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DEEPER COMPARISONS

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Abstract

Ackerman's *Revolutionary constitutions* supports the study of comparative constitutional law by providing a typology of constitution-making processes and their effects over time. This typology is based on an analysis of the historical and political processes leading to the making of a constitution. Ackerman acknowledges the cosmopolitan dimensions in which the constitution making process always takes place. Nonetheless, his analysis rejects the possibility of a single blue print for constitutional projects. His vision of constitutional processes is therefore anchored to the idea of "rooted cosmopolitanism", in which jurists and judges ultimately have a major role to play in the long run towards the stabilisation of a constitutional experience over time once the founding moment is passed and the constitution is not just imagined but must be lived.

TABLE OF CONTENTS

1. Varieties of comparative constitutional law

Constitutionalism has swept the world, and constitutional law has become a major source of legal change all around the globe. Massive research efforts in the field show that comparative constitutional law is living its golden age. In recent decades, this

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subject enjoys a new, much more exciting intellectual life, enriched by controversy and dissent.

Bruce Ackerman's *Revolutionary Constitutions,* the first volume of a set of three, is a major contribution to the further development of the field. The work is inspired by the ambition of putting: "…the bewildering complexity of global [constitutional] experience into a compelling comparative framework."[1].

As a result of the above mentioned change of pace, there are now available large scale quantitative studies mapping the various features of constitutions of the countries around the world[2]. These studies help to detect a whole range of global and regional trends. They help to clarify, for example, how frequent the incorporation of certain rights – such as the right to health - is in the constitutions of the various countries[3]. They document, for instance, the spreading of constitutional clauses in the Arab world that affirm Islamic law as supreme, or provide that laws repugnant to Islam will be void[4]. On the other hand, by now several studies show how judicial decisions by supreme courts or constitutional courts handle comparative materials on questions that have already been the object of judicial deliberations elsewhere[5]. Recently, the Italian Constitutional Court

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[1] B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* 1, (2019).

[2] The best example of this kind is the Comparative Constitutions Project, directed by Zachary Elkins (University of Texas, Department of Government), Tom Ginsburg (University of Chicago, Law School), and James Melton, which produces comprehensive data about the world's constitutions that can be consulted at: <https://comparativeconstitutionsproject.org/>.

[3] Cp. H. Matsuura, *'The Effect of a Constitutional Right to Health on Population Health in 157 Countries, 1970–2007: The Role of Democratic Governance'*, PGDA Working Paper no. 106, Harvard University (2013).

[4] D.I. Ahmed, T. Ginsburg, *'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions'* 54 Va. J. Int'l L. 615, (2013).

[5] See., eg., G. Halmai, *'The Use of Foreign Law in Constitutional Interpretation'*, in: M. Rosenfeld, A. Sajó, (eds.) *Oxford Handbook of Comparative Constitutional Law* (2012) 1328; M. Bobek, *Comparative Reasoning in European Supreme Courts* (2013); T. Groppi, M.C. Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (2013); E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013); R. Hirschl, *Comparative Matters:*

ruled on the unconstitutionality of a criminal law provision that punishes assistance to suicide provided to patients that are in certain serious, irreversible conditions, and who are still able to exercise autonomy[6]. In an interim decision on the issue, released in 2018[7], the Italian Constitutional Court cited the UK Supreme Court decision in *R (Nicklinson) v. Ministry of Justice*[8], and the Supreme Court of Canada in *Carter v. Canada*[9], to come to the conclusion that it was necessary to suspend the proceedings pending before it to order to give Parliament the opportunity to legislate on the issue. Parliament did nothing, and the Court thus handed down its decision. nonetheless, the unusual move of suspending the deliberation of the case for a year was surely fortified by the knowledge of foreign precedents, which the Court duly cited. Legislatures, too, often have the opportunity to consider how foreign parliaments have catered for emerging societal problems under their respective constitutions. The familiar examples of constitutional debates in which elements deriving from different constitutional experiences become part of the local constitutional conversation are by now too many to be examined in detail here[10]. All in all, they are perhaps the most apparent symptoms of a cosmopolitan outlook on what constitutional law is, or can be, in this epoch[11]. Whether the spread of this tendency should be considered an unmitigated good or not can be seriously debated. It is well known that the US Supreme Court has taken part

The Renaissance of Comparative Constitutional Law (2014), M. Andenas, D. Fairgrieve (eds) *Courts and Comparative Law* (2015).

[6] Corte Costituzionale, Judgment n. 242/2019, available at <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf> (last consulted on 20 January 2020).

