

participation, subjectivities and socialities. The collection also highlights various challenges to human rights: its appropriation by those working in anti-human rights directions; competition for regulatory territory from other meta-discourses; the Rule of Technology; and the potential for human rights to merely legitimate rather than truly shape governance of new technologies and support hubris.

Nevertheless, the collection is encouraging because it shows human rights *is* being made ready in order to combat these challenges and maintain a connection with, and control over, science and technology. This act of reimagining can also be found in scholarship demonstrating that human rights is *not* in a 'zero-sum' relationship with dignity and risk, itself a significant move to combatting claims to the contrary. *New Technologies and Human Rights* should stimulate further research that attempts to show the continued relevance of human rights so that it assists citizens as they attempt to shape new and innovative technologies.

Mark Flear*

Zachary Elkins, Tom Ginsburg and James Melton, **The Endurance of National Constitutions**, Cambridge: Cambridge University Press, 2009, 270 pp, pb £18.99.

The year 1789 marks a crucial constitutional moment in both the United States and France. France was transformed by the start of the revolution and the Declaration of the Rights of Man and of the Citizen; in the US, the Constitution came into effect. The US Constitution has endured since then, for 222 years. During the same period, France has had no less than 15 constitutions. Constitutions have been replaced frequently in many other countries. An extreme example of constitutional instability is the Dominican Republic, which had 33 different constitutions between 1844 and 2002, an average of a new constitution every 4.78 years. How can these phenomena be explained? Why do some constitutions last while others fail? These are some of the main questions addressed in *The Endurance of National Constitutions*.

Zachary Elkins, Tom Ginsburg and James Melton, together with a team of researchers, have gathered data on all national written constitutions from 1789 to 2005, with a total of 935 constitutions from more than 200 countries. The constitutions are coded based on multiple characteristics, with each constitution reviewed against an extensive survey analysing different criteria for constitutional longevity. The data allows the authors to create an empirical framework designed to answer the thorny question of why some constitutions endure while others do not. This issue is central to a constitutional order. A constitution's primary *raison d'être* is to stabilise. Constitutions are intended to be long-lasting and to reflect long-term considerations. Despite this, constitutional literature has devoted little attention to the issue of constitutional endurance, hence the importance of this project. In addition to its importance, this is an extensive project, with a

*School of Law, Queen's University Belfast

theoretical component and comparative case studies in addition to the main quantitative analysis.

The introductory chapter presents the book's structure and aim, and lays out the theoretical debate on why some constitutions fail and others endure. While it is generally assumed that constitutional durability is linked largely to particular environmental factors, the authors maintain that constitutional design can have a great effect on a constitution's longevity: '[d]esign choices matter' (10).

One of the authors' more surprising observations is that constitutions frequently 'die' at a 'young age'. Perhaps because of the dominant example of the US Constitution, we tend to imagine that constitutions are stable and nearly permanent. Yet this book dispels that idea, revealing that a national constitution's median lifespan is a mere 19 years (129).

This finding is even more astonishing if one considers the celebrated correspondence between James Madison and Thomas Jefferson in which Jefferson argued that constitutions should be rewritten every generation – every 19 years, to be more precise. According to Jefferson, the dead should not govern the living since 'the earth belongs always to the living generation'. Despite the surface appeal of this rationale, the idea that a new constitution should be adopted every 19 years has horrified most constitutionalists. Do we really wish to find ourselves in a fresh struggle over collective identity every 19 years? Indeed, as James Madison argued in *Federalist No. 49*, frequent 'recurrence to the people' would endanger 'the public tranquillity by interesting too strongly the public passions' and 'deprive the government of that veneration which time bestows' and on which every government depends for stability. Jefferson's debate with Madison over the desirable life span of a constitution frames the second Chapter in which the authors explore the question of whether constitutions should last for generations or be revised frequently.

In Chapter 3, the authors engage the knotty question of 'what is a constitution?' They acknowledge the analytical distinction between a constitution with a small 'c', referring to the broader constitutional order, and a capital 'C', referring to the constitutional text. For the purposes of their study, they focus on the latter. While this focus bears certain weaknesses and limitations (which the authors modestly admit (6, 36)), it was a wise decision, since constitutional texts are more readily evaluated and compared across both geography and time (48). The authors also address the functions of constitutions, the distinction between constitutional replacement and amendment, and the relationship between constitutional change and regime change.

In Chapter 4, the authors propose a general 'theory of renegotiation' to explain what makes constitutions endure. This theory includes constitutional design elements that can impact constitutional life since, according to the authors, 'certain structural features of constitutions promote stability in the face of external pressures' (66). The main features they identify are 'inclusion', 'flexibility' and 'specificity' (scope and detail). The authors cautiously propose that 'constitutions are more likely to endure when they are flexible, detailed, and able to induce interest groups to invest in their processes' (89). This suggestion is neither obvious nor trite. It contradicts the conventional wisdom according to which constitutional provisions are considered of higher quality if they are general, rigid and exclude interest groups in order to avoid 'rent-seeking' and short-sighted political considerations.

Chapter 5 aims to ‘identify risks to constitutional life’ by focusing on design features of the constitution and environmental factors. Among the design features are inclusion, ease of amendment, and specificity, discussed in the previous chapter, as well as constitutional review and the power balance between the executive and legislature. Environmental factors are independent of constitutional texts – for example, territorial change, regime or leadership transition, inter-state conflict, economic crisis or historical legacies. Applying their data, the authors quantify the extent of the impact each of these factors can have on constitutional endurance.

The authors test their hypotheses about how constitutional design affects constitutional mortality in Chapter 6. They conclude that although environmental factors do influence the longevity of constitutions, design factors have a greater impact on the lifespan of constitutions (146). To take the inclusion factor, for example, ‘the life expectancy of the least inclusive constitution is fourteen [years] whereas that of the most inclusive is sixty-nine’ (139). Similarly, the more detailed a constitution is and the greater its scope, the better its chance of survival (141). Their general conclusion is that ‘an optimal design can reduce the mortality rate of constitutions significantly’ (146). If we acknowledge that constitutions are made and not found, then this provides invaluable lessons for constitutional drafters.

The book’s final two chapters offer narrative comparative case studies placing the empirical findings in context. The authors compare states with fairly analogous constitutional situations in order to test their general theory and to provide the reader with an appreciation of the environmental and design factors that are conducive to a constitution’s longevity. While these two chapters are remarkably instructive, I found them to be the book’s ‘palest’ parts, perhaps because the revelations they describe are not as exciting as those contained in previous chapters.

Nevertheless, these last two chapters highlight an extremely positive aspect of this entire project, namely, the authors’ frequent referral to a variety of constitutional examples other than the US. This is important not only because of the growing number of constitutional experiences that have accumulated in many countries during the past half century, but also because, apparently, the US Constitution would not be expected to endure based on the authors’ general findings. In fact, it completely contradicts their theory: it was constituted by an exclusive elite, and it is extremely rigid and relatively vague. Yet it is now the oldest enduring written constitution in the world. One can perhaps ascribe the US Constitution’s stability to judicial interpretation which enhances the Constitution’s flexibility. Indeed, some scholars, such as Sanford Levinson, claim that certain judicial interpretations of the US Constitution are better viewed as amendments. To highlight this finding, the authors colourfully compare the US Constitution to a woman who lived to the age of 122, subsisting on cigarettes, chocolates, olive oil and port wine (65). Bruce Ackerman was thus correct in urging scholars ‘to look upon the American experience as a special case, not as the paradigmatic case’ (‘The Rise of World Constitutionalism’ (1997) 83 *Virginia Law Review* 771, 775).

A few critical remarks may, however, be made. First, the remarkable scope of the project – the comparison of hundreds of constitutions – is one of its positive qualities, but also creates certain difficulties. Whereas the authors acknowledge that their ‘global approach will fail to account for many individual cases’, they

believe that it allows them 'to draw broad conclusions about constitutions, which apply across many countries and areas' (9). While this is true, one has to bear in mind that constitutional texts vary. Not all constitutions enjoy the same level of authority and effectiveness. Some constitutions are mostly or partially ignored. Others, even if authoritative and effective, function as a mechanism to enhance rather than limit government's power. Can one compare these different kinds of constitutions? The authors recognise these difficulties, but they generally reject them, claiming, for example, that 'the status of . . . constitutions as mere parchment does not condemn our enterprise' (48). However, such differences surely matter when analysing the survivability of constitutions. As Benjamin Akzin taught us long ago, a constitution could be stable but ineffective in reality ('On the Stability and Reality of Constitutions' (1956) 3 *Scripta Hierosolymitana* 313). For the constitutional lawyer, it would be more useful to learn about the endurance of *effective* constitutions. Constitutionalism is far more than simply having a constitution – but this concept seems to be a significant factor missing from their equation.

A second important and related issue is whether endurance is necessarily a good thing. Certainly, endurance provides stability and that is a virtue for any legal rule. The authors note that 'constitutional stability may provide the necessary predictability for markets to flourish' (22). Also, their data indicates that 'endurance is positively associated with GDP per capita, democracy, and political stability and negatively associated with crisis propensity' (31–32). But endurance is not necessarily beneficial, if we take a constitution's substance into account. We certainly do not want a dictatorial constitution to enjoy a 'long life'. Hence, even when the authors note that 'the life expectancy of a constitution in democracy, on average, is twenty-one years, whereas that in an authoritarian situation is fifteen years' (137), they seem to give insufficient weight to this distinction, attributing to democracy only secondary importance. Long life expectancy is not always the best indicator of constitutional well-being, and the quality of a life is no less important than its length.

The third issue relates to the authors' findings that constitutions endure 'when they are more like statutes – flexible, detailed and infused with self-interest' (211). These findings are very surprising, for this is the opposite of the conventional image of constitutions: entrenched, general and embodying principles considered to be above ordinary politics. The fact, however, that constitutions with characteristics similar to ordinary laws tend to endure does not reveal anything about how these documents fulfil their constitutional function. The authors themselves admit that 'if taken to an extreme, flexibility undermines the very notion of constitutionalism as a set of stable limits on ordinary politics' (82); 'when amendment constraints are no more difficult than those of ordinary legislation, the healthful aspects of flexibility would seem to give way' (100); and similarly with respect to specificity and inclusion, 'specificity is helpful, but not if the constitution becomes a complete code governing every contingency. Inclusion is also beneficial so long as it does not degenerate into endless cycles of deliberative disagreement' (208). The notion that constitutions last longer when they more closely resemble ordinary statutes is thus accurate only to a certain point, beyond which they might endure but nevertheless fail to fulfil their functions. However, the authors do not sufficiently emphasise the significance of this issue.

To take one example, let us focus on constitutional flexibility. In setting the 'rules of the game', the constitution must be sufficiently stable in order to allow participants to anticipate the consequences of their actions, yet sufficiently flexible to allow future generations to respond to political and social developments. The constitution's amendment procedure is one method of reconciling the clash between stability and progress, which Benjamin Cardozo called the great 'antinomies' of the law.

The authors extensively analyse India's constitution (151–157), noting that India's amendment procedure (which is relatively easy) appears to be 'just right' on their amendment flexibility scale (141). Nonetheless it was the judiciary, not the amendment procedure, which saved India from a dictatorship. An overly flexible amendment process together with short-term political interests and the danger of qualified majorities give rise to potential abuses of the constitutional amendment power. The Indian 'basic structure' doctrine that restricts the constitutional amendment power from altering the basic features of the constitution, which is mentioned in the book, was created by the judiciary in response to the Parliament's abuse of the constitutional amendment power, and proved that a limited amendment power may preserve democracy. One can only imagine what would have been the Indian constitution's destiny if the basic structure doctrine had not been created.

On the whole, this book is surely one of the most attention-grabbing studies published in the area of constitutional law in recent times. No other project examines constitutional durability to this extent. The authors' quantitative methodology, despite its weaknesses, clearly supports their theories. Not only do the authors pose important and interesting questions, their findings are fascinating. Most importantly, the issue of a constitution's endurance is not merely of academic interest. It has practical significance, and this book could be influential in states involved in constitution-making. The text is also well written and very accessible, containing useful footnotes, references and appendices with the empirical analysis data.

This book would enhance the library of anyone interested in comparative constitutional law, institutional design and political science. Prospectively, this comprehensive research project, with its remarkable collection of constitutions, creates great opportunities for further research and it will be thrilling to see other studies emanating from it.

*Yaniv Roznai**

*Federico Etro and Ioannis Kokkoris, **Competition Law and the Enforcement of Article 102**, Oxford: Oxford University Press, 2010, 224 pp, hb £95.00.*

Article 102 of the Treaty on the Functioning of the EU (formerly Article 82 of the EC Treaty) prohibits the abusive exploitation of a dominant market position in a

*Law Department, London School of Economics and Political Science.