REVOLUTIONARY CONSTITUTIONALISM AND CONSTITUTIONAL HISTORY

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Abstract

Given Bruce Ackerman's aim of distinguishing three "pathways" through which constitutions won legitimacy over the past century as Max Weber did with respect to those concerning political power's legitimacy, the Author examines the analogies and differences between the two scientific enterprises.

Bruce Ackerman presents 'Revolutionary Constitutions: Charismatic Leadership and the Rule of Law' as the first in a series of volumes that explores "three different pathways through which constitutions have won legitimacy over the past century", namely constitutions: 1) rooted in the experience of revolutionary insurgents sustaining a struggle against the established order for years or decades before gaining political ascendancy; 2) built by pragmatic insiders, not revolutionary outsiders; 3) resulting from elite construction, due to a power vacuum that was exploited by previously excluded elites, who finally succeed in creating a new constitutional order.

Before entering into the book's details, attention is therefore needed to the announced objectives and theoretical underpinnings of the whole enterprise. With a premise. More than twenty years ago, Ackerman warned American constitutional lawyers against their "astonishing indifference", and their "emphatic provincialism", *vis-à-vis* the ascertainment that "The Enlightenment hope in written constitutions is sweeping the world"[1]. Given the good average of the following US comparative constitutional law's studies, Ackerman should be acknowledged as a pioneer in the field. At any rate, he would not content himself with this. His declared ambition consists now in affording a picture of the deep differences affecting world constitutionalism, as Max Weber did with respect to those concerning political power's legitimacy with the categories of tradition, charisma, and

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[1] B. Ackerman, *The Rise of World Constitutionalism*, *Virginia Law Review* (1997), 772.

bureaucratic rationality (1). Ackerman designs in fact his pathways as "ideal-types", and asserts that "Law legitimates power. Constitutionalism is part of this larger dynamic – and it has played an increasingly dominant role over the past century".

I would recall that Weber's ideal-types correspond to the permanent sources of political power's legitimacy in different regimes: tradition, charisma, and bureaucratic rationality are meant as invariants aimed at comprehending the intimate structure of a certain regime. Ackerman's pathways refer rather to the regime change that brought to the constitution's legitimation. To what extent, then, can such change, be it authored by revolutionary outsiders, by responsible insiders, or by an elite, shed light on the new regime's structure and evolution? For the author, "the presence or absence of a widespread belief in constitutional legitimacy can play an important – sometimes, all-important – role in shaping political and social life" (7). I totally agree. Given the Author's aim, a further question however arises: does such presence or absence depend on the pathways through which it was acquired? Ackerman observes inter alia that "regimes traveling down the pathways described by the establishmentarian and elitist pathways confront very different legitimation challenges from those encountered along the revolutionary track – and that judges play different roles in meeting these challenges" (38). It remains to see whether this assumption fills the gap with Weber's ideal-types.

Significantly, Ackerman claims to "part company with the positivist when it comes to defining the nature of constitutional revolution. This is because we are asking fundamentally different questions. The positivist doesn't ask how a regime legitimates itself. He simply wants to identify the fundamental rules by which a particular regime distinguishes law from non-law. If, for example, the state is suddenly dominated by lawmakers who transform basic principles in a big way, the positivist doesn't count this change as 'revolutionary' if it is enacted in conformity with the pre-existing constitution. It's only when these foundational rules are broken that the positivist recognizes something 'revolutionary' is going on" (36-37).

This is indeed an accurate account of the positivist's approach, and therefore of how law is conceived in the bureaucratic rationality's ideal-type. The point is though that, despite its diverse methodology and disciplinary background,

Weber's cathegorisation deeply influenced continental Europe's positivism, and the conception of the state in particular, over the course of the twentieth century. Ackerman's questions differ from those of Weber also in this perspective.

A different kind of issues is raised by the Author's assertion that "constitutionalism legitimates power". The frequent assumption seems thus denied that, while defining constitutional democracy, the function of limiting power through the rule of law should be viewed as distinct from, and concurrent with, that of legitimating power.

