Empirical Constitutional Studies

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A. Chilton and M. Versteeg, *How Constitutional Rights Matter* (Oxford University Press 2020) 384 pp.

Introduction

Long after the United States and Israel, it would seem that Europe is finally embracing empirical legal studies. Conferences, books, workshops, research projects promising to investigate all kinds of things legal through an empirical lens are mushrooming in every corner of the European legal academy.[1] This newly-found enthusiasm for empirical techniques is also triggering criticism.[2] Proponents of empirical approaches, it would seem, still have their work cut out to convert their more traditionalist colleagues to their creed.

To the sceptic and even the neophyte, some areas of law may seem to be more amenable to empirical analysis, especially the quantitative sort, than others. The impact of environmental legislation is a question that naturally calls for an empirical answer. Legal scholars often insist on the normative character of their discipline. Yet environmental regulations are hard to assess normatively without delving into their empirical-causal impact on the environment. Nor does one need a degree in climate science to have an idea of how environmental impact can

[1]U. Šadl, 'Who Needs the European Society for Empirical Legal Studies?', 29 *Maastricht Journal of European and Comparative Law* (2022) p. 643; A. Dyevre et al., 'The Future of European Legal Scholarship: Empirical Jurisprudence', 26 *Maastricht Journal of European and Comparative Law* (2019) p. 348; G. Van Dijck et al., 'Empirical Legal Research in Europe: Prevalence, Obstacles, and Interventions', 11 *Erasmus Law Review* (2018) p. 105.

[2]G. Davies, 'The Relationship between Empirical Legal Studies and Doctrinal Legal Research', 13 *Erasmus Law Review* (2020) p. 3; G. Davies, 'Taming Law: the Risks of Making Doctrinal Analysis the Servant of Empirical Research', in M. Bartl et al. (eds.), *The Politics of European Legal Research* (Edward Elgar, 2022) p. 124.

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be measured – whether it is in emission reduction, water purity or wildlife diversity.

Other legal areas may look less suited to empirical inquiry, constitutional rights law being a case in point. Rights differ across time and jurisdictions. They are not only enshrined in constitutional charters but also defined in highly contextualised ways by courts and legislators. Also, much of what is said and written about them in legal circles is lyrical and aspirational in tone. Here, what can be measured and how, if at all, is not straightforward. Can we assess the effectiveness of constitutional rights the same way we measure the reduction in carbon-emission brought about by environmental regulations?

Efforts to offer an empirical assessment of the effectiveness of formal rights guarantees are a relatively recent endeavour. The first studies, examining the impact of international human rights treaties, were published in the late 1990s.[3] As researchers readily acknowledge, it is an enterprise fraught with methodological challenges, from collecting data on constitutions and human rights charters to counting human rights violations and, not least, isolating causal effects. Listing all the methodological hurdles, many legal scholars may feel the inclination to dismiss attempts to apply quantitative empirical methods to assess the impact of constitutional rights provisions as a futile exercise, if not as damn lies and statistics.

However, the authors of the excellent monograph, *How Constitutional Rights Matter*,[4] Adam Chilton and Mila Versteeg, convincingly demonstrate both that empirical methods can produce credible results and that empirical analysis can greatly illuminate our understanding of the effect of formal constitutional rights on the prevalence of rights violations.

The conventional wisdom is that constitutional rights are worth having spelled out in your constitutional charter. It also asserts the importance of independent courts as chief guarantors of effective rights enforcement. Make sure you have a bill of right and constitutional review and your country will have made a big step towards being an effective democracy. Such confidence in the power of constitutional rights is understandable given the normative aspiration of constitutional scholarship. Persuading state actors to observe rights provisions may be easier if more people are convinced that constitutional rights are important and make a real difference. To be sure, as Chilton and Versteeg note, scepticism about the effectiveness of bills of rights is old as rights talk. Both Thomas Jefferson and James Madison accepted that bills of rights were not

[3] *See* the recent meta-analysis of S.J. Hoffman et al., 'International Treaties Have Mostly Failed to Produce their Intended Effects', 119 *Proceedings of the National Academy of Sciences* (2022) e2122854119.

[4] A. Chilton and M. Versteeg, *How Constitutional Rights Matter* (Oxford University Press 2020).

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entirely useless but agreed that in many circumstances they would amount to little more than parchment barriers.

But the conventional wisdom points to examples of countries that have successfully developed a vibrant constitutional rights culture as proof that the adoption of a bill of rights and the erection of a constitutional court make a difference: Germany, the United States, South Africa, Canada – even France and Italy. The countries that most frequently feature in comparative law textbooks.

This argument, however, rests on a huge selection bias. The attention of comparative law scholars may naturally be drawn to the settings where rights have been invoked more assertively by judges and litigants. But this is a poor basis on which to make inferences about causation and the influence of formal rights on behaviour. What if many countries with similar constitutional arrangements – generous human rights catalogues and judicial review – were found to fare differently? The best way to answer the effectiveness question is to examine as many countries as possible, as Chilton and Versteeg undertake to do, building off from years of research and results published in peer-reviewed journals. Their main finding is that it depends on the nature of the right. Specifically, they find evidence that organisational rights – i.e. rights that empower organisations such as unions and churches – make a tangible difference, whereas individual rights lack effectiveness, a divergence they put down to the distinct incentives and resources of individuals and private organisations in defending and upholding constitutional rights.

The book proceeds in three parts (the table of contents lists four, but Part IV is simply the conclusion). Part I sets out the theoretical argument and explains the data and empirical methodology in addition to taking stock of previous studies. Part II examines the evidence for the effectiveness of individual rights: free speech, the prohibition of torture, the freedom of movement, the right to education and the right to healthcare. It further reports the results of the two survey experiments conducted in Turkey and the United States. Telling Turkish respondents that a Wikipedia ban violates the free speech clause of their Constitution, or American ones that using torture to obtain information from terrorist suspects violates the Bill of Rights, it turns out, barely affect their level of support for these measures. These results support the authors' hypothesis that the benefits of individual rights are too diffuse for public opinion to operate as compliance mechanism: 'When citizens shrug off rights violations, they are unlikely to mobilize or support organizations that seek to protect these rights'.[5] Part III then presents the evidence for the impact of organisational rights, looking in turn at the freedom of religion, the right to unionise and the right to form political parties. Finally, the book concludes with reflections from a study of tribal constitutions in the United States

[5]Ibid., p. 226.

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(which provides an interesting quasi-natural experiment), avenues for future research and lessons for advocacy.

Theory: Organisational versus Individual Rights

As always, serious empirical work begins with serious theorising. The book takes a deep look at the mechanisms that may affect the enforcement and effectiveness of constitutional rights. The discussion has the great merit of going beyond the myopic focus on courts and litigation prevalent in comparative constitutional law to reflect on the role of civil society and the resources and incentives of individuals and organisations. The book's starting point is that citizens face two fundamental obstacles when attempting to punish their government for rights violations. The first is a coordination problem:

> save for extreme circumstances, [citizens] are unlikely to agree about when punishing the government is appropriate. Citizens have different ideas about when a government transgresses its power. For example, some citizens believe that free speech should not extend to hate speech; others believe it should. In the absence of rights provisions, citizens who claim the government transgressed its powers have to resort to arguments rooted in morality or fairness. Doing so is difficult, as different citizens likely have different, or even opposing, notions of what is fair and just.[6]

The existence of a constitutional rule partly mitigates this coordination problem, as it supplies citizens with the ability to make legal arguments: 'When the constitution states that everyone shall have the freedom of expression, except when harming the dignity of others', it clarifies that legislation against hate speech is not a 'transgression of powers'.[7]

In practice, the authors contend, constitutional rights by themselves are rarely enough to overcome this coordination problem. Rights provisions tend to be vague and ambiguous while the protection of a wide range of rights creates clashes among competing rights claims. This makes it difficult for citizens to agree that a right has been violated and that the violation should be punished.

No less acute is the collective action problem confronting citizens:

> Many ways of punishing rights-violating governments, like protesting or engaging in civil disobedience, are only effective when a significant number of citizens act together. While we can marvel at the unknown 'Tank Man' who set off the 1989

[6]Ibid., p. 30.
[7]Ibid., p. 31.

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> Tiananmen Square protest or the Tunisian street vendor, Mohamed Bouazizi, who set himself on fire and triggered the Arab Spring, most of the time, a single protester does not accomplish much. Governments are not rattled by small groups of protesters; it is large crowds that make them wary.[8]

The authors borrow many of their theoretical insights from Charles Epp's *The Rights Revolution*,[9] which argued that the effectiveness of rights depends on the existence of an appropriate support structure comprising non-governmental organisations, activists and lawyers. Going beyond Epp, though, they contend that support structures and constituencies diverge across rights, making some more effective than others:

> Because some rights are practiced by organizations, these rights are particularly hard to repress because the relevant organizations will seek to protect them. We call these rights organizational rights. The freedom of religion, the right to unionize, and the right to form political parties are examples of organizational rights, since they are practiced by religious groups, trade unions, and political parties, respectively. Though these organizations are not established for the express purpose of protecting those rights, they will be motivated to resist rights violations that hamper their ability to operate freely. And because their ability to organize is directly protected by the constitution, they can use the constitution to call out and challenge obstacles they encounter. This, in turn, boosts confidence in these organizations and encourages investments in them, which make the organizations grow stronger.[10]

The overall argument of the book is that whereas individual rights – free speech, free movement, the prohibition of torture, the social rights to education and healthcare – do little to change governments' behaviours, organisational rights – the rights that empower unions, churches and political parties – do matter. The reason, in short, is that organisational rights benefit organisations – religious groups, labour outfits, parties – which have the incentives, resources and loyal membership to call out violations and mobilise support. In other words, organisational rights have strong organisations with powerful incentives to defend their rights built into them. The benefits of individual rights, by contrast, are too diffuse to overcome collective action problems. When organisations do exist – such as schools, hospitals and media outlets – they lack a loyal motivated membership and are, for that reason, easily coaxed by the state.

[8]Ibid., p. 32.

[9]C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998).

[10]Chilton and Versteeg, *supra* n. 4, p. 27.

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Interestingly, the book sees the role of courts in rights protection as complex and nuanced but suggests that they are far from the magic bullet that the comparative literature has made them out to be.[11] When it comes to making rights effective, the decisive forum is not the courtroom but the political process.

Data and Methodology

Having carefully derived their hypotheses about the role of organisation in making rights effectiveness in their theoretical chapter, the authors proceed to test and substantiate them. To do so, they expand existing data on constitutional rights to create a comprehensive dataset of rights in the constitutions of 194 countries, covering the period 1946 to 2016. On top of that, they survey 200 constitutional experts in 100 countries, conduct case studies in five countries and field experiments in Turkey and the United States.

As with any global, large-scale attempt to gauge the influence of legal structures on real-world outcomes, the enterprise inevitably entails making consequential methodological choices along with a myriad of judgement calls. What counts as a constitutional right? Does a right have to be explicitly mentioned in the constitution? What should one do with judicial rights-creating interpretations? Can US State Department rights reports be trusted? Have reporting practices changed over time? As the authors transparently acknowledge, all solutions to these questions come with their own limitations. Yet the book not only carefully justifies the choices ultimately made but also takes pains to evaluate their robustness to alternative specifications. The authors opt for a nominal rather than a functional definition of rights and concentrate on large-C constitutional rights, i.e. formal written rights, but they check this measure against other datasets as well as against the results of their expert survey, which explicitly asked country experts about small-c rights, i.e. rights not expressly enunciated in formal constitutional provisions but resulting from judicial interpretations and other sources.

The empirical dats, far from betraying blind faith in the power of regression analysis, fully take on board the criticism levelled at quantitative studies by the credibility revolution in the social sciences.[12] Comparing countries, even when observed over many years, is difficult because each country is the abstraction of complex, intricate and often idiosyncratic social dynamics that, even in the best of

[11]Ibid., p. 53.

[12]J.D. Angrist and J.-S. Pischke, 'The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con out of Econometrics', 24 *Journal of Economic Perspectives* (2010) p. 3.

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circumstances, are only imperfectly tracked by available data.[13] To answer the challenge, the authors have opted for methodological triangulation, where large-n analysis of data on constitutional rights and human rights violation remains the work-horse but is supplemented with findings from expert surveys, survey experiments and case studies.

Challenges and Limitations

At times the case studies – especially free speech in Poland and the right to healthcare in Colombia – lack focus and, lost in the details of the narratives, one struggles to see how they bear on the main argument of the book. In general though, the book is well-written and well-executed, making for a rewarding read. Quantitative results are reported in a transparent and accessible manner, comparing countries with and without the right at issue, violations in the years preceding and following its introduction. The authors also compare violations before and after the introduction of the right at issue using a control group constructed from a stacked event design – in short, the country experiencing the introduction of a new right is compared to countries which either lacked or did not experience constitutional change over an 11-year period.[14] Regression tables, together with additional robustness checks, are wisely kept for lengthy appendices and readers need not be versed in the fine arts of econometrics to understand and absorb the significance of the findings.

Because countries are heterogenous and comparably few, comparing them is a treacherous exercise. Country-level data are aggregations of individual behaviours and institutions. Moreover, even when the data are of the highest quality, countries may differ in unobserved ways, which in turn may correlate with both institutional choices (adding or not a particular right to the constitution) and de facto observance of rights. A look at the book's main empirical measure of de facto human protection, the Cingranelli and Richards (CIRI) data set, compiled from US State Department and Amnesty International annual reports, reveals that European liberal-democracies are top human rights compliers whereas autocracies in the Middle-East and Asia exhibit the worst human rights records. But the book does not make the mistake of confusing resemblance with European democratic states with proof of the effectiveness of rights. The empirical analysis does allow for the fact that countries start from distinct baselines: constitutional rights need not

[13] *See* the discussion in H. Spamann, 'Empirical Comparative Law', 11 *Annual Review of Law and Social Science* (2015) p. 131; and N. Petersen and K. Chatziathanasiou, 'Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or All Smoke and Mirrors?', 19 *International Journal of Constitutional Law* (2021) p. 1810.

[14] Chilton and Versteeg, *supra* n. 4, p. 107.

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reduce the frequency of violations to Western European levels to be considered impactful. The controlled analysis further helps in ruling out the effect of time-varying confounders. International pressure, for example, may induce greater compliance with human rights norms. If this happens after the adoption of a new constitutional right, it may give the false impression that it is the new right provision which is inducing greater respect for the right under consideration. But because the authors' control group is constructed from countries with similar characteristics except that they have not undergone constitutional change during the same period, it offers a way to dispel the effect of such confounders. If we observe the same increase in compliance in the control group as in the state where the new right has been introduced, we may more confidently state that it is not the new right which is causing this effect.

Despite the vast dataset on which the book builds, there are limitations as to the book's empirical scope. While the eight constitutional rights covered arguably rank among the most important (that certainly holds for free speech, free movement and the right to form political parties), many are left to future research: right to equal treatment, right to family life, right to property, right to life, right to a fair trial, etc. Also left out are third-generation collective rights: cultural rights, right to self-determination, etc. To be sure, the authors' choices are understandable given the data limitations they confronted – many rights simply lack a reliable empirical measure of their effectiveness. On the role of courts, the authors accept that many questions remain unanswered.[15] In a separate publication explicitly aimed at measuring the impact of courts on de facto human rights performance, they found scant evidence that independent courts and judicial review affect human rights outcomes. However, this study is not devoid of methodological shortcomings (it applies matching methods, which as the book recognises, rely on heroic assumptions).[16] This suggests that there is a chance the book may not be the final word on the individual versus organisational rights argument.

Careful analysis reinforced by methodological triangulation means the evidence discussed by the book can claim to be the strongest and most comprehensive presented to date on the effectiveness of constitutional rights. Still, the main findings are based on observational data, not on a randomised experiment which serves as the gold standard for causal inference – as the book explicity recognises (motivating the discussion of tribal constitutions in the United States in Part IV of the book). Until confirmed by replication studies, one should guard against treating the results as incontrovertible truth. However, given

[15]Ibid., p. 53.

[16]A.S. Chilton and M. Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights', 85 *The University of Chicago Law Review* (2018) p. 293.

the near-impossibility of conducting randomised constitutional experiments, this does not diminish the value of the book.

Conclusion

How Constitutional Rights Matter is part of a broad empirical turn in comparative constitutional law addressing the diffusion of constitutional practices, institutions and rights. Some of the accumulated work has come in the form of articles in law and social science journals. Some has come in the form of monographs. *The Endurance of National Constitutions* by Zachary Elkins, Tom Ginsburg and James Melton,[17] drawing on the most comprehensive comparative law database ever built, has a been a major milestone, ushering in a decade of increasingly ambitious empirical work.[18] Impressive as it was at the time, covering constitutional events worldwide over two centuries, *The Endurance of Constitutions* also suffered from methodological weaknesses, although these appeared only in retrospect as the credibility revolution spread to empirical comparative law. With its comprehensive mixed-method treatment, *How Constitutional Rights Matter* certainly sets the methodological bar higher and will define the standard against which empirical constitutional law will be assessed in the years to come.

Human rights revolutions are fought in poetry. But understanding what bills of rights are able to achieve requires a sober mind and lucid prose. Currently, *How Constitutional Rights Matter* is the most accomplished monograph on the reality of constitutional rights.

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[17]Z. Elkins et al., *The Endurance of National Constitutions* (Cambridge University Press 2009).

[18]D.S. Law and M. Versteeg, 'The Evolution and Ideology of Global Constitutionalism', 99 California Law Review (2011) p. 1163; T. Ginsburg and M. Versteeg, 'Why Do Countries Adopt Constitutional Review?', 30(3) Journal of Law, Economics, and Organization (2013) p. 587; Spamann, supra n. 13; Petersen and Chatziathanasiou, supra n. 13.

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