

A NEW IDEA OF CONSTITUTIONALISM FACING THE GLOBAL CONSTITUTIONAL LAW

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Abstract

The originality of the analysis of Bruce Ackerman resides in the perspective of classifying ideal-types allowing the interpretation on the birth of ideal Constitutions. This book also help us to reflect on our past, and allows us to say, in summary, that France believed in revolutionary constitutionalism, one Ackerman's ideal-type, while Italy did not. Furthermore, Italy and France are today at the same point: they have indeed two similar constitutional Courts, and the legitimisation of the Constitution does not depend on the judicial review alone, even if in both countries the Courts expand their powers in the absence of a Leader. But we also know that the revolutionary constitutionalism does not guarantee that the future will be better (or worse) than the past, as in order to realise radical changes the political elites need the consent of the majority.

1. The nature of World Constitutionalism is the pivotal argument of the Author as well as the Legitimacy of the Constitution, that means "*constitutionalism involves the imposition of significant legal constraints on top decision-makers*"¹.

Democracy in the 21st century is regulated by constitutionalism and, with the daily risk of losing it, we share the Author's position according to which "*Autocracy [is] not a constitutional state*"²: no democracy in illiberal states.

The founding thesis of a Revolutionary constitutionalism move from the interpretation proposal of three types of ideas sustaining a new Constitution, starting from the contraposition that they impose on the legal order which the new Constitution goes to affect. The originality of the analysis of Bruce Ackerman resides in the first place in the perspective of classifying and construct ideal-

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¹ B. Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, 2 (2019).

² *Ibidem*, 3.

types allowing the interpretation on the birth of ideal Constitutions. A perspective dating back to the ambition of ideal Constitutions, in order to understand the potentiality within the Constitution's birth itself or, better said, how the Revolutionary movement against the *status quo*, both in Italy and in France, have consolidated the prescriptive capacity of the Constitution. Or, in other constitutional realities, how the "*Political order is built by pragmatic insiders*"³; or, finally, how the new regime is an *elite* construction, not a revolutionary creation, like it happened with the affirmation of the new Constitution in Germany and Spain.

According to this perspective, a Constitution is a compromise between insiders and outsiders, a "*compromise Constitution*" we could say, using the Italian constitutional lexicon, which, like in other European experiences, poses the question on how can a Constitution establish its legitimacy?

It is therefore, in my opinion, a path full of difficulties. And in Ackermann's perspective, "*constitutional statesmanship can play a key role in sustaining political legitimacy, but its failure may undermine the most entrenched paradigms*"⁴.

For this reason, legal orders founded on several different pillars may not be considered an ideal type. Just think about the issue regarding the European order and if it may be considered a federal system: according to Ackerman the European experience is unique, as it is founded on a "*trilemma*"⁵, i.e. three different types of origin; whereas a new legal order needs a path of constitutionalising charisma, "*establishmentarian and elitist pathways confront way different legitimation challenges from those encountered along the revolutionary track*"⁶.

2. The Legitimation of authority in particular cultures and historical contexts thus allow revolutionaries to write the rules and respect them; what happened with the resistance, that in Italy legitimised our Constitution not through a single party but due to a coalition (**Cln**) including juxtaposed and competing ideas, which had however to be compromised in order to create a Constitution.

³ Ibidem, 4.

⁴ Ibidem, 18.

⁵ Ibidem, 23.

⁶ Ibidem, 38.

As proven, according to the Author, by India and South Africa, mentioned in order to compare the revolutionary paradigm to the other pathways, the path to constitutionalism, mass political mobilisation, represents a profound threat to legitimate power. Indeed, in these cases revolutionary outsiders became a party with small numbers of leaders that struggle against old regime.

In this example we have, in summary, One party – One Constitution; while in the others, in France and Italy, we have war time coalitions, with the question: after the war will the coalition stay unite for the Constitution?

After fragmentations, on the one hand France has De Gaulle, part of the military (the personal charisma of De Gaulle might suffice for the damage to the Constitution achievement against the organisational charisma of resistance parties), while on the other, in Italy, De Gasperi is not.

In France the semi-presidentialism affirms itself in 1958 with the return of De Gaulle, while in Italy the Constitution strengthens itself through the judicial review: a profile underlined also by A. Baraggia, *Recensione del libro di Bruce Ackerman, Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, Harvard University Press, 2019, in *Osservatorio AIC*, 4 del 2019, p. 248.

