Article

The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law

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Abstract

Many constitutions of the world contain special provisions for indigenous communities, granting them particular rights and regulating their traditional political institutions and customary law. Building on rational theories of constitution-making, we employ a demand and supply framework to explain the constitutionalization of such provisions. To test our hypotheses, we code the presence of indigenous provisions in the current constitutions of 193 United Nations member states. We find full democracy and previous conflict to stimulate the inclusion of indigenous group rights but not of customary law and traditional institutions. Customary law and traditional institutions are more likely constitutionalized in countries with high ethnic fractionalization. Low levels of modernity affect particularly the constitutionalization of traditional political institutions, while low levels of development correlate with provisions on customary law. Former British colonies are more likely to constitutionalize customary law.

Keywords

constitutionalization, traditional institutions, customary law, indigenous rights

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Introduction

Many constitutions of the world contain special provisions on indigenous communities or those with traditional organization. To give a first impression of the size of the phenomenon: Out of the 193 member states of the United Nations (UN), 94 recognize the existence of indigenous communities and their traditional or customary institutions. The constitutions vary, however, in the way they make arrangements for such groups. Three approaches can be distinguished: Constitutional provisions include, first, the granting of distinct rights to indigenous peoples, second, the acknowledgment and regulation of their traditional political institutions, and, third, the acknowledgment of customary law as a basis for internal decision-making and judicial processes. In the following, we refer to the three categories of provisions with the umbrella term "indigenous provisions."[1]

Political scientists have recently observed a "constitutional resurgence" of traditional institutions and group rights for indigenous people (e.g., Aguilar, Lafosse, Rojas, & Steward, 2010; Englebert, 2002a, 2002b; Law & Versteeg, 2011; Ubink, 2008, p. 1201). While most prominent in sub-Saharan Africa, the constitutionalization of indigenous rights and traditional political institutions can also be observed in other regions, for instance, in Latin America, Oceania, and the Pacific (e.g., Care & Zorn, 2001; Forsyth, 2009).

These developments indicate the political importance of the constitutionalization of such provisions. Constitutions "represent a tangible manifestation of the social contract" (Wallis, 2014, p. 2) and are the basis of the political system of a state: They serve as institutions to limit government and protect individual and minority rights (Hirschl, 2013; Versteeg, 2015). Moreover, the constitutional status of indigenous groups and their institutions might also provide a platform for claims by these groups. They serve as a commitment that is backed by institutions such as supermajorities for constitutional change or constitutional courts. Constitutionalization therefore implies a promise to reliably respect these provisions (Ginsburg, 2003). Given the high symbolic value of constitutions, it is important to understand the conditions under which certain rules and rights are constitutionalized.

Those 94 countries that include indigenous provisions vary greatly in the type of provision and the specificity of the rights and regulations they provide for. However, by far not all countries in which indigenous or traditionally organized groups exist constitutionalize such provisions. Why do some countries constitutionally acknowledge indigenous rights, traditional political institutions, and customary law, sometimes to a great extent, while others abstain from doing so? Indigenous communities practice their own cultures, apply their customary norms and rules, and pay allegiance to traditional political

authorities. If unregulated, this parallelism of state law and traditional political institutions may cause tensions if indigenous rules and practices are applied within the same territory: Laws may be contradictory, legal security may suffer, competition or lack of coordination in public goods provision may occur, and political allegiance and legitimacy may be divided. As a consequence, a need for regulation, coordination, or integration of parallel norms and structures might be perceived by state or indigenous actors. Moreover, indigenous groups may advocate for special constitutional rights.

The observed variation motivates our research: Which factors account for the constitutionalization of indigenous group rights, their traditional political institutions, and their customary law? What induces political actors to demand the constitutionalization of "indigenous provisions" and under which conditions do constitutional designers supply them? Finally, as there is a broad array of different rights and regulations that address indigenous communities, do we find different sets of conditions leading to the constitutionalization of these provisions?

Building on rational theories that interpret constitutionalization as strategic political games (cf. Galligan & Versteeg, 2013; Hirschl, 2013), we enhance the perspective of constitutions as contracts negotiated through elite bargaining as put forward by Ginsburg (2013) and introduce the citizens into the model. We consider the constitutional choice of provisions for indigenous communities to be a case of rational political decision-making that is driven by the demand of these communities and the willingness to supply by the constitutional political actors.

As for the drivers of political demand, we expect only those countries to constitutionalize that face a multiethnic composition consisting of indigenous and nonindigenous parts of the population. Furthermore, we examine factors influencing the political relevance of perceived problems and the demand for constitutionalization, such as the level of modernity and economic development. However, whether indigenous rights or traditional institutions are constitutionalized depends also on the supply side: the "enabling" properties of a state's political system, such as the states' level of democracy, their previous experience with conflict, and international norms.

Hitherto, comparative research on the constitutionalization of indigenous issues is sparse, although data on ethnic and indigenous political rights have been provided by the Comparative Constitutions Project (CCP).[2] As these data do not include information on traditional political institutions and customary law we collected original data on all three categories of constitutional provisions for indigenous peoples for all 193 UN states. With these data, we are able to provide a broad, cross-national comparison of the constitutionalization of provisions on indigenous groups. Because in-depth time series data

are not available on our dependent variables, our study is cross-sectional and not dynamic. The analysis is correlational in kind and does not allow for causal interpretation.

Our analysis shows that with regard to demand factors, traditional institutions and customary law receive constitutional status predominantly in countries with high levels of ethnic fractionalization, whereas indigenous rights seem to appear also in less fractionalized countries. Traditional institutions are more likely constitutionally recognized in countries with low levels of metropolization, while customary law appears more likely in less developed countries. As to the supply side, indigenous group rights are more likely constitutionalized in democratic countries and in those that had previously experienced conflict. Furthermore, customary law provisions appear mostly in former British colonies.

Contribution to Related Research

Our analysis contributes to three strands of empirical research: the literature concerned with the phenomenon of the coexistence of legal systems, the literature on traditional governance and indigenous peoples, and the literature on constitution-making and the constitutionalization of rights. We outline three research gaps. First, there is a normative debate on legal pluralism but little comparative research so far. Second, a trend of resurgence of traditional institutions and recognition of indigenous rights has been observed, but as yet only case studies analyze this trend at the constitutional level. Third, large-*N* studies on the constitutionalization of rights focus neither on indigenous rights nor on customary law and traditional institutions. Finally, we contribute to theories of constitution-making broadening the elite negotiation perspective by introducing a political market perspective.

Parallelism of Customary and State Law and Institutions

First, the existence of indigenous groups, their leaders, institutions, and rules within a country might imply overlapping authority, that is, the coexistence of different legal structures within one state. This phenomenon has been discussed by scholars researching legal pluralism (e.g., Bennett & Vermeulen, 1980; Griffiths, 1986; Tamanaha, 2008). Legal pluralism denotes that institutions that are not subsumed within one coherent system may "support, complement, ignore or frustrate one another" (Griffiths, 1986, p. 39). Most legal scholars, therefore, argue in favor of the formal integration of customary legal structures into state law as a way to mitigate the undesirable effects of parallelism (e.g., Morse & Woodman, 1988; Otis, 2014), but they disagree on how this integration should exactly look like (Levy, 2000). This latter

question has been extensively discussed in the 1960s (e.g., Daniels, 1964; Read, 1963) and continues to be controversial (e.g., Benjamin, 2008; Bennett, 2009).