[7] Corte Costituzionale, Ordinance n. 207/2018, available at: <http://www.giurcost.org/decisioni/2018/0207o-18.html> (last consulted on 27 September 2019).

[8] [2014] UKSC 38.

[9] (2015) CSC 5.

[10] They are documented in leading textbooks: N. Dorsen, M. Rosenfeld, A. Sajó, S. Baer, S. Mancini, *Comparative constitutionalism: cases and materials* (2016); V. C. Jackson, M. Tushnet, *Comparative constitutional law* (2014).

[11] Human rights law is as well experiencing the same tendency, and in turn provides intellectual ammunitions in favour of such cosmopolitan approach: see, e.g., S. Fredman, *Comparative Human Rights Law* (2018).

in this debate in recent decades. I will not consider the matter further, but he staunch defence of American exceptionalism in the field of constitutional law has pushed some Justices to flatly reject the idea of consulting foreign laws while deciding constitutional issues. Other members of the Court hold instead that this attitude simply deprives the Court of the possibility of gaining insights and perspective from how other countries have addressed fundamental constitutional issues.

2. Rooted cosmopolitanism

In any case, even the most ardent believer in the utility of an open minded approach to the study of foreign constitutional experience for the purpose of drawing some lessons from it would recognise there are limits to a cosmopolitan approach to constitutionalism.

Each constitutional experience has certain peculiar, local traits, which defy easy conclusions about the transferability of constitutional norms. Even when the constitutional document of a country was drafted by taking as a template, or as a source of inspiration, a prior constitutional text, the constitution as the law of a country is unique, in a sense: it is out on its own, and will have its own fate[12]. In making this assessment I am not necessarily referring to the text of the constitution itself. I am rather thinking of the particular constitutional experience that is symbolized by a certain constitutional text.

Many constitutions have origins that unveil the influence of a whole range of foreign ideas and precedents. But over time, even these components will be inscribed in the concrete political, institutional, and social life of a particular polity. The idea of a living constitution, among others, reflects this dynamic. Aristotle's famous remark that "there are constitutions which according to law incline towards democracy, but by reason of their customs and training

[12] The notion of 'constitutional identity' which in this book is used with great moderation, is sometimes used to turn this rather obvious remark into a platform for a variety of claims, including nationalist claims.

operate more like oligarchies"[13] shows how old this idea is: it is surely not some newfangled rhetorical device to justify, e.g. unbound judicial law making. To put it simply, the text of the constitutional document does not tell the full story of a constitution. Therefore the constitution is "best understood" not as a document, but "as a historically rooted tradition of theory and practice" according to the diagnosis that Bruce Ackerman formulated some years ago[14].

Interestingly, this is also the language spoken by the Treaty of the European Union and by the Charter of Fundamental Rights. These fundamental texts consider the constitutional traditions common to the Members States as general principles of EU law in the field of fundamental rights. Beyond the values and the norms proclaimed in the Treaties and the Charter of Fundamental Rights, the glue to cement the EU's approach to fundamental rights is not what national constitutional documents recite, but what the shared constitutional traditions of the Member States stand for.

Within this framework, once what is peculiar and original to each constitutional experience is seriously considered, how is it possible to draw more meaningful constitutional comparisons?

This is precisely the question at the centre of Ackerman's book, and of the two volumes that should complete the intellectual project outlined in this publication. This question becomes more urgent than ever when the custodians of the constitution have a keen sense of the originality of their particular constitutional experience grounded in the constitutional document. Once more there are classical precedents for this way of thinking. Pericles' funeral oration for the war dead over two thousand years ago is famous for this pronouncement:

> "We have a form of government which does not emulate the practice of our neighbours: we are more an example to others than an imitation of them."[15].

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[13] Aristotle, *Politics* IV, 1292b17-20, tr. by T.A. Sinclair, revised and re-presented by T.J. Saunders (1992), 253.

[14] See B. Ackerman, *We The People: Foundations* (1991), 22.

[15] Pericles' funeral oration in Thucydides, *The Peloponnesian War*, (M. Hammond trans. 2009), 2.37, 91.