Although admitting that "Constitutionalism, as I understand it, involves the imposition of significant legal constraints on top decision-makers.", Ackerman adds: "But the broader "rule of law" ideal deals primarily with the techniques by which top decision-makers try to control everybody else. Many autocratic regimes have found the "rule of law" an extremely useful device in governing their societies. Under this set-up, the autocrats assert their arbitrary right to establish the rules, but require the bureaucracy and the judiciary to implement their commands in a consistent and principled fashion. So understood, the "rule of law" is a fundamental principle in its own right – providing legal equality for all, regardless of their social position. If the autocratic regime fulfils its promise, it may well persuade its inhabitants of the legitimacy of the system" (6).

The rule of law has indeed legitimated autocracies, provided however that it was reduced to legality. For many, the challenge of constitutional democracy consists exactly in maintaining an interplay over time between the rule of law, viewed as limiting the "top decision-makers"'s power, and the function of legitimating their power, beyond the deep institutional conflicts that the co-existence of these functions might engender. For the author, to the contrary, even the rule of law tends to legitimate power. It only remains unclear how: does it depend on the different pathways? This is a further reason for giving an account of Ackerman's design, departing from 'Revolutionary constitutionalism'.

The Author mentions India, South Africa, France, Italy, Poland, Israel, and Iran as the countries involved by 'revolutions on a human scale', each of which passed through a 'four-phase dynamic of revolutionary constitutionalism – proceeding from mobilized insurgency (time one) through constitutional founding

(two) through succession crisis (three) through consolidation (four).' (43). These are examined as case studies, among which he finds analogies going beyond obvious differences.

I admire how Ackerman dwells into single national contexts. He draws upon an eclecticism of fields that, as it has been noted, "also extends to the range of sources he draws upon for each of his case studies. In the Indian case, for instance, he relies on the work of political scientists, sociologists, historians, and journalists beyond legal scholars."[2]. Thorough accounts are thus given of the political, social, and legal conflicts and bargaining affecting each 'revolution'.

I am instead skeptical about some analogies. The definition of India and France as 'Sister Republics' appears for instance quite bizarre.

A difficulty emerges even in equating De Gaulle to Gandhi under the label 'revolutionary', since the former could rely on the longstanding favour for the executive's primacy that had not disappeared even with the triumph of the '*tradition républicaine*' at the time of the III Republic, while Gandhi's role was primarily crucial in meeting the challenge of his country's independence. Nor circumstances concerning the Mitterrand's nationalizing legislation can be compared to the constitutional crisis provoked by Indira Gandhi. We are told that 'Mitterrand's struggle with the Constitutional Council was not on the same scale as Gandhi's confrontation with the Supreme Court. It only reached the stage at which he was threatening to override the Council with a constitutional amendment if it continued to resist his Socialist program. In contrast, Gandhi actually enacted amendments to guarantee her sweeping Socialist initiatives -- and then went even further to crush judicial efforts to protect civil liberties during her authoritarian period of Emergency rule. Nothing like this happened in France.' (226-227). These struggles were not "on the same scale" because of the striking difference between Mitterrand's nationalizing legislation, that by no means involved a constitutional crisis, and Indira's clear threat to Indian constitutional democracy. Ackerman avoids the point, and goes on by saying: 'Yet this big difference should not blind us to

[2] A.K.Thiruvengadam, *'Evaluating Bruce Ackerman's "Pathways to Constitutionalism" and India as an exemplar of "revolutionary constitutionalism on a human scale"*, *I•CON* (2019), 684

common patterns emerging in the life of these two revolutionary regimes" (227).

"Common patterns" are at the forefront of his accounts at the expenses of differences: it is as if the author would do whatever to make ends meet. After having vividly and convincingly reconstructed each case study, at a certain point he needs to show that the country's phases of constitutionalism recur in other countries of the revolutionary basket, with the effect that little attention is payed to the stretches and flaws that might compromise his "Time One"-"Time Four" classification.

Take the Italian case. A realistic and at the same time passionate constitutional narrative is given of the key events occurring since the 1944-1946 transitional period. Italian scholars should learn here something more about their own country's constitutional developments. Things change though when it comes to the alleged Italy's 'fundamental similarity' with India 'in their patterns of intergenerational evolution'. The analogy has to fit with the general assumption that 'During Time two, courts in both countries fail to assert their constitutional supremacy over the charismatic leaders who have led their movement-parties to channel their high-energy politics into a revolutionary Constitution in the name of the People. This period of subordination only comes to an end during the succession crises of Time three.' (172).

For that end, the author compares inter alia the Indian judges' capitulation vis-à-vis a constitutional amendment authorizing the government to insulate their legislative initiatives from all judicial scrutiny to the fact that 'De Gasperi preempted the threat of judicial review by stalling on the implementing legislation required to create the constitutional court until the very end of his time in office.'

Nothing of that sort happened though. In the early Fifties, Prime Minister De Gasperi was far from being the charismatic leader imagined by the author: he was first of all leader of an already powerful party, Christian Democracy, that conditioned significantly his political direction. On the other hand, the legislation required to create the constitutional court was adopted when De Gasperi was in office (1953), while the stalling on its implementation regarded rather the appointment of judges, which occurred when he had already retired (1954-1955). Nor can the already reported Indian judges' capitulation be even slightly

assimilated to Italian events. Suffice is to remind that decision n° 1/1956 of the constitutional court established the very rule of recognition of the new constitutional order, and paved thus the way for the Constitution's legislative enforcement.

Further comments deserves the assertion that 'the Italian court moved more cautiously [than the Indian court], contenting itself with invalidating Fascist laws for a couple of decades before it challenged more recent legislation.' (173). The point is however that, in the first two decades, the court had essentially to deal with cases concerning Fascist laws, while further on a huge part of cases regarded the Republic's legislation. Nothing to do with the hypothesis of a court's "caution", that corresponds to Ackerman's Time two.

A further reason might perhaps explain why he obliterates the fact that the Republic's legislation took more time for being brought before the court, due to a procedural restraint put on the judiciary such as the rule *ne procedat iudex ex officio*. That rule appears a dispensable formality in a design of the dynamic of power's legitimation, where questions concerning the courts' role are reduced to that of whether they defer to the legislature or instead adopt an activist approach. The former case corresponds to "Time Two", while in "Time Three", courts take "constitutional leadership to preserve core revolutionary principles once the founding generation has left the scene" (337).

Being used for giving a causal account of the revolutionary constitutionalism's pathways, the old dichotomy between judicial self-restraint and activism reveals Ackerman's conception of the rule of law. The judiciary counts because of the power it can exert within the institutional arena, not because of the limits it can put on the legislature or on the executive, with the effect of blurring the nature of the former vis-à-vis that of the political branches. In the same direction goes the assertion that "Iran's constitution is based on the separation of powers – in which different branches engage in an on-going competition for effective authority. As in many other countries, the balance of legitimate power shifts over time, sometimes dramatically. But so long as Iran does not collapse into a top-down system of autocratic rule, it falls within my definition of constitutional government" (350).

To sum up. For Ackerman, competition between different branches for effective authority is a sufficient requirement for having a constitutional government. A true independence of the

judiciary appears thus unnecessary for that end, as indirectly confirmed by the parallel between the French Conseil Constitutionnel and the Guardians of the Iranian Revolution (380). On the other hand, as we have seen, the fact that (a certain version of) the rule of law can legitimate autocracies is alleged for discrediting the latter's role in constitutional democracies. Overall, an instrumental conception of the rule of law permeates the whole picture of constitutionalism.

The last chapter of the book ("American Exceptionalism?") poses a different set of issues. Ackerman calls there for "a *rooted cosmopolitanism* – an approach which recognizes that America's constitutional culture is indeed exceptional when compared to many other relatively successful systems; but that it is by no means unique, and that we have something special to learn from sister nations whose constitutions have emerged from revolutions on a human scale." (392).

I think this is the right approach to "American exceptionalism". My question concerns rather what have Americans to learn from sister nations. I fully agree with Ackerman when he urges them "to appreciate that the same legal 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 anti-revolutionary culture of Germany, and the Anglo-establishmentarian culture of Canada. It's possible, of course, that German or Canadian doctrines of "dignity" have more to offer the United States than Israeli approaches. But Americans should consider the matter carefully before coming to this conclusion. They should not assume that dignity-talk supports a "one-size-fits-all" framework for analysis. [….] The key thing is to appreciate the need for self-conscious reflection on the boundary-crossing question before resolving the issue." (392).

However, it is exactly because I agree with him on those differences that I feel uncomfortable with his efforts of drawing parallels, such as that between Washington and De Gaulle, and more generally between the US's and the Fifth Republic's constitution-making. After all, does the wise warning "against an overly enthusiastic form of cosmopolitanism" (392) really need this?