Furthermore, various typologies of the state-traditional legal relationship have been put forward (e.g., Forsyth, 2007; Muriaas, 2011; Ubink, 2008). They are derived from country-level analysis and point to problems and potential remedies of the integration of traditional and state law. These studies provide empirical examples of legal (non)integration while undertaking analyses on small numbers of cases. Constitutionalization and its causes is, however, not specifically addressed by these comparative studies.

"Resurgence" of Traditional and Indigenous Institutions and Rights

A second strand of relevant literature encompasses studies of the "resurgence of traditional institutions" (Buur & Kyed, 2007; Logan, 2013; Mengisteab & Hagg, 2017; Ubink, 2008). The bulk of this literature deliberates on the normative desirability of state-traditional integration (Mamdani, 1996; Ntsebeza, 2005; Sklar, 2005) or analyses the consequences of parallelism and integration on democracy, conflict, and development (cf. the review of Holzinger, Kern, & Kromrey, 2016).

Few studies focus on *constitutional* resurgence (e.g., Oomen & van Kessel, 1997; Sklar, 2005). Englebert (2002a, 2002b), as one exception, points to the variance of reemergence across the African continent—ranging from increased political significance to the adoption of constitutional arrangements such as national houses of chiefs in Ghana, South Africa, and Namibia. He compares the magnitude of the constitutional incorporation of traditional authorities and develops some conjectures on the underlying causes, but lacks the comparative data to test them with more cases.

While the literature on sub-Saharan African countries certainly dominates this strand, there are also contributions that focus on indigenous rights and institutions in Latin America (e.g., Díaz-Cayeros, Magaloni, & Ruiz-Euler, 2014; Yashar, 1996, 2005), the Pacific (e.g., Care & Zorn, 2001; Forsyth, 2009; White & Lindstrom, 1997), and the Caribbean (e.g., Forte, 2006). Many studies are concerned with the right to self-determination of indigenous communities (e.g., their right to preserve traditional ways of life; their right to traditional lands or to autonomous community governance; see, for example, Law & Versteeg, 2011).

In general, the field of indigenous politics represents a small fraction of political science research. Prominent are the Anglo-Saxon (cf. Bruyneel, 2014; Evans, 2011a, 2011b, 2014; Ladner, 2017; Sanders, 2015) or Latin

American country studies (cf. VanCott, 2010; Yashar, 2005). Other continents are recognized by fewer country studies, with perhaps the exception of Scandinavia (e.g., Berg-Nordlie, Saglie, & Sullivan, 2015; Mörkenstam, Josefsen, & Saglie, 2015). Two features of this research are noteworthy. First, most often the (re)searchlight is on the indigenous communities themselves, their mobilization, or on the tribal–state relationship. Seldom do studies focus on the state and its responses in the form of statutory policies. Second, most of these studies lack a broader comparative dimension, focusing mostly on a single or a small group of countries (cf. the reviews of Bruyneel, 2014; Ladner, 2017; Sanders, 2015).

Constitutionalization of Rights

A third branch of literature important for our research is concerned with the constitutionalization of individual and group rights. Most relevant in our context are studies of constitutional choice that attempt to explain why certain provisions enter the constitutions in some countries, but not in others. Examples include the human rights language in constitutions around the world (Beck, Drori, & Meyer, 2012), the incorporation of international law (Ginsburg, Chernykh, & Elkins, 2008), the inclusion of the right to resist (Ginsburg, Lansberg-Rodriguez, & Versteeg, 2013), and judicial review (Ginsburg & Versteeg, 2014). Elkins, Ginsburg, and Simmons (2013) show that human rights catalogs in constitutions converge, which can be explained by UN adoption and ratification of human rights documents (cf. Ginsburg et al., 2008). Beck et al. (2012) find the number of signed international human rights treaties to be significant for the amount of "human rights words" used in constitutions. A fine-grained analysis of six core human rights treaties by Versteeg (2015) shows that only some international treaties have such effects.

Most of these publications build on the data provided by the CCP (Elkins, Ginsburg, & Melton, 2009). They share many explanatory factors and the associated theoretical approaches—albeit with different findings. The more specific the dependent variables in these studies, the more specific the findings. We take this as an indication that the explanation of constitutionalization depends very much on the specific content of the provision. Therefore, we separate the three categories of indigenous provisions in our upcoming analyses.

The scholarly interest in explaining the constitutionalization of indigenous rights, however, is limited. Many legal scholars treat indigenous rights as a subcategory of human rights that deserve normative deliberation as social rights (e.g., Fabre, 1998; Miller, 2002; Wesson, 2012); or they describe and analyze these rights for individual countries from a legal perspective. For example, Aguilar et al. (2010) compare fifteen Latin American constitutions

with respect to indigenous rights, whereas Macklem (2001) and Otis (2014) analyze the constitutional rights of the First Nations of Canada. Hammond (2011, p. 560) argues that a demand for constitutionalization of indigenous rights in Bolivia grew due to increased "indigenous consciousness." Political scientists concerned with indigenous politics also rarely investigate the constitutionalization of indigenous rights (e.g., Berg-Nordlie, Saglie, & Sullivan, 2015; Sieder, 2002; VanCott, 1994; Yashar, 1996, 2005). An exception is VanCott (2002), who analyses the processes leading to constitutionalizing indigenous rights in Colombia, Bolivia, and Ecuador.

In sum, there is hitherto no comprehensive study seeking to explain the constitutionalization of indigenous provisions across a large number of countries. Our article is the first to move beyond single country or comparative case studies and instead provides a worldwide cross-country comparison on the topic of indigenous policies and politics.

Theory and Hypotheses

Basic Concepts: Indigenous Communities and Multiethnicity

In this study, we are particularly interested in the constitutional representation of indigenous groups, their rights, laws, and political organization. As Berg-Nordlie et al. (2015, p. 9) note, a "universally recognized definition of the term does not exist but a very commonly cited one is found in ILO 169." The International Labour Organization (ILO) defines indigenous communities as

> peoples . . . who are regarded as indigenous on account of their descent from the populations which inhabited the country . . . at the time of conquest or colonisation or the establishment of present state boundaries and who . . . retain some or all of their own social, economic, cultural and political institutions. (Art. 1b of the Indigenous and Tribal Peoples Convention of 1989: ILO 169)

Indigenous peoples are often conceived of as few, small, and remote minorities (e.g., Choudhry, 2012, p. 1103). In a global perspective, however, this is far from being valid. Indigenous groups may constitute a minority in a country, as in North America or in Australia; or they may represent a majority, as in sub-Saharan Africa or India. As the ILO 169 definition states, referring to "indigenous" groups implies, first, referring to the processes of colonization or conquest leading to a particular situation of multiethnicity, characterized by the coexistence of colonialists and indigenous population, and second, a parallelism of cultural and political institutions. Legal pluralism and overlapping authority are a typical consequence. It is this form of multiethnicity we intend to analyze.

Certainly, there are other forms of multiethnicity. Kymlicka (1996) distinguishes three sources of ethnocultural diversity, leading to three forms of "multiculturalism" pertaining to different ethnic groups: national minorities, immigrants, and indigenous peoples (Banting & Kymlicka, 2006).[3] First, multiethnicity may be a result of historical processes of nation-building and border-drawing, leading to national minorities. Second, multiethnicity might be a consequence of large-scale immigration. Both forms, however, do usually not lead to legal pluralism and overlapping authorities. Nevertheless, we might find these situations addressed in a constitution—for example, in the form of granting political rights to certain ethnic groups. The fact that constitutions do not always explicitly distinguish the three types of ethnic groups (and sometimes a provision addresses more than one type) provides a challenge for coding indigenous rights as opposed to rights for other types of ethnic groups. We come back to this problem in the operationalization section.

A Rational Model of Constitutional Choice: Demand and Supply of Indigenous Provisions

We understand constitutional choice as a form of rational decision-making about constitutional policies within a political system. Thus, we follow theories that interpret constitution-making as a rational process and political power game (e.g., Ginsburg, 2003; Hirschl, 2004), as opposed to ideational approaches viewing constitutions as expressions of values, or functional approaches emphasizing the coordination function of constitutions (cf. Galligan & Versteeg, 2013; Hirschl, 2013). While the latter perspectives have their merits, the focus on political processes and actors seems more appropriate for the explanation of how constitutions are made and changed, and why rules are constitutionalized. As Hirschl (2013) states, "strategic behavior by politicians, elites and courts plays a key role in explaining the tremendous variance in the scope, nature and timing of constitutional reform" (p. 157).

The strategic approaches to constitution-making emphasize the role of political elites: They depict constitutions as contracts emanating from elite bargaining (Ginsburg, 2013). The citizens (the societies) are not perceived as constitutional actors or active bargainers in the negotiation game. Whereas the actors directly involved in constitution-making are indeed often limited to constitutional assemblies, supermajorities in parliaments, supreme courts, or autocratic government, the citizens are still sometimes directly involved via constitutional referendums. Moreover, they are indirectly present insofar as they create "electoral uncertainty" (Ginsburg, 2003), or more generally, as acquiescence of citizens is needed for a constitution to work successfully

(Hardin, 2013, pp. 60ff). While popular acquiescence can surely not sufficiently explain the equilibrium in a constitutional coordination game, or predict "which actual constitutions will be formed and endure" (Ginsburg, 2013, p. 183), the contractarian elite negotiation explanation may not be sufficient either.

To more strongly account for the role of the ordinary citizen in constitutionalization processes, we extend the prevailing model of elite negotiation to include citizens as actors exerting political demand for the constitutionalization of certain rights or rules (potentially limiting governments). The elite constitutional actors then respond to these demands by supplying constitutional rules in exchange for political support and acquiescence. This conception is more similar to a market model than a model of bargaining, albeit the supply side resembles an oligopoly.[4]

Employing this framework of demand and supply, we follow recent studies that use this approach to explain political decision-making outcomes (e.g., Fowler, 2015; Harden, 2016). Our concept starts from the idea that actors with given preferences, such as indigenous individuals, groups, organizations, or parties, demand certain constitutional provisions. In the course of a constitutional process, they "meet on the political market" the constitutional actors that are responsible for organizing the supply of these provisions. The output of such a process, the constitutional provisions, can a posteriori be thought of as an equilibrium.[5]

We begin by describing the output of constitutional provisions on indigenous peoples, that is, the dependent variables in our empirical model. Afterwards, we present demand and supply factors that may potentially explain the output and formulate the respective hypotheses.

Dependent Variables: Constitutionalization of Indigenous Provisions

What do constitutions regulate with respect to indigenous communities? With a view toward the parallel situation and based on what we empirically find in the constitutions, we distinguish three categories of provisions as our dependent variables. It is important to note that these categories are not exclusive; countries can and do have provisions in more than one category.

First, the constitution may acknowledge the existence of particular indigenous groups and may grant them special rights, for example, educational rights, political rights, or the right to self-determination. The Bolivian constitution, for instance, provides an extensive chapter on the rights of nations and rural indigenous peoples.

Second, the constitution may acknowledge the traditional political organization of certain groups and permit it to be effective within the community. It may regulate some aspects of it, such as prescribe leadership selection rules or and delineate the jurisdiction of traditional authorities. In addition, the constitution may provide for the integration of traditional and state political institutions. For example, some constitutions create state institutions for the representation of traditional authorities, such as conciliatory houses of chiefs (e.g., Botswana, Ghana, Malaysia, Vanuatu, Zambia).

Third, the constitution may acknowledge the existence of customary law or customary dispute resolution within certain indigenous communities (e.g., Colombia, Malaysia, the Philippines). For example, many African countries allow for customary land ownership (e.g., Uganda) and many Pacific states for customary fishing rights (e.g., Fiji). In the same vein, constitutions may restrict the application of customary law by forbidding certain ways of punishment, by reserving capital crime to state courts, or by specifying general collision rules (e.g., South Africa). Thus, the constitution may regulate the ways customary law and state law are intertwined (Forsyth, 2007). These restrictions, however, imply the acknowledgment of the customary law in the first place.

It is important to note that our concept of customary law does not include religious law. There is no doubt that legal pluralism is most prominent when it comes to the coexistence of state and religious law (cf. Sezgin, 2004; Woodman, 2008). However, our focus is on the implications of customary law as the defining norms for indigenous communities and their traditional political institutions. This analytical distinction is supported by constitutions that make explicit reference to both, customary and religious law (e.g., Fiji, Kenya, South Africa, or The Gambia). In predominantly Muslim countries (e.g., Qatar, Oman, Yemen), on the contrary, constitutions typically do not refer to customary, but to religious law (see Figure 1).

Explanatory Variables and Hypotheses: Political Demand and Supply

We expect the three categories of provisions to cluster in certain contexts, according to the extent and structure of multiethnicity. For example, indigenous rights are special rights for groups that may be granted in any society that has at least one indigenous community. Therefore, in a postcolonial context with a dominant colonialist majority and indigenous minorities, one would rather expect to see provisions for indigenous rights as minority rights. In contrast, in a postcolonial context, where the indigenous population constitutes the majority, we anticipate to observe constitutional reference

to traditional political institutions and customary law, as these are broader phenomena. Constitutionalizing traditional institutions and customary law implies the acknowledgment of a legal and political pluralism. If this holds true, we should also expect the factors explaining the constitutionalization to vary across categories. We therefore differentiate the following hypotheses to some degree according to the categories of constitutional provisions. We discuss these differentiations solely in the text, however, because we prefer to phrase the hypotheses as parsimonious as possible.

The constitutionalization of indigenous provisions implies the existence of a demand for it. We expect to observe a demand for constitutionalization if the following preconditions are fulfilled in the country: Indigenous groups exist, they maintain their own traditional political institutions to some degree, and they express a desire for some autonomy. Intuitively, the best indicator for the demand for the constitutionalization of indigenous rights would be a measure of the degree of political organization of indigenous and traditionally organized communities. Hitherto, such measure does not exist for a worldwide sample,[6] despite much case and comparative research (e.g., Evans, 2011a, 2011b; Lightfoot, 2016; VanCott, 2010; Yashar, 1996, 2005). Constructing a worldwide variable would require extensive data collection which is currently beyond our means. In consequence, we rely on structural approximations that measure the "silent presence" of a political demand indirectly.

The demand for the constitutionalization of such rules will depend on the political relevance of the phenomenon. The more relevant the issue of indigenous groups and of a potential parallelism of political and legal institutions in a state, the more likely constitutional designers adopt provisions accounting for the problem. A number of factors may render this relevance. The first is the share of population potentially demanding constitutionalization, that is, the share of indigenous population. As reliable numbers for indigenous groups and their share in populations are not available for all UN countries, we build on the degree of multiethnicity as an approximation. Measures of multiethnicity, such as ethnic fractionalization, draw on both number and size of groups. We expect the share of the population belonging to an ethnic group and the number of ethnic groups to affect all three categories of constitutional provisions. However, we expect the association to be less pronounced for indigenous rights because also states with few and/or small indigenous minorities might grant them special rights in their constitutions.

Hypothesis 1: A high degree of multiethnicity is more likely associated with the constitutionalization of indigenous provisions.

However, the mere existence of large shares of indigenous population will not suffice to fully explain the political demand for constitutionalization of indigenous provisions. It is important to which degree the institutions are still maintained and how significant they are for the members of the communities. We assume that a sense of identity and loyalty to the community at the individual level reflect the degree of modernity of a state. Thereby, we refer to a sociological concept of modernity, marked by social norms and attributes of societies, such as individualism, freedom, and equality; rationalization and secularization; the nation-state, modern bureaucracy; and industrialization, urbanization, and a movement toward market economies (Berman, 2010). The more individuals are exposed to modernity, we argue, the less they pay allegiance to their indigenous identities and traditional authorities.

Indigenous groups are more often residing in rural territories and the same is true for the salience of their traditional political institutions. The degree of urbanization may therefore provide an indication for the social significance of the issue at hand. Cities often display greater ethnic heterogeneity than rural areas and thereby they might weaken ethnic identification. Even more accurate might be an indicator of metropolization: How many urbanites live in the metropolis of a country? We assume that modernity is most pronounced in the metropolises, where the political, economic, and social life of a country is concentrated (Schulz, 2015). The inhabitant of the metropolis is most exposed to modernity and thus least inclined to adhere to traditional rules and to uphold loyalty toward traditional authorities. If more people live in the metropolis, the demand for constitutionalization should be lower. In addition, increased metropolization may lead to decreased support for traditional leaders who would be the agents of exerting demand for constitutionalization. Therefore, we conjecture this effect to appear in particular for traditional political institutions.

> **Hypothesis 2:** A low degree of metropolization is more likely associated with the constitutionalization of indigenous provisions.

Third, the level of economic development of a country may influence the demand for constitutionalization of indigenous provisions (Englebert, 2002a, p. 59). Weak overall economic performance and insufficient economic opportunities for constituents may go hand in hand with more informal subsistence-based market economies. The latter, we assume, are more likely to provide a greater role to indigenous communities and to traditional leaders as agents in these markets. The increased role of indigenous actors in informal market transactions may be translated into constitutionalization, in case

governments acknowledge that local economic prosperity depends on indigenous actors and traditional rules.

Furthermore, less developed countries are predominantly agrarian economies where many people still pay allegiance to traditional leaders. The poor majority living under traditional leaders might feel oppressed by an elite minority with severe consequences on the legitimacy of the government, if the social practice of adhering to traditional leaders and the state's legal system, with the constitution leading the way, are not brought in line (Knight, 2010). Because governments might fear that people living under traditional institutions otherwise reject the state's institutions altogether, we expect a higher degree of constitutionalization of traditional political institutions in poorer states (cf. Shivakumar, 2003).

Moreover, states with low administrative capacity might prefer to decentralize economic policy competences. Constitutionalization of indigenous provisions might gradually encourage traditional authorities and indigenous groups to craft specialized rules needed to govern the provision of public goods (Baldwin, 2015; Boone, 2014; MacLean, 2011; Shivakumar, 2012). Furthermore, constitutional rules may work as a basis for tools for locally meaningful solutions to collective action problems (Shivakumar, 2003). We expect development to play out less for indigenous rights as compared with traditional institutions, as indigenous groups reside also in developed states, which might be more likely to supply indigenous rights.

Hypothesis 3: A low level of development is more likely associated with the constitutionalization of indigenous provisions.

Turning to the supply-side of constitutionalization, we ask, "What causes constitutional designers to constitutionally acknowledge indigenous provisions?" We discuss three factors: the political system of a state, political shocks, and international law. To start with, we assume that a democratic system is more responsive to demands for a legal status of indigenous groups and their institutions. A democratic state ideally aggregates heterogeneous interests of its constituents, for example, by granting identity and cultural rights to indigenous groups. Although these rights can be provided by ordinary law as well, one would expect democratic states to display a higher status of constitutionalization (Englebert, 2002a, p. 58).

There is, however, one counterargument: Autocracies might simply consider the constitutionalization cheap talk or "window dressing" (Law & Versteeg, 2013) and include the rights to satisfy demands of international donors and the population alike, knowing they do not need to implement them. Thus, constitutionalization may be welcome to autocrats as well, and

this may cancel out the positive effect of democracy. Nevertheless, complying with most empirical evidence on the effects of constitutions so far, we phrase our hypothesis in favor of democracy.

> **Hypothesis 4:** Democratic states are more likely to constitutionalize indigenous provisions.

By political shocks, we refer to events that might cause a state to adopt a new constitution or to substantially amend the current one. As we are dealing with amendments concerning indigenous groups, the political shock should be somehow connected to those groups. Armed conflict within a country, particularly if related to ethnic groups, can certainly be considered such a political shock. It might be outright civil war or rebellion against a government, leading to a new constitution after a peace agreement, or causing the parliament to adopt a constitutional amendment.

Constitutionalization then represents an attempt to accommodate for cleavages and conflict arising from a setting characterized by multiethnicity. The literature on constitutional design in highly divided societies has suggested so-called power-sharing institutions: According to Lijphart (e.g., 2004, 2008), Hartzell and Hoddie (2003), Horowitz (e.g., 2008), or Choudhry (2008), federalism, consociationalism, proportional representation, or ethnic quota will allow for the inclusion of ethnic factions and have integrating or accommodating effects. In contrast, proponents of the power-dividing approach (Roeder, 2011; Roeder & Rothchild, 2005) see power-sharing as an obstacle to long-lasting peace as they fortify rather than accommodate ethnic cleavages; however, they agree that power-sharing right after the end of civil war serves to build trust in divided societies. Following the power-sharing logic, we expect countries that recently experienced conflict to enshrine more indigenous provisions in their constitutions.

> **Hypothesis 5:** States that recently experienced internal conflict are more likely to constitutionalize indigenous provisions.

The literature on the constitutionalization of political rights emphasizes international influence as an important causal factor (Beck et al., 2012; Elkins et al., 2013; Ginsburg et al., 2008; Versteeg, 2015). International norms may stimulate or require the adoption of rules in national constitutions. We concentrate on direct effects of international law on the constitutionalization of our three categories of provisions. There are basically three binding documents that relate to the subject of this article. The first one is the UN International Covenant on Civil and Political Rights (ICCPR), which

stipulates individual rights for minorities. The second one is the UN International Covenant on Economic, Social, and Cultural Rights (ICESCR). Next to positive socioeconomic rights, it includes a political group right, the right to self-determination of peoples. Third, the ILO's Convention on Indigenous and Tribal Peoples (ILO 169) is the only international treaty specifying rights for indigenous peoples.

We expect that ratification of international treaties has a positive effect on constitutionalization in general. A country that committed itself to an international policy should be more likely to ensure similar rights and rules in its own constitution. There is one clear caveat, however, with respect to international treaties: Ratification demands implementation by law or constitution in countries following a dualist approach to international law, but implies direct effect in monist countries, where international treaties automatically become part of domestic law. In consequence, we should observe a positive correlation with the constitutionalization of rights for dualist states, whereas for monist countries we should rather see a negative one. In fact, Versteeg (2015, p. 99) shows that this difference holds for the ICESCR. We nevertheless phrase our hypothesis in the positive direction. We expect this effect to be particularly strong for indigenous rights as the treaties address rights in particular.

Hypothesis 6: States that ratified relevant international human rights law are more likely to constitutionalize indigenous provisions.

A historical determinant of the supply of indigenous provisions is the effect of colonial administrations on constitutional arrangements. The French and the British used different approaches toward the indigenous peoples and their institutions. The French tried to implant their home culture in their overseas territories (direct rule), while the British usually left traditional institutions of governance in place (indirect rule), including traditional systems within their hierarchies of rule, and often granting them a legal status (e.g., Englebert, 2002a; Firmin-Sellers, 1996, 2001; Mamdani, 1996).

Portraying these different colonial approaches underpins how postcolonial states dealt with traditional political institutions. Immediately after independence, colonial approaches were usually perpetuated and much of them survived until today. For example, MacLean (2010) shows how the colonial approach of the French in Côte d'Ivoire and the British in Ghana impacted on the contemporary politics within the countries: Ghana incorporated a House of Chiefs in its constitution, while Côte d'Ivoire remained centralized with almost no role for chiefs. In a more general approach, Levi (1989) argues that politicians have always built their governments on preexisting, strong institutions to be more efficient. De Kadt and Larreguy (2018) show for today's

South Africa, a former British colony, that politicians continue to make use of the powers of traditional leaders, providing them with institutional recognition in exchange for political support.

While colonial legacies may vary depending on local contexts (Boone, 2003), one can assume that path dependencies of these policies have impacted later constitutional texts. We therefore expect that former British colonies are more likely to include traditional political institutions and customary law into their constitutions after independence (cf. Englebert, 2002a, p. 56), while this is not necessarily so for indigenous rights.

Hypothesis 7: Former British colonies are more likely to constitutionalize indigenous provisions.

Research Design

To explore the pattern of constitutionalization of indigenous group rights, customary law, and traditional political institutions, we collected new data and built a cross-sectional data set. In the following, we describe how we collected and operationalized our variables.

Dependent Variables: Data Collection and Operationalization

To measure the constitutionalization of indigenous provisions, we created a unique data set[7] by coding the constitutions of all 193 UN member states that were in force as of July 2014. The constitutions were collected using various sources[8] and were coded in English (official translation) or at times in Dutch, French, Portuguese, or Spanish. Overall, 94 constitutions contain at least one provision on one of our three dependent variables.

Indigenous group rights comprises the (a) acknowledgment of groups and (b) autonomy, political, social, economic, land, reservation-related, cultural, education, and religious rights granted to at least one indigenous group. Constitutions rarely clearly designate rights as indigenous. Often, indigenous rights are subsumed under ethnic group or minority rights. One important reason for this is the fact that "indigeneity" is a politically contested concept in many countries (cf. de Costa, 2015). To single out the rights for indigenous groups, we first determine those countries in which indigenous groups exist. Thereby, we rely on the definition of ILO 169 (as cited above) and secondary sources. Second, for these countries we revert to explicit references to indigenous groups within the constitution, either addressing a particular group or using words such as *Indigenous, Native, Aboriginal, Indian, Inuit, Métis,*

Adivasi. This way, we can safely exclude all ethnic rights provisions that cannot address indigenous groups (but immigrants or national minorities), and we can safely determine all provisions that solely address indigenous groups. We cannot and do not exclude provisions, however, that might address indigenous and other ethnic groups at the same time.

To capture the comprehensiveness of rights, we construct a count variable. This variable equals 0 if no indigenous groups are mentioned in the constitution; it equals 1 if indigenous groups are merely mentioned but no special rights are granted; and it ranges between 2 and 10 if indigenous groups are mentioned and one or more of the nine rights listed above are granted. In 73 countries, indigenous groups are acknowledged, of which 58 grant special rights.

Traditional political institution refers to all provisions in which the existence of traditional or indigenous leaders (e.g., chiefs, headmen, councils of elders) or institutionalized bodies representing indigenous groups at the state level (e.g., houses of chiefs) are acknowledged or regulated. This variable equals 0 if no traditional institutions are mentioned in the constitution, and it ranges between 1 and 10 if traditional political institutions are acknowledged and special rights are granted on one or more of the following categories: executive, legislative, and judicative political rights; social, economic, land, autonomy, and cultural rights; and the recognition of the intermediary function of traditional institutions. Traditional institutions are acknowledged in 48 constitutions.

Customary law includes provisions on one or more of the following types of provisions: the acknowledgment of its existence, its application through customary courts and dispute resolution, the specification of the jurisdiction, and the relationship to state law through collision rules. This leads us to a count variable ranging from 0 to 4. Out of 193 countries, 53 recognize customary law in their constitutions.

Furthermore, we are interested in the *current* state of constitutions concerning these provisions. Yet to understand the variance in constitutionalization, it is crucial to look at the precise time when the respective provision entered the constitution—either by amendment or through a new constitution. Constitutional debates on the provisions will be influenced by the explanatory factors just before this point in time. Therefore, starting from the most current constitutions, we checked all preceding versions (including amendments) backward, up to the point where we observe a substantial change in our three categories of provisions. This is the temporal reference point of each observation for our time-variant independent variables. For those countries where the constitution does not contain any provision of interest to us, we use the date of the most current version.

Independent Variables: Operationalization and Data Sources

The first hypothesis refers to the number and size of indigenous groups. We use ethnic fractionalization to capture the extent of multiethnicity because it is more precise than coding the simple presence of indigenous groups. We employ the measure proposed by Alesina, Devleeschauwer, Easterly, Kurlat, and Wacziarg (2003), which runs from 0 to 1 and reflects the probability that two randomly selected individuals from a population belong to different groups (Alesina et al., 2003, p. 5).[9]

The operationalization for Hypotheses 2 and 3 is straightforward. Metropolization measures the percentage of urban population living in a country's largest metropolis. We operationalize economic development by per capita gross domestic product in constant 2005 US dollars (GDP pc). The data for both variables are taken from the World Development Indicators and are logged for the upcoming analyses.[10]

For Hypothesis 4, we apply a strict conceptualization of democracy based on institutional characteristics that ensure the responsiveness of a political system to (political) demands from society. We therefore employ a binary version of the *polity2* item from the Polity IV data set (Marshall & Jaggers, 2004). It receives the value of 1 (full democracy) for a *polity2* score of 5 or higher and 0 otherwise.[11]

For Hypothesis 5, regarding the effect of having experienced a conflict, we apply a measure of conflict intensity based on the Uppsala Conflict Data Program/Peace Research Institute Oslo (UCDP/PRIO) Armed Conflict Data (Gleditsch, Wallensteen, Eriksson, Sollenberg, & Strand, 2002), ranging from 0 (no internal conflict took place in a country) to 2 (major internal conflict took place).

Hypothesis 6 on the influence of international law is operationalized by the ratification of the ICCPR covenant.[12] We prefer not using the ratification of ILO 169 as it covers less than half of our time period. In addition, there is not much variance, with only seven countries having signed ILO until 1 year prior to the latest relevant amendment of their indigenous provisions.[13] Therefore, we include a dichotomous variable that turns 1 if the country has ratified the ICCPR before the constitutionalization and 0 otherwise.

For testing Hypothesis 7, we code a dichotomous variable as 1 if the country was a former British colony and 0 otherwise. The data are taken from the ICOW Colonial History Data Set (Hensel, 2014).

The literature on constitutions suggests that we should control for the time a constitution is in force to capture general trends in constitution-making. Ginsburg (2010, p. 71.) shows a trend of constitutions becoming longer over time. Length is associated with greater specificity and greater scope (Elkins et al., 2009; Ginsburg, 2010). If younger constitutions enlarge their scope and

Table 1. Summary Statistics of Variables.

Variables	Observations	*M*	*SD*	Minimum	Maximum
Constitutionalization					
Indigenous group rights	193	1.47	2.43	0	10
Traditional institutions	193	0.67	1.43	0	9
Customary law	193	0.67	1.18	0	4
Demand					
Fractionalization	157	0.46	0.26	0	0.93
Metropolization (log)	129	3.38	0.57	1.14	4.61
Development (log)	149	7.82	1.65	4.82	11.72
Supply					
Democracy	193	0.61	0.49	0	1
Conflict	192	0.25	0.57	0	2
ICCPR	193	0.65	0.48	0	1
British colony	193	0.30	0.46	0	1
Control					
Age of constitution	193	41.42	49.91	2	416

ICCPR = International Covenant on Civil and Political Rights.

regulate in more detail, we should expect that they are also more likely to constitutionalize the provisions we are interested in. To capture this trend, we create a variable from our data set that codes the year of the first adoption of the most current constitutions. This measure of the "age" of the coded constitution accounts also for the potential influence of an international trend to constitutionalize more rights. We code the variable as the years between the adoption date and 2016.

Finally, for the time-variant explanatory variables, we use a 1-year lag to allow for the process of constitutionalization. The year of reference for the lag is the precise year of constitutionalization of the current provisions as outlined above. Table 1 provides the summary statistics of all dependent and independent variables.

Models

Because all of our outcome variables are count variables with overdispersion, we calculate negative binomial models rather than Poisson models. We estimate two models per dependent variable. The first model includes solely the demand factors (plus the control for age of constitutions), to estimate to which degree the structural demand indicators are associated with our constitutional provisions and whether there is a difference between the granting of

indigenous rights and the acknowledgment of legal pluralism (traditional institutions and customary law). The second model of each outcome variable includes both demand and supply factors as they together constitute the political process leading to the constitutionalization. As coefficients of these nonlinear models are not intuitively interpretable in terms of effect size, we also present the average marginal effects across all countries (Figures 2 to 4). This allows for estimating the effect of each independent variable on the expected number of provisions, while keeping all other variables at their means.

Empirical Analysis

We start by a brief description of the regional distribution of the three categories of provisions. Next, we present the results of the analyses. As we do not expect all explanatory variables to have the same effects across the three categories, we discuss each category separately.

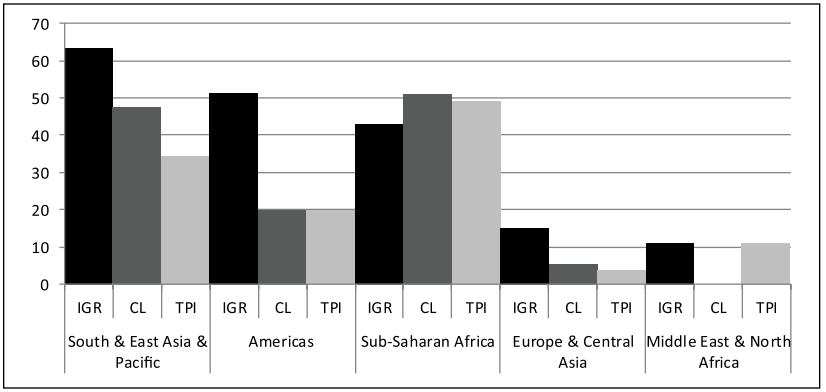

Figure 1. Share of countries constitutionalizing indigenous provision per region (in percent).
Constitutionalization distinguished by categories of provisions, that is, IGR, CL, and TPI.
IGR = indigenous group rights; CL = customary law; TPI = traditional political institutions.

Regional Distribution of Constitutional Provisions

Figure 1 illustrates the distribution of the three dependent variables across the world's regions, depicting the share of countries per region that contain provisions on indigenous group rights, customary law, and traditional political institutions. It shows that these provisions are of global relevance: On each continent we can find almost all of them. However, countries in

different regions prioritize differently. With the exception of sub-Saharan Africa, states constitutionalize indigenous rights more often than traditional institutions and customary law. Whereas large shares of countries in South & East Asia and in the Americas grant rights to indigenous groups, the shares are lower in Europe & Central Asia and the Middle East & North Africa. Customary law and traditional political institutions are more prevalent in sub-Saharan Africa[14] and South & East Asia than in the other regions.

Indigenous Group Rights

Table 2 shows the results of the negative binomial models. The first two columns pertain to the constitutionalization of indigenous rights. The variables of the demand model do not have any statistically significant effects. We therefore cannot confirm Hypotheses 1 through 3, although all variables show the expected direction, positive for fractionalization and negative for metropolization and development. This might be explained by the fact that homogeneous states with just one indigenous minority (e.g., Norway with the Sami) might also constitutionalize special rights. Furthermore, indigenous minorities also exist and receive rights in countries with high levels of development (e.g., North America, Australia). The pressure for constitutionalization may even be higher in ethnically homogeneous states than in highly fractionalized ones, as a consequence of stronger feelings of discrimination in countries with few or small indigenous minorities.

Turning to the full model in column two, we observe significant results for the supply factors: Countries with higher levels of democracy and countries that recently experienced conflict (both significant at 5 percent level) are more likely to have more specific regulations on indigenous rights in their constitutions. This is in line with Hypotheses 4 and 5. In terms of their average marginal effects (Figure 2), this implies that democratic states are predicted to have 2.06 more indigenous rights provisions than nondemocratic ones. A state that has experienced a one unit increase in conflict intensity is likely to have 1.03 more provisions on indigenous group rights.

Moreover, we find a significant (at 10 percent level), but negative correlation with ratification of the ICCPR covenant. A state that ratified the ICCPR is predicted to have 2.17 fewer provisions on indigenous rights compared with those states that did not ratify it. We hypothesized that the ICCPR would play out in particular for indigenous rights. We were not sure about the direction of the effect, as it will depend on the monist versus dualist approach to international law. For monist countries, our result

Table 2. Explaining the Constitutionalization of IGR, TPI, and CL.

	IGR		TPI		CL	
Variables	(1) demand	(2) full	(3) demand	(4) full	(5) demand	(6) full
Demand						
Fractionalization	0.441	0.130	3.195**	3.501***	1.935**	1.592**
	(0.756)	(0.761)	(1.251)	(1.332)	(0.849)	(0.798)
Metropolization[a]	−0.442	−0.294	−1.314**	−1.418**	−0.634*	−0.463
	(0.275)	(0.290)	(0.574)	(0.630)	(0.374)	(0.348)
Development[a]	−0.0847	−0.124	−0.077	−0.004	−0.401**	−0.250
	(0.139)	(0.149)	(0.212)	(0.243)	(0.157)	(0.154)
Supply						
Democracy[a]		0.964**		−0.247		−0.106
		(0.453)		(0.582)		(0.427)
Conflict[a]		0.519**		−0.332		0.232
		(0.249)		(0.353)		(0.243)
ICCPR[a]		−0.836*		−0.172		−0.271
		(0.463)		(0.634)		(0.417)
British colony		0.297		0.572		1.02**
		(0.421)		(0.590)		(0.397)
Control						
Age of constitution	−0.001	−0.001	−0.022*	−0.022*	−0.002	−0.004
	(0.005)	(0.005)	(0.012)	(0.012)	(0.007)	(0.007)
Constant	2.528*	2.343	3.293	3.141	3.555*	1.958
	(1.433)	(1.433)	(2.825)	(3.157)	(1.934)	(1.832)
Observations	118	118	118	118	118	118
Pseudo R^2	.009	.028	.082	.093	.082	.110
Log likelihood	−206.7	−202.7	−108.03	−106.73	−115.68	−112.13
χ^2	3.84	11.82	19.25	21.84	20.63	27.73
Prob > χ^2	0.43	0.16	0.001	0.005	0.00	0.00

Standard errors in parentheses. IGR = indigenous group rights; TPI = traditional political institutions; CL = customary law; ICCPR = International Covenant on Civil and Political Rights.

[a]Variable is lagged: We take the value 1 year before the last amendments to the respective constitutional provisions entered the current constitution.

*p < .1**p < .05. ***p < .01.

would make perfect sense, for dualist ones it implies they did not implement the covenant.

In sum, we find that the constitutionalization of indigenous group rights is better explained by the supply factors. While structural demand alone is not sufficient to explain the supply of these provisions, state characteristics such as democracy and previously experienced conflict seem to motivate constitutional actors to deliver the respective provisions.

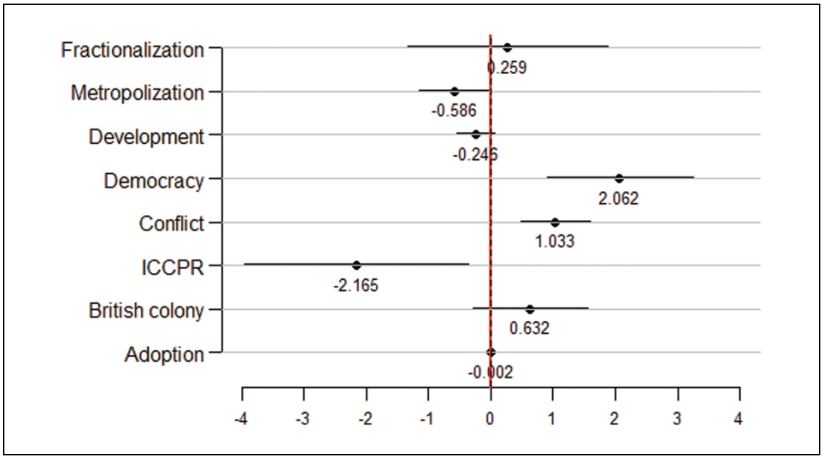

Figure 2. Indigenous group rights: Average marginal effects.
ICCPR = International Covenant on Civil and Political Rights.

Traditional Political Institutions

Next, we turn to the models for traditional political institutions (Models 3 and 4). As expected, ethnic fractionalization is positively associated with the dependent variable and is significant at the 5% level in the demand model (Hypothesis 1). The more fractionalized a country is, the more likely it includes provisions on traditional institutions in its constitution. To be more precise, more fractionalized countries are predicted to have on average 2.7 additional provisions (Figure 3). Furthermore, we observe a negative and significant correlation of metropolization and constitutionalization—the more metropolized the country is, the fewer provisions on traditional institutions we find in the constitution (the average marginal effect shows a decline of 1.1 provisions). This is in line with Hypothesis 2.

The age of the constitution is negatively associated with constitutionalization throughout all models, implying that younger constitutions are indeed more specific on indigenous provisions. However, only for the traditional institutions model the coefficient turns weakly significant. We take this as an indication that those authors are right who diagnosed a recent constitutional resurgence of traditional political institutions in Africa (e.g., Englebert, 2002a, 2002b; Sklar, 2005) and elsewhere (Hammond, 2011; VanCott, 1994, 2002; Yashar, 1996, 2005).

In the full model (Model 4) the coefficients do not change direction and remain significant. None of the supply factors are significant; however,

democracy and previous conflict are even negatively associated with the constitutionalization of traditional institutions, that is, Hypotheses 4 and 5 cannot be confirmed. This is somewhat surprising. A more democratic country should be more open to constitutionalize provisions if there is a societal demand for it, irrespective of the type of provision. There are two ways of interpreting this result: First, the structural demand for acknowledgment of traditional institutions (size and political relevance of the phenomenon) might be so strong that also autocratic constitutional actors respond, in search of acquiescence. Second, autocracies might in fact be interested in regulating their traditional authorities in a struggle for political power. Uganda would be a good example for this mechanism. As to previous conflict, it seems the more peaceful countries are the ones which constitutionalize traditional institutions and accept the legitimacy of traditional authorities coexisting with the state. This implies that it is not the political shocks that induce the constitutionalization of traditional political institutions. We should keep in mind, however, that we talk about nonsignificant correlations.

We conclude that the constitutionalization of traditional political institutions is best explained by the structural demand factors, that is, the size of the phenomenon and the degree of modernity. Demand seems to be sufficient to stimulate constitutional supply, irrespective of regime characteristics.

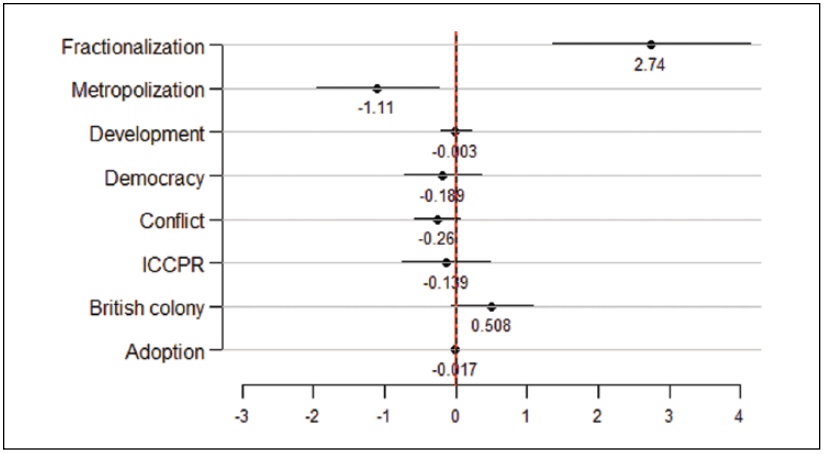

Figure 3. Traditional political institutions: Average marginal effects.
ICCPR = International Covenant on Civil and Political Rights.

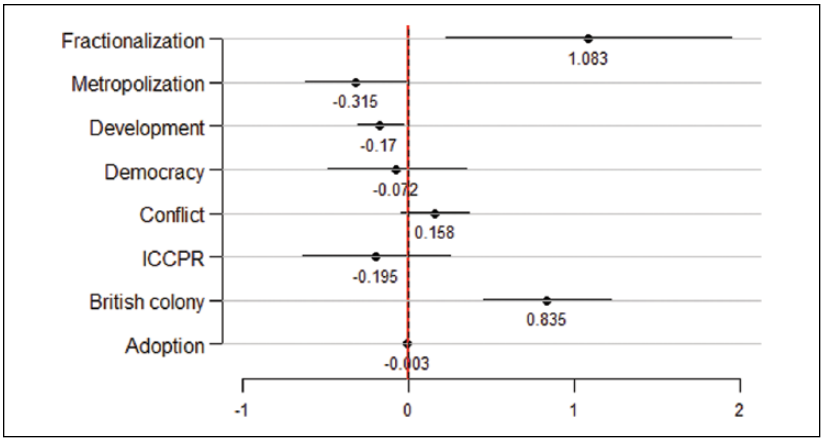

Figure 4. Customary law: Average marginal effects.
ICCPR = International Covenant on Civil and Political Rights.

Customary Law

Finally, we estimate the Models 5 and 6 for the acknowledgment of customary law. We can again confirm Hypothesis 1, as the degree of multiethnicity is significantly associated with the acknowledgment of customary law in the constitution. A state with one more unit of fractionalization is predicted to have 1.08 more provisions on customary law (Figure 4). Hypothesis 2 is also confirmed; the negative coefficient of metropolization indicates that the more modern a country is, the fewer provisions on customary law we will find in the constitution. We find also support for Hypothesis 3 on development: The higher the level of development, the less the constitutional recognition of customary law. While development shows a negative association with all three dependent variables, it turns only significant for customary law. All in all, the demand model seems to work well for customary law.

Turning to the full model (Model 6), however, the introduction of the supply variables affects the demand variables. Whereas democracy, conflict, and international law are insignificant, being a former British colony has a strong positive effect on constitutionalizing customary law. Former British colonies are predicted to have 0.84 more provisions on customary law as compared with the other countries. The demand factors clearly loose in significance if this is taken into account. We expected that British colony, or indirect rule, would play out in particular for traditional institutions and customary law (the acknowledgment of legal and political pluralism), and not so much for

indigenous group rights (Hypothesis 7). However, the variable is positively correlated with all three groups but turns significant only for customary law. In conclusion, we see some interaction between the demand and the full model for customary law.

Conclusion

In this article, we analyzed the constitutionalization of three categories of indigenous provisions: indigenous group rights, traditional political institutions, and customary law. Drawing on newly collected data on the constitutionalization of these provisions for all 193 recognized UN member states, we tested seven theoretical conjectures on potential supply and demand factors.

We find that full democracy and previous internal conflict stimulate the inclusion of indigenous group rights but not of customary law and traditional institutions. Customary law and traditional institutions are more likely constitutionalized in countries with high ethnic fractionalization, while indigenous group rights seem to also appear in less fractionalized countries. Lower levels of modernity affect particularly the constitutionalization of traditional political institutions, whereas lower levels of development correlate positively with customary law. Former British colonies are more likely to constitutionalize customary law.

We find it worth to consider the three categories of constitutional provisions separately, as their constitutionalization does not seem to be always driven by the same factors. Indigenous rights as an instance of special group rights granted in constitutions seem to be more a consequence of the characteristics of constitutional actors—leading them to supply those rights. The constitutionalization of traditional political institutions as an instance of acknowledging the existence of legal and political pluralism seems to be a response to the structural demand factors. The same applies to customary law, although in this case the legacy of British indirect rule complements the demand factors.

What does this tell us about constitutional theory? The "silent presence" of citizens' demand for indigenous provisions, as expressed by the degree of multiethnicity and modernization, may not be sufficient to cause elite constitutional actors to "clip the wings" of the governments by granting rights to indigenous communities. It might be sufficient, on the contrary, to trigger the acknowledgment and regulation of these communities and their coexistence with the state. The reader should recall, however, that our measures of "silent presence" are very indirect proxies of political demand. For the political elites to limit themselves by granting rights, it seems necessary that states exhibit more specific characteristics: They ought to be democratic or to have experienced the shock of conflict.

Several avenues for future research can be considered. We briefly outline three of them. First, our data on the constitutionalization of indigenous provisions are recorded in a cross-sectional format. In consequence, we were restricted to correlational analysis at one point in time, although we accounted for the year of introduction into the constitution. We might arrive at a better understanding of the causal mechanisms, however, when examining changes over time. While the in-depth coding of indigenous provisions as in our data for a longer period of time would be a tremendous task, an analysis for political indigenous group rights might build on the time series data set of the CCP.[15]

Second, it is possible that provisions on indigenous issues are to be found more often in ordinary law than in the constitution. Although examining the determinants of constitutional inclusion might give a better indication of their political importance in a country, it might still be worthwhile investigating the presence of such regulations in ordinary law.

Third, as mentioned in the theory section, we currently lack comparative data on indigenous mobilization. Therefore, we cannot directly evaluate the influence on constitutionalization of the growing politicization of indigenous issues since the 1990s. The collection of worldwide data on indigenous movements would thus constitute another important contribution.

Although many different avenues for deepening this research exist, we think this article fills an important scientific gap by focusing on the political importance of indigenous constitutional provisions and by providing a worldwide comparison. From a policy perspective, it is a natural next step to examine to which degree these provisions are implemented, whether constitutionalization improves the situation of those affected by the provisions, and how these particular provisions affect the coordination of parallel political systems in a country.

Authors' Note

Roos Haer is now affiliated to University of Leiden, Netherlands and Daniela M. Behr is now affiliated to World Bank, Washington, DC.

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Supplemental Material

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Notes

1. We use the term for brevity; similarly, we use "indigenous groups" to denominate the communities addressed by the three categories of rights, even if they would not necessarily refer to themselves as "indigenous."
2. Cf. http://comparativeconstitutionsproject.org/ (last accessed 31 October 2017).
3. We prefer the term multiethnicity to avoid connotations of "culturalism."
4. The approach is also compatible with an Eastonian (1965) conception of the political process, with demands as inputs, and decisions as the output of political systems.
5. Because demand for and supply of policies are not coordinated through production costs, willingness to pay and prizes as in a product market, the market language is somewhat metaphorical: We cannot put numbers on the costs and benefits of certain constitutional provisions. In this respect, our approach is not distinct from others (e.g., Fowler, 2015; Harden, 2016), however.
6. The UN has a list of about 2,500 indigenous organizations but only about 70 of them have a status at the UN Economic and Social Council (ECOSOC). A closer look at these organizations reveals that many of them cannot be taken as serious representatives of indigenous issues, as they are comprised of single persons or as they no longer exist.
7. The data set and the replication materials can be obtained at the *CPS* website.
8. We used government websites, the Database of the Constitutions of Sub-Saharan Africa (https://www.polver.uni-konstanz.de/holzinger/research/datasets-and-databases/traditional-institutions-in-sub-sahara-africa/), the Political Database of the Americas (http://pdba.georgetown.edu/), and the Constitute Project (https://

www.constituteproject.org/). Applying a fine-grained coding scheme, all constitutions were coded independently by two coders; instances of disagreement were solved in group discussion by the research team.

9. We also ran our analyses with the fractionalization index by Fearon (2003). The results are very similar. As Fearon (2003) is largely based on linguistic variation, we decided to use the Alesina, Devleeschauwer, Easterly, Kurlat, and Wacziarg (2003) data.
10. http://data.worldbank.org/data-catalog/world-development-indicators
11. Different operationalization of Polity IV scores was also used (such as the full range of the Polity score, or a score of 0 or higher for democracy), but no statistically significant different results were detected.
12. The data are taken from the UN Human Rights Office of the High Commissioner: http://indicators.ohchr.org. We also ran the models with ICESCR as an alternative. The analyses show similar effects.
13. If included in the model, the ILO variable has a positive and strongly significant effect on all three of our dependent variables; this holds if we include it instead of the ICCPR variable and in addition to it.
14. As sub-Saharan Africa stands out with a different distribution across the categories of provisions, we ran a regression with a regional fixed effect for sub-Saharan Africa. We find a weakly significant negative correlation with indigenous rights, implying that indigenous rights are granted to a lesser degree in sub-Saharan Africa, but we find no significant effects for traditional political institutions and customary law.
15. http://comparativeconstitutionsproject.org/

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