This eloquent sentence captures well sentiments and arguments that return over and over in history. Indeed, insisting on the originality and exceptionality of the US constitutional experience, is just one way to come to the conclusion that each constitution is ultimately rooted in its own environment, in the moral, ethical, and political life of a particular society, and that this is by itself a formidable obstacle to meaningful constitutional transfers. Rousseau and Hegel, among other classical thinkers, shared this conclusion[16]. Pondering on the Polish constitution, Rousseau wrote:

> "Unless one knows the nation for which one is working thoroughly, one's labor on its behalf, regardless of how excellent it may be in itself, will invariably fall short in application, and even more so in the case of an already fully instituted nation, whose tastes, morals, prejudices and vices are too deeply rooted to be easily stifled by new seeds."[17]

These words come after a draft constitution for Corsica, written by Rousseau at the demand of Matteo Buttafuoco and Pasquale Paoli, when the island had just established its independence as a republic by rebelling against Genoa.

Bruce Ackerman's *Revolutionary constitutions* sets out to answer the question about how to proceed on this uncertain terrain. In developing his approach, Ackerman does not intend to reject cosmopolitanism, but rather to recalibrate it, by working to eschew its traps and pitfalls, through the possibility of producing deeper comparisons. In doing so, Ackerman charts a new territory for comparative constitutional law.

Here I will not focus on the reconstruction of each constitutional experience covered by the author in the chapters or parts of the book to assess their accuracy, although the dazzling coverage of nine constitutional experiences (Burma/Myanmar,

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[16] Cp. D. T. Butler Ritchie, *'Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society'* 6 J L Soc'y 36, (2005).

[17] J.-J. Rousseau, *'Consideration on the Government of Poland and its projected reformation'*, in Rousseau: The Social Contract and Other Later Political Writings (2nd, ed. trans. V. Gourevitch, 2018), 181 ff.

France, India, Iran, Israel, Italy, South Africa, and the United States) is by itself an extraordinary achievement. Nor do I intend to examine the fitting of such constitutional experiences into the structure that provides the basic architecture of the book. Some of the recently published contributions that discuss the book have questioned Ackerman's work on one or other of these points with respect to India[18], Italy[19], and Poland[20]. I am not surprised that some critical reservations have been made in this respect. Any intellectual enterprise as vast and ambitious as the one that informs this book (and the two following volumes that should complete Ackerman's coverage of the subject) is bound to take some risks, and to generate some controversy. Two centuries after its publication, Montesquieu's *Spirit of the laws* is still the target of critical observations that highlight some errors committed by the author of that immense work[21]. It would be surprising if a book and a project with a scope and ambition on the same scale as that first monumental comparative treatise did not present some shortcomings. Considering the risk of some inaccuracies, Ackerman could well have adorned his book with the same quotation put by O.W. Holmes Jr in the last line of the preface to *The Common Law* to anticipate some of his critics: "Nous faisons une théorie et non un spicilège.".

Revolutionary constitutions is indeed, first of all, laying out a theory to provide fruitful and deeper constitutional comparisons at the world level. This theory is encapsulated in the expression *rooted cosmopolitanism*, an apparent oxymoron, first introduced in the last chapter of the book, dedicated to the US constitutional experience. Despite this late appearance in the book, rooted cosmopolitanism is a notion that pervades the entire book, and animates the intellectual

[18] A. K. Thiruvengadam, *Evaluating Bruce Ackerman's "Pathways to Constitutionalism" and India as an exemplar of "revolutionary constitutionalism on a human scale"*, 17 International Journal of Constitutional Law 682, (2019).
[19] D. Tega, *The Constitution of the Italian Republic: Not revolution, but principled liberation,* 17 International Journal of Constitutional Law 690, (2019).
[20] T. T. Koncewicz, *Understanding Polish pacted (r)evolution(s) of 1989 and the politics of resentment of 2015–2018 and beyond*, 17 International Journal of Constitutional Law 695, (2017).
[21] L. Claus, *'Montesquieu's mistakes and the true meaning of separation'* , 25 Oxford Journal of Legal Studies 419, (2015).

project behind it. In advancing it, Ackerman makes a first important point. To put it as an anthropologist famously put it: law, like gardening, sailing, or politics: 'works by the light of the local knowledge'[22], and yet, the local dimensions of the constitution are still inscribed into the broader cosmopolitan dimension, that sets the discursive framework of the constitutional conversations occurring over time in each country. So, for example, history shows how the constitutions of Poland and Iran are both indebted to the constitution of the fifth French republic, with fateful consequences for both countries.

