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SPECIAL ISSUE ON "REVOLUTIONARY CONSTITUTIONS. CHARISMATIC LEADERSHIP AND THE RULE OF LAW" BY BRUCE ACKERMAN

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INTRODUCTION

REVOLUTIONARY CONSTITUTIONALISM: AN INTRODUCTION

Antonia Baraggia and Lorenza Violini[*]

Bruce Ackerman's latest book "*Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*" represents an important and timing contribution to the debate about the crisis of our contemporary constitutional democracies.

According to Ackerman "a deeper understanding of the past is especially important at this moment. With constitutional crises erupting throughout the world, it is tempting to believe that all of them are symptoms of the same disease, so-called populism - and can be cured in similar way. This is a mistake. Countries that have travelled down the three different paths to constitutionalism confront very different crises[1]".

Ackerman starts from the assumption that the goal of his research itinerary is to explore "three different pathways through which constitutions have won legitimacy over the past century"[2]. The first of these ideal types is the concept of "revolutionary constitutionalism".

Revolution is a controversial concept in the context of constitutional law studies, and it is even more so if a revolution is the origin of a new constitutional order.

In Ackerman's reconstruction, revolutionary moments were at the origin of the constitutional experiences in India, South Africa, Italy, France, Poland, Israel and Iran. The Author recognises the specific and heterogeneous social and economic contexts of these different countries, as well as their varied legal and political cultures; however, this awareness does not prevent him from

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

tracing a common thread that binds these experiences together, such that they ultimately represent "variants" of the same phenomenon: "*Revolution on a Human Scale*".

Revolutions on a human scale must be distinguished by another type of modern revolutions, the "totalizing variants". In the latter "the mobilized movement of the People aims for a root-and-branch reconstruction of all aspects of social and political life. This aspiration legitimates the worst pathologies of the twentieth century"[3]. On the contrary, revolutions on a human scale "do not attempt a total makeover of society. They focus on particular sphere(s) of social or political life, and mobilize activists to repudiate currently dominant beliefs and practices within the target of revolutionary concern while leaving intact prevailing mores in other spheres"[4].

Central to the "revolutionary path" is another traditionally ambiguous notion: charismatic leader. The charismatic leaders - identified by the Author in Nehru, Mandela, De Gaulle, Walesa, De Gasperi - are fundamental actors in the process of legitimizing the newly established order. Ackerman distinguishes two types of charisma: organizational charisma and leadership charisma.

In the first case, a central role is played by the movement or by the party in whose struggle activists identify themselves, in the belief that the organization itself represents the means by which "their grassroots struggles can transform the State into an engine for legitimate social change"[5]. The second declination of charisma is personalistic: the leaders of the successful experiences of revolutionary constitutionalism "found themselves at the right place at the right time in the revolutionary struggle - and their decisive acts of sacrifice served as exemplars for the broader struggle for a "new beginning" in the political life of the nation"[6].

As for the concrete declination of "revolutionary constitutionalism", Ackerman identifies four phases in which the revolutionary path unfolds: the mobilization against the old regime (Time one), the foundation of the constitutional order (Time two), the crisis that opens up in the face of the loss of the original forces and charisma with the consequent creation of a "legitimacy

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[3] Ibidem, 28.
[4] Ibidem, 28.
[5] Ibidem, 35.
[6] Ibidem, 35.

vacuum" (Time three), and, finally, the consolidation of power (Time four). Ackerman applies this scheme to the cases he analyzes in this volume: India, South-Africa, France, Italy, Poland, Israel and Iran, all variants of the same ideal type. They participate in a "common experience - in which revolutionary insurgents manage to sustain a struggle against the old order for years or decades before finally gaining political ascendancy[7]".

Inexhaustible and heated could be the debate on the correspondence of the particular constitutional experiences with the ideal-type, but as Ackerman himself recognizes, by recalling the Weberian lesson, "no real-world polity perfectly expresses any ideal-type"[8]. There can be criticisms and doubts about the historical reconstruction of events and their reading within the conceptual schemes proposed by Ackerman[9]. Nonetheless, Ackerman's volume offers a masterful and authoritative contribution to comparative law, the history and theory of constitutional law.

Like all great works, they measure themselves on the ability to shed light on the future, to open new horizons and research hypotheses, starting from a deep analysis of the events of the past and the theoretical reflections that the legal scholarship has given us.

Certainly Ackerman's work has this important impact, especially in a context dominated by the effort to codify and understand the specific features and dynamics of our constitutional systems under pressure. Ackerman's work has the great merit of inviting us to look at the phenomenon of constitutionalism in its evolution over time and space, beyond the unique characteristics of each constitutional experience: "My three ideal types will (...) enable a more discriminating form of transnational learning. If, as I suggest, the leading countries of Europe emerge from different constitutional pathways, these differences should be treated with respect if the European Union is to sustain itself as a vital force in the coming generation. I will also try to persuade you that my three

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[7] Ibidem, 3.

[8] Ibidem, 23.

[9] Among the first comments see A. K. Thiruvengadam, *Evaluating Bruce Ackerman's "Pathways to Constitutionalism" and India as an exemplar of "revolutionary constitutionalism on a human scale"*, International Journal of Constitutional Law, Volume 17, Issue 2, 682-689 (2019); D. Tega, *The Constitution of the Italian Republic: Not revolution, but principled liberation*, *International Journal of Constitutional Law,* Volume 17, Issue 2, 690–694 (2019).

ideal types also open up powerful insights into the dilemmas confronting leading nations in Africa, Asia, the Middle East and South America - enabling comparative insights into common dilemmas that would otherwise escape the attention of national politicians transfixed by the seemingly unique features of their domestic crises"[10].

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[10] B. Ackerman, cit. at 1, 2.

ARTICLES

SOME REMARKS ON BRUCE ACKERMAN'S
"REVOLUTIONARY CONSTITUTIONS: CHARISMATIC
LEADERSHIP AND THE RULE OF LAW"

*Nicolò Zanon**

Abstract

The contribution offers a short analysis of Bruce Ackerman's book "Revolutionary Constitutions: Charismatic Leadership and the Rule of Law". In particular the Author focuses on two key issues of Ackerman's analysis. The first relevant aspect is the role played by the judiciary, especially by constitutional and supreme Courts, in the revolutionary dynamic. The second one is the cultural diagnosis of the EU crisis and of its legitimacy, read in the light of the different constitutional paths (elite-driven, revolutionary and establishmentarian) taken by EU Member States.

1. This is a short analysis on Bruce Ackerman's new book "*Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*".

Despite the title of his famous essay on "The Rise of World Constitutionalism"[1], at the very beginning of the new book, Ackerman puts a warning: Constitutionalism is not a "one-size-fits-all" ideal that animates a common project throughout the world.

Instead, there are different pathways trough which Constitutions have won legitimacy.

The big issue is precisely "Legitimacy of Power": Bruce Ackerman is overtly on Max Weber's pathway and spirit.

He is well aware that also for Constitutionalism the key point is legitimacy of power. According to him, the rule of law has two

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[1] B. Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

very different meanings: on one hand, rule of law involves the imposition of significant constraints on top decision-makers. But on the other hand the broader "rule of law ideal" deals primarily with the techniques by which top decision-makers try to control everybody else: rule of law is a fundamental legitimating principle. We can't forget it. Quoting from the Introduction: "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"[2].

As I said, according to Ackerman there are different pathways trough which Constitutions have won legitimacy over the past century all over the world: and this is the first of a series of books that explore these different pathways.

Ackerman analyzes three ideal-types.

The first scenario and the first ideal type is precisely "Revolutionary Constitutionalism". Under this the scenario, a revolutionary movement makes a big effort to mobilize the masses against the existing regime. Ackerman focuses on success stories, in which revolutionary-outsiders manage to oust establishment-insiders from political authority. He indicates two pairwise comparisons: in Europe France and Italy after the Second World War, but also Poland in the 80's. Outside Europe: India and South Africa, but also Iran.

The goal of the first volume is precisely to understand the legitimating dynamics, in a revolutionary scenario, through which one or another Constitution gains its central claim to authority in organizing the new regime - both for the newly ascendant governing elites, and for the millions of followers who supported the collective effort to revolutionize the system.

Revolutionary scenario, I said, but I think it's very important to highlight that the book discusses what Ackerman calls "*Revolutions on human scale*". It's a particular kind of Revolution, very different from revolutions in a totalitarian perspective. This kind of Revolution remains a very ambitious affair but doesn't attempt a total makeover of the society: it's a Revolution that focuses on particular spheres of social or political life. This kind of Revolution doesn't aim to create a "brave new world" or to change the human nature: it's a new beginning not for heroes but for

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[2] B. Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, 3 (2019).

ordinary people: "time and again we will see movement leaders, in collaboration with grass-roots activists, channel their high-energy politics into constitutions that credibly serve, both to elites and ordinary citizens, as an enduring legacy of their great acts of collective sacrifice"[3].

Anyway, in all those examples of Revolution a central role is played by charismatic leaders: De Gaulle, Nehru, Mandela, Khomeini, Walesa and in Italy Alcide De Gasperi (whose role is much emphasized in the chapter regarding Italy).

The main problem for all these leaders, in what Ackerman calls *time 2* of the revolutionary dynamic (*time 1* is the time for struggle against the old regime) is the *constitutionalisation of revolutionary charisma*. The insurgent leaders and movements translate their high-energy politics into a Constitution that seeks to prevent a relapse into the past and commits the new regime to the new principles proclaimed during the hard struggle in *time 1*. In this dynamic, crucial relationships and contrasts arise between new political and constitutional actors - especially Courts, on one hand, and the new political class, on the other.

The second ideal-type will be the subject of the second volume, but on the first one we have some previews, and it's very useful to speak a little about it because second and third scenarios help a better understanding of the first one.

Under this second scenario (the second ideal-type: establishmentarian pathway), the political and constitutional order is built by pragmatic insiders, not by revolutionary outsiders. In this ideal-type, when confronting popular movement seeking a fundamental change, the insider-establishment responds with strategic concessions that split the outsiders into moderate and radical camps. They then invite the moderate outsiders to desert their radical brethren and join the political establishment in governing the country. The Reform Act of 1832 and the Parliament Act in 1911 in Great Britain are paradigmatic examples, in which moderate insiders and sensible outsiders join together.

Under the third scenario, in the third ideal type (elitist pathway), subject of the third book, regime-change occurs without the pressure of a massive popular uprising, and we are in presence of an "elite construction". The examples here are the Basic law of Germany and the Constitution of Japan after the second world war

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[3] Ibidem, 42.

II, but also the Constitution of Spain (1978) after Franco's death. The other important case-study is the European Union and its "Constitution" (am I authorized saying so? I think I'm not).

As we see, in this book the research methodology is not a strictly positivistic one. Instead, political science and comparative constitutional law are masterfully related with history, of course, and sociology.

I think the message of this new book is clear. As Italian and European citizens we are now facing huge challenges and crisis, and only an high degree of consciousness allows scholars to develop plausible analysis.

Ackerman's aim is diagnosis not cure, but a correct diagnosis is an essential requirement.

2. The first short remark is about the role played by the judiciary, especially by constitutional and supreme Courts, in the revolutionary dynamic.

Ackerman's approach is not a Court-centered approach, as we are used to read amongst European scholars. These traditional approaches are very sensible to the common law/civil law split, because of the big differences existing between Anglo-American and Continental styles of judicial review. Instead, Ackerman's key point is the problem of the legitimating the regime as a hole in the revolutionary dynamic. In this dynamic, the Courts are important, but not always all-important: «my challenge is to explore the dynamic process through which courts may – or may not – play an increasingly legitimate role in the evolving system over time».

Regimes traveling down the pathways described by establishmentarian and elitist pathways confront very different legitimation challenges from those encountered along the revolutionary track. So judges play different roles in meeting these challenges, and so do Supreme and Constitutional Courts.

Ackerman reports that much recent works obscure these differences, and treat Constitutional Courts as if they were merely engaged in a world-wide conversation about the meaning of "free-speech", "human dignity" and so on.

I join this concern and, if I may, I say that it would be better for scholars to stop with the rhetorical connection to the delights of "dialogue" between constitutional and European and supreme

Courts all over Europe and all over the world[4]. I'm afraid it risks to be just the self-centred illustration of selected values shared only by a "new class" of intellectuals, justices, academics, without any real connection with historical, political, institutional dynamics.

Instead, I will take seriously the role (drawn by Ackerman) of Constitutional or Supreme Courts in the revolutionary dynamic, and especially in time of the "constitutionalisation of charisma". And I'm not sure to share Ackerman's point of view, at least when speaking of Italy.

In what Ackerman calls time 3, in the revolutionary dynamic, as the founding generation (the Framers) dies off, the revolutionary regime faces a "legitimacy vacuum". Usually we have a series of "succession crisis" in which an increasingly confident judiciary will confront an increasingly normalized political class in an intensive struggle to occupy the legitimacy vacuum left by the preceding generation. In many cases the judiciary successfully manages to gain the grudging recognition of its claims from the political branches. That's precisely the rise of the judicial review.

According to Ackerman, after the De Gasperi's failure the Italian constitutional Court emerges from a succession crisis to gain broad political recognition as a privileged legal guardian of the nation's revolutionary principles.

I'm not sure to share this idea and I think the way in which the Italian constitutional Court has gained its role and legitimacy is quite different.

First of all, I think in Italy the constitutionalisation of charisma has been a more shared, cooperative, collective procedure, if I may say so: Alcide De Gasperi has been an extraordinary political leader for Italy, but he was not the only one.

In 50's and 60's the party system in Italy was strong. After all, the antifascist parties, all together, have been the key player of the constitutional revolution; the Parliament's legitimacy was strong too, and the role of the other balancing power, the President of the Republic, has been quite important. So, I'm not sure we had a real "legitimacy vacuum" in time 3.

On the other hand, when speaking about Italian Constitutional Court, the first group of justices fully understood

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[4] See a non-conformist analysis in G. De Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazioni*, (2010).

that the role of this totally new actor would depend more on the concrete acceptance of it by all the other constitutional and political actors than by its legal force within the Constitution. The acceptance of the Court in public opinion, it's legitimacy, was very important, but, more important, I think, was the acceptance of the Court among the other political actors. And the Italian Court had successfully the chance not to confront directly against the political majority and the sitting Parliament in an intensive struggle to occupy the "legitimacy vacuum" left by the preceding generation.

The "vacuum" was in fact occupied by a strong party-system, and from 1956 to 70's the Court rarely considered the constitutional validity of statutes enacted by a post-Constitution Parliament, and till 70's the Court never considered the validity of statutes enacted by a Parliament sitting at the time when the decision was given[5]. Rather, as we know, the Italian Court played a central role in the modernization of our democracy removing from our legal system many unconstitutional statutes dating back to the nineteenth century and, above all, from the Fascist era.

So, Parliament and party-system, on one hand, and constitutional Court, on the other hand, did different jobs, and the Italian Constitutional Court has gained its legitimacy through a way not corresponding with Ackerman's view.

3. The second short remark is about European Union.

Although the subject isn't directly the European Union, this book includes a cultural diagnosis about its crisis.

The leading nations of Europe, Ackerman says, come to the Union along very different constitutional paths. The Constitutions of Germany and Spain are elite constructions. France, Italy and Poland have moved down the revolutionary path. Great Britain emerges from the establishmentarian tradition. Little wonder, the Author concludes, these countries have troubles in finding a common pathway to a more perfect Union, or just to a Union. They don't even converge on the appropriate path to take in resolving the crisis that threaten to rip the Union apart.

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[5] See V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in a Global Context* (2016), 37 ff.

But the main issue is always legitimacy and European Union has a problem with constitutional legitimacy. I would like to underline some Ackerman's remarks on that issue.

As we know, a decade ago the member states of the EU met at the Brussel Convention to launch an appeal to "the Peoples of Europe" to ratify a Constitutional Treaty. I remember discussions on technical, legal and theoretical objections against a European referendum. After all, does an "European People" exist? Can we say "We the people"? That's the right question for Professor Ackerman… (an affirmative answer is now given by M. Luciani, *Il futuro dell'Europa. Note a margine*, in www.nomos-leattualitaneldiritto.it n.2 del 2018).

Anyway, the voters in France and in the Netherland rejected the proposed Treaty. But then, political elites met in Lisbon and hammered out a new agreement which contains many of the same terms and rules, and which currently provides the basic framework for the Union. Scholars, Ackerman says, emphasize the importance of this new Treaty. I should say: not only scholars, Courts all over Europe do the same. Both scholars and Courts usually ignore that Lisbon and others Treaty like Lisbon are elite constructions that avoided, as much as possible, consideration of their merits and contents by ordinary citizens. According to Ackerman: "this decade of evasion is allowing rising protest movements to present the Union as an alien force dominated by harsh technocrats, with Union-politicians serving as pseudo-democratic ornaments"[6]. I know, it sounds brutal, but I think it's true.

So, again, the message is clear. To face huge challenges we are confronting, we need a self-consciousness analysis and a large-scale overview: Bruce Ackerman's book give us both.

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[6] B. Ackerman, cit. at 2, 23.

REVOLUTIONARY CONSTITUTIONALISM AND CONSTITUTIONAL HISTORY

Cesare Pinelli[*]

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

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[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?

DEEPER COMPARISONS

Michele Graziadei[*]

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.

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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

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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

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[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

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[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

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[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

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[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,

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[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

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[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.

BUILDING A CONSTITUTION: REFLECTIONS ON A BOOK BY BRUCE ACKERMAN

Claudio Martinelli[*]

Abstract

This article aims at summarizing and explaining the fundamental issues this book by Bruce Ackerman is based on, and then at purposing some reflections and critical remarks about some concepts and interpretations argued by the Author about constitutional theory and history.

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1. A Book against the Trend

Finally a book that returns to argue on the paths of legitimization of contemporary Constitutions. This is the first immediate and satisfying impression while reading the last book by Bruce Ackerman (*Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*). And the satisfaction goes on to note that this is only the first volume of a trilogy on the subject: *The Rise of World Constitutionalism*. A prospect that promises to investigate for a long time, and certainly in a non-trivial or obvious way, the historical, political and legal modalities, with which a State gives itself a constitutional Charter. As it often happens with all Ackerman's works, this first volume has already been carefully evaluated and is intended to make constitutionalists and political scientists from all over the world debate[1].

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[1] See, for example, N. Zanon, *Some Remarks on Bruce Ackerman's* "The Rise of World Constitutionalism. Volume one: Revolutionary Constitutionalism: Charismatic Leadership", Forum Quad. Cost., (2018) and in this Journal (Vol. 12, 1/2020); M. Hailbronner (ed.), *Review Symposium*, IJCL, 17, Issue 2, 681-694 (2019) and A. Baraggia, *Recensione del libro di Bruce Ackerman,* Revolutionary

So, as mentioned, it is a book clearly at odds with the canons of contemporary constitutional studies at a global level, and for various reasons.

First of all, its methodological approach is based on a interdisciplinary research. The comparative constitutional law, the historical reconstruction and the reinterpretation of political categories, mix and merge with no concern to preserve the purity of each discipline. A kind of approach we are too often forced to observe from the reading of scientific works, particularly in the Italian language, an approach that from the premises is meant to clarify their sectorial position, to define the disciplinary boundaries, to reassure interested readers and professional evaluators on the strict respect of fences, corporately raised not only between branches of knowledge very far apart, but especially among related sectors. Ploughing borderlands continues to be an unpopular exercise, annoying the readers and troubling the writers; while the real trouble is precisely the persistence of this mentality that, willing to pursue an abstract and supposed uniqueness in method and concepts, actually ends up withering the strands of research, often screwing them around stale ideas.

On the contrary, this book by Ackerman does not care about boundaries, it continually crosses them, feeding of the resources each discipline can offer. At the same time, however, it never falls into a kind of methodological confusion, knowing full well that every knowledge is the bearer of specificity that must be respected.

This interdisciplinary nature generates the happy consequence of an anti-formalistic and non-positivistic approach to legal issues. The law, meant in both ways objectively and subjectively, is not treated according to typically technical canons, but is placed within a broader horizon, rich of many other historical, political, social phenomena, and so on, not linked to the technicalities of law. In this way it fully grasps the specificity of constitutional law, understood not as a mere set of rules, but as a real crossroads towards which various aspects of social life converge, which explanation needs plural knowledge. And if this is true for constitutional law in the strict sense, it is even truer if the field of investigation concerns the constitutional comparison,

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Constitutions. Charismatic Leadership and the Rule of Law, *Harvard University Press, 2019*, Oss. Cost., 4, (2019).

specifically proposed in relation to the different ways the Charters are born and consolidated in.

And here we cross a further counter-trend, pertinent to the object of analysis. The book by Ackerman has the merit of reflecting on the historical roots of contemporary constitutionalism. In the framework of the volume, the adjective must be understood essentially as a limit in the field of investigation to the events of the 20th century, an historical period that was as intense and contradictory as ever, luminous and tragic, which saw on the History scene antithetic political philosophies, alternative models of power organization and charismatic personalities able to throw the world into the abyss or help save it. Within this frame our author is concerned with providing some reading keys aimed at interpreting this complexity. In his analysis constitutional Charters are not taken statically, as photographs to be commented in their details perhaps losing sight of the overall vision of the images. Ackerman wonders, instead, how each photograph was taken, who took it, by which techniques and by which constraints. In short, metaphor aside, he draws our attention to the importance of understanding the criteria and the ways that legitimize a Constitution in order to interpret its present, even from a strictly legal point of view.

While turning the attention to these issues, the author attempts a double operation, apparently contradictory but in reality fully coherent: revising and reformulating the conceptual categories to catalogue by the historical processes of formation of a new order (first the State, but also supranational as in the specific case of the European Union), and then placing the analysis of each experience framed in these new categories, showing how elastic these bands could be in order to contain all possible variants and internal variations. In short, a continuous, two-way dialogue between particular and general, between theories and practices, between history and present.

2. Three Ideal-Types of Political Order Building

The core behind the entire trilogy is in these new categories, elaborated by Ackerman to catalogue in three distinct groups the historical processes of formation of the twentieth century constitutional systems. The adjective "new" should not be understood in an absolute sense, neither linguistically nor on the

point of scientific dogmatics. In fact, in the book are used concepts such as "revolution", "leadership", "charisma", "elite", "establishment", which for centuries have been the heritage of all sciences that, from different points of view, study the dynamics of political power, in its constants and in its variables. The new element is instead in the different nuances of meaning given to these expressions and the particular interpretative value of the phenomena the author draws from the categories he proposes and the related case study groupings.

In Ackerman's view there have been three ways to establish a political order, corresponding to three ideal-types:

a) a revolutionary moment;

b) pragmatic insiders establishment;

c) elite construction.

According to this reconstruction, the first scenario «makes a sustained effort to mobilize the masses against the existing regime»; in the second one «the political order is built by pragmatic insiders, not revolutionary outsiders»; and finally we need to examine a third scenario because «regime-change sometimes occurs without the pressure of a massive popular uprising – and this requires the addition of a third ideal-type. Call it elite construction»[2].

The published volume focuses the analysis on the first path but the introductory chapter is eloquent enough to explain the overall meaning of the trilogy.

In my opinion, the main merit of the whole work is to propose a vision of constitutionalism based on specificities and distinctions, at a two-tier. The three *Pathways* are the first level. By their identification, Ackerman draws our attention to the need to investigate how a constitutional process is established not only from the point of view of the legal construction of the institutions, but from the broader point of view of the "legitimacy of power". The different prospective is not a negligible detail since it provides a very different classification of phenomena. For example, the factual perception that a Charter derives from the work of a constituent assembly is not a decisive factor to place it in one of the three paths, nor are the fundamental principles it is based on. In fact, to quote only one of the many possible comparisons, according to Ackerman the Italian Constitution is part of a

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[2] See the *Introduction: Pathways*, pp. 1-3.

historical process of a revolutionary type, and therefore ranks in the group of *Revolutionary moments*[3]; whereas the post-Franchist Spanish Constitution, while also drawn on democratic values and having treasured the constitutional experiences arisen in the immediate World War II, would be the result of a very different process, essentially managed by elites in charge and, therefore, classified as belonging to the third group. As well as the German *Grundgesetz*, mainly because of the decisive conditioning exerted by foreign powers on constitutional choices.

The second level consists of the distinctions drawn within each reference group: a setting that allows the author to make full use of their categories, fleeing from the danger of turning them into parameters and making them really elastic and enveloping, but never at risk of falling into a substantial irrelevance.

In short, a courageous and daring operation, it might be possible to disagree with about the merits, even radically, but that certainly cannot be dismissed as irrelevant.

3. Reflections on the *Revolutionary Moment*

Entering, therefore, on the merits of the distinctions, classifications and interpretations proposed by the book, we have to focalize on the first group, the subject of the book: the *Revolutionary moment*.

The fundamental and essential concept to understand the meaning of this *Pathway* is summarized by the expression *Revolution on a human scale*[4]. Ackerman wants to draw a line between, on one hand, the revolutions pursuing a complete upheaval of political structures, of legal system, of foundations of society and even of anthropological character of citizens[5], and, on the other, moments of political change, certainly also very marked and radical, but that «do not attempt a total makeover of society. They focus on *particular sphere(s) of social or political life*, and

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[3] See some critical remarks about this vision of Italian constitutional history in D. Tega, *The Constitution of the Italian Republic: Not revolution, but principled liberation*, IJCL, 17, Issue 2, 690-694 (2019).

[4] Emphasize the importance of this concept N. Zanon, *Some Remarks on Bruce Ackerman's* "The Rise of World Constitutionalism. Volume one: Revolutionary Constitutionalism: Charismatic Leadership", cit. at 1, 2.

[5] For very deep reflections about the concept of revolution see D. Fisichella, *Rivoluzione, politica e diritto*, in Id., *Concetti e realtà della politica*, 259-273, (2015)

mobilize activists to repudiate currently dominant beliefs and practices within *the target of revolutionary concern* while leaving intact prevailing mores in other spheres»[6].

Therefore, a revolutionary process "with a human face", which pursues change but is respectful of some of the underlying elements that characterize society.

A journey that, in Ackerman's reconstruction, unifies three moments corresponding to three distinct political phases.

"Time one" sees the struggle between the new and the old, between change and repression. If forces of change impose themselves in this struggle, "Time two" will manifest itself, when the charismatic profile of the leaders and their ability to build a solid relationship with the population are decisive: «The experience of common sacrifice establishes a charismatic bond between revolutionary leaders and their followers that legitimates their new Constitutions»[7].

The Constitution is the result of this new relationship between rulers and ruled determined by the fight against the previous regime. In Ackerman's vision, the constitutional text is important but, at this time, it is secondary to the strength of legitimacy that the revolutionary political class draws from that victorious struggle. A legitimization destined to fail as time passes because inevitably the revolutionary generation that made the revolution will eventually disappear: it will open "Time three", with a "legitimacy vacuum". Filling the emptiness will be the task of the second-generation revolutionaries, who will have to consolidate the new order but, of course, will no longer be able to count on a charismatic relationship with the people, because they didn't have a direct role in the fight against the past.

This theoretical scheme, rich of its peculiar characteristics and temporal scans, is lowered by Ackerman into twentieth century history and practice to include some revolutionary processes and to exclude others. Among the latter, of course, are those processes so totalitarian and fundamentalist that they do not have the characteristics of the "human scale", and which in fact have led to the establishment of authoritarian and autocratic regimes. Among the mentioned examples are both communist dictatorships, such as Stalinism and Maoism «who claimed

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[6] See *Chapter One: Constitutionalizing Revolution*, 28.

[7] See *Introduction: Pathways*, p. 8.

"scientific" Marxism as a warrant for the death and degradation of tens of millions in the Party's struggle to assure the triumph of the Working Class», both Hitlerian Nazism, which «repudiated the Marxists' universalistic appeals to the workers of the world, but shared their belief that Party dictatorship was the only serious way to establish Heaven on Earth»[8].

To these negative protagonists the author opposes historical examples that instead have seen the affirmation of a "Revolution on a human scale". He dedicates a chapter of the book to each episode, giving a large amount of space to describe the charismatic figures who, through their political action, have contributed decisively to the regime change. Here, then, are treated in the order chosen by the author, India of Gandhi and Nehru[9], South Africa of Mandela, France of De Gaulle, Italy of De Gasperi, Poland of Walesa[10], Burma of Aung San Suu Kyi, Israel of Ben-Gurion and Iran of Khomeini.

Well, facing a list like this I think it is possible to propose two observations of opposite sign.

On the one hand, we can only admire the effort of classification and synthesis put in place by the author. Ackerman tells us not all revolutions are the same, when it comes to conceptual premises, to the methodology adopted and the results achieved. Therefore, saying "revolution" is not enough to evoke a unique way to achieve a radical change of political regime or form of State.

On the other hand, however, we might express some misgivings about the heterogeneity of the processed category, especially in light of the historical examples recalled to fill it with content. The cases examined are obviously extremely different as for time, because they cover completely different historical moments; geopolitically, because they are located on three continents (Asia, Europe, Africa) that have little in common in terms of philosophical thought, social history and political culture;

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[8] See *Chapter One: Constitutionalizing Revolution*, p. 28.

[9] For a different approach to the Indian constitutional experience see A.K. Thiruvengadam, *Evaluating Bruce Ackerman's "Pathways to Constitutionalism" and India as an exemplar of "revolutionary constitutionalism on a human scale"*, IJCL, 17, Issue 2, 682-689 (2019).

[10] See some critical remarks in T.T. Koncewicz, *Understanding Polish Pacted (r)evolution(s) of 1989 and the politics of resentment of 2015-2018 and beyond*, IJCL, 17, Issue 2, 695-700 (2019).

and with respect to historical context, because every revolutionary moment occurs within the framework of well-defined specificities from nation to nation.

Not to mention the very different consequences of each process in terms of political and legal effects, particularly in relation to the fundamentals and history of constitutionalism. Just think of the abysmal difference between Israel and Iran from any point of view. Although the two countries are located in the same geographical quadrant, outside the proper field of the constitutional rule of law, the first is in fact a State that can be ascribed to the history of constitutionalism, while the second, although formally endowed with a constitutional Charter, it is essentially a theocracy denying the most elementary individual and collective freedoms, often using methods that bring it closer to those totalitarian States mentioned above.

And big doubts also arise in relation to the exemplification of charismatic leaders as leaders of revolution[11]. I take into account the two most problematic cases in my opinion.

Does De Gaulle's decisive role in opposing Nazism and the Vichy collaborationist regime make him a revolutionary? De Gaulle was a French nationalist, proud and energetic, son of an inclusive military culture throughout all the French national history: monarchist and republican, loyalist and revolutionary, conservative and progressive, traditionalist and rationalist, Christian and secular. A soldier who was never in harmony with the party system and parliamentary dialectic, but who always felt, during the war and in the post-war period, to embody the deep spirit of the nation, and to put himself at the service of the homeland precisely to assure it historical continuity and international prestige. Therefore, certainly a charismatic leader, able to establish a bond of trust directly with the people, a military and political leader capable of motivating troops and citizens, but hardly attributable to any category of revolutionary leadership. If anything, for ideological convictions and character disposition, a "restorer" of the lost dignity of the nation. Paradoxically, it could be argued that historically De Gaulle was a revolutionary for Algerians, for his decisive role in the recognition of the independence movement in the wider framework of

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[11] For some remarks about how it is difficult to define what is a charismatic leader see A. Baraggia, *Recensione del libro di Bruce Ackerman*, Revolutionary Constitutions. Charismatic Leadership and the Rule of Law, cit. at 1, 5.

decolonization, but from the French point of view his unique address was to preserve the homeland from the very serious risks of an authoritarian drift that the Algerian crisis was leading to.

Finally, for us Italians, I think it is very difficult to think of the figure of Alcide De Gasperi as a revolutionary, although with a human face. He is undoubtedly the most relevant political figure for post-war reconstruction, from all points of view: political, material and moral. A sincere democrat that had never come to terms with the previous regime, who knew how to manage the institutional and governmental transition, who, in the context of the Yalta balances, had the merit of consolidating as Western and Atlantic the geopolitical position of Italy, who laid the groundwork for the construction of European integration. His political action was never based on the claim of direct personal involvement in the end of Fascism, aware the historic turning point had been determined by the war power of the Anglo-American Allies and by action side-by-side of the various formations of the Italian Resistance to Nazi-Fascism. His political genius never resorted to charismatic elements because it was not his dimension. He was not a spellbinder of crowds, a rallyer in the square, a tribune of the plebs. He was a politician from Trentino, serious, demure and reserved, imbued with the characters of the mountain man who grew up in the Habsburg Empire. Deeply religious but firmly secular in his political action. He was even able to say many no, even to the Pope. In short, the opposite of modern populist leaders, an expression of a world that probably no longer exists, unfortunately. Therefore, a giant of Italian politics, by far the most eminent figure of the years between 1945 and 1954 (the year of death), a "builder" of the new constitutional order and a "reconstructor" of the Italian economic and social fabric.

4. The British Constitution as the most important example of *Pragmatic Insiders Establishment*

Ackerman calls the British Constitution as a paradigmatic example of pragmatism by the insiders to lead the political change. Particularly, he describes the moment of the *Great Reform Act 1832* as paradigm of this way. And all the passages from constitutional monarchy to the parliamentary monarchy are full of legislative reforms and there are no break through moments. One of the most important is *Parliament Act 1911*.

It is true that the English constitutional history is an history of transformations and evolutions. I completely agree with the author when he writes: «These great reform statutes seem so different from revolutionary Constitutions that scholars often deny that the British have a constitution at all. This claim might make sense if "constitutionalism" designated a "one-size-fits-all" ideal-type. But this is precisely what I deny. Countries travelling down the establishment track do indeed place great value on achievements like the Parliament Act»[12].

In Ackerman's view there is a correspondence between different types and different problems. About the second ideal-type the most important problem is the *Dis-Establishment*.

Ackerman argues that in this type of constitutionalism «there is no room for judges to invalidate legislation by claiming that it violates fundamental principles established "by the People" at the Founding moment – for the simple reason that no such revolutionary transformations are recognized as legitimate. Instead, talk of "popular sovereignty" is dismissed as a legal fiction concealing the crucial role of statesman-like elites in the democratic process. On this understanding, voters confront competing Election Manifestos, prepared by leaders of rival political parties, describing their action plans if they gain support of the voters at the next election. When their party does indeed triumph on election day, its leaders have *earned* the democratic right to enact its manifesto into law»[13].

I don't agree completely with the distinguish author about this sentence, particularly if it is linked to the British case of referendum, as it is done in the book.

The referendums have been accepted for a long time in the British constitution as a tool for resolving political-institutional issues. In 1890 Dicey published an article in which affirmed the theoretical and practical compatibility of the appeal to popular pronouncement with the foundations of the British constitution and its form of government based on supremacy of Parliament[14]. Dicey's opinion was based on two insights: the compatibility between representative and direct democracy is linked to the fact that the practical feasibility of the referendum remains in the discretionary determinations of Westminster; the popular

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[12] See *Introduction: Pathways*, p. 5.

[13] See *Introduction: Pathways*, p. 10.

[14] See A.V. Dicey, *Ought the Referendum to be introduced in England?*, in *Contemporary Review*, 57, 489-511 (1890).

referendum should be used only where the political system, facing up particularly delicate institutional crossroads, is unable to keep widely shared decisions. And actually since the Seventies of the twentieth century it has been widely practiced in these terms.

Therefore, I believe we can say that in the British Constitution there is not a dualism between representative and direct democracy because the most important decisions to resort to this tool remain inside the relationships between Parliament and Government.

About the nature of Brexit referendum the starting point is that the Parliament addresses the electoral body by delegating, in the specific case, a power that belongs to it[15]. And it does so by asking voters for a political pronouncement which content will direct the subsequent determinations of the representative bodies, primarily the Parliament itself. It is, therefore, a very strong political decision.

As it is well known, the Brexit affair after the celebration of the referendum has triggered a complex judicial question. In the so-called *Miller Case* the Supreme Court of the United Kingdom widely argued about the nature of referendum.

Well, at a crucial point the effects of each particular referendum are said to depend on the provisions contained in the law establishing the referendum itself[16]. This rule may regulate the legal consequences of the popular consultation or may refrain from doing so. For example, both in the case of the first Brexit referendum, in 1975, and in the second one in 2016, the law did not regulate the consequences of a result in favour of Brexit. While, for example, in the case of the electoral system referendum in 2011, the mandatory profile of the popular vote was previously governed by the Parliament, which had written a law establishing the electoral rules of the new AV system, to be applied only if this option had prevailed. But it is clear that this procedure could not be followed in the two consultations concerning the Brexit issue, since the concrete consequences of that decision did not belong to the free determinations of Westminster but were entrusted to the negotiating table with the European institutions.

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[15] On Brexit referendum see, if you wish, C. Martinelli, *L'Isola e il Continente: un matrimonio d'interesse e un divorzio complicato. Dai discorsi di Churchill alle sentenze Brexit*, in Id. (ed.), *Il referendum Brexit e le sue ricadute costituzionali*, 9-62. (2017).

[16] See [2017] UKSC 5, par. 118.

Therefore, the Court observes that «Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation»[17]. Therefore, the political decision of the electoral body, to produce concrete effects on the legal system, subsequently needs transforming in juridical acts.

In conclusion, I believe that in the modern British Constitution the use of the referendum can be criticized in terms of political opportunity but I do not think it could be the origin of a constitutional crisis. The referendum can provide a lot of consequences and it is possible to consider them as constitutional crises, but they are consequences of a big political mistake and not a direct consequences of the use of this tool. In fact, the same problem could be provided by a parliamentary decision to leave the European Union.

So, in this context, the future of British Constitutionalism is full of question marks, someone very dangerous too. I hope it will not run towards a revolutionary moment, but it will remain the most important example of the second ideal-type.

5. The European Union and the *Elitist Pathway*
Among the examples of building a new order through the third ideal-type, the model called *elite construction*, Ackerman inserts the European Union.

The author notes that the fundamental steps of European integration have been drawn up and decided only in a context of agreements between the political classes. This specific character is evident in comparison with the training process of the United States. The latter experienced in the 18th century their decisive *revolutionary moment*, and «from the Founding onward, the revolutionary paradigm has remained central to the American experience – with mobilized political movements repeatedly transforming fundamental principles during Reconstruction, the New Deal, and the Civil Rights Revolution»[18].

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[17] See [2017] UKSC 5, par. 121.
[18] See the *Introduction: Pathways*, p. 22.

This historical element has solved forever the problem of the definition of *legitimacy* in the USA, while the European Union has always suffered from it precisely because of the lack of popular involvement, repeated over the decades.

In addition, it should be considered a second reason of differentiation with respect to the North American experience. The EU is made up of States that have had a completely different training process, as is evident precisely from the varied membership of the three ideal types proposed by Ackerman. Among others, as we know, France and Italy fall into the first, the United Kingdom is placed in the second, Germany and Spain in the third. Of course, the United States does not know this kind of heterogeneity and thanks to the common paradigm they are able to find a unified direction to cope with problems and critical moments. On the contrary, the layered unevenness that the European Union has always suffered is the key point in understanding the difficulties it faces in dealing with crises: «Since member States emerge from different paradigms, they don't even converge on the appropriate path to take in resolving the crises that threaten to rip the Union apart – with Germany, France/Italy and Great Britain predisposed to respond very differently to common problems»[19].

According to Ackerman, all these peculiarities make the European Union a "unicum" in the panorama of the great institutional federations of history, but they also contribute to undermining its solidity. The European political classes do not understand that as long as they continue to think in terms of summit agreements and not of people's involvement in the most important decisions, the Community institutions will continue to be weak because they are considered distant precisely by those peoples they would like to represent. An example of this detachment are the Lisbon Treaties, because once again an expression of the exclusive will of the elites, with an aggravating factor: in that case even giving the impression they wanted to circumvent the substance of the rejection of the European Constitution caused by French and Dutch referendums in 2005[20]. The outcome «is allowing rising protest movements to present the

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[19] Idem.

[20] See, in accordance with this picture, N. Zanon, *Some Remarks on Bruce Ackerman's* "The Rise of World Constitutionalism. Volume one: Revolutionary Constitutionalism: Charismatic Leadership", cit. at 1, 5.

Union as an alien force dominated by harsh technocrats, with Union-politicians serving as pseudo-democratic ornaments»[21].

However, in the face of these radical criticisms, I think it is fair to raise some doubts about their correspondence with reality. First of all, historically: is it realistically conceivable that the process of European integration could begin in the 1950s and proceed in the later decades following completely different tracks from those travelled? Agreements between elites, of course, but all political elites belonging to democratic States founded on the principle of popular sovereignty, and therefore strongly representative of the peoples who are called to govern.

It is true that the political current events of recent years have seen the emergence of political movements and parties that are in stark contrast to the policies of the European Union, in particular on issues such as budgetary discipline and monetary stability, who have managed to put their paradigms at the centre of the debate, namely that the narrative according to the EU is the primary cause of the economic difficulties that large areas of the continent are facing.

But we must not forget that even this critical approach is the product of one or more elites, of course sovereignist and populist, that in democratic dialectic use these paradigms to legitimize themselves before public opinion and acquire shares consensus on the electoral market, as Joseph Schumpeter would have said. A fully legitimate and coherent operation, of course, but that shows nothing about the veracity of the reconstructions and opinions that are proposed.

Struggles among elites, indeed, as always and inevitably.

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[21] See the *Introduction: Pathways*, p. 23.

THE ROLE OF "CHARISMATIC LEADERSHIP" IN THE FUTURE OF WORLD CONSTITUTIONALISM

Carla Bassu[*]

Abstract

Bruce Ackerman does not support the validity of a «one size fits all constitutionalism» and the facts prove him right. We have been witnessing to the deterioration of the structure and the substance of the constitutional liberal democracy, which has gathered place in countries that have generally been considered as consolidated democracies. Ackerman's innovative proposal of a Popular Sovereignty Initiative is important, because it is aimed to value the People's role in the decision-making process, preventing the risk of exploitation by more or less charismatic leaders. It is oriented to give the People the importance they deserve in determining the orientation of the constitutional order, within the framework of constitutionalism.

"*Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*"[1] is an intense and thought-provoking book and that is no surprise, since reading Bruce Ackerman's production is always an enriching experience.

I found very powerful and inspiring the general reflection on the rise of world-wide constitutionalism and on the imperfection of the concept of constitutionalism, as «one size fits all ideal type».

Every section gave new, interesting gateways about the genesis, consolidation and evolution of «Revolutionary Constitutions».

The three constitutional pathways construction is extremely evocative and reading through the chapter gave me a lot to think about.

Ackerman notes how leading countries of Europe emerge from different constitutional pathways and claims that countries that have travelled down the three different paths of constitutionalism confront very different crisis. Moreover, since

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

constitutionalism involves the imposition of significant legal constraints on top decision makers, the book points out that any autocratic regimes have found «the rule of law» an extremely useful device in governing their societies. Ackerman notices that 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.

Among the many, suggestive issues covered by the book, I'd like to dwell on the theme of Charismatic Leadership. I was impressed and fascinated by the analytical, compared consideration of the personality and vision of leaders who played a key role in revolutionary constitutionalism. It was interesting and, at times surprising, to notice analogies and differences pointed out by Ackerman in leading figures like De Gaulle, De Gasperi, Nehru, Walesa, Ben-Gurion, Mandela, Khomeini. In particular, I found illuminating the study of the impact of leaders' choice to constitutionalizing charisma or not on the evolution of the constitutional order.

1.   In this context, I would like to focus on the argument affirmed in the chapter dedicated to the alleged «American Exceptionalism». Ackerman suggests the American case to be considered in a new perspective, comparing it to the revolutionary experiences.

In particular, I would like to emphasize the comparison made between President Roosvelt's effort to constitutionalize social democracy in America and similar attempts such as Nehru's in India and Ben-Gurion's in Israel.

Ackerman notices that Roosvelt, «in contrast to Nehru, refused to codify the New Deal's sweeping assault on laissez faire capitalism in a series of formal constitutional provisions elaborating foundational principles of social and economic equality» (p. 393). On the other hand, «like Ben-Gurion, he feared that judges would use their power of "interpretation" to transform these new textual commitments into new juridical weapons against the New Deal vision of the welfare state. Rather than write things down on paper – says Ackerman – it was better to force courts to recognize that they suffer from a profound "counter-majoritarian difficulty", which required them to defer to the political branches» (p.393).

Ackerman explains in detail how Roosvelt's refusal to lead a popular campaign for the proposal and ratification of New Deal

Amendments has had a profound impact on the next sixty years of American constitutional development,

I was impressed, and indeed persuaded by the relation individuated between Presidents Roosvelt and Trump's Administration. Actually Ackerman identifies a continuity in the attitudes of some of the most remarkable American Presidents who challenged the status quo in the attempt of promoting constitutional change. In this perspective, George Washingthon, Abraham Lincoln, Franklin D. Roosvelt and – yes – also Donald Trump - look like each other because even, if they are deeply different in their approach to the Presidential Institution and in their use of power, they all wanted to represent «new beginnings» in constitutional history.

So Donald Trump can be seen as a «revolutionary outsider», Bruce Ackerman tells us (see chapter. 13), because he is determined to sweep away the old insider elite in the name of the American People.

He can be identified as a Charismatic Leader who explicitly reported to the American People his intention to use the presidency to «drain the swamp» in Washingthon D.C.; he has no interest in elaborating the constitutional implications of his position. He relies on the opportunities connected to the appointment of Supreme Court Justices (not an easy operation…).

Donald Trump shows a sort of impatience towards constitutional boundaries and he has a peculiar concept of popular sovereignty which is supposed to legitimate any presidential action.

Moreover, President Trump speaks directly to the People, making extensive and unconventional use of social media, removing any bureaucratic or diplomatic filter in spreading his message around. And this is somehow flattering to the mass who feel important, being the straight interlocutor of the President. This sort of *one on one telematic relationship* between the Executive and the People makes persons who usually consider themselves as outsiders to the institutional dynamic feel powerful. But they are mistaken. Trump's confidentiality to the electorate has nothing to do with enhancing popular sovereignty.

Popular sovereignty is something very different form tweeting (and Ackerman with his proposal of Popular Sovereignty Initiative explains it very clearly).

But this kind of misunderstanding of the concept of popular sovereignty is not an isolated case. Many «Charismatic Leaders» nowadays adopt exactly the same approach and we have some good example of it in Italy as well.

The question is: what are these leaders going to do with their "charisma"? Is such "charisma" going to be somehow costitutionalized?

2.   Bruce Ackerman does not support the validity of a «one size fits all constitutionalism» and the facts prove him right. We have been witnessing to the deterioration of the structure and the substance of the constitutional liberal democracy, which has gathered place in countries that have generally been considered as consolidated democracies. That's what Huq and Ginzburg called *constitutional retrogression*[2], which is an incremental erosion that happens simultaneously to three institutional predicates of democracy: competitive elections; rights of political speech and association and the rule of law.

In general, it can be said that we have been assisting to a sort of intolerance towards some fundamental constitutional principles that have been hard achievements for constitutionalism. Even here in Italy (and I don't think that our country is a case of constitutional retrogression) we have lately heard some political leader talk about removing from our constitutional system cornerstones of constitutionalism such as the prohibition of a binding mandate and someone has even figured out the perspective of abolishing the Parliament which is seen as not really necessary since the people should be involved directly in any public decision so that no representative filter should be needed (statement by Davide Casaleggio).

That's something that does not properly fit in with constitutionalism.

Such ideas would have not came to mind to anyone few years ago, while now they come together the wave of populistic movements that have grown up so fast and became established in Europe and not only. Such ideas do find breeding ground in the electorate. So, can we say, with the intention to be provocative, that

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[2] A. Z. Huq, T. Ginzburg, *How to Lose a Constitutional Democracy*, UCLA Law Review, (2017).

the People - or at least a significant part of it – is somehow disappointed by constitutionalism?

Has constitutionalism became an elitarian ideal type?

That is the message that some political movements worldwide seem to be wanting to send. And it is a worrying message. What seems to be happening is that principles of constitutionalism, designed as guarantees for the safeguarding of constitutional democracy, are interpreted and reported as limits to popular sovereignty.

But in a constitutional democracy popular sovereignty is not absolute, nor unlimited. On the contrary it is mitigated by boundaries aimed to avoid the violation of the essential core of the Constitution itself.

We don't need here to remind the harms caused by the indiscriminate interpretation of popular sovereignty in the rise of authoritarian regimes.

That's why I think that Ackerman's innovative proposal of a Popular Sovereignty Initiative is so important, because it is aimed to value the People's role in the decision-making process, preventing the risk of exploitation by more or less charismatic leaders. It is oriented to give the People the importance they deserve in determining the orientation of the constitutional order, within the framework of constitutionalism.

DEMOS CREATION, RELIGION, AND FEDERALISM IN THE G-20 CONSTITUTIONAL DEMOCRACIES

Steven G. Calabresi[*]

Abstract

The article supplements Professor Ackerman's account of the role of Mass Popular Movements in his book "Revolutionary Constitutions" by arguing that these movements did more than simply constitutionalize their charisma. In the Author's view, they also created the demos or nation state, which became a constitutional democracy. Before one can have a nation state or a constitutional democracy one must have a nation or a demos. Strikingly, in four of the nation states, which Professor Ackerman studies Mass Popular Movements created the demos or nation state, which then became a constitutional democracy. The Mass Popular Movements, which Professor Ackerman studies thus engaged in nation-state creation as well as in the constitutionalization of their charism. In the course of discussing this process of demos creation, the Author will also explain why some constitutional democracies emerge as genuine nation states and others emerge as truly federal regimes.

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1. Introduction

Professor Bruce Ackerman's new book, "Revolutionary Constitution" [1] provides a brilliant account, relying on extensive

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

original research, of the rise to power of Mass Popular Movements in a series of western democracies and of their effective decision to constitutionalize their charisma in a lasting written constitution with working systems of checks and balances and with judicial review of the constitutionality of legislation. This book offers the only English-language treatment of the emergence of constitutional democracy in many of these countries. Professor Ackerman's account in Volume I will ultimately be supplemented by the emergence of new democratic constitutions as a result of an Elite driven process in Volume II and as a result of an Evolutionary process in Volume III. Professor Ackerman's three book series will be the leading university press monograph in the nascent field of Comparative Constitutional Law.

My comments herein supplement Professor Ackerman's account of the role of Mass Popular Movements in Volume I by arguing that these movements did more than simply constitutionalize their charisma. In my view, they also created the demos or nation state, which became a constitutional democracy. Before one can have a nation state or a constitutional democracy one must have a nation or a demos. Strikingly, in four of the nation states, which Professor Ackerman studies Mass Popular Movements created the demos or nation state, which then became a constitutional democracy. The Mass Popular Movements, which Professor Ackerman studies thus engaged in nation-state creation as well as in the constitutionalization of their charism. In the course of discussing this process of demos creation, I will also explain why I think some constitutional democracies emerge as genuine nation states and others emerge as truly federal regimes.

Two political scientists have written about the problem of demos creation recognizing that before one can have majority rule in a democracy one must know what the size of the relevant democratic unit is. Robert A. Dahl & Edward A. Tufte, Size and Democracy (1973); Alberto Alesina & Enrico Spolaore, The Size of Nations (2003). I have previously written about this issue in: Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from Law*, 1;-/23-189 in Nomos LV Federalism and Subsidiarity (James E. Fleming & Jacob T. Levy eds. 2014) and in Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 Florida L. Rev. 1 to 45 (2011). It is absolutely essential that one establish what the demos is before one can have majority rule within it in a constitutional

democracy. Four of Professor Ackerman's Mass Popular Movements engaged in demos creation, as well as in constitutionalizing their charisma in a written constitution and Bill of Rights enforceable by a working system of checks and balances with judicial review of the constitutionality of federal and state legislation and executive acts.

Part I below discusses the process of demos creation in the countries, which Professor Ackerman studies. In Part II, I will discuss the process of demos creation in the remaining G-20 constitutional democracies, which Professor Ackerman does not discuss in "Revolutionary Constitutions". I seek here to explain why some constitutional democracies emerge as genuinely federal regimes and others emerge as genuinely unitary regimes. Finally, in Part III I will offer some thoughts about what is normatively desirable in demos creation and in the creation of meaningful federal regimes.

2. Demos Creation in the Regimes Discussed in: "Revolutionary Constitutions. Charismatic Leadership and the Rule of Law "

In his volume on Revolutionary Constitutions, Professor Ackerman persuasively argues that Mass Popular Movements constitutionalized their charisma in: India; South Africa; Italy; France; Poland; and Iran. I totally agree with Professor Ackerman's thesis but think these Mass Popular Movements also engaged in demos or nation-state creation. I will briefly discuss this process in the countries Professor Ackerman's new book discusses to show how powerful the Mass Popular Movements were that he describes. In doing this, I will discuss each country in the order in which Professor Ackerman discusses it.

A.   India

Imperial British India consisted of what are today four independent nation states: 1) the Republic of India; 2) the nation of Pakistan; 3) the nation of Bangladesh; and 4) the nation of Myanmar. British India contained, in addition to a very large number of states, 555 Princely Kingdoms, in which a hereditary Indian Prince governed

domestic affairs while the British Empire governed foreign affairs.[2] The Princely States occupied the territory of approximately 48% of British India, which also had huge Hindu and Muslim populations living for the most part peacefully side-by-side.

Professor Ackerman describes admirably how the Mass Popular Movement of the Indian Congress Party, led first by Mahatma Gandhi and then in 1947 by Jawaharlal Nehru, created the nation of India in 1947. What I want to stress here is that the Congress Party not only constitutionalized its charisma, as Professor Ackerman proves, but it also created modern boundaries of the Republic of India within British India, while not including the areas of British India that ultimately became the separate nations of Pakistan, Bangladesh, and Myanmar. The Mass Popular Movement of the Congress Party that created the predominantly Hindu nation of the Republic of India in 1947 found itself in competition at that time with another Mass Popular Movement, the All-India Muslim League, led by Muhammed Ali Jinnah, which founded the Islamic countries of West and East Pakistan in 1947, with East Pakistan eventually becoming its own independent nation state, Bangladesh.[3]

It is important to note that the process of demos creation of India and Pakistan in 1947 led to a war between those two countries with huge casualties and with huge numbers of Hindus leaving Pakistan to move to India and huge numbers of Muslims leaving India to move to Pakistan. An estimated 11 million refuges moved from India to Pakistan or vice versa in 1947 and possibly 1 million people died in the Indo-Pakistani war of 1947.[4] Demos creation by the Mass Popular Movement of the Congress Party of India was a very bloody affair, but it was necessary to create the constitutional democracy of India, which exists today.

Because India was born in the dire emergency of a war it has a stronger central government and weaker states than do most federations.[5] It is best described as being a quasi-federal regime.[6] One of the earliest steps, which the Congress Party took was to abolish

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[2]A. K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (2017).
[3]S.Aziz, *The Constitution of Pakistan: A Contextual Analysis* (2018).
[4]Thiruvengadam, *supra* note 2 at 30.
[5]Id., at 77-81.
[6]K.C. Wheare, *Federal Government* (1946).

those of the 555 Princely States, occupying 48% of the country, which ended up on the Indian side of the India-Pakistan international border.[7] The abolition of these Princely States was yet another act of demos creation by the Indian Congress Party. The Congress Party redrew all of the Indian state boundary lines, trying to put separate language groups in separate states of India, and India today has 29 states and 11 union territories. India, today, is not plagued by any serious separatist movement so the act of demos creation in 1947 was highly successful. India does experience religious strife between its huge Hindu majority and its small Muslim minority, and I will address that topic in Part III below.

The Indian government is usually describe as being quasi-federal because it has a strong central government born during the Indo-Pakistani War of 1947 and weak states. Since the year 2000, the Indian states have been steadily gaining power making India more federal than it once was. India today is 79.8% Hindu; 14.2% Islamic; 2.3 % Christian; 1.7% Sikh; and .7% Buddhist. There are also small Jain and Zoroastrian communities in India. Because India's Hindu population is so large, real federalism has never been an imperative in India.

The bottom line on India, then, is that the Mass Popular Movement, which constitutionalized its charisma after Independence in 1947, also engaged in demos creation by: 1) separating India from Pakistan in a very bloody war in 1947; and 2) by abolishing the 555 Princely States, which had existed under the British Empire, but which ceased to exist in independent India.

B.   South Africa

The Mass Popular Movement of the African National Congress Party (ANC) led by Nelson Mandela constitutionalized its charisma in the democratic constitution of South Africa.[8] But, before that could happen, the ANC faced two demos creation issues. The first issue was whether the white South African community should have its own small predominantly white nation state centered perhaps around Cape Town, while the rest of what had once been Imperial British South Africa became an all-black African nation state. The second issue was

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[7]Thiruvengadam, *supra* note 2, at 52; 74-79.
[8]H. Klug, *The Constitution of South Africa: A Contextual Analysis* (2010).

whether the Zulu nation, which had its own Bantustan under the apartheid regime, which had governed South Africa from 1948 to 1992, should be either an independent Zulu nation state or at least a highly autonomous province.[9]

Nelson Mandela, and the ANC, were opposed to either of these sub-divisions of South Africa and wanted to create one multi-racial South African demos. They prevailed in doing so over the opposition of the Zulus, and today's South Africa is: 80.2% Black; 8.8% Colored; 8.4% White; and 2.5% Asian. Happily, and thanks largely to Nelson Mandela's heroic leadership, the multi-racial republic of South Africa came into existence in 1996 with no loss of life due to civil war and no migration of minority communities. Over the last twenty-two years, however, a significant number of White South Africans have emigrated to the United States and to other White nations that were once part of the British Empire. There have been no significant separatist movements in South Africa since 1996 so the ANC's act of demos creation was a huge success.

The South African Constitution does set up a quasi-federal regime with an all-powerful national government. The country is often referred to as "The Rainbow Republic" because of its racial and ethnic pluralism. South Africa has nine Provinces, which each send ten delegates to the National Council of Provinces, which is the weak upper house of the South African bicameral legislature.[10] South Africa is: 73.2% Protestant; 14.9% secular; 7.4% Catholic; 1.7% Muslim; 1.1% Hindu; and 1.7% of other faiths. There are thus no significant religious divisions in the country.

The Mass Popular Movement of the ANC led by Nelson Mandela not only constitutionalized its charisma in South Africa; it also created the demos of South Africa within its British colonial borders. Separate White or Zulu nations could in theory have been created in the 1990's, but this subdivision of colonial South Africa did not occur.

C.   Italy

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[9]Id., at 8, 17, 101, and 188.
[10]Klug, *supra* note 8, at 153-186.

As Professor Ackerman explains, the Mass Popular Movements of the Italian resistance against fascism created the Post-World War II Constitution of the Republic of Italy.[11] Since Italy had lost World War II, Italian claims on Italian speaking portions of Austria; Croatia; and Switzerland were a non-starter. Moreover, Italy is today: 91.5% ethnically Italian; and only 8.5% others. Italy has been a nation state since the Unification of Italy in the mid-Nineteenth Century. Thus, superficially the issue of demos creation was not on the table when the current Italian Constitution was written after World War II.

If one looks more deeply, however, at the Italian nation state, it becomes apparent that Italy, like Germany, has many regions, which for a very long time were governed independently of one another and which have a rich and storied history. These regions include: 1) Venice, which was an independent republic for a thousand years from 697 A.D. until 1797 A.D. when Napoleon disbanded it; [12] 2) Piedmont Savoy, which was for centuries a self-governing state; 3) the so-called Kingdom of the Two Sicilies, which included southern Italy and the Island of Sicily and which was independent from 1815 until 1860; 4) the Republic of Florence, which was for a time an independent republic between 1115 A.D. and 1532 A.D.; and 5) the area from Rome to Bologna and Ferrara, which was a part of the Papal State before that entity was confined to the Vatican and to St. Peter's Cathedral. These independent Italian city states had at least as long and as glorious a history as independent entities as did the independent German states of the Nineteenth Century like: Bavaria, Saxony, Hanover, and Prussia. The Republic of Venice for example controlled most of the Greek Islands and kept the Turks out of Europe, while the Republic of Florence was the home of the Renaissance.

German constitutions from the Imperial Constitution of 1871 to the Weimar Constitution to the Basic Law of 1949 all set up federal systems of government that recognized that the German demos included many state demoi that required independent and real powers.[13] Italian Constitutions from the *Statuto Albertino*, under which

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[11]Valerio Onida, et al., *Constitutional Law in Italy* (2013); James L. Newell, *The Politics of Italy* (2010); Vittoria Barsotti, et. al, *Italian Constitutional Justice in Global Context* (2015).

[12]W.H. McNeill, *Venice: The Hinge of Europe*, 1081-1794 (1974).

[13]W. Heun, *The Constitution of Germany: A Contextual Analysis* 1-24 (2011).

Italy unified in the 1860's, to the post-World War II Constitution of Italy have all in contrast created all-powerful national governments with no meaningful system of federalism at all. Italian unification and German unification were both liberal, anti-feudalist political movements of the Nineteenth Century, and yet Germany has today, and has always had a federal regime of many demoi within a larger federal demos, while Italy has today, and has always had, an all-powerful national government, even though it contains entities like Venice, which were independent republics for one thousand years. What explains this difference between Italy and Germany?

Daniel Ziblatt, Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism (2008) argues that the key difference between the 19th Century German states and their Italian counterparts is that the former had much more developed state apparatuses and bureaucracies than did the latter. Ziblatt makes a persuasive case on this point, but I think there is more at work here than he realizes

For reasons I will set forth in the remainder of this essay, I think the reason Italy is a unified national state demos and Germany is a federal republic demos with many state demoi has to do with religion in the two countries and the more entrenched state bureaucracies in the German Lander as compared to the Italian regions. Italy is: 74.4% Catholic; 22.6% irreligious; and 3% other. Germany, in contrast, is 59.3% Christian, but the Christian majority is divided into roughly equal groups of: 1) Lutheran and Calvinist Protestants united in the Evangelical Church of Germany; and 2) Roman Catholics. In addition, Germany is: 34.4% irreligious; 5.5% Islamic; and .8% other religions. The big difference then between Germany and Italy is that Germany is very pluralistic with respect to the religious beliefs of its people whereas Italy is monolithically Catholic or secular.

These differences are deeply rooted in the histories of Italy and of Germany. The Italian City states prior to the liberal, anti-feudal unification of Italy in the Nineteenth Century were all Catholic or secular. The German states, however, which made up the Holy Roman Empire were all either Catholic, like Bavaria, or Protestant, like Prussia. Under the famous Peace of Augsberg, in 1555, which ended the Thirty Year War in Continental Europe between Protestants and Catholics, a rule was adopted of cuius regio, eius religio. This rule

meant that the religion of the Prince of a German state determined the religion of that prince's subjects.[14] This was the first of a series of settlements of Catholic-Protestant wars in Europe, which only came to a final end with the Peace of Westphalia in 1648.

In other words, when Germany and Italy unified in a classical liberal, anti-feudal nationalist revolution in the mid-Nineteenth Century, Germany maintained federalism because some of its states were Protestant and others were Catholic whereas Italy did not maintain federalism because all of Italy was either Catholic or secular. It was in part the need to accommodate religious pluralism, which led to federalism in Germany and to a unitary nation state in Italy. I will defend this proposition further below. Constitution writers in Germany and Italy after World War II opted for federalism in Germany and a unitary government in Italy because this had been the pre-World War II practice in those respective countries.

The Allied powers made Germany totally redrew its state boundary lines chopping the militaristic mega-state of Prussia into small pieces, but it retained the historical German preference for federalism.[15] Italy acknowledged the existence of its various regions after World War II, but it gave them no power at all as demoi within a larger demos because they had not had power under the pre-World War II *Statuto Albertino*. In addition, the Allied victors in World War II pushed for federalism in Germany, which country they feared, but not in Italy, which country they did not fear.

The Italian Mass Popular Movement described by Professor Ackerman thus pushed for a unitary nation state demos in Italy, and that is what Italy today has. Italy has a political party, the Northern League, which has pushed for real federalism, and at times for the secession of the Po Valley area, for thirty years now, but the Northern League has not come remotely close to realizing its objectives.

D.   France

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[14]W. Heun, *The Constitution of Germany: A Contextual Analysis* (2011).

[15]Martin Kitchen, *A History of Modern Germany: 1800 to the Present* (2006); Gen. Lucius D. Clay, *Decision in Germany: A Personal Report on the Four Crucial Years that Set the Course of Future World History* (1950). For an account of modern German constitutional law on federalism, see Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed. 2012).

Professor Ackerman describes how a Mass Popular Movement of fighters in the resistance against the Nazis formed the French Fourth Republic and sadly that Republic did face a demos definition issue, which strained it quite badly followed by a second demos definition issue, which destroyed the Fourth Republic and ushered in the Fifth Republic. [16] Demos definition issues arise for a constitutional democracy because one has to know what the demos of the constitutional democracy is within which a majority of the people can elect a government.

The first demos definition issue, which the French Fourth Republic had to address was a drive for national independence in the French colonies of Indo-China and most especially in Vietnam. The Labour government of Clement Atlee of the United Kingdom of Great Britain and Northern Ireland deliberately abandoned the Imperial Regime of British India in 1947 without a fight. Prime Minister Atlee disapproved of British colonialism on moral grounds, and he wanted to spend British taxpayer funds on a new National Health Care plan and not on fighting colonial wars half way across the world. When India asked for its independence after World War II, Atlee granted independence to India and Pakistan so fast that a war between those two countries ensued over where the border between them lay.

The French Fourth Republic, however, did not follow this approach at all with respect to the French colonial holdings in Indo-China and a long war of independence in that area began. The French military forces were defeated in this war in a decisive battle at Dien Ben Phu between March and May of 1954, and the French were compelled to surrender and withdraw their forces from Vietnam. The war was expensive, long, and unpopular in France, especially after the French lost. This military defeat stained the reputation of the government of the Fourth Republic.

A far more serious demos definition issue then around in French colonized Algeria, which had been part of France since the early 19th Century. Nearly, 2 million French citizens lived in Algeria, and there

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[16]Sophie Boyron, *The Constitution of France: A Contextual Analysis (2013)*; Martin A. Rogoff, *French Constitutional Law: Cases and Materials* (2010); John A. Rohr, *Founding Republics in France and America: A Study of Constitutional Governance (1995)*; John S. Bell, *French Constitutional Law* (1992).

were many additional Algerians of partial French descent. Abandoning Algeria was politically a wrenching process because so many French citizens lived there along with people of mixed French and Algerian heritage. By early 1958, the Algerian rebels, who sought independence for their country, had so overwhelmed the French military that it began to look as if French forces would be driven into the sea.

There were so many French Algerians and Algerians of partial French descent who wanted Algeria to remain French that the conflict was in essence a civil war as well as a revolutionary war. French Algeria sent representatives to the French parliament and leading French military officers in Algeria threatened to revolt and topple the Fourth Republic unless retired World War II hero Charles De Gaulle was brought in to run the French government. The rebellious French Algerian military officers seized the island of Corsica and were threatening to seize Paris when, on May 29, 1958, De Gaulle agreed to take over the government so long as he could write a new presidential, separation of powers Constitution for France.

De Gaulle assumed power and the Algerian crisis abated as the French military swore loyalty to him. As Professor Ackerman explains, De Gaulle came to power, and built while he was in power, a Mass Popular Movement of Gaullists, who were committed to constitutional change and to the creation of a strong presidency. A new Constitution of the Fifth Republic of France, with a very strong presidency, was approved by 80% of all those who voted on it in a referendum held on September 28, 1954. The new Constitution, which was the result of a crisis over the scope of the French demos went into effect on October 4, 1958. On October 28, 1962, France held a referendum on whether the President of France should be separately and directly elected by the voters of France. This referendum was approved by 62.3% of those voting in an election in which 77% of French voters participated.

Struggle over the Algerian civil war continued into the 1960's, and there was a brief attempt to topple De Gaulle in a coup d'etat, which resulted in De Gaulle declaring a constitutional state of emergency. Ultimately, Algeria achieved independence from France in 1962, but only after one million Europeans fled to France, two million Algerians resettled or were displaced, and hundreds of thousands of people lost their lives. De Gaulle remained as President from 1958 to

1969, and he presided over the messy civil war that ultimately ended French control of Algeria. De Gaulle's personal charisma, and his Mass Popular Movement of Gaullists ended up having to accept the French loss of control over the demos of Algeria.

The French Fifth Republic was thus born out of a demos definition crisis during a civil war over French control of Algeria. The French lost that war, but they accepted their defeat because of De Gaulle's enormous popularity and charisma and the power of his Mass Popular Movement. Just as India's Congress Party had to acknowledge the independence of Pakistan, so too did the French Gaullists had to reconcile themselves to Algerian independence. Between four and five million Algerian refugees fled Algeria to live in France in 1962 and after. A significant majority of them were Muslims, which made France a partially Catholic and partially Muslim country with substantial long term ramifications. France today is 51% Catholic; 40% irreligious; 6% Muslim; and 1% Jewish. Many recent emigrants to France have also been Muslims.

France has an all-powerful unitary national government because the French Revolutionaries of 1789 hated the provincial nobility and the Catholic religion, and so they thoroughly rooted out and eliminated the traditional French regions, which once had a strong subculture. These regions once included: Brittany; Normandy; Ile de France; Pays de la Loire; Nouvelle Aquitaine; Provence; and Corsica. The French Revolutionaries destroyed these regions as demoi and created in their place one national French demos , with 101 territorial departments. This fragmenting of regional power from 19 into 101 units made the only relevant demos in France the nation state demos. See, e.g., Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 Florida L. Rev. 1 to 45 (2011). Recently, France has begun to decentralize some power,[17] but it is, along with Japan, one of the two most unitary of the fifteen constitutional democracies that are also members of the G-20 group of nations.

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[17]V. A. Schmidt, *Democratizing France: The Political and Administrative History of Decentralization* (1990).

A key historical factor that explains the absence of federalism in France is King Louis XIV's Revocation of the Edict of Nantes expelling the French Huguenots or Protestants from France in 1685. As many as 400,000 French Protestants left France after 1685 relocating in Great Britain, Prussia, the Dutch Republic, Switzerland, South Africa, and Thirteen British North American colonies. These individuals included many of the best businessmen and minds of France, and their exile sent France into a long term decline. Most important of all, the expulsion of all French Protestants in 1685 has meant that France from 1789 to 2018 is either Catholic or secular but has no Protestant minority. This difference between France and Germany helps explain why Germany has maintained federalism and France has not.

In France, as in India and South Africa, one can see an Ackermanian Mass Popular Movement engaging in demos creation as well as constitutionalizing charisma.

3. Demos Creation in the G-20 Constitutional Democracies Beyond those Which Professor Ackerman Discusses

I will now briefly discuss the demos creation and federalism issues in those of the G-20 Nations, which Professor Ackerman does not address in The Rise of World Constitutionalism, Volume I (forthcoming 2018). In Part III, I will discuss normative issues raised by demos creation and by the creation of federal systems with demoi.

A.   The United States

When the thirteen British North American colonies declared independence on July 4, 1776, many wondered whether French-speaking Quebec or the British colonies in the Caribbean would follow suit and join the rebellion against British rule. They did not do so. The British had, in 1774, guaranteed Quebec the freedom to be Catholic; the freedom to follow the civil law rather than the common law; and some freedom of self-government. As a result, Quebec remained in the British Empire and did not join the United States.

The Declaration of Independence and the Articles of Confederation both recognized the sovereignty and independence of each of the thirteen original colonies, which became thirteen demoi. When the federal Constitution was written in 1787, it created a federal U.S. demos, but it was originally understood as being a federal

government of limited and enumerated powers with huge powers remaining in the states as demoi until the Constitutional Revolution of 1937. As Justice Kennedy has written, the Framers of the Constitution split the atom of sovereignty between the national demos and the state demoi.[18] As a result, a new sort of federal sovereignty came into existence when a Mass Popular Movement of Federalists narrowly secured the ratification of the Constitution by popularly elected conventions in the thirteen original states.

Among the many reasons that the Framers set up a federal system under the Constitution of 1787 with many powers in the state demoi was that the thirteen original states sharply differed from one another on matters of religion. The New England colonies had been founded by Puritans and were all Congregationalist in the 1780's. All of the New England colonies, except Rhode Island, had established churches in the 1780's, and Massachusetts did not legalize the celebration of Christmas Day until the 1830's. In contrast, Virginia, the Carolinas, and Georgia were all Anglican/Episcopal states in the 1780's. Southerners worshiped in the Church of England, which the Puritans had abandoned because they thought it was too Catholic. Among the middle colonies: 1) Maryland had a significant number of Catholics; 2) Pennsylvania had significant numbers of Quakers and Lutherans; 3) New York had members of the Dutch Reformed Church, Anglicans, and Lutherans; and 4) Rhode Island had a huge number of Quakers,[19] as well as Anabaptists, Anglicans, and a Jewish community. In short, the thirteen American states were all English-speaking and the colonists in those states were all of English descent, but there were sharp religious differences among the thirteen original states.

American federalism in 1791 was reflected in the first clause of the Bill of Rights, which provides that: "Congress shall make no law respecting an Establishment of Religion." This Clause was meant to ensure that the federal government could not impose on the states with their very diverse religious beliefs a federally established church or religion. As in Germany, and unlike the situation in Italy, state disagreements about religion led to the establishments of a federal

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[18] *U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995).

[19] M. N. Rothbard, *The First Executions for Religion on American Soil* in Conceived in Liberty, Chapter 29.

government with meaningful power reserved to the states. An American demos was created, but within it were thirteen demoi. The American Framers chose to split the atom of sovereignty between the federal government and the states. Yet another cause of American federalism was disagreement between the North and the South about slavery. This, too, led to the creation of only a limited national government.

The demos/demoi issue was further addressed by the Northwest Ordinance of 1787, by which Virginia and the other original states ceded their land claims to an area that became the free states of: Ohio, Indiana, Illinoi, Michigan, Wisconsin, and part of Minnesota. This action guaranteed that the U.S. would be a union of lots of small state demoi and no large state like Virginia plus the Northwest Territories. After 1791, the U.S. acquired and incorporated into the American demos: 1) the lands west of the Mississippi acquired in 1803 by the Louisiana Purchase; 2) Florida; 3) the lands conquered from Mexico in the Mexican-American War plus the independent state of Texas; 4) Alaska, which was bought from the Russians, and 5) the state of Hawaii, which was militarily annexed. Territories, which were acquired but which have not been annexed as states include: 1) the Philippines; 2) Guam; 3) Puerto Rico; and 4) the U.S. Virgin Islands.

The key demos/demoi test faced by the U.S. was the attempted secession of 11 Confederate slave states in 1861, which attempt was defeated in the U.S. Civil War. In 1861, there were fifteen slave states, but four did not secede from the Union: 1) Maryland; 2) Delaware; 3) Kentucky; and 4) Missouri. In addition, part of Virginia secede from Virginia during the Civil War and became the free state of West Virginia. The Civil War was barely won by the North, and it is quite possible that it would not have won if all 15 slave states had seceded. The collective action problem of organizing a secession in a Union with only 11 of the 15 slave states out of the 34 states in the Union in 1861 is quite possibly the collective action problem that doom the southern slavery secession.[20]

One final word about the U.S. demos. The Articles of Confederation specifically provided that Canada had an automatic

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[20]Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 Florida L. Rev. 1 to 45 (2011).

right to join the United States, and a principle unaccomplished goal of the U.S. in the War of 1812 was to annex Canada. Why did Canada remain independent of the U.S.? To begin with, the British offered Quebec the freedom to practice Catholocism and the right to follow the civil law and not the common law, and Quebec might not have gotten this good a deal if it had joined the U.S. In addition, Ontario and English speaking Canada was settled by U.S. Tories who liked the English monarchy and had no desire to live in a republic. Moreover, in the wake of the American Revolutionary War, the English-speaking population of North America sorted itself out into two halves with Whigs moving from Canada to the U.S. and Tories moving from the U.S. to Canada. Seymour Martin Lipset, American Exceptionalism: A Double- Edged Sword (1996). It is for these reasons that English-speaking North America is vided between the United States and Canada.

B.   Germany

As mentioned above, German federalism with a demos/demoi arrangement is a consequence of the historical divisions among Protestant and Catholic states, which dates back to the 1500's and 1600's.[21] No such division is evident in Italy where all the regions were always Catholic, which is why Italy today is a unitary nation state even though it has, and has always had, profound regional differences. The other great demos problem faced by Germany was what to do when the East German communist regime collapsed. The German Basic Law of 1949 had said it was provisional pending a reunification of East and West Germany. When that reunification occurred, East Germany simply acceded to the Basic Law as six additional states and so reunited Germany is today one demos with sixteen state demoi. German federalism remains alive and kicking today in 2018. Steven Gow Calabresi et al., The U.S. Constitution and Comparative Constitutional Law: Texts, Cases, and Materials 598-620 (2016)

C.   Japan

Japan is, today, a unitary nation state with minimal decentralization and with territorial claims to a few historically

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[21]W. Heun, *The Constitution of Germany: A Contextual Analysis* (2011).

Japanese islands seized by Russia at the end of World War II. The Japanese demos consists of a cluster of ethnically and linguistically identical people living on two main islands and some smaller islands nearby. The people of Japan are: 51.82% Shinto; 34.9% Buddhist; 4% Shinto sects; and 2.3% Christian. There are no sharp religious disagreements among the Japanese people, which I will argue is part of the reason why federalism has never taken root in Japan.[22]

D.　　Canada

The great demos/demoi issue in Canada is the status of Quebec Province as an historically Catholic and French-speaking jurisdiction in a country where the other nine Provinces are English-speaking and Protestant. Canada has now survived two Quebec secession referenda, and it has become a militantly bi-lingual country since Pierre Trudeau served as Prime Minister in the 1970's and 1980's. Canada does have, however, a strongly federal constitution, and the Canadian provinces retain many important powers.[23] The Canadian Supreme Court, for example, ruled in 2011 that the Canadian national government lacked the power to adopt an analogue to the U.S. Securities and Exchange Act. Canadian federalism is thus alive and well in 2018. Steven Gow Calabresi et al., The U.S. Constitution and Comparative Constitutional Law: Texts, Cases, and Materials 641-662 (2016).

E.　　Australia

Australia is a federal republic with six states as part of the federal Commonwealth government but support for federalism is so low today in Australia that one could easily imagine it being abolished.[24] Australian federalism is essentially dead whereas U.S. and Canadian federalism are very much alive. I think this is due to religious difference in the United States among 1) evangelical Christians; 2) followers of mainline Protestant denominations; 3) Catholics; 4) Jewish groups; and 5) non-believers. I think Canadian federalism remains alive because culturally Quebec is Catholic whereas the rest of Canada is Protestant and while most Canadians are

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[22]S. Matsui, *The Constitution of Japan: A Contextual Analysis* (2011).
[23]J. Weber, *The Constitution of Canada: A Contextual Analysis* (2015).
[24]C. Saunders, *The Constitution of Australia: A Contextual Analysis* (2011).

pretty secular the religious cultural and linguistic difference still matter.

Australians are: 30.1% non-believers; 22.6% Catholic; 18.7% General Protestant; 13.3% Anglican; and 2.6% Islamic. No one is very ardent about any of these faiths in Australia, and so there is no under-pinning for a religion-based federal system. This explains why Australian federalism is now dead. There have been no other significant demos issues in Australian history.

F.   South Korea

South Korea is a unitary nation state whose only demos issue is a desire to be reunited with North Korea someday – a union that is very unlikely to happen anytime soon. The religion of South Koreans is: 56.9% unknown; 19.7% Protestant; 7.9% Catholic; and 15.5% Korean Buddhist. Religion is not an important force in South Korea, which has no federal structure. This fits with what I believe is a global pattern of demos creation issues resulting from religious differences, as happened with India and Pakistan, or with religious differences manifesting themselves in strongly federal systems, as I argues has happened in the U.S.; Germany; and Canada.

G.   Brazil

Brazil has had a federal structure to its Constitution since the 1820's, but the Brazilian states have never been remotely as power as the states are in the United States. The explanation for this, as Keith Rosenn points out in a brilliant law review article, which has heavily shaped my thinking, is that the Brazilian states were all founded by Portuguese speaking Catholics, and so Brazil has never had or needed a strongly federal constitutional structure.[25] See Calabresi, supra et al. at 669-675. In contrast again, the thirteen original American states differed sharply from one another with respect to religion (as Rosenn points out) as did the provinces in Canada and the lander in Germany. Brazil's strongly unitary form of federalism reflects the fact that, until quite recently, Brazil has been an overwhelmingly Catholic country. The power of the Brazilian states is also undermined by the recognition its constitution gives to the rights of municipal governments. This

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[25]K. S. Rosenn, *Federalism in Brazil*, 43 Duq. L. Rev. 577 (2005).

weakens the states by allowing the national government to all with the municipal governments.

H.   Indonesia

Indonesia has moved to a decentralized government, but it does not have a federal system.[26] This reflects the fact that the country is: 87.2% Islamic; 7% Protestant; 2.9% Catholic; and 1.7% Hindu. Indonesia is essentially uniform with respect to religion, which eliminates the need for German or U.S. or Canadian style federalism. It has no other demos determination issues now that East Timor has gained its independence from Indonesia.

I.   Mexico

Until the revolutionary changes ushered in around the year 2000, the main Mexican demos issue was the country's loss of a huge amount of territory to the United States in the Mexican-American War of the 1840's. A huge number of Mexicans have either emigrated to the United States or work in the United States and remit funds to their families in Mexico. The number of Mexican and Hispanic emigrants to the U.S. is sometimes referred to by Mexican intellectuals as being in effect a *reconquesta* of that which was lost in the 1840's in the Mexican-American War.

Mexico has historically been a federation with much weaker states than the states of the U.S. or the provinces of Canada or the lander of Germany.[27] The population of Mexico is 83% Catholic; 10% Protestant; .2% other religion; and 5% no religion. Mexico is thus another federal regime, which is overwhelmingly of one religion. It is thus not surprising that the Mexican states have not historically been very autonomous. This may now be changing as Mexico has liberalized and democratized its culture.

J.   The United Kingdom of Great Britain and Northern Ireland

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[26]S. Butt & T. Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (2012).
[27]Jose Maria Serna de la Garza, *The Constitution of Mexico: A Contextual Analysis* (2013).

The U.K. presents some of the most fascinating demos definition problems gracing the front pages of our newspapers and newsmagazines today.[28] It is almost hard to know where to begin except by observing that the demos upon which the sun never set and which occupied one quarter of the world in 1914 may soon be reduced to include on England. The American Revolution of 1776; the Irish Revolution; the Statute of Westminster 1931; the Indian Declaration of Independence; the Israeli Declaration of Independence; the Canadian Constitution Act 1982; and the Devolutions of Power to Scotland, Wales, Northern Ireland, and the City of London in 1997 and 1999 had a revolutionary effect on the British Empire.

We have already discussed the U.S.; Indian; Canadian; and Australian devolutions, so we will begin here by observing that Catholic Ireland rebelled against the Anglican United Kingdom, and the Irish Free State Constitution Act 1922 recognized that most of Ireland was a free sovereign country independent of the U.K. with a population that was almost exclusively Catholic. The cause of the creation of an Irish demos, which was separate from the U.K. demos, was almost entirely due to religious differences was the case with the separation of India and Pakistan in 1947 and of Jordan and Israel in 1946 to 1948. The U.K. retained control after 1922 over Northern Ireland, which was two-thirds Protestant Scots-Irish and one-third Catholic. U.K. control continued over Northern Ireland to protect Scots-Irish Protestants from being a minority in a unified country of Ireland.

This arrangement was not satisfactory to many Northern Irish Catholics or to their supporters in Ireland, and, after decades of Irish Republican Army terrorism, Northern Ireland was given home rule in the late 1990's under a consociational power-sharing plan designed to protect the rights of the Catholic minority in Northern Ireland. Thus, the creation of the Irish Free State demos, and the recognition of a separate Protestant demos with a powerful Catholic minority in Northern Ireland, are all indicators of how religion leads uniquely to demos definition issues.

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[28]P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (2nd ed. 2012).

Another demos definition issue has arisen in the modern U.K. as a result of the decision of Tony Blair's New Labor Government, which acquired the power to make constitutional changes in the U.K. after winning only 43% of the vote in the 1997 parliamentary election was the devolution of power to Scotland, Wales, and the City of London. This development led to the emergence of a very popular Scottish Independence Party known as the Scottish Nationalist Party or SNP. The SNP pushed the Conservative government of David Cameron to hold a referendum on Scottish independence from the U.K., which Cameron foolishly agreed to hold. Cameron then foolishly agreed to allow all EU residents in Scotland to vote on Scottish independence, he agreed to lower the voting age for this referendum to 16, and he inexplicably disenfranchised Scots who happened to be working or living in England at the time the referendum was held from voting in the referendum. The end result was a surprisingly close vote of 55% of Scots against independence and 45% in favor of it. This was a good enough showing to allow the issue of whether Scotland should be a separate demos from the U.K. to fester for the foreseeable future.

Scots differ from the English in that they are largely of Celtic or Viking descent whereas the English are mostly descending from pre-Roman inhabitants of Britain, from Anglo-Saxon Germans, from French Normans, and from the Vikings instead. Historically, Scotland was Presbyterian and English was Anglican, but, in modern day Scotland, only 54% of the population calls itself Christian while 37% report not having a religion. The Presbyterian Church of Scotland has 7.5% of the population as members, while 27.8% say they are followers of the Church of Scotland. In contrast, in England 59.4% of the population calls itself Christian; 24.7% say they have no religion; 5% are Muslims; and 3.7% belong to other faiths. The largest group by far of English Christians belong to the Church of England; the next largest group practice the Latin rite and are English Catholics; and the third largest group are Methodists. A small minority of the population practices ancient Pagan rites.

There are thus some religious differences between England and Scotland and some ethnic differences, which explains why the issue of whether there should be a separate Scottish demos or a federal structure to the U.K. government is presently open for debate. The existence of the European Union, and the belief of many Scots that they

could join it as a co-equal member and get all the free trade and national defense benefits they now receive from the U.K. keeps the issue of Scottish independence very much alive. This is especially so since the United Kingdom voted 51.9% to 48.1% to leave the European Union in an all U.K. referendum held by Prime Minister David Cameron on June 23, 2016 with 72.2% of the electorate turning out to vote.

Brexit, or the United Kingdom's decision to leave the European Union (EU), was itself a major demos definition issue because the EU government is turning into a real federal government with more powers than the U.S. federal government had under the Articles of Confederation. The EU is itself a demos for free trade and movement of labor issues; it is also a regulatory state; and it aspires one day to have a common foreign policy and perhaps even a common defense. The 28 member nations of the EU are, however, sovereign demoi as well, because they regulate cultural and religious issues; their internal economies; and for now, at least, their budgetary taxing and spending policies; their foreign policies; and their defense policies. The U.K. stumbled into foolishly voting for Brexit because David Cameron, who is surely the worst Prime Minister the U.K. has had since Lord North, made the idiotic decision to hold a popular referendum on a highly complex and intricate issue in which the only choices were: leave or remain.

I think Brexit is a disaster for the U.K., which must be undone as soon as possible. The U.K. is too small in population and GDP to go it alone against economies as big as those of the U.S.; the EU; and China. Yes, the U.K. is for cultural, historic, and religious reasons a separate demos from the EU, but it cannot prosper economically or have an effective voice in foreign or defense policy without being also a member of the EU demos. The sooner the people of the U.K. realize this basic fact the better.

In sum, the U.K.'s history over the past 100 years has been rife with demos definition matters, and such matters remain at the forefront of the agenda in British politics.

K.   The European Union

The European Union (EU) is the fifteenth member of the G-20 group of nations with the world's most advanced economies, and, as

my comments above suggest, it is now a real federal government, which counts as a demos on its own. The 28 member nations of the EU are, however, demoi themselves who have retained sovereignty; control over taxing and spending; control over foreign policy; and control over defense policy. The EU may gradually grow to take on all of these functions, but it may not due to friction between the mostly Protestant northern EU nations and 2) the mostly Catholic or Greek Orthodox southern EU nations. We have seen by now that religion is a powerful factor in determining whether a country splits apart or units and whether it has a federal structure or a unitary structure. The EU is characterized by sharp religious differences and hard-working German Calvinists do not want to subsidize what they perceive as being lazy southerners of a different faith.

The EU faces an additional very serious problem with a religious dimension, which is threatening to tear it apart. This problem concerns the huge immigration of impoverished Muslim refugees from Syria, Libya, Turkey, and North Africa into the EU countries. The overwhelmingly Christian EU nation of Hungary has barred its doors to these immigrants for religious reasons and recent power shifts in Italy, and in the last few weeks in Germany, make it unlikely that more Muslim immigration will be allowed. This is a highly fraught religious controversy, which is tearing through the EU like a hurricane.

For reasons I will explain below, I think the EU is a wonderful proto-government, and I would dearly like for it to succeed. Whether it can succeed or not remains uncertain at this time.

4.   Size and Democracy: Normative Considerations

There is a body of scholarly literature on the optimal size of a democracy. Robert A. Dahl & Edward A. Tufte, Size and Democracy (1973); Alberto Alesina & Enrico Spolaore, The Size of Nations (2003). I have previously written about this issue in: Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from Law*, 1;-/23-189 in Nomos LV Federalism and Subsidiarity (James E. Fleming & Jacob T. Levy eds. 2014) and in Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 Florida L. Rev. 1 to 45 (2011). I will not repeat what this literature says, but I will draw on it to offer some suggestions as to what is the optimal

size of a democracy and a federation is appropriate rather than merely good neighborly relationships.

A. Federalism and Religion

Religious differences are often a reason for forming a separate or new demos because, for whatever reason, very religious people often want to encounter only people who agree with them on matters of religion. Keith S. Rosenn relies on such differences between the U.S. and Brazil to explain different federalism structures in those two federations.[29] I personally as an Anglican who attended and was greatly influence by a Quaker school think that this is regrettable and mistaken, but the experience of the countries discussed in this book makes it clear that differences in religion often require different demoi. British India, for example, had to be partitioned into Hindu India and Islamic Pakistan; Ireland had to be portioned into the Catholic Free State and a mostly Protestant Northern Ireland; and British Palestine had to be partitioned into a Jordan Islamic State and the Jewish State of Israel. France, to its great detriment, converted itself into an entirely Catholic country in 1685 by expelling the Protestant French Huguenots. Catholic France also, to its great detriment, had to separate from Islamic Algeria. The gulf between these two religions was too great to bridge. Britain, to its great detriment, forced its Puritans to emigrate to New England where they helped found the United States in the battles of Lexington, Concord, and Bunkers' Hill.

Sometimes, however, people of different religions can learn to live together in a federation where religious matters are handled at the state level and free trade, foreign policy, and defense are handled at the federal level. This is essentially the way German federalism has worked out, and it also explains why Swiss federalism has been a huge success in a country with large numbers of both Protestants and Catholics, as well as speakers of four separate languages. U.S. federalism has also always allowed different religious groups to transcend their disagreements and cooperate on free trade, foreign policy, and defense. This was true in 1791 when Puritan New England joined in a Union with the Anglican south, and it remains true today. The biggest differences between the almost evenly matched Blue states

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[29]K.S. Rosenn, *Federalism in Brazil,* 43 Duq. L. Rev. 577 (2005).

and Red states in the U.S. are due to differences on religion. Blue states are more secular, or are in line with main line Protestant thinking; red states are more likely to have mobilized groups of evangelical and devout Catholic voters. I think the U.S. federal system is working well at suppressing and containing a religious war, as I will explain further below.

One striking fact that is revealed by Professor Ackerman's new book is that even countries with huge subracial and ethnic minorities and with large numbers of language groups can coalesce in a federation so long as the problem of religious differences is solved. Thus, Hindu India flourishes even though it has 17 languages in addition to the official languages of Hindi and English and even though it has at least nineteen different ethnic groups with different skin colors, facial features, and of different castes. The Republic of South Africa flourishes even though it has 11 languages and four racial groups: Blacks, Whites; Coloured, and Asians with Black South Africans being of eight ethnicities including Khoisan, Bantu-speaking, Khoikoi, Zulu, Xhosa, Swazi, Ndebele, Sotho-Tswanal, Shangan-Tsonga origin.

Italy flourishes even though it is a centralized nation state with 20 regions each with distinguished and separate histories like the 1000 year history of the Republic of Venice. There are ethnic tensions among Italians especially between northern Italians and southern Italians, but the country holds together as a unitary nation state with some bickering simply because all Italians are either secular or Catholic except for the tiny 40,000 member Italian Jewish community from which I descend.

The first normative point then on size and democracy is that federations can successfully bridge over racial, ethnic, and linguistic differences, but they have much more trouble bridging over religious differences. This is an argument for being cautious about the exercise of national power in the U.S. or EU power in the European Union.

B. Federalism and Secession

The second normative conclusion I would offer is that if one is going to set up a federation for a religiously divided society, a large

number of federal subunits is preferable to a small number.[30] Thus, the United States, which is locked in a culture war between secular voters and evangelical Christians is quite lucky that it is chopped up into 50 states rather than 4. Imagine a United States with the following four states: the Northeast; the Midwest; the South; and the West. I doubt such a four state federation would last more than a couple of years before the Northeast seceded from the South or vice versa. And then all the benefits of free trade; a common defense; and a common foreign policy would go down the drain.

The 50 U.S. states include at least 25 that are some shade of Purple rather than being Red or Blue. Moreover, different voters participate in presidential elections, mid-term elections, and elections in odd numbered years. We elect 39 of the 50 state governors in mid-term or odd numbered year elections when the party in power in the White House usually loses.[31] Thus, our Democratic presidents like Obama usually face off against Republican governors, and I predict our Republican President Trump will face off after election day this year against Democratic governors.

Consider now two federations with only a small number of federal subunits: Canada with ten provinces and the United Kingdom with four entities with devolved power. Quebec and Scottish separatism are only viable because neither Canada nor the U.K. has 50 federal subunits. When 11 of the 15 slave states tried to secede from the U.S. in 1861 they could not quite pull it off, although they came close. The collective action problem of organizing Confederate secession was too great to pull off in a federation that in 1861 had 34 states and 15 slave states. Similarly, the French speaking provinces in a Canada with 50 provinces would never be able to negotiate a secession. Nor would Scotts in a 50 devolved entity U.K. be able to secede. The larger the number of federal subunits the greater are the collective action costs of negotiating and pulling off a successful secession.

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[30]Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 Florida L. Rev. 1 to 45 (2011).

[31]Steven G. Calabresi & James Lindgren, *The President: Lightening Rod or King?* 115 Yale Law Journal 2611 (2006).

I think the U.K. will find its Brexit attempt to secede from the 28 member European Union to be as hard to pull off as was southern secession in the 1860's. Brexit may occur, but if it does the U.K.'s economy will crash and the U.K. will beg to be readmitted to the EU. Similarly, Greece's thoughts of EU secession were tamped down once leaders realized the reality of the pickle Greece was in. An EU with 28 members is here to stay, and any country that secedes will end up begging to be readmitted.

C. Federalism and Subsidiarity

A critic might object at this point that I am a fanatical federalist who favors federal regimes or quasi-federal regimes from India to Germany to the United States to Canada to the European Union. I plead guilty as charged. Federalism promotes human happiness and flourishing so long as the principle of subsidiarity is followed. Subsidiarity is a principle of social organization that holds that social and political issues should be dealt with at the lowest level of government that competent to resolve them. As the Bedford Resolution, which was passed in 1787 at the U.S. Constitutional Convention, put it: The federal government should have the power to act when the states separately are incompetent to act and to promote the harmony of the federal union. What then should states or demoi do in a federation and what should a national government or demos do in such a federation?

First, states should legislate as to matters of culture, taste moral preference, or physical conditions that differ from state to state. It makes no sense to have a national speed limit of 55 miles per hour as we once did when circumstances in Montana and Alaska make it perfectly safe to drive at 90 miles per hour in those states. More people will be happy if we let states set speed limits and not the federal government.

Second, states should be free to compete with each other in offering an optimal bundle of public goods so long as they are not engaged in a race to the bottom to prevent the necessary redistribution of wealth. Just as competition in the free market is better than having an oligopoly so is fifty state competition to attract businesses and new state citizens of talent a good thing in a democracy.

Third, states should be free to experiment with new ideas like same sex marriage, legalization of marijuana, and restriction of sex-selective abortions. With 50 states competing and experimenting in the United States or 28 doing so in the European Union, one can imagine that some of these experiments will succeed and be applied nationwide as has happened in the U.S. with the legalization of marijuana.

Finally, matters should presumptively be handled at the state level because voters are in much closer physical proximity and contact with state politicians than they are with federal politicians. This lowers a voter's agency costs in monitoring what government is up to. For all of these reasons, there should be a presumption defeasible by 51% evidence that a matter ought to be handled at the state level unless one of the four following arguments for handling matters at the national level applies.

The first argument for handling matter at the national rather than the state level is that there may be economies of scale from having one national space program rather than 50 or one federal interstate highway plan rather than fifty.

Second, the 50 states will face huge collective action problems in acting jointly and they may be unable to stop a race to the bottom to allow child labor or to deny persons a minimum wage. Federal power is necessary to stop such races to the bottom and to do the lion's share of the work in redistributing wealth. The states simply cannot effectively redistribute wealth because businesses and people will move to low tax states in such situations.

Third, federal power is needed when a state's policies result in negative externalities for people living in other states. Dirty air and water crossing state boundary line are classic examples of why we need federal clean air and water acts even if dirty air and water is not technically commerce among the states.

Fourth, and finally, for the reasons James Madison advanced in the Federalist No. 10, the national government will always be more protective of minority rights than the state governments. There are infinitely more factions at the federal level than there are in any one of the fifty states so the likelihood of a self-interested over-bearing stable majority is lower in Congress than it is in a state legislature. Two-hundred-twenty five years of history have proven this point. Federal governments must have the power to protect civil rights.

In sum, a federal government practicing subsidiarity in the way I have just described is most likely to lead to human flourishing both economically and educationally and spiritually. Federal structures not only split the atom of the sovereign demos; they produce as in the U.S. and in the EU greater levels of well-being in every way. A federal demos with as many state demoi as possible is optimal for human flourishing.

5. Conclusion

This essay has proven that the Mass Popular Movements, which Professor Bruce Ackerman has described as having constitutionalized their charisma <u>also created</u> the very nation states to which their written constitutions would apply. I believe I have shown how national leaders did or did not create demos or demoi in the countries, which Professor Ackerman studies in The Rise of World Constitutionalism, Volume I (2018). In Part II, I extend the analysis greatly and discuss the process of demos creation in the remaining G-20 constitutional democracies, which Professor Ackerman does not discuss in The Rise of World Constitutionalism, Volume I (forthcoming 2018). I sought here to explain why some constitutional democracies emerged as genuinely federal regimes and others emerge as genuinely unitary regimes. Finally, Part III I offered some thoughts about what is normatively desirable in demos creation and in the creation of meaningful federal regimes with subunit demoi.

A NEW IDEA OF CONSTITUTIONALISM FACING THE GLOBAL CONSTITUTIONAL LAW

Gianmario Demuro[*]

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.

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[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 power[7]. 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 Ackerman[9]. The

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[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 Ackerman[10], 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 constitutionalism[11], 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[12], even if in both countries the Courts expand their powers in the absence of a Leader[13].

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

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[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 constitutionalist have to consolidate the revolution, like in 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 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.

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[14] Ibidem, 303.

THE ITALIAN CONSTITUTION AS A REVOLUTIONARY
AGREEMENT

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Abstract

In his recent book, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, Bruce Ackerman counts Italy among the successful examples of "revolutionary constitutionalism" of the XX century, along with France, India, South Africa, Poland, Israel and Iran. All these countries went through the "four-time" development that he describes as components of the revolutionary constitutionalism and were able to overcome times of crisis, establishing fairly solid constitutional regimes that have endured to the present day. This essay discusses the idea of revolution as the basis on which the Italian Constitution is founded. In fact, as for its relationship with the past, the Italian Constitution is undeniably a «never again» constitution: one that rejects the previous regime.

The Constitution is imbued with anti-fascist principles. In this sense, there is a revolutionary side in the Italian transition, which marks a clean break with the fascist regime. Yet, the construction of the new polity was successful because of its inclusive, dialogical, incremental approach to constitutional change. The Italian Constitution was rather the result of the convergence between different and even opposed political ideas about the new society. It was not an abrupt and radical makeover of the country, but an incremental reconstruction of the legal, political, economic system. This article shows the continuity and discontinuity between the past regime and the new Italian republic and the long and difficult implementation of the new republican constitution.

> [P]er compensare le forze di sinistra di
> una rivoluzione *mancata*, le forze di destra non
> si opposero ad accogliere nella Costituzione
> una rivoluzione *promessa*[1].

1. Introduction

Italy is one of the paradigmatic examples of Bruce Ackerman's *Revolutionary Constitutionalism*, the first ideal type of the three different pathways by which constitutions have won legitimacy in the past century. It is considered one of the success stories, which – along with France, India, South Africa, Poland, Israel and Iran –went through the "four-time" development and was able to overcome times of crisis, establishing a fairly solid constitutional regime that has endured to the present day.

Following Bruce Ackerman's account, in the Italian case, time one – where, according to his theory, «revolutionary movements» «mobilize the masses» and «manage to oust establishment-insiders», denouncing the existing regime as «illegitimate»[2] – was marked by the guerrilla fighters of the Resistance movement, who managed to create grassroots revolutionary governments in key areas of the North of Italy and

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[1] «To give compensation to the left parties for a *missed* revolution, the right parties did not resist to admit in the Constitution a *promised* revolution». P. Calamandrei, *La Costituzione e le leggi per attuarla 7-8,* (2000, but 1955).

[2] B. Ackerman, *Revolutionary Constitutions*. Charismatic Leadership and the Rule of Law 6-7, (2019).

finally succeeded in seizing and killing Mussolini during the closing days of the war.

In time two – the time for the construction of a new regime based on the translation of «high-energy politics into a Constitution that seeks to prevent a relapse into the abuses of the past, and commits the republic to the new principles proclaimed during the long hard struggle of Time one», i.e. «the constitutionalization of the revolutionary charisma»[3] – the polls of June 2, 1946 are given an important place in the Italian history. Then, a majority of the Italian people[4] chose the Republic and rejected the Monarchy and also elected the Constituent Assembly, vested with the power to draft a new Republican Constitution.

Time three – a time of crisis, which takes place when the founding generation dies off, the political authority moves towards the «normalization of revolutionary politics», and the regime confronts a «legitimacy vacuum», which is occupied by an increasingly confident judiciary[5] – is identified in Italian history with the end of the first legislature (1948-1953), when De Gasperi's leadership of the Christian Democrats was «defeated»[6] and he fell from power and was stripped of his formal position as the head of the Christian Democratic Party. He died a few months later. At this time, the new Constitutional Court was established and began operating taking a vigorous stance among the other republican institutions[7].

Time four is the time of consolidation[8] of the new constitutional regime, thanks, if I am not mistaken, to the undisputed authority of the judicial bodies.

All this considered, Italy roughly fits in the ideal-type of revolutionary constitutionalism.

However, in Italy the role and the nature of the Italian "revolution" in the transition from fascism to the republic has some peculiarities that deserve attention in order to understand revolutionary constitutionalism as such.

In reality, the protagonists of the birth of the Republic hesitated to qualify the transition from the Fascist State to the

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[3] *Id.* at 4.
[4] *Id.* at 141.
[5] *Id.* at 8-9.
[6] *Id.* at 150-52.
[7] *Id.* at 152.
[8] *Id.* at 155-56.

Republic as a revolution. The revolutionary approach was debated and rejected by the main political forces involved, and, in the Constitution itself, a revolution was announced more than codified. As Bruce Ackerman acknowledges, the Italian experience can be described by the famous words of one of the most popular protagonists of the epoch, Piero Calamandrei: «to compensate the forces of the left for a circumvented revolution, the forces of the right showed no opposition to a promised revolution in the Constitution»[9]. In the Italian case, the Constitution, rather than translating the chief tenets of a political revolution into higher legal principles, provides a legal framework that leaves room for a revolution yet to come. The question of whether this promise was later maintained is another matter.

In other words, Italy is a successful example of path one, precisely because (and not despite the fact that) the revolutionary side had only a limited role, extending only to time one, in the transition from fascism to the republic. As for its relationship with the past, the Italian Constitution is undeniably a «never again» constitution: one that rejects the previous regime. Nevertheless, as to the future of the polity, the features of the new republic were, in a way, «undecided». It is true that there is a revolutionary side in the Italian transition, which marks a clean break with the fascist regime. The Constitution is imbued with anti-fascist principles. Yet, the construction of the new polity was successful because its inclusive, dialogical, incremental approach to constitutional change.

This character had some consequences for the «consolidation» of the new regime. First, the implementation of the new constitutional architecture was neither immediate nor swift, and even less so complete. What's more, the delayed implementation included some institutions that were intended to play a crucial role in the constitutional system, first of all the Constitutional Court. Second, the new constitutional order very soon, in the seventies and eighties, went through recurrent periods of crisis and broad calls for constitutional reform began when the process of implementation of the Republican Constitution was not yet complete.

I would like to revisit here some of the historical steps of the founding period that show the importance of the capacity to bridge

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[9] *Id.* at 143.

divergent forces and design converging avenues in time Two, as elements of the success of Italian Constitutional revolutionary history.

More generally, I ask whether this capacity for «building bridges» is a necessary component of «time two» in all constitutional experiences at the time of the construction of a new polity after the dismantling of a previous regime.

Stephen Gardbaum's chapter[10] points out that among the Arab spring revolution, the Tunisian example is the only one that was successful. Its success can hardly be credited to a single charismatic personality or a single revolutionary party. The productive contribution of the Tunisian National Dialogue Quartet to the building of a pluralistic democracy in the wake of the Jasmine Revolution of 2011 was in no way a secondary element. The Quartet was established in the summer of 2013 when the democratization process was in danger of collapsing as a result of political assassinations and widespread social unrest. Then, in 2015 it was awarded the Nobel Prize for Peace. It bears noting that the prize was a tribute to the Quartet as such, not to the four individual organizations, representing different sectors and values in Tunisian society, that contributed to completing the constitutional process.

Another success story is South Africa, where much credit was given to the charismatic personality of Nelson Mandela and to his party. However, his personal charisma was not imposed *ex cathedra* on the people. His leadership was able to connect opposed factions, so much so that nobody doubts that the most relevant role was played by the Truth and Reconciliation Commission in the successful constitutional transition of South Africa

In these examples, and certainly in the Italian case, the building of the new order was not the "codification" of a single "charisma". It was, rather, the result of difficult agreements, an inclusive pact which opened a new process, an open-ended and incremental enterprise.

I consider it very important to learn this kind of lesson from history, particularly for the present stage of constitutionalism around the world. To me, and to many Europeans, «revolution has

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[10]See Stephen Gardbaum, *Uncharismatic Revolutionary Constitutionalism*, in Albert, cit. at note *.

a destructive logic» (as Andrew Arato pointed out[11]), after the French and Russian prototypes. European experience shows that a revolutionary action is unable, as such, to have a generative effect. Conflict brings about more conflict. As to the origin of the Italian republic, the context cannot be overlooked: after two world wars and twenty years of fascism, the priority for the Italian leaders was the reconstruction and reunification of a devastated country.

2. Revolution and Constitution: a Multifaceted Relationship

The Italian Republican Constitution was indeed a *new beginning* in the history of the country, and the State was reconstructed on new founding principles. Remarkable differences distinguish the Republic from the Fascist and the prior Liberal State.

At the same time, the debate on the continuity and discontinuity of the State, since its origins in 1871 is still open and has never been settled, with some legal and political historians maintaining that the evolution from the liberal, to the fascist, to the republican phases took place without any clear-cut interruption,[12] and others heralding the new republican era as a veritable new world[13].

In reality, the great majority of scholars maintain the first thesis. One of the most representative supporters of this position was Piero Calamandrei, who had originally championed the need for a revolutionary reaction against the fascist regime and, after the approval of the Constitution, wrote:

> It was a *popular* constitution, approved when any hindrance from the former king had been barred by the institutional June 2, 1946 referendum […]. But *it wasn't a revolutionary constitution* in the sense of consecrating, in juridical forms, a *politically accomplished revolution*[14].

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[11]See Andrew Arato, *Revolution on a Human Scale: Liberal Values, Populist Theory?*, in Albert, cit. at note *.

[12]See, eg, at least Guido Quazza, *La Resistenza italiana: appunti e documenti* (1976); Claudio Pavone, *Alle origini della Repubblica. Scritti su fascismo, antifascismo e continuità dello Stato* (1995); Sabino Cassese, *Lo stato fascista* (2010).

[13]See V. Onida, *La transizione costituzionale* 2 Diritto pubblico 571 (1996).

[14]My translation from Calamandrei, *supra* note 2, at 5: «[F]u una costituzione *popolare*, deliberata, quando ormai ogni ingerenza dell'ex sovrano era stata

For those who expected a «total makeover» or, at least, a radical renovation, the new Constitution was disappointing.

I would like to continue this discussion by dividing my reasoning into two threads: first I will move on the *legal* plane (2.1.) and show some elements of continuity and discontinuity between the fascist regime and the Italian democratic republic. Then, I will conduct a similar analysis on the *political* plane (2.2).

2.1 Continuity and Discontinuity in the New *Legal* Order

In fact, if a revolution is meant to reset a legal order from scratch, Italy can be hardly considered a good example of path one. Yet, since Ackerman's revolution «on a human scale» doesn't aim at a totalizing break with the past, and includes old and new elements, the conclusion is more nuanced.

a. Departures from the Past in the Basic Legal Structure of the State
Indeed, the Republican Constitution has introduced a relevant number of *legal innovations*, and almost all of them were responses to the legal tenets of fascism.

First and foremost, according to the results of the institutional referendum, the Constitution established a *republican* regime and rejected the *monarchy*, which had been tainted by fascism.

Moreover, the Constitution set in motion a paradigm shift in the legal order, because of its *normative* and *rigid character* as opposed to the *political* and *flexible* attributes of the Statuto Albertino[15]. This was a major and essential innovation that the Italian Republican Constitution shares with other twentieth century European constitutions, following the US model. This move was a true breaking point: in fact, the normative supremacy of the Constitution washed away the traditional idea of the sovereignty of parliamentary legislation and framed a new balance between the Parliament and the Judiciary.

The superior value of the constitution paved the way for judicial review of legislation to be carried out by a new special

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esclusa dal referendum istituzionale del 2 giugno 1946 […]. Ma *non fu una costituzione rivoluzionaria,* nel senso che consacrasse in forme giuridiche una rivoluzione politicamente *già compiuta*».

[15]The Statuto Albertino (Albertine Statute) was the predecessor of the current Italian Constitution; it was released by king Carlo Alberto in 1848.

body, the Constitutional Court. Over time, this new institution would renovate the constitutional mindset that had informed the legal culture prior to the dawn of the republic.

Under these and many other respects, the new constitutional principles contrasted with the main features of the fascist state and went far beyond the basic ideas of the liberal state, which had left too much leeway to the maneuvers of the fascist regime[16]. Let us just mention a few of them.

The protection of fundamental rights increased sharply. Whereas the liberal ideas of individual rights were influenced by the theory of the *Reflexrechte* (elaborated by Gerber in Germany and imported to Italy by Rocco[17]), under the Republican Constitution human rights are the first limit on the power of the State. To highlight this point, Article 2 of the Constitution reads that the inviolable rights of each person are *recognized*, and not conferred, by the Republic, thus implying that they belong to each person and not to the State. Therefore, they are *inviolable:* nobody can be stripped of his or her rights, the State has no power to repeal them, and even constitutional amendments that infringe upon the core of those individual rights are considered unconstitutional (eternity clauses).

Special attention was given to freedom of speech (Article 21), which was utterly repressed under fascist *propaganda.*

As opposed to fascist corporativism, freedom of association (Article 18 of the Constitution) and freedom of other intermediate bodies (Article 2), including political parties (Article 49) and trade unions (Article 39), was released from State control.

Alongside social pluralism, veritable political pluralism was re-established, after many years of a single political party – *partito unico* – which had deprived the right to vote and electoral competition of any effective meaning.

The longstanding tradition of local self-government was restored (Articles 5 and 114 of the Constitution), whereas the fascist State had imposed strict governmental control by means of the *prefetti* (prefects) and *podestà* (the town mayor under the fascist regime), according to its centralized character. In the same vein, a new regional architecture was envisaged (Article 114 ff. of the Constitution), with five Regions endowed with enhanced

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[16] S. Cassese, *Lo stato fascista*, cit at 12, at 47 ff.

[17]See A. Baldassarre, *Le ideologie costituzionali dei diritti delle libertà*, in Diritti della persona e valori costituzionali (2007).

autonomy at the legislative, administrative, and financial levels, and another fifteen with ordinary autonomy.

The constitution carefully countered the concentration of power that was one of the main features of the fascist state, under which the role of Parliament was pre-empted by the government. The Republican Constitution aimed at curbing such a powerful Government and any other form of concentration of power. «The specter of totalitarian dictatorship»[18] suggested that the Parliament be returned to a central position (Article 70 of the Constitution). The Chambers were vested with the legislative function (Article 72), whereas the normative power of the Government was strictly regulated (Article 76 and 77). The political structure was centered on the confidence relationship (Article 94 of the Constitution) between the Parliament and the Government in order to maintain strict parliamentary control over the political choices of the Government.

This analysis could go on, but these examples suffice to conclude that, indeed, the Republican Constitution has deeply transformed the constitutional principles on which the Italian State was based.

b. An Undecided New Polity

Yet, such innovations were not organized into a coherent new idea of State.

The Italian Republic was not founded on a single political idea. It was the result of different ideologies – Christian democrat, communist, socialist and liberal – that were bound together by a common *anti-fascist* commitment, but which did not share a common vision of the future. The unity and the innovations came from a common *reaction against the past*, rather than from a shared new plan for the future. The constitution was intended to prevent a relapse into the abuses of the totalitarian regime and was firmly grounded on an anti-fascist commitment. If any revolutionary charisma can be detected in the constitution, it was the antifascist one:

In those years, the break with the past assumed a more negative connotation, rather than showing the traits of a

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[18]Giuliano Amato terms this weakness of the Italian politics as "the complex of the tyrant", in *Dal caso italiano al capitalismo ingovernabile,* in G. Amato, *Una repubblica da riformare* 37 ff. (1980).

definite and constructive project. In other, more precise, words, they wanted to prevent the restoration of fascism at any cost, even in disguise; yet, the common will to adopt an anti-fascist Constitution was not enough when it came to determining the features of the new forms of the State and the Government[19].

c. *The Legacy of the Past: Legal Rules and Public Officials*

The Italian Republic after World War II shows some legal continuities with the past that one would not expect from a constitutional revolution. This does not diminish the importance of the discontinuities highlighted above. It does, however, demand a more complex reading of the Italian constitutional experience.

Whereas the King was ousted, and a new Constitution replaced the old "Statute", the underlying legal system was wholly transplanted from the fascist state into the Republic. The Criminal Code of 1930 and the Civil Code of 1942, both drafted and approved by the fascist government, were and still are in force. The same is true of the procedural codes and all the basic administrative laws, the law on the judiciary, military legislation, and even the infamous law on public order[20]: not one of them was repealed[21].

The sub-constitutional legal framework of the new republic was imbued with fascist culture. The responsibility to wipe away all the legal dross of the fascist epoch would later be taken on by the Constitutional Court. Instead of resetting the legal system from scratch, the Republic was reconstructed within the legal framework of the fascist state. Step by step, norm by norm, the legislation in place was eventually brought into line with Constitutional principles by the judiciary: the Constitutional Court and the ordinary courts together. This incremental renovation took decades, and the business is still unfinished. At the outset, the old

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[19]My translation from Livio Paladin, Per una storia costituzionale dell'Italia repubblicana 35 (2004): «[L]a rottura con il passato in quegli anni assunse connotazioni negative, piuttosto che presentare i tratti di un definito e costruttivo progetto. In altre e più chiare parole, ciò che si volle evitare ad ogni costo fu la restaurazione del fascismo, quand'anche mutato nelle sue vesti; ma la comune volontà di adottare una Costituzione antifascista non fu sufficiente a fissare le caratteristiche delle nuove forme di Stato e di Governo». See also Massimo Luciani, *Antifascismo e nascita della Costituzione* 2 Politica del diritto 183 ff. (1991).
[20]Royal Decree of 18 June 1931, n. 773 (Testo unico delle leggi di pubblica sicurezza).
[21]For a more detailed analysis, see S. Cassese, cit at 12, at 47 ff.

and the new lived together in the new Republican Constitutional legal system. Later on, some of the old elements underwent a process of *unconventional adaptation* (to recall Ackerman's wording), whereas many others had to be struck down, because they were utterly incompatible with the new Constitution.

The alignment of the old legislation with the new constitutional principles was slow and difficult because the civil servants working in the public administration and the judiciary, who had been educated under the fascist culture, were still in office:

«The administrative personnel of the state were mostly still the fascist ones, and the continuity was not only in the people themselves, but also in their mindset»[22].

The bureaucratic bodies had not been renovated and the employees were still the same, «conservative, authoritarian, and bureaucratic» people[23].

After all, the tentative "epuration" – that was supposed to purge all the public institutions from those who had been entangled with the authoritarian regime – was faltering and uncertain. For many commentators, it was, by and large, disappointing.

After a severe beginning with the first two decrees of December 1943 and July 1944[24], the legislation on epuration was softened by numerous acts handed down starting in the final months of 1945[25]. Similarly, the enforcement of that legislation was strict and severe in the first months, but later became more tolerant and indulgent. All things considered, the epuration machinery produced a massive number of files, but resulted in very few convictions.

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[22]My translation from Aurelio Lepre, Storia della prima Repubblica. L'Italia dal 1942 al 1992 56 (1993): «Il personale nell'amministrazione statale era ancora, in gran parte, quello fascista e la continuità non era solo nelle persone ma anche negli atteggiamenti mentali».

[23]These are the words of MP Zuccarini at the Constituent Assembly (March 7, 1947), quoted in Paladin, *supra* note 19, at 38; on this point, see also Onida, *supra* note 13, at 571 and many others.

[24]They were the Royal Law Decree 28 December 1943, no. 29/B and the Royal Regency Legislative Decree 27 July 1944, no. 159.

[25]G. Melis, *Note sull'epurazione dei ministeri, 1944-46* 4 Ventunesimo secolo 17-52 (2003); see also A. Battaglia, *Giustizia e politica nella giurisprudenza* in Dieci anni dopo 21 ff. (Achille Battaglia et al. eds, 1955).

Long after the entry into force of the new Constitution, the top-level agents of the public administration were still people trained and educated under fascism[26]. The members of the judiciary remained almost untouched: after examining some hundred cases, only a few units of judges were dismissed, even most of the judicial body under fascism had been connected with the regime and had operated under the direction of the government[27].

The drive toward the national pacification of a divided, destitute and dejected country exceeded the urge of punishment and vindication, to the point that, right after the referendum for the Republic, on June 22nd, 1946 Palmiro Togliatti, the historical leader of the Communist Party acting in his capacity as Minister of Justice in the Government, signed a general amnesty for common and political crimes.

2.2 Political Continuity and Discontinuity in the Transitional Phase

The same ambivalence between continuity and innovation can be found in the *political process* that took place in the crossing-over phase between the old illegitimate regime and the new constitutional era.

From the historical point of view, two major facts give a revolutionary flavor to the founding of the Italian Republic: the role of the National Liberation Committees – the institutional offspring of the Resistance movements – and the institutional referendum of June 2, 1946, when the Italian people chose the Republic and turned down the Monarchy.

a. A Constitution Born out of the "Resistance"?

It is often said that the Italian Constitution was "born out of the Resistance". This statement wishes to recognize the value and the importance of popular participation in the final stage of the dismantlement of the fascist regime. This importance is undisputable. However, the very same statement can be misleading

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[26]S. S. Cassese, *La formazione dello stato amministrativo* 5 (1974).

[27]A. Meniconi, *Storia della magistratura italiana* 250 ff.(2012). See also P. Saraceno, *Le «epurazioni» della magistratura in Italia. Dal Regno di Sardegna alla repubblica: 1848-1951* 39 Clio 521 ff. (1993).

if it is read as suggesting that the Italian constitution is solely the result of the violent uprising of a group of people that was able to take power, replacing the fascist regime.

As a matter of fact, the "resistance guerrillas" were present in only some areas of Italy, namely in the north and center of the country, whereas in the South the king still governed, and it was the allies who began the liberation of the country. Moreover, the nature and functions of the National Liberation Committees was not entirely clear. Certainly, they aimed at a double target: to set Italy free from both the external and the internal oppressors, the Nazis and the Fascists. As grassroots revolutionary forces, one could expect them to be the protagonist of the constitutional revolution, but in reality things were much more complex than that.

In 1945 – before the referendum and the elections for the Constituent Aassembly – Piero Calamandrei, one of the standout voices of the "Action Party", which championed the "revolution", wrote that the liberation committees, «after the liberation from the foreigners, shall have the constitutional task to complete the liberation of Italy from fascism. They are new bodies, born of historical need. Outside of any preconceived doctrinal scheme, they naturally rallied all the forces ready to hold their own against the oppressors and to rebuild the State based on the principles of democracy. […] Only these forces are entitled to rebuild the new Italian state. Only these forces. […] This is the great, unaccomplished function of the liberation committees. To ensure that the Constitution is the exclusive task of the revolutionary forces»[28].

Yet their role in the reconstruction of the country was not up to these expectations. The role of the Resistance and of the national liberation committees did not go this far. A number of different

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[28]My translation from Piero Calamandrei, *Funzione rivoluzionaria dei Comitati di Liberazione* I, 2 Il Ponte 138-140 (1945, now republished in Andrea Mugnai, Storia e Costituzione. Radici politiche e tradizione culturale nella Costituzione italiana del 1948 33-37 [1998]): «dopo avvenuta la liberazione dallo straniero hanno la funzione costituzionale di portare a termine la liberazione dell'Italia dal fascismo. [Essi] sono appunto gli organi nuovi, partoriti dalla necessità storica, nei quali si sono spontaneamente raggruppate, fuor da ogni preconcetto schema dottrinario, tutte le forze decise a resistere agli oppressori ed a ricostruire lo stato secondo i principi della democrazia. […] A queste stesse forze, e ad esse sole, spetta oggi il compito di ricostruire il nuovo stato italiano. Ad esse sole […] Questa è la grande funzione, non ancora esaurita dei comitati di liberazione. Per garantire che la Costituente sia opera delle sole forze rivoluzionarie».

forces played a role in the composite and tortuous liberation process: the monarchy, the allies, the trade unions, the Catholic Church, and, yes, the parties of the national liberation committees.

In 1942, Great Britain believed that the existing anti-fascist leaders in Italy or in exile would not be able to create a movement that would succeed in countering fascism. On November 30, 1942, a note from the Foreign Office to the State Department said that, at that moment, there was no leader in Italy able to oppose fascism, nor was there any person abroad who could take up that task[29].

The Resistance movement covered a limited time period, spanning only from September 9, 1943 to the last days of April 1945. Anticipating or extending the terms of that period would entail the distortion of its exact definition and historical significance[30]. According to the protagonists of the guerrilla struggle, the men who fought in the Resistance never thought they were the winners. It was the allied armies who won, the English army, first, and, then, the Russians and the Americans. The contribution of the Resistance amounted to twenty months of suffering and armed conflict[31], within the context of a more complex process.

«The famous sentence "a Constitution born out of the Resistance" remained little more than an empty slogan»[32].

b. From the Revolutionary Approach to the "Provisional Constitutions"

The transitional period was a theater in which a variety of forces were at play, moving in different directions. A number of factors suggests that, upon closer analysis, the two great leaders of the constituent momentum, De Gasperi and Togliatti, at different stages of the transitional process, refused all *revolutionary* stances in favor of a more *evolutionary* approach. Both decided to support the Government lead by Marshal Badoglio in the wake of the fall of fascism and supported the two "provisional constitutions" issued

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[29]See A. Lepre, *Storia della prima Repubblica. L'Italia dal 1942 al 1992*, cit at. 22, at 15, 56.

[30]P. E. Taviani, *Politica a memoria d'uomo* 69 (2002). Taviani is one of the main protagonists of the entire lifetime of the Christian Democratic Party and had the chance to fight in the final months as a guerrilla fighter in a Communist brigade.

[31]*Id.* at 73.

[32]My translation from Paladin, *supra* note 19 at 35: «[L]a celebre formula della "Costituzione nata dalla Resistenza" rimase poco più che uno slogan».

by the royal regency in 1944 and 1946[33], calling for a Constituent Assembly after a general election.

After Victor Emmanuel's decision to have Mussolini apprehended, following the resolution of the Grand Council of Fascism on July 25, 1943 to dismiss il Duce from his role as the leader of the Fascist Party in Italy, a discussion about the form of collaboration to extend to Marshall Badoglio's government and to the monarchy arose amongst the leaders of the parties of the National Liberation Committee and among their popular base, mostly in Northern Italy, where opposition to the Nazis was stiffer.

At that very moment, as De Gasperi would later recall in his address at the first congress of the Christian Democrats on April 1946, the parties were facing *two options: uprising or the Constituent Assembly*. At first, the Socialist Party, the Action Party (which was the second group of the Resistance in terms of the number of people involved), and the Communist Party were in favor of the first option; the Christian Democrats were in favor of the second. When Palmiro Togliatti, leader of the Communist Party came back from Moscow to Naples on March 27, 1944, immediately after the recognition of Badoglio's government by the USSR, first of the allied forces, on March 14, his first statements concerned the willingness of the Communist Party to be an active part of Badoglio's government, much to the surprise of the Communist popular base, and much to the anger of the Socialist Party and the Action Party. These parties later accepted that turn, though reluctantly and only under the condition that the King abdicated in favour of his son. They worked under a "veil of ignorance" as Ackerman notes.

In his report, De Gasperi also recalled himself saying:

> «I am not afraid of the word revolution, rather it bothers me, after twenty years in which fascism, always citing the rights of the revolution, committed so many abuses and violated the rights of citizens. In any case, the

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[33]Royal Regency Decree 16 March 1946, n. 98 (Integrazioni e modifiche al decreto-legge Luogotenenziale 25 giugno 1944, n. 151, relativo all'Assemblea per la nuova costituzione dello Stato, al giuramento dei Membri del Governo ed alla facoltà del Governo di emanare norme giuridiche): it changes the Royal Regency Decree 25 June 1944, n. 151 (Assemblea per la nuova costituzione dello Stato, giuramento dei Membri del Governo e facoltà del Governo di emanare norme giuridiche), which would originally leave the choice between monarchy and republic to the Constituent Assembly.

Constituent Assembly is the true revolution. […] The Christian Democrats are in favor of a democratic solution […]. The words "Constituent Assembly" did not come later; they were born during the conflict of those days as a democratic propensity over and against any insurrectionist ambitions. […] Our work in the government, which went forward amid shoals and difficulties of many kinds, was able to ensure that the Constituent Assembly and the referendum were part of the agreement»[34].

c. Monarchy or Republic?

As for the *Referendum of June 2, 1946*, it was indeed a clear-cut break with the past. The Italian people put an end to the Monarchy that had been involved with the fascist regime and chose to establish a democratic republic.

But here, too, a proper understanding of this historical fact requires careful interpretation. In reality, the referendum can hardly be considered "revolutionary", since it was the outcome of an agreement among government parties, and not the result of an uprising. The agreement was then adopted by an act of the royal regency and is usually referred to as "provisional constitution"[35].

The number of votes in favor of the Republic did not amount to an overwhelming majority: the republic gained 12,717,923 and the monarchy 10,719,284, so that the difference was about two million votes. However, 1.498.136 votes were invalid. The votes in favor of the Monarchy came mostly from the south of the country;

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[34]My translation from Alcide De Gasperi, Linee programmatiche delle Democrazia Cristiana, National Secretary's address at the I Congress of the Christian Democrat Party, April 24-28, 1946, http://s3-eu-west-1.amazonaws.com/dellarepubblica.it/Legislature/1943-46/1946/Dc-%201cong%2046/Popolo%20Icongresso%2046/De%20Gasperi.pdf: «Non temo la parola rivoluzione, ma ne ho piuttosto fastidio dopo venti anni che il fascismo, richiamandosi ai diritti della rivoluzione, ha commesso tante soperchierie e violato i diritti dei cittadini. A ogni modo la vera rivoluzione è la Costituente. […] I democratici cristiani sono per la soluzione democratica […]. [L]a parola Costituente non è venuta più tardi, ma è nata nel conflitto d'allora ed è nata soprattutto come tendenza democratica contro velleità di carattere insurrezionale […]. La nostra opera di Governo, che seguì fra scogli e difficoltà diverse, ha portato ad assicurare la Costituente nell'accordo stesso delle parti in causa e ad introdurre anche il referendum».

[35]See Cassese *supra* note n. 26.

the Christian Democrats, the largest political party at the time, were split about this basic choice.

A legal dispute was brought before the Supreme Court of Cassation as to the interpretation of the majority required to grant victory to one or the other of the two options – the controversial clause referred to "voters" rather than to "valid votes". The Supreme Court was expected to announce the poll results on June 10, but the pronouncement was postponed, leaving the country in very dangerous suspense for weeks. Before the results were officially communicated, the King left country. Under the guise of a subtle legal dispute, a major political conflict was raging[36].

All things considered, the country had chosen in favor of the Republic, but polls showed that Italy was a split country from a political point of view. And this division cast its shadow on the constituent process, which had to take into consideration the conservative soul of a significant part of the Italian people: if the new Republic was to be established on solid ground, the Constitution had to represent the whole Italian people, including those who were still nostalgic for the monarchy.

d. *The Unexpected Convergence of a Polarized Political System*

The Constituent Assembly was made up of a very fragmented political body: out of the 552 members at the end of its mandate, 209 were Christian Democrats, 104 were Communists, 65 were Socialists, 49 were Workers Socialists, 25 were Republicans, 22 were Liberals, 20 were members of the Common Man's Front, and the others were members of 5 further groups. None of the political groups had the majority of the votes. Moreover, none of the parties could imagine whether, at the next elections, they would be able to govern the country or would instead be the opposition. Nevertheless, the final text of the Constitution was the result of broad agreement – 453 votes in favor and 62 against – on which all the political parties had made their mark. This agreement was a remarkable result, considering that, by the time of the final vote on the Constitution, the Communist Party had just been ousted from the government coalition. The Constituent Assembly took a very inclusive stance. None of the many voices tried to impose its own view on the others. The Constitution was not the result of a single ideology. Consider, for example, that Article 7 of the Constitution –

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[36]Battaglia *supra* note 25 at 21 ff.; Paladin *supra* note 19 at 30.

regarding the privileged position of the Catholic Church regulated by a concordat signed by Mussolini – was supported by Palmiro Togliatti, the leader of the Communist Party, together with the Christian Democrats. Reasons of social peace and reunification of the country prevailed over divergent ideologies. For similar reasons, in every constitutional clause, the footprints of different, and even competing, political ideas can be easily recognized.

The constitutional principles were phrased in such a way that they were open to development in many directions. Consider those relating to the economic model, a very sensitive issue at the time: «Property is public or private. Economic assets may belong to the State, to public bodies or to private persons» (Article 42 of the Constitution). «Private enterprise is free» (Article 41 of the Constitution), but «economic activity may be oriented and coordinated for social purposes». Principles like these were susceptible to leaving room for a liberal free market or for state control of the economic sector. Or, again, for a "third" model, championed by the Christian Democrats.

As has been said, the Italian Constitution was a "compromise constitution". In fact, one can hardly say that, in the Italian experience, the new Constitution was the result of the constitutionalization of a unique revolutionary ideology. Firmly rejecting fascist ideology, the Constitution set the basis for future, undetermined developments. The revolution was not an accomplished fact, nor was it translated in coherent legal principles.

Given this historical and political background, the question arises of whether the Italian Constitution was born out of a *revolution* or was, rather, at the origin of a "gentle", "incremental" *evolution*. For sure, the Italian constitutional transition was not an abrupt change; the Constitution triggered a new beginning that brought about a "slow release" transformation. Discontinuity with the past was remarkable, but not immediate. Many constitutional principles were open-ended and left many things undecided[37]. It would take decades after the entry into force of the new Constitution to implement the new principles, give birth to the new institutions, and remodel the whole legal system[38].

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[37]See Cass R. Sustein, *Foreword: Leaving Things Undecided* 110 Harv. L. R. 6 (1996).
[38]See Maurizio Fioravanti, *Per una storia della legge fondamentale in Italia: dallo Statuo alla Costituzione* in M. Fioravanti ed., *Il valore della Costituzione. L'esperienza della democrazia repubblicana* 17 (2009).

3. The Meandering Implementation of the Constitution

The ambivalent origin of the Constitution and the open-ended result of many Constitutional principles accounts for the difficult and uneven implementation of the Constitution.

The old principles and institutions received swift implementation. A new Parliament was elected in 1948, a new President of the Republic was elected, and a new Government nominated. On the contrary, it took almost a decade to establish the Constitutional Court (1956) and the Supreme Council of the Judiciary (1958), an essential security measure for the independence of the judiciary. It took more than twenty years to put the ordinary Regions and the referendum (abrogative and constitutional) into place (1970). And some of the constitutional provisions – like Article 39 on the trade unions and Article 46 on "the rights of workers to collaborate in the management of enterprises" – have yet to be implemented. In a word, the Constitution was enforced at different speeds, and some of its provisions were simply ignored.

What is even more remarkable is that – as Bruce Ackerman recalls – an attempt was made to downplay the legal value of the Constitution, in particular its more innovative principles on social rights, healthcare, working conditions, and pension and social assistance, (dis)qualifying them as political provisions to be left to the political bodies, rather than legal ones, and not susceptible to enforcement by the judiciary. The most innovative features of the Constitution as higher law, which was normative and rigid, as opposed to the political and flexible Albertine Statute, were at risk.

A very dangerous attack on the authority of the Constitution was, in fact, launched by a landmark decision of the Supreme Court of Cassation on February 7, 1948[39] (a few weeks after the entry into force of the Constitution), which drew a distinction between preceptive rules and mere programmatic principles, which were to be treated as non-justiciable, and the binding force of which was conditional upon legislative implementation. The Supreme Court of Cassation was giving voice to a very conservative position that

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[39]Court of Cassation, Criminal United Sessions, 7 February 1948, 2 Foro ital., 57 ff. (1948).

was circulating among some legal scholars (V. E. Orlando[40] and many others) and in the judiciary, where the vast majority of the judges were those who served in the previous regime.

Had this doctrine taken root, the innovative driving force of the Constitution would have been neutralized. Had the implementation process been left to the Parliament, the translation of the constitutional framework into practice would have been distorted or, at least, incomplete.

In reality, the political landscape had dramatically changed in the meanwhile, with the Communist Party excluded from the Government since May 1947. After the election of 1948, when the Christian Democrats won more than 48.5 percent of votes and the parties on the left lost the competition, it became clear that the Communist Party would not return to the government for a long time, also considering the unwritten agreement on the implicit *conventio ad excludendum* subsequent to De Gasperi's visit to the US in 1947. The Parliament and the political institutions were dominated by the Christian democrats.

That was the reason why the parties on the left turned to the judiciary to have their voices heard in the implementation of the Constitution.

There are two relevant facts to be recorded: the establishment of the Constitