45 Am. Sociol. Rev. 525, 526 (1980).

[7] David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Calif. L. Rev 1163, 1169 (2011).

[8] *Id.* at 1248; *see also* Adi Leibovitch, Alexander Stremitzer & Mila Versteeg, *Aspirational Rules* 15 (2019), http://micro.econ.kit.edu/downloads/Stremitzer,%20Leibovitch,%20Versteeg%20-%20Aspirational%20Rules.pdf.

assumption that adding intellectual property rights to a constitution will provide better protection for these rights and highlights how this assumption is predominantly a result of global political inequality and asymmetrical power relations. This section first evaluates the ideological motivations of countries to adopt intellectual property as a socio-economic right in their formal constitutions. It then introduces and empirically analyzes the results of the data collected. This chapter concludes by discussing the inequality-related consequences of unbalanced intellectual property constitutional commitments.

10.1 THREE OBJECTIVES

Catharine MacKinnon applied the claim that a country's inclusion of a particular fundamental right in its formal constitution does not project its enforceability. Her article examined the inclusion of the concept of gender equality in formal constitutions and compared measures of "sex equality" in constitutions.[9] Of the two countries with the highest international ranking for equality of the sexes, Norway has no equality provision in its constitution, while Australia has no formal written bill of rights. In contrast, many countries with the lowest equality rankings in the world have strongly worded provisions guaranteeing equality in general and gender equality in particular. Malawi has one of the most detailed constitutional provisions for equality of the sexes in the world, guaranteeing equal protection for women, invalidating laws that discriminate based on gender, and requiring legislation to be passed to eliminate discriminatory customs and practices, including "sexual abuse, harassment, and violence"[10] as well as "discrimination at work and in property."[11] Malawi sits at 153rd in sex equality among the 169 nations ranked.[12] Indeed, many states have anchored the term "equality" in their formal constitutions. In 2020, Jody Heymann, Aleta Sprague, and Amy Ruab mapped equality clauses in world constitutions.[13] The study examined 193 U.N. member states and found that 20 percent of the constitutions generally protect equality without explicitly mentioning inequality concerning a particular category.[14] Irrespective of the frequent appearance of

[9] Catharine A. MacKinnon, *Gender in Constitutions*, *in* The Oxford Handbook of Comparative Constitutional Law 398 (Michel Rosenfeld & András Sajó eds., 2012).

[10] *Id.* at 401.

[11] *See id.*

[12] *See id.*

[13] Jody Heymann, Aleta Sprague & Amy Raub, Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide 22 (2020).

[14] *Id.* The study further found that 76 percent of the constitutions explicitly refer to equality in the context of race or ethnicity and 44 percent of constitutions explicitly prohibit inequality based on language. *Id.* at 25. The study also found that the number of constitutions protecting equality has increased over the years and that constitutions tend to protect equality and nondiscrimination based on religion or belief. *Id.* at 29, 106.

"equality" in constitutions, the authors reminded us how far we still have to go in order to practically and adequately protect equality.

Another example demonstrating the gap between the mere existence of a constitutional equality provision and its application on the ground is the constitution of South Africa. That constitution begins with a commitment that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . Human dignity, the achievement of equality and the advancement of human rights and freedoms."[15] Despite the explicit and detailed defense of equality in the South African Constitution, it appears that, in practice, there exist significant wage gaps based on both race[16] and gender.[17] South Africa is ranked 149 out of 150 in the Gini World Index[18] and is rated 92 out of 153 in economic participation and opportunity in the *Global Gender Gap Report* 2020.[19]

The same conflict was recently examined in relation to the freedoms of expression, movement, association and assembly, religion,[20] private property,[21] torture,[22] and health.[23] An example of the right to health is the constitution of Afghanistan, which commits the State to "provide free preventive health care and treatment of diseases as well as medical facilities to all citizens in accordance with the law."[24] And yet, despite this commitment, Afghanistan has one of the lowest life expectancies in the world.[25] These examples raise complex questions that are critical in the constitutional context, such as the following: Why would countries adopt constitutional

[15] S. Afr. Const., 1996, art. 1(a).

[16] Haroon Bhorat & Sumayya Goga, *The Gender Wage Gap in Post-Apartheid South Africa: A Re-examination*, 22 J. Afr. Econ. 827 (2013).

[17] Debra Shepherd, *Post-Apartheid Trends in Gender Discrimination in South Africa: Analysis through Decomposition Techniques* (Univ. of Stellenbosch, Dep't of Econ., Stellenbosch Economic Working Paper No. 06/08, 2008); Rulof Burger & Rachel Jafta, *Returns to Race: Labour Market Discrimination in Post-Apartheid South Africa* (Univ. of Stellenbosch, Dep't of Econ., Stellenbosch Economic Working Paper No. 04/06, 2006).

[18] *GINI Index (World Bank Estimate): South Africa*, World Bank, https://data.worldbank.org/indicator/SI.POV.GINI (last visited July 21, 2022).

[19] World Econ. F., Global Gender Gap Report 2020, at 12 (2020), http://www3.weforum.org/docs/WEF_GGGR_2020.pdf. This report measures gender-based inequalities in terms of key outcome variables relating to access to resources such as economic opportunities, education, health, and political empowerment. It is important to note that the overall result of South Africa is good compared with other countries, but inequalities still exist in terms of incorporating women into senior positions in the business sector. *See also* Catherine Ndinda, *Present but Absent: Women in Business Leadership in South Africa*, 13 J. Int'l Women's Stud. 127 (2012).

[20] Linda Camp Keith, *Constitutional Provisions for Individual Human Rights (1977–1996): Are They More than Mere "Window Dressing?"* 51 Pol. Rsch. Q. 111 (2002); Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 Am. J. Pol. Sci. 575 (2016).

[21] Mila Versteeg, *The Politics of Takings Clauses*, 109 Nw. U. L. Rev. 695, 695–746 (2015).

[22] David S. Law, *Constitutions*, *in* The Oxford Handbook of Empirical Legal Research 376, 382 (Peter Cane & Herbert M. Kritzer eds., 2010).

[23] *See* Chilton & Versteeg, *supra* note 20.

[24] Constitution Jan. 26, 2004, art. 52 (Afghanistan).

[25] *See* Law & Versteeg, *supra* note 7, at 869.

commitments that cannot be enforced? What are the ideological motivations for countries to adopt socio-economic rights that conflict with and are unsuitable to their political and social realities? This chapter addresses these questions.

Intellectual property displays a similarly misleading assumption and raises the same questions. This chapter examines this assumption and provides theoretical and empirical support to this claim. It has three main objectives. First, the chapter shows how asymmetrical power relations dictate which countries will include intellectual property as a constitutional guarantee. Second, it discusses how these unequal power relations nurture a wrongful assumption according to which intellectual property as a constitutional guarantee secures better protection in practice. For example, Venezuela, which has one of the most detailed intellectual property provisions in its constitution, was ranked last among 128 nations in the 2016 International Property Rights Index.[26] The text from the Constitution of Venezuela reads as follows:

> Cultural creation is free. This freedom includes the right to invest in, produce and disseminate the creative, scientific, technical and humanistic work, as well as legal protection of the author's rights in his works. The State recognizes and protects intellectual property rights in scientific, literary and artistic works, inventions, innovations, trade names, patents, trademarks and slogans, in accordance with the conditions and exceptions established by law and the international treaties executed and ratified by the Republic in this field.[27]

Haiti has the oldest provision situating intellectual property as a fundamental human right in the world, which dates back to 1801.[28] Despite redrafting its working constitution in 2012,[29] Haiti is ranked three places before last.[30] To quote MacKinnon, "often the reasons for the gap between guarantee and reality lie elsewhere than in constitutions."[31]

Third, this chapter invites the constitutional aspect into scholarship that heavily criticizes the lack of balance between countries in global intellectual property affairs, where weaker countries are coerced into accepting the standards of dominant countries. One of the main expressions of this criticism revolves around the unilateral acts that certain countries inflict upon other countries and the suitability of international intellectual property standards and their enforcement in certain parts

[26] Sary Levy-Carciente, 2016 International Property Rights Index: Executive Summary4 (2016), www.indiapropertyrights.org/2016-International-Property-Rights-Index.pdf.

[27] Constitution Mar. 24, 2000, No. 5.453 Ext, art. 98 (Venez.).

[28] Constitution de Saint-Domingue de 1801 [Haitian Constitution of 1801], July 8, 1801, art. 13 (Haiti).

[29] The new version of the intellectual property clause provides: "Scientific, literary and artistic property is protected by law." Loi Constitutionnelle de 2012 Portant Amendement de la Constitution de 1987 [Haiti's Constitution of 1987 with Amendments through 2012], June 20, 2012, art. 38 (Haiti).

[30] *See* Levy-Carciente, *supra* note 26, at 4.

[31] *See* MacKinnon, *supra* note 9, at 402.

of the world. As this chapter shows, coercing countries to constitutionalizing intellectual property rights drives many adopting countries into severe violation of these rights and to consequently appear on lists of countries that do not adequately protect intellectual property. This chapter aims to add a layer to this discourse by examining how asymmetrical power relations do not leave constitutions unaffected.

10.2 INTELLECTUAL PROPERTY AND INEQUALITY

Intellectual property systems increase the benefits and reward the owners or investors of an idea, product, or process gained from their activity.[32] Inequality is a concept embedded within contemporary intellectual property discourses and explains many of the system's deficiencies. The following three examples highlight this claim. First, inequality in intellectual property explains limits on access to knowledge and their effect on income equality and local stability.[33] Because these systems have been transformed into a "hegemonic battleground,"[34] rather than preserving their role as "an indispensable tool of modern economic management,"[35] they feed power asymmetries that dictate who owns and controls products of knowledge. In this regard, Rebecca Eisenberg and Richard Nelson claim:

> Patent rights motivate private firms to invest in research, but they also introduce significant inefficiencies that may inhibit future research. Patents permit innovators to restrict access to, and thus raise prices for, their inventions. Although sometimes necessary to allow firms to recover R&D [research and development] costs and thus profit from innovation, such pricing is inefficient, because it excludes users who would be willing to pay enough to cover marginal production costs but not the additional patent premium.[36]

Another empirical study found that increasing patent breadth leads to economic growth by increasing R&D but also simultaneously increases income inequality by increasing the rate of return on assets. The researchers also examined the macroeconomic effects of international intellectual property rights. They found that strengthening patent protection in any given country increases global economic

[32] The U.S. Constitution demonstrates this purpose in section 8, which lists the powers of Congress and states that one of these powers is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

[33] Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

[34] JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 170 (2011).

[35] Peter Drahos, *Thinking Strategically about Intellectual Property Rights*, 21 TELECOMM. POL'Y 201, 207 (1997).

[36] Rebecca S. Eisenberg & Richard R. Nelson, *Public vs. Proprietary Science: A Fruitful Tension?*, 131 DAEDALUS 89, 92 (2002). See, for example, SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 50–52 (2001).

growth but also worsens income inequality in both developed and developing countries.[37] Similarly, the *World Social Report* 2020, which addresses complex issues of inequality,[38] states that technological changes are driving wage and income inequality upward and most highly skilled workers away. The report further refers to intellectual property, saying that it must become one of the main focal points of the international community, alongside transnational crimes and international trade, to reduce inequalities in an interconnected world.[39] States must agree on "a more flexible approach to intellectual property rights that can provide adequate patent protection, while enabling and facilitating access to technological enhancements within and among countries."[40]

Second, inequality in intellectual property results in social exclusion and explains the rapid growth in counterfeit goods. This is another way to demonstrate unequal power relations between weak and strong private members of society. Intellectual property laws act as laws of social exclusion, building cultural fences around goods of high social symbolism. Consumers react to this exclusion by massively using counterfeit goods, thereby creating and financially feeding a market where violations of intellectual property rights flourish. The consumption of these goods is a "strategic response to the general cultural struggle of acceptance and recognition in the context of class divided property relations."[41] In other words, using these counterfeit goods is a "social reaction to inequality and marginalization . . . the counterfeit trade thrives in the context of organized, historically rooted, structural inequality."[42]

Third, on the international level, inequality persists and defines differences between weak and strong countries – for example, in access to medicine.[43] In this area, inequalities are magnified by intellectual property regulations.[44] The third example is best explained using the explanatory narratives Peter Yu provides for the developing countries' accession to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The bargain narrative provides that this agreement is a product of a compromise between developing and developed countries. While developed countries received stronger protection for intellectual property rights and a reduction in restrictions against foreign direct

[37] Angus C. Chu & Shin-Kun Peng, *International Intellectual Property Rights: Effects on Growth, Welfare and Income Inequality*, 33 J. Macroeconomics 276, 277, 284 (2011).

[38] *See* United Nations Dep't of Econ. & Soc. Affs., World Social Report 2020: Inequality in a Rapidly Changing world (2020) [hereinafter World Social Report 2020].

[39] *Id.* at 15.

[40] *Id.* at 79.

[41] Chris Rojek, *Counterfeit Commerce: The Illegal Accumulation and Distribution of Intellectual Property*, *in* The SAGE Handbook of Intellectual Property 189, 200 (Matthew David & Debora Halbert eds., 2015).

[42] *Id.*

[43] *See generally* Intellectual Property, Pharmaceuticals and Public Health: Access to Drugs in Developing Countries (Kenneth C. Shadlen, Samira Guennif, Alenka Guzmán & N. Lalitha eds., 2011).

[44] Mikayla Novak, Inequality: An Entangled Political Economy Perspective 139 (2018).

investment, developing countries obtained lower tariffs on textiles and agriculture as well as protection against unilateral sanctions imposed by the United States and other developed countries via the mandatory dispute settlement process.[45] This narrative, however, does not give enough weight to the fact that power relations between developed and developing countries at the time of the negotiations were far from equal. The coercion narrative declares that "the TRIPs Agreement is considered an unfair trade document that developed countries imposed on their less developed counterparts. The Agreement is 'coercive,' 'imperialistic,' and does not take into consideration the goals and interests of less developed countries."[46] An additional narrative suggests that developing countries did not fully understand the importance and implications of intellectual property protection, which has led to an agreement that does not reflect their interests.[47]

These narratives highlight how unequal power relations impact the development of international and national intellectual property laws in developing and politically weaker countries.[48] In times of health crisis, highlighted since the COVID-19 pandemic began to control the life of people in every corner of the world, inequality in access to medicine will have a devastating effect on these countries. According to the U.N. Development Programme, the crisis threatens to devastate developing country economies and ramp up inequality disproportionately.[49] Interestingly, the constitution of only one country in the world explicitly mentions access to medicine as part of its clause protecting intellectual property as a fundamental socio-economic right.[50] Article 41 of the Bolivian Constitution of 2009 provides:

> I. The State shall guarantee the access of the population to medicines.
> II. The State shall prioritize generic medicines through the promotion of their domestic production and, if need be, shall decide to import them.
> III. The right to access medicine shall not be restricted by intellectual property rights and commercial rights, and it contemplates quality standards and first generation medicines.

Access to medicine is not the only area of conflict between developed and developing countries. Yu notes that both domestic and international digital

[45] Peter K. Yu, *TRIPs and Its Discontents*, 10 Marq. Intell. Prop. L. Rev. 369, 371 (2006).
[46] *Id.* at 373.
[47] *Id.* at 375; *see also* Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO and Beyond*, 46 Hous. L. Rev. 1187 (2009).
[48] World Social Report 2020, *supra* note 38, at 166.
[49] *COVID-19: Looming Crisis in Developing Countries Threatens to Devastate Economies and Ramp Up Inequality*, United Nations Dev. Programme (Mar. 30, 2020), www.undp.org/content/undp/en/home/news-centre/news/2020/COVID19_Crisis_in_developing_countries_threatens_devastate_economies.html.
[50] For constitutional guarantees of access to medicines in general, see S. Katrina Perehudoff, Brigit Toebes & Hans Hogerzeil, *Essential Medicines in National Constitutions: Progress since 2008*, 18 Health & Hum. Rights J. 141 (2016).

copyright enforcement measures pose threats to human rights such as free speech and free press.[51] He explains how favoring rights holders over the public in copyright feeds inequality:

> [I]n an age where digital literacy is highly important, users who cannot exercise their right to freedom of opinion and expression are unlikely to be able to function effectively in the digital environment. It is therefore no surprise that UN bodies and developing country governments have expressed grave concern that the growing global digital divide could cause many individuals and developing countries to lose out on the unprecedented opportunities generated by the information revolution. Such impeded access would make it difficult for individuals to fully realize themselves and to develop . . . human capabilities.[52]

What needs to be done, in the words of Laurence Helfer, is to "reorient a legal discourse that privileged the private (and often corporate) ownership of IP [intellectual property] over human rights and other societal values."[53] Inequality and power asymmetries, as defining defects of global intellectual property developments, have brought many scholars, such as Graeme Dinwoodie and Rochelle Dreyfuss, to declare that "the North had the South over a barrel."[54] Daniel Benoliel, in his recent inquiry into patents and economic growth, further explains the North–South dichotomy. His approach raises concerns relating to asymmetrical power relations within global intellectual property clubs of states:

> Growing evidence reveals differences between developing countries in their ability to make use of [intellectual property rights] as a tool for fostering domestic innovation. All these pieces of evidence are startling when placed against the backdrop of a traditional World Bank-led and rather inflexible North/South country-group dichotomy, or some variant thereof. Such an innovation policy setting continually highlights the asymmetries between Northern countries, which are deemed to generate innovative products and technologies, and Southern countries, which are generally thought to consume them.[55]

In sum, inequality in intellectual property can be demonstrated in many forms. It can be demonstrated through the restriction on access to knowledge, through social exclusion that fosters gaps between weak and strong private members of society – and, of course, through fostering such gaps between the countries of the

[51] Peter K. Yu, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, *in* Research Handbook on Human Rights and Intellectual Property 455 (Christophe Geiger ed., 2015).

[52] *Id.* at 458.

[53] Laurence R. Helfer, *Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship*, *in* The Oxford Handbook of Intellectual Property Law 117, 127–28 (Rochelle Dreyfuss & Justine Pila eds., 2018).

[54] Graeme B. Dinwoodie & Rochelle C. Dreyfuss, A Neofederalist Vision of TRIPS 33 (2012).

[55] Daniel Benoliel, Patent Intensity and Economic Growth 49 (2017).

world at the international level. As mentioned at the beginning, this chapter takes the discussion further and shows how inequality permeates formal constitutions through intellectual property protection clauses. The next section, therefore, lays down the fundamental discussion on intellectual property and constitution and highlights the absence of scholarly debate on intellectual property in formal constitutions.

10.3 INTELLECTUAL PROPERTY CONSTITUTIONALISM

Contemporary scholarship on the relationship between intellectual property and constitutionalism has focused on the way scholars have addressed intellectual property–related constitutional clauses, such as the U.S. constitutional clause that empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[56] This focus has left outside the discourse a two-century phenomenon, in which countries protect intellectual property as a socio-economic constitutional right alongside the rights to health, work, education, housing, and private property.[57] The presence of intellectual property in bills of rights has much to tell about the nature of the right, its constitutional status in different countries and geographical regions, and the constitutional and cultural ideologies underlying the decision to adopt the right.[58] Such presence further highlights the benefits of learning from other systems and allows a better viewpoint on the image of intellectual property as a system of rules that protects cultural diversity and the universality of human rights.

The first time a constitution included intellectual property as a basic right, as opposed to an empowerment clause, was the 1801 Constitution of Haiti declaring the right to benefit from inventions in rural machinery.[59] According to Article 70 of that constitution, "The law provides for awards to inventors of rural machines, or for the preservation of the exclusive ownership of their discoveries." Two of the youngest countries in the world, South Sudan and Kosovo, have made intellectual property part of their constitutions. The 2011 constitution of the former includes

[56] U.S. Const. art. I, § 8, cl. 8. See, for example, Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 Colum. L. Rev. 272 (2004); David Lange, *Sensing the Constitution in* Feist, 17 U. Dayton L. Rev. 367 (1992); Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 Harv. J.L. & Tech. 87 (1999); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1845 (2006). *See also* Eldred v. Ashcroft, 537 U.S. 186, 223 (2003); Golan v. Holder, 565 U.S. 302 (2012); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. Rev. 1057, 1065 (2001).

[57] Goderis & Versteeg, *supra* note 4, at 7.

[58] See, for example, Fabrício Bertini Pasquot Polido & Mônica Steffen Guise Rosina, *The Emergence and Development of Intellectual Property Law in South America*, *in* The Oxford Handbook of Intellectual Property Law, *supra* note 53, at 431, 444–47.

[59] Haitian Constitution of 1801, *supra* note 28.

"intellectual property rights" in the list of "national powers."[60] Article 46 deals with the right to own property and its limits while stating that "intellectual property is protected by law."[61] Only a handful of scholars in the field of intellectual property or comparative constitutionalism referred to this phenomenon – intellectual property as part of a list of fundamental socio-economic rights in a formal constitution. These inquiries only briefly mentioned intellectual property.[62]

The wisdom behind adopting intellectual property rights in formal constitutional documents is embedded in the presumptions that constitutional laws "send a message about the priority of particular policies"[63] and that "constitutional commitments are potentially credible ones and send a strong signal to potential buyers and investors."[64] Although the idea of written constitutions has spread to virtually every corner of the world, scholars are divided over the strength of constitutional text as a source for learning about constitutional practice. On the one hand, "constitutions are gaining recognition as enforceable legal documents, rather than mere declarations."[65] On the other hand, the gap between constitutional text and its applicability raises questions about the role and impact of the text. Horowitz defines this gap as one between "law in books" and "law in action," explaining as follows: "[T]he gap between a formal constitution and the practice under its aegis is perhaps greater than with ordinary law. Because constitutions often perform symbolic or aspirational functions that have little relationship to the ways in which constitutional law actually operates."[66] Moreover, some constitutions are just "sham."[67] For example, they could bear "no relationship to reality."[68]

David Law and Mila Versteeg explain this tension by drawing a distinction between de jure, written, codified, or formal constitutions ("large-C"

[60] Constitution (2011), sched. (A)24 (S. Sudan).

[61] Kushtetuta e Republikës së Kosovës [Constitution of the Republic of Kosovo], art. 46.

[62] See, for example, Goderis & Versteeg, *supra* note 4; Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 Harv. Int'l L.J. 61, 72 (2013). *See also* Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering*, *in* Constitution-Making and Transnational Legal Order 10 (Tom Ginsburg, Terence C. Halliday & Gregory Shaffer eds., 2019); Christophe Geiger, *"Constitutionalizing" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 Int'l Rev. Intell. Prop. & Competition L. 371 (2006).

[63] Elkins, Ginsburg & Simmons, *supra* note 62, at 81.

[64] Goderis & Versteeg, *supra* note 1, at 114; Daniel A. Farber, *Rights as Signals*, 31 J. Legal Stud. 83, 85–94, 98 (2002).

[65] Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* The Oxford Handbook of Comparative Constitutional Law, *supra* note 9, at 1313, 1314–15.

[66] Morton J. Horowitz, *Constitutional Transplants*, 10 Theoretical Inq. L. 535, 536 (2009); *see also* Henc van Maarseveen & Gen van der Tang, Written Constitutions: A Computerized Comparative Study 11 (Oceana Publications 1978) (1943).

[67] David S. Law & Mila Versteeg, *Sham Constitutions*, 101 Calif. L. Rev. 863 (2013).

[68] *Id.* at 879.

Constitutions) on the one hand and de facto, unwritten, uncodified, or informal constitutions ("small-c" constitutions) on the other.[69] The latter attracted much scholarly debate, while the former has much less debate even though it represents an "act of making reasoned, explicit, commitments in written form."[70] A focus on formal constitutions has its limits. Certainly, "not all that is constitutional is written, and not all that is written is constitutional."[71] However, "the text pays extraordinary dividends both in terms of analytic leverage and in understanding change in the broader constitutional order."[72] For certain countries, the choice to constitutionally codify intellectual property as a basic right projects their commitment toward certain goals in pursuing the common good and highlights their will to become members of the international community. As this chapter will show, this choice sometimes violates norms of equality and enforces cultural hegemony.

10.4 INEQUALITY AND INTELLECTUAL PROPERTY CONSTITUTIONALISM

After discussing and illustrating inequality in intellectual property and how it is articulated in formal constitutions, this chapter shows the asymmetrical motivations of countries in adopting intellectual property rights in their constitutions. This section shows that, in reality, adding intellectual property rights to a constitution does not necessarily provide better protection to these rights, in contrast to the intuitive assumption that the constitutional protection of a particular right will secure protection on the ground. This section further highlights how this assumption is predominantly a result of global political inequality and asymmetrical power relations. It also shows that this assumption often stimulates constitutional templates unsuitable for the local culture or the countries' ability to apply these templates locally. This section is divided into two subsections. The first subsection evaluates the ideological motivations of countries to adopt intellectual property as a socio-economic right in their formal constitutions, and the second subsection introduces and empirically analyzes the results of the data collected that support the main claim of this chapter. The findings undoubtedly show that when countries adopt intellectual property rights in their constitutions, sometimes due to asymmetrical power relations, it does not assure protection on the ground.

10.4.1 *Asymmetrical Motivations*

Constitutional ideas diffuse across borders, systems, and contexts.[73] David Strang defines diffusion as "the process by which the prior adoption of a trait or practice in a

[69] Law & Versteeg, *supra* note 7, at 1188; *see also supra* Section 10.2.
[70] Perju, *supra* note 65.
[71] Elkins, Ginsburg & Melton, *supra* note 1, at 36.
[72] *Id.*
[73] See further inquiry in The Migration of Constitutional Ideas (Sujit Choudhry ed., 2009).

population alters the probability of adoption for the remaining non-adopters."[74] In their study of the diffusion of 108 rights across 188 countries in sixty-one years, Benedikt Goderis and Mila Versteeg found evidence of diffusion to particular groups of countries. For example, countries with a common aid donor or a common colonizer suggest that constitutions are affected by coercive pressures from aid donors and former colonizers.[75] Diffusion can also be found among countries that compete for foreign capital[76] or aim to be acculturated into the constitutional norms of world culture.[77] In these situations, unequal power relations dictate the content and structure of many norms that found their way into constitutions, regardless of ideological preferences that aim to protect cultural diversity and local legal history. When intellectual property is at stake, these diffusion channels exhibit how unequal power relations result in countries adding to their formal constitutions rights and duties that they cannot protect.

Various pathways define foreign influences and mechanisms of rights diffusion in constitutional design. The common mechanisms employed are coercion, learning, competition, and acculturation.[78] The logic behind competition suggests that states strategically imitate foreign constitutions in order to attract foreign capital. Competition is the rivalry between two or more states for material benefits.[79] Thus, countries act strategically in order to attract foreign capital, design a set of rules, and establish institutions that signal to investors and buyers that the local market can accommodate their interests, limit economic risks, and provide stability. Constitutional documents and lists of fundamental rights provide one of the ultimate sources of good signals to alleviate foreign investors' concerns. Contemporaneous observers have found that a high level of protection of basic human rights renders countries more attractive to foreign investment.[80] Investors believe that "regimes with strong human rights records are typically stable ones"[81] and that public reception will be better if their company gains a reputation that promotes fair trade, does not engage child labor, or builds where basic income is unavailable. Thus, when governments offer a strong and detailed list of rights in a constitution, they believe it "may attract economic benefits."[82] Property and

[74] David Strang, *Adding Social Structure to Diffusion Models: An Event History Framework*, 19 Sociol. Methods & Rsch. 324, 324 (1991).
[75] Goderis & Versteeg, *supra* note 1, at 124.
[76] *Id.* at 112–14.
[77] *Id.* at 124–26.
[78] See, for example, Roderic O'Gorman, *Environmental Constitutionalism: A Comparative Study*, 6 Transnat'l Envtl. L. 435, 446–47 (2017); Hanna Lerner & Amir Lupovici, *Constitution-Making and International Relations Theories*, 20 Int'l Stud. Persp. 412, 420–21 (2019).
[79] David S. Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U. L. Rev. 1277, 1307–11 (2008).
[80] Matthias Busse & Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment*, 23 Eur. J. Pol. Econ. 397 (2007).
[81] Goderis & Versteeg, *supra* note 1; Leibovitch, Stremitzer & Versteeg, *supra* note 8, at 113.
[82] Goderis & Versteeg, *supra* note 1, at 114.

intellectual property as constitutional human rights are important to foreign investors. In other words, when a state constitutionalizes intellectual property rights in its highest formal legal script, it invites investors to view its commitment to their rights.

Another example of how constitutional ideas diffuse across the border is the "learning" process. Learning means that "countries borrow each other's constitutional provisions because the constitutional choices of others have altered their preexisting beliefs: they adopt certain arrangements only when they are convinced that these will be beneficial."[83] Learning raises interesting issues with regard to intellectual property laws. Countries are open to learning from foreign sources, mainly because "the new global obligations from the treatment of intellectual property are transmitted from the international to the national level."[84] Intellectual property rights

> have gained increased prominence on the international economic agenda, rich and poor countries alike have responded by reforming their copyright, patent and trademark regimes, introducing new legislation, and creating new administrative and judicial institutions to facilitate the enforcement of these rights. In so doing, most countries have brought their [intellectual property right] systems into conformity with – and at times exceeded – the standards required by TRIPs.[85]

Ruth Okediji further reminded us how these processes affect weaker countries:

> Progressive harmonization of international IP law has continued in various fora, exacerbating historical and continuing burdens on the economic prospects of developing and least-developed countries. In particular, multilateral, regional, and bilateral trade agreements have assumed a crucial role in the creation of new international IP norms, with even stronger requirements and fewer safeguards for public welfare interests.[86]

The above reflects how "states respond to cultural forces"[87] and how, in doing so, they often emulate foreign constitutional templates irrespective of their content, unsuitable dialectics to the local culture, or even their ability to apply them locally. This diffusion mechanism is defined as acculturation – denoting, as Ryan Goodman and Derek Jinks explain, "the general process of adopting the beliefs and behavioral patterns of the surrounding culture."[88] Acculturation is different from coercion or

[83] *Id.* at 115; *see also* Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 229.

[84] Kenneth C. Shadlen, Andrew Schrank & Marcus J. Kurtz, *The Political Economy of Intellectual Property Protection: The Case of Software*, 49 INT'L STUD. Q. 45, 46 (2005).

[85] *Id.*

[86] Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. INT'L L. & POL. 1, 15 (2018).

[87] Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 654 (2004).

[88] *Id.* at 638.

competition because it explains how states act in order to reap social benefits. The logic behind acculturation is premised on organizational sociology, implying that organizations adopt models "not because of their functional utility but because of their legitimacy and the social relationships they represent."[89] Acculturation brings states to sign international human rights agreements and adopt environmental policies and other trade treaties without intending to comply with their requirements.[90] For example, as discussed earlier, the number of constitutions that include provisions on gender equality is increasing. However, as MacKinnon has found, the existence of such a provision is disconnected from its practical applicability.[91] What states achieve through acculturation is an option to signal to domestic and international audiences that they value integration in world society and comply with cultural norms. Acculturation has been a defining component in contemporary discourse on intellectual property protection for indigenous cultures and native communities[92] and on the tension between preserving ancient languages and cultural assimilation.[93] Acculturation in these ways has impacted biodiversity, cultural diversity,[94] as well as individual acceptance of the effects of acculturation.[95]

Many countries, rather than engaging in deliberate processes of adopting foreign constitutional norms and textual choices, are coerced into applying values alien to their national identity. Coercion sets aside the constitutional autonomy of a country and its cultural and legal histories.[96] Under this logic, "weaker states will converge upon the models provided by stronger states."[97] Powerful countries often pursue coercion unilaterally to overcome resistance to international treaties,[98] respect international norms, and join multilateral institutions. However, coercion can also be used as a mechanism to assist countries in nation-building.[99]

[89] *Id.*

[90] *Id.* at 648.

[91] MacKinnon, *supra* note 9, at 402.

[92] Julie Hollowell, *Intellectual Property Protection and the Market for Alaska Native Arts and Crafts*, *in* Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions 55, 71 (Mary Riley ed., 2004).

[93] Esther Almeida, *Traditional Knowledge: An Analysis of the Current International Debate Applied to the Ecuadorian Amazon Context*, *in* Human Rights and Intellectual Property Rights: Tensions and Convergences 209, 215 (Mpazi Sinjela ed., 2007).

[94] Josephine R. Axt, M. Margaret Lee & David M. Ackerman, Biotechnology, Indigenous Peoples, and Intellectual Property Rights 20 (1993).

[95] Ngulube Patrick, Handbook of Research on Theoretical Perspectives on Indigenous Knowledge Systems in Developing Countries 403 (2017).

[96] See, for example, David S. Law, *Imposed Constitutions and Romantic Constitutions*, *in* The Law and Legitimacy of Imposed Constitutions 34, 37 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2018).

[97] Goderis & Versteeg, *supra* note 1, at 123.

[98] See, for example, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 1978 (2004).

[99] Constance Grewe & Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, 15 Max Planck Yb. United Nations L. Online 1 (2011); *see also* Richard Albert, *Constitutions Imposed with Consent?*, *in*

Coercion is not an alien concept in contemporary intellectual property discourse. From a multilateral perspective, the TRIPS Agreement has been at the forefront of critiques. The primary complaint is that "there were elements of coercion and questionable trade-offs may have been made between market access for commodities and intellectual property protection."[100] The aggressive imposition of intellectual property norms on developing countries has become associated with concepts such as "recolonization"[101] and economic imperialism.[102] From a unilateral perspective, coercion has become a matter of trade policy in intellectual property. Lack of intellectual property protection risks economic isolation and unilateral acts such as economic sanctions and placement on lists of counterfeiting countries. The U.S. Trade Representative's *Special 301 Report*[103] is an example where a government empowers trade representatives to unilaterally test the level of intellectual property protection in other countries. Another example is the European Union's annual *Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries*. In its 2020 Report, the European Commission has remarked that one of the main objectives of the report is to "inform right holders, in particular small and medium-sized enterprises, about potential risks to their [intellectual property rights] when engaging in business activities in certain third countries and thus to allow them to design business strategies and operations to protect the value of their intangibles."[104]

The motivations of countries to include intellectual property in their constitutional bills of rights affect the structure of intellectual property constitutional clauses. Such clauses are sometimes shaped as a result of external interests or the influence of strong elites, as these clauses may "bear the imprint of the powerful."[105] These imprints, as discussed earlier, disturb constitutional cultures that countries aim to preserve. These imprints project a desired and unequal cultural hegemony that

The Law and Legitimacy of Imposed Constitutions (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2018).

[100] Dinwoodie & Dreyfuss, *supra* note 54, at 41.

[101] Peter Drahos, *Global Property Rights in Information*, 13 Prometheus 6, 9 (1995).

[102] Sam F. Halabi, Intellectual Property and the New International Economic Order: Oligopoly, Regulation, and Wealth Redistribution in the Global Knowledge Economy 53 (2018).

[103] The *Special 301 Reports* from 1989 to 2015 are available at https://ustr.gov/issue-areas/intellectual-property/Special-301.

[104] Eur. Comm'n, Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries 3 (2020), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159553.pdf.

[105] David S. Law, *Constitutional Dialects: The Language of Transnational Legal Orders*, *in* Constitution-Making and Transnational Legal Order, *supra* note 62, at 110, 124; *see also* O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 12–13 (1974) (discussing the transplantation of legal norms and arguing that there are different degrees of transplantation, which are dependent, inter alia, on "sociological factors," such as the role of strong social groups in the law-making process).

conflicts with the legal history and political autonomy of constitutional regimes and affects the actual protection these constitutions can afford to adopt on the ground.

10.4.2 *Empirical Results*

A comprehensive and original dataset was created to provide modest empirical support to the main claim of this chapter. The findings show how asymmetrical power relations may bring countries to constitutionalize intellectual property protection. In reality, however, constitutionalization cannot guarantee protection on the ground – and, in the case of developing countries, this guarantees the opposite. The dataset covers all constitutional provisions since 1801 that protect intellectual property as a fundamental right. Compiling the dataset involved a range of methodological choices. A choice has been made to focus on formal, written constitutions.[106] A search has been conducted in numerous databases using keywords pertaining to intellectual property rights.[107] The findings were cross-referenced with the WIPO Lex database constructed by the World Intellectual Property Organization (WIPO),[108] the Comparative Constitutions Project,[109] Constitution Finder,[110] Oxford Constitutions of the World,[111] HeinOnline, and Constitutions of Nations.[112] The data includes information gathered from sources such as the U.S. Trade Representative, which publishes an annual report on intellectual property protection in designated countries.[113] Two indices were used for the purpose of evaluating the level of de facto intellectual property protection given by the relevant country: the Intellectual Property Rights Index constructed by the Property Rights Alliance (IPR)[114] and the U.S. Chamber International Intellectual Property Index (GIPC).[115] It is important to mention again that the data collected for this chapter

[106] The dataset refers to documents explicitly labeled as constitutions and does not include "laws that are not explicitly labeled 'constitutional' but which govern functionally constitutional matters." Law & Versteeg, *supra* note 7, at 1188.

[107] These keywords include intellectual, patent, invention, authors, copyright, trademarks, science, and culture.

[108] Available per country at WIPO Lex, www.wipo.int/wipolex/en/.

[109] Compar. Consts. Project, http://comparativeconstitutionsproject.org/about-constitute/. This database is commonly used as well. See, for example, Zachary Elkins, Tom Ginsburg & James Melton, *The Content of Authoritarian Constitutions*, *in* Constitutions in Authoritarian Regimes 141–42 (Tom Ginsburg & Alberto Simpser eds., 2013).

[110] Constitute, www.constituteproject.org/search?lang=en. This is a database constructed by the University of Richmond School of Law.

[111] Oxford Const. L.: Oxford Consts. World, https://oxcon.ouplaw.com/home/OCW.

[112] 1–3 Amos J. Peaslee, Constitutions of Nations (1950). This is the first compilation in English of the texts of the constitutions of nations throughout the world.

[113] *See supra* text accompanying note 105.

[114] Int'l Prop. Rts. Index 2018, www.internationalpropertyrightsindex.org/about.

[115] The GIPC Index maps the level of intellectual property protection in thirty-eight countries which collectively account for nearly 85 percent of GDP. U.S. Chamber Int'l IP Index, www.uschamber.com/report/us-chamber-international-ip-index.

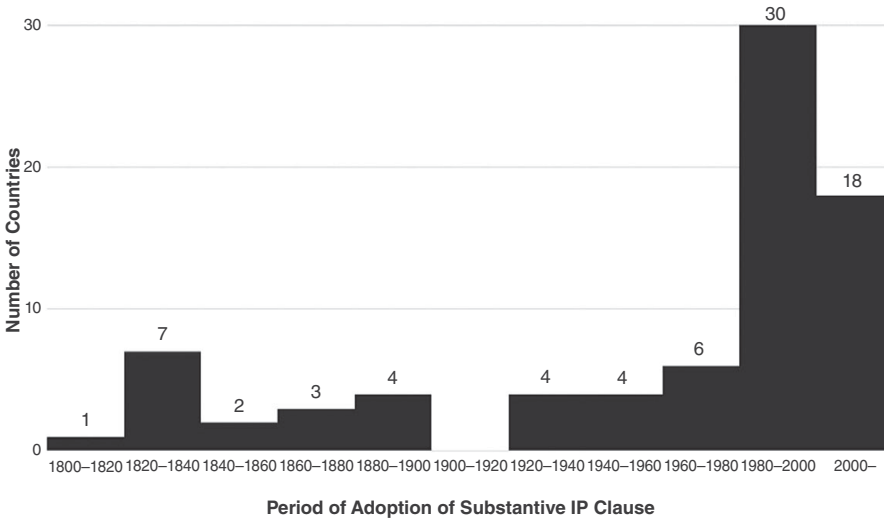

FIGURE 10.1 Period of adoption of intellectual property as a fundamental constitutional right

deals with intellectual property as a fundamental right in constitutional provisions; it does not thoroughly evaluate provisions referring to intellectual property as a legislative empowerment clause. The dataset is updated to January 2017.

As Figure 10.1 shows, the number of countries adopting intellectual property as a fundamental constitutional right has risen. Rapid growth can be seen since 1974 when Sweden adopted intellectual property rights in its formal constitution. Since then, fifty-one countries have followed suit. Haiti was the first country to adopt intellectual property as a fundamental constitutional right in 1801,[116] and Nepal is the most recent country to have adopted such a provision in 2015. Between 1895 and 1973, only nine countries adopted an intellectual property clause. Colonial histories determined the structure of the constitutional design, and states in Central and South America were the first to adopt an intellectual property clause as a fundamental right in the nineteenth century after Portugal's adoption of such a clause in 1826. Since the early twentieth century, including intellectual property in bills of rights has become more common among countries. As presented later, the major growth occurred during the last two decades of the twentieth century, shortly after Sweden adopted such a provision in its formal constitution in 1974. Another interesting insight is that many countries that adopted intellectual property as a fundamental constitutional right during that period were developing countries.

[116] Haiti has also been found to be the first to include the right to free public education. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1673 (2014).

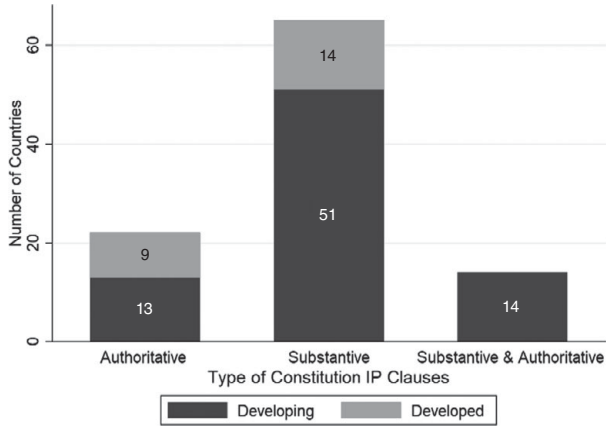

FIGURE 10.2 Types of constitutional intellectual property clauses

There are currently seventy-eight countries with a clause protecting intellectual property as a fundamental constitutional right.

Countries refer to intellectual property in their constitution in two ways. First, they adopt an authoritative/empowerment clause – namely, a commitment vested in the state to legislate and regulate in the field. An example of such a clause is the U.S. Constitution, which empowers Congress "[t]o promote the Progress of Science and useful Arts," as discussed at the beginning of the third section. Second, and more substantively, countries treat the right to own and protect intellectual property as a fundamental socio-economic right and make it part of a given bill of rights.

Some countries refer to intellectual property in both ways. As illustrated in Figure 10.2, twenty-two countries (thirteen of which are developing countries) adopted only an authoritative/empowerment clause;[117] sixty-five countries (fifty-one of which are developing countries) adopted a substantive clause;[118] and fourteen (all of which are developing countries) adopted an authoritative *as well as* a substantive clause.[119] It can be assumed that the status of a country as developed or developing will impact the way the country adopts such a clause.

[117] These countries were Australia, Austria, Belize, Canada, Germany, Hungary, India, Italy, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Palau, Papua New Guinea, South Sudan, Spain, Sri Lanka, Sudan, Thailand, Uganda, United Arab Emirates, and the United States.

[118] These countries included Afghanistan, Albania, Chad, Chile, Estonia, Fiji, Guatemala, Guinea-Bissau, Haiti, Korea, Kosovo, Kyrgyzstan, Lao, Latvia, Lesotho, Libya, Liechtenstein, Lithuania, Macedonia, Madagascar, Moldova, Mongolia, Montenegro, Mozambique, Nicaragua, Panama, Paraguay, Peru, the Philippines, Portugal, Romania, Sao Tome and Principe, Serbia, the Slovak Republic, Slovenia, Sweden, the Syrian Arab Republic, Taiwan, Tunisia, Turkey, Turkmenistan, Ukraine, Uruguay, Vietnam, and Yemen.

[119] These countries included Argentina, Azerbaijan, Bolivia, Colombia, the Democratic Republic of Congo, Costa Rica, Ethiopia, Georgia, Honduras, Kenya, Myanmar (Burma), the Russian Federation, and Venezuela.

TABLE 10.1 *Textual ranking index*

Where the constitutional clause	Score
Explicitly provides "IP shall be protected" and specifically mentions all three main IP branches/elements (author/copyright, inventor/patent/invention, trademark) as well as additional principles such as moral rights	9
Explicitly provides "IP shall be protected" and specifically mentions all three main IP branches/elements (author/copyright, inventor/patent/invention, trademark) (including when the clause's text provides "and other rights")	8
Explicitly provides "IP shall be protected" and specifically mentions two of the three main IP branches/elements (author/copyright, inventor/patent/invention, trademark)	7
Explicitly provides "IP shall be protected" and specifically mentions one of the three main IP branches/elements (author/copyright, inventor/patent/invention, trademark)	6
Explicitly provides "IP shall be protected"	5
Does not explicitly mention IP but refers to three additional branches/elements (author/copyright, inventor/patent/invention, trademark)	4
Does not explicitly mention IP but refers to two of the three additional branches/elements (author/copyright, inventor/patent/invention, trademark)	3
Does not explicitly mention IP but refers to one of the three additional branches/elements (author/copyright, inventor/patent/invention, trademark)	2
Provides weak reference to intellectual property	1

Including intellectual property protection in constitutional bills of rights does not guarantee enforcement of these rights on the ground. That is, the mere existence of the right in a constitution can sometimes amount to a false signal: "False can be detected by a conspicuous absence of real enforcement mechanisms."[120] Applied to the present argument, the adoption of intellectual property clauses sends a false signal if it lacks the possibility of enforcement. This section offers a modest empirical answer to this assumption. It explores the relations between the scope of protection given in a constitution (as measured by the textual ranking index created for this chapter)[121] and the level of protection given de facto to intellectual property in the applicable country (as measured by two available comparative data indices commonly used in the literature).[122] Table 10.1 provides the score of intellectual property clauses received, which were then applied to the data gathered from the indices:

[120] Versteeg, *supra* note 21, at 707.

[121] *See* Table 10.1.

[122] For an application of the indices in literature, see, for example, Benjamin Balsmeiera & Julie Delanote, *Employment Growth Heterogeneity under Varying Intellectual Property Rights Regimes in European Transition Economies: Young vs. Mature Innovators*, 43 J. COMPAR. ECON. 1069, 1072 (2015); Antonio Della Malva & Enrico Santarelli, *Intellectual Property Rights, Distance to the Frontier, and R&D: Evidence from Microdata*, 6 EURASIAN BUS. REV. 1, 8–9 (2016).

Analysis of the textual ranking, alongside the ranking of the state in the two indices examined, reveals a paradoxical reality: The more a constitution expands the scope of the protection by explicitly specifying the main branches of intellectual property rights (e.g., copyright, patents, and trademarks) in the text of the constitution and makes efforts to encompass different intellectual property doctrines and principles (e.g., moral rights) and rights holders (e.g., indigenous people), *the less* intellectual property protection is given de facto (in the manner the indices capture the latter). For example, Venezuela, a country with a broad constitutional language for de jure protection of intellectual property rights,[123] was given a maximum textual ranking of 9. Venezuela is also the country with the minimal overall GIPC score, at 6.88 out of 35. Similarly, Azerbaijan, which specifically includes in its constitutional language protection for "copyright, patent rights and other rights for intellectual property" as well as safeguarding "the right for intellectual property,"[124] achieved almost the maximum textual ranking score (8), but minimal de facto overall IPR score at 2.8 out of 10. Egypt, a country that provides constitutional protection to "all types of intellectual property rights in all fields,"[125] scored a similar textual ranking of 8 and low de facto intellectual property indices scores (overall IPR score of 4.4 and overall GIPC score of 9.4 out of 35). In contrast, the textual ranking score of Sweden, a leading nation in intellectual property de facto protection, is only 2 even though it has a GIPC overall score of 30.99 and overall IPR score of 8.2.

These findings uncover the apparent paradox concerning the constitutional protection of intellectual property rights, where countries with strong de facto protection of intellectual property rights do not offer broad explicit protection of those rights in their formal constitutions. The majority of the IPR and GIPC scores – Singapore, Switzerland, France, Belgium, Denmark, the Netherlands, Finland, Japan, Germany, the United Kingdom, and the United States (except Sweden) – do not refer to intellectual property as a fundamental socio-economic right in their constitutions. The geographical spread of textual ranking worldwide, illustrated in Figure 10.3, explains the almost inevitable pattern: Many countries with the highest score in the Textual Ranking Index are developing countries.

As Figure 10.4 illustrates, the textual ranking of developing countries (4.431) is, on average, higher than those of developed countries (2.929). This is, of course, not surprising, given that most countries that adopted a substantive clause in their constitutions are developing countries, as Figure 10.2 shows. Figure 10.4, therefore, emphasizes this through a more detailed explanation. These findings lend credence to the conflicting motivations of countries to adopt intellectual property as a fundamental constitutional right. Figure 10.4 confirms that regimes pay lip service or send false signals to appease the international community, certain powerful states,

[123] Constitución (1999), título 3, capitulo 6, art. 98 (Venez.); *id.* título 3, capítulo 8, art. 124.
[124] Constitution (1995), art. 30 (Azer.).
[125] Constitution Jan. 18, 2014, art. 69 (Egypt).

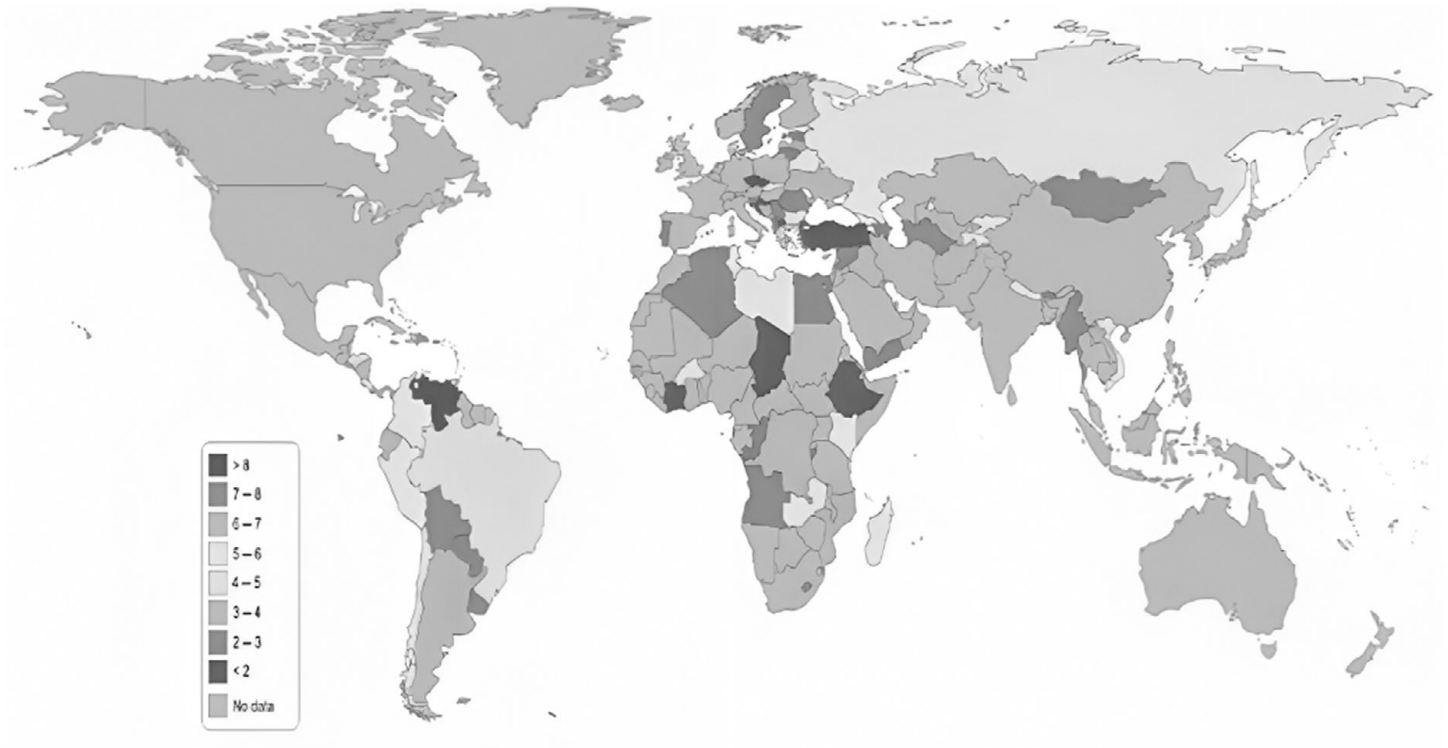

FIGURE 10.3 Textual ranking of constitutions with intellectual property as a fundamental right

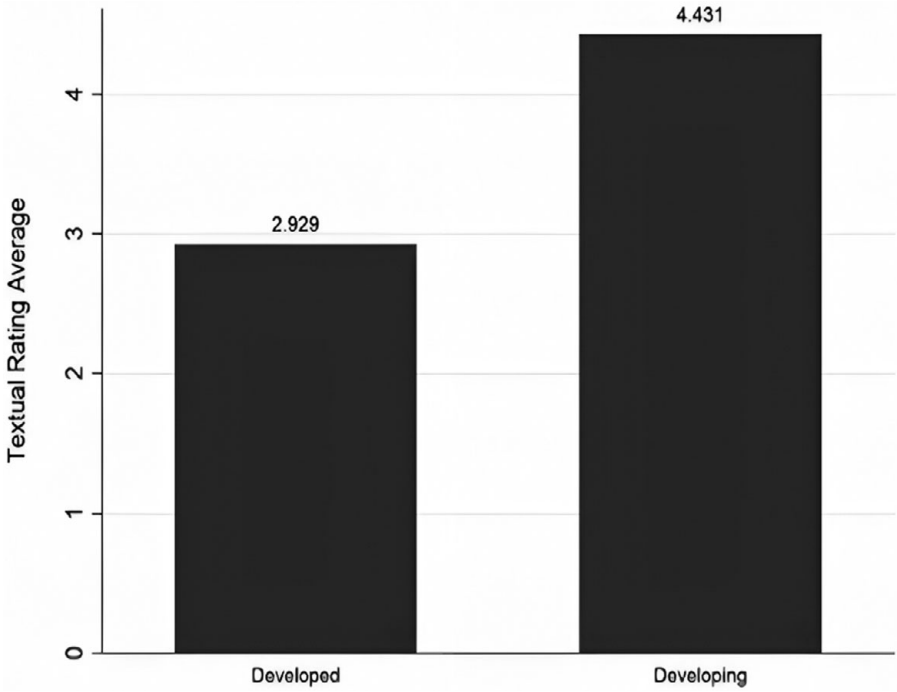

FIGURE 10.4 Average of textual ranking for developing and developed countries

and potential foreign investors without an ability to honor these rights or the ability to enforce them due to various reasons such as political unrest and economic instability.

CONCLUSION

Constitutions have protected intellectual property as a socio-economic right for over two centuries. To date, this phenomenon has been absent from the scholarly discourse. This chapter provided theoretical and empirical support to the conflicting motivations of countries to adopt such a right and challenges the claim that protecting intellectual property in a constitution guarantees better protection on the ground. The case of intellectual property rights constitutionalism provides evidence for the argument that the "poorest nations by definition lack the resources to honor the kinds of positive socio-economic rights that have grown increasingly popular in recent years."[126] This chapter highlights how global political inequality dictates what rights appear in the constitutions of certain countries and demonstrates the neglected value of constitutional intellectual property rights as an exemplar of

[126] Law & Versteeg, *supra* note 67, at 867–68.

the paradoxical consequences introduced by processes of global constitutionalism. Imposing a duty on countries to protect intellectual property rights in their constitution ignores, in many cases, the cultural history and social needs of these countries, leaving them unable to meet their constitutional commitments. One of the main consequences of this process is widening the distance between de jure and de facto protection of constitutional rights.[127]

[127] Goderis & Versteeg, *supra* note 1, at 126.