This approach allows Ackerman to more generally reject the idea that there can be a single model of constitutionalism[23]. The circumstance that the same verbal formulas occur over and over in constitutional documents spread across the world should not lead to the easy conclusion that they express identical concepts and the same constitutional commitments. Actually, these formulas are often written in disparate languages, a point that should by itself suggest caution in reaching this conclusion. Therefore the repetition in a constitutional text of verbiage coined elsewhere should never be taken at face value:

> "….the same formula can take on very different meanings in radically different cultures. To take one example the principle of "human dignity" is used in very different ways within the revolutionary culture of Israel, the antirevolutionary culture of Germany, and the Anglo-establishmentarian culture of Canada."[24]

This vital remark warns that the large scale collection of constitutional texts and provisions can tell us which written formulas have fortune in the process of constitutional law making, and little more. The power of the form is not to be underrate, of course. But to learn more about constitutions and constitutional dynamics, we have

[22] C. Geertz, *'Local Knowledge: Fact and Law in Comparative Perspective'* in Id., *Local Knowledge: Further Essays in Interpretive Anthropology* (1983), 167.
[23] In a critical vein on this issue see: G. Frankenberg (ed.), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (2013).
[24] Ackerman, *Revolutionary Constitutions*, cit. at 1, 362.

to look elsewhere, as *Revolutionary constitutions* does. Therefore, Ackerman's approach resonates with other remarks and observations that discuss the limits of unbridled cosmopolitanism, while admitting that comparative law has a role to play in the interpretation of the law. This approach resonates with the analysis of the use of comparative law by the European Court of Justice advanced by Judge Siniša Rodin[25]. For Rodin the ontology of each constitutional experience is decisive in establishing how the comparative study of foreign material comes into play in the process of constitutional adjudication.

Ackerman holds that some constitutional experiences should therefore be more carefully considered by Americans when considering foreign constitutional ideas or solutions. In historical and political terms the more relevance experiences are those embodying the same constitutional law-making process that the American revolution first experimented. Ackerman does not at all rule out the possibility of reaching beyond the divide that separates constitutions of one kind from constitutions of a different kind in his typology. Nonetheless, such separation should be seriously taken into account, rather than blissfully ignored, when looking for helpful comparisons.

In looking beyond the texts of the constitutional documents, Ackerman draws upon law, politics, history, and sociology. This interdisciplinary approach leads Ackerman to build a typology of constitutional experiences that is the cornerstone of his comparative approach.

The first constitutional ideal type is provided by the case in which "revolutionary-outsiders manage to oust establishment-insiders from political authority". The countries examined in this volume all fall under this category. Ackerman's other two categories, as outlined in the introductory chapter of the book, are respectively the "establishment-constitutions" and the "elite construction constitutions". In the establishment constitutions "the political order is built by pragmatic insiders, not revolutionary outsiders". This happens because establishment insiders manage to isolate the more radical outsiders and co-opt instead the more moderate among them

[25] S. Rodin, '*Constitutional Relevance of Foreign Court Decisions*' 64 Am. J. Comp. L. 815, (2016).

in the process of constitutional change. Great Britain, Australia, Canada, and New Zealand all belong to this typology along with other countries in Scandinavia, Latin America and Asia. All these countries "…share a distrust for ringing revolutionary principles and emphasize the virtue of prudent adaptation."[26]. Elite construction constitutions are represented by countries like Spain, Germany, Japan. The constitutions of these countries are the by-product of a dynamic in which the old system of government is collapsing, but the population is relatively passive. At this point: "…the power vacuum is occupied by previously excluded political and social elites, who serve as a principal force in the creation of a new constitutional order."[27]. In this scenario, the crisis is so serious that the old elite can hope to retain some power only by making an elaborate compact with the outsiders, something that does not occur under establishment type constitutions.

Revolutionary constitutions is therefore the first of three books by Ackerman that examine key constitutional experiences with the help of the interpretative keys offered by these models.

This first volume sets out to explain how the constitutional path moves from revolutionary impulse, mass mobilisation, and the agency of charismatic figures to the constitutionalisation of charisma- to use the language of the author - as the ultimate result of a revolution on a human scale. History shows that, more often than not, this is an anticlimactic trajectory. Looking back to the achievement of independence by that part of the world that had endured colonialism, and successfully fought against it, Clifford Geertz shows what such trajectory implies:

> "It is not that nothing has happened, that a new era has not been entered. Rather, that era having been entered, it is necessary now to live in it rather than merely imagine it, and that is inevitably a deflating experience.
> The signs of this darkened mood are everywhere: in nostalgia for the emphatic personalities and well-made dramas of the revolutionary struggle; in disenchantment with party politics,

[26] Ackerman, *Revolutionary constitutions,* cit. at 1, 5.
[27] Ackerman, *Revolutionary constitutions,* cit. at 1, 6.

> parliamentarianism, bureaucracy, and the new class of soldiers….."[28]

Nonetheless, this is precisely the passage in which the constitution may become the anchor of subsequent political life, even when the unfolding of constitutional events takes a path different from the path originally traced by the revolutionary leaders.

It is a huge merit of Ackerman's book to put at the centre of the scene all the unexpected twists and turns that eventually lead to a specific constitutional configuration. In what Ackerman labels as time three, when politicians and the masses move towards the normalisation of revolutionary politics, jurists and judges have a window of opportunity. They can then claim that, in the interpretation of the constitutional settlement, their doctrines are more deeply embedded in the Founding than anything that second generation politicians can offer[29]. If this window of opportunity is seized, in time four, constitutional law becomes fully incorporated into the legal system by the working of legal scholars and the accumulation of decisions rendered on the basis of the constitution. This provides: "…the rising generation of lawyers with the cultural tools they need to treat constitutional law as fundamentally similar to other legal domains that they could discuss with professional self confidence."[30]. By hinting at this time sequence, the last element of the architecture of the book is coming into its place.

The analysis developed by Ackerman is therefore an analysis of constitutions over time. One of the currently much underrated functions of a constitution is to secure a legitimate succession to government over time, one generation after another. This is an achievement that cannot be taken for granted even in the old democracies. Side by side with this problem, there is the question of how a constitution can legitimately evolve over time, to speak to the present generation, rather than to the past ones.

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[28] C. Geertz, '*After the Revolution: The Fate of Nationalism in the New States*', in Id., *The Interpretation of cultures: Selected Essay*, at 234, (1973).
[29] Ackerman, *Revolutionary Constitutions*, cit. at 1, 10.
[30] Ackerman, *Revolutionary Constitutions*, cit. at 1, 162.

On this last point Ackerman's book is fully in line with the vision articulated in the three previous volumes of his masterpiece *WE The People.* In that work, he argued for a less court- centered approach to US constitutional law and in favour of a more holistic, "regime-centered", approach to constitutional change. *Revolutionary constitutions* is guided as well by the deep belief that that "We the People" are actually responsible for the constitution-making process and its successive transformations. Ackerman makes clear that, especially in the case of revolutionary constitutions "Popular sovereignty isn't a myth" and that politics is responsible for change in constitutional doctrine. The place assigned in this book to charismatic figures like De Gaulle, Nehru, De Gasperi, Ben-Gurion, Mandela etc., is huge. Nonetheless, this book is also a vigorous illustration of the paradoxical power of formal constitutional constraints. Ackerman thus laments that Franklin D. Roosevelt failed to constitutionalise the social reforms of the new deal by passing the constitutional amendments that would have made those reforms constitutional law once and for all. Unfortunately, Roosevelt preferred instead to have them sanctioned by Supreme Court precedents. For Ackerman, this failure ultimately left open to the originalists the possibility of arguing that the original founding has pre-eminent importance in the reading of the constitution. This line of argument is perhaps surprising, in a book that is so vigorously animated by realism. To me the originalists' take on the constitution owes very little to the proclaimed fidelity to the historical foundations of the constitutional text, and owes much more to the current distribution of economic and political power in the US. This hugely asymmetric distribution has become a serious hindrance to democratic government, despite the constitutional safeguards that are still in place, and the vigorous political and civic life of the country. The history of the Reconstruction following the Civil War shows how written constitutional amendments can still be warped and virtually nullified by conservative Courts[31]. But I am ready to share Ackerman's point that with the new deal amendments incorporating certain social

[31] E. Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019).

rights the US constitution would have entered the twentieth century and would once and for all have left the eighteenth century.

3. Conclusions

Ackerman's book will not shake the faith of those comparative constitutional lawyers that trade in the tools provided by quantitative social sciences and digital technologies to assess constitutions and map the growth of constitutionalism at the world level. Nor will the lessons contained in the book prevent some ongoing constitutional bric-a-brac. But this book is a firm and sober denunciation of an ideology, namely that there can be a 'one size fits all' variety of constitutionalism. The search for a ready made recipe that by itself will guarantee the unmitigated good of a democratic constitution is a dangerous illusion.

The fact that this denunciation comes from a leading liberal light makes it even more important, bringing to the table as it does weighty arguments against isolationism and unbridled optimism about the fate of world constitutionalism. The great lesson of this book is the invitation to take the blinkers off, and to come to the ground where the fight for shaping the constitution goes on. On this ground the fight is eventually gained or lost by the political forces, with the contribution of jurists and judges. On the basis of this incandescent material, a comparative constitutional theory can be built – we are not simply left with the chronicle of the events – and this will cast light on the effective value of the constitutional settlement that is established for a time.