The parties that in France controlled the Constituent Assembly constitutionalised the revolution, breaking with the past. In Italy De Gasperi, considered by the Author as a revolutionary like Mandela, “breaking” with the Pope in order to affirm the ideals of social justice. The innovation proposed by the external view of Ackerman is that De Gasperi managed to bring the Catholics from fascism to the Republic through the instrument of government granted by the rigid Constitution, with the goal to overcome the over centralisation power⁷. As regards the judicial review, the Constitutional Court, the Court of Cassation and the State Council are defined as a “*Constitutional Frankenstein*”⁸; however, in 1956 a political majority is formed, with enough strength in order to grant the functioning of the Constitutional Court, that starts, with its first decision 1/1956, a path of implementation of the Constitution, guided by the Court itself. A model, according to Ackerman⁹. The

⁷ Ibidem, 142.

⁸ Ibidem, 146.

⁹ Ibidem, 155.

growth of constitutionalism in Italy is, in his opinion, similar to the Indian and South African one, but different from the French.

In Italy a fragmented political coalition relies on the Constitution for the future development of the constitutional revolution, with a switch from parliamentary sovereignty to the judicial review, while in the same year the Fifth French Republic relies on semi-presidentialism for its revolution, and not on its Constitutional Court. The *Gaulliste* model in France brought fragmentation, and the Fifth Republic was built on the algorithm Popular sovereignty = Personal chamber + mass media + special referendum. Indeed, the new Constitution has been ratified by a special Referendum, with the precise goal of constitutionalising the charisma of De Gaulle. According to the Author, the people authorised this “violation” of the Constitution, and ten years later in 1968 as well, with the world-wide constitutional crisis.

Today we can affirm that the *Conseil Constitutionnel* and the *Corte Costituzionale* have become closer, and 40 years of strengthening determined an institutional supremacy. According to Ackerman¹⁰, the *Conseil* maintains its strength as long as the foundation and its movement keep on winning the election, thus legitimising the Sixth Republic.

3. We need this book in order to reflect on our past, and allows us to say, in summary, that France believed in revolutionary constitutionalism¹¹, while Italy did not. Furthermore, Italy and France are today at the same point: they have indeed two similar constitutional Courts, and the legitimisation of the Constitution does not depend on the judicial review alone¹², even if in both countries the Courts expand their powers in the absence of a Leader¹³.

Indeed, the revolutionary constitutionalism does not guarantee that the future will be better (or worse) than the past, as in order to realise radical changes the political elites need the consent of the majority. The French semi-presidentialism is in fact not comparable to the American one, and may even be considered as super-presidentialist, as the revolutionary constitutionalism in

¹⁰ Ibidem, 223.

¹¹ Ibidem, 224.

¹² Ibidem, 226.

¹³ Ibidem, 316.

France always goes through the Presidents' Party. Importing French super-presidentialism into revolutionary situations is therefore a mistake, as revolutionary constitutionalists have to consolidate the revolution, like in the Burmese case: a "*race against time*"¹⁴.

4. Talking about the future of global constitutionalism, what have we learned from this book? First of all, we have new tools to make clear: a. Interdisciplinarity; b. History (to understand the past); c. Political science (to understand the present); d. Constitutionalism test (to understand the future). Secondly, we can say that there is a difference between constitutionalism and dictatorship, that depends on: a. Constitutional timing; b. Models; c. The difference between models depending on constitutional identity.

A new Constitution can anticipate crisis, and that poses to everybody a question: How does (liberal) democracy work in Europe?

We can expect, according to the English model, a Conventional evolution or, following the French model, a separation between President and Prime Minister, but can we also expect from the Italian model an illiberal democracy like in Poland, using the French model? In fact, as Ackerman wrote, we know that the same legal formula can take different meanings in different cultures: for example, American political identity is a rooted cosmopolitanism, and Washington's symbolic leadership is clear in a deeply entrenched practice of self-government developed in the previous century, and power goes from the States to the Centre in a New Deal democracy during Roosevelt and judges make the revolution. The future of written constitutionalism on America's Constitutional identity is the same struggle for the EU.

¹⁴ Ibidem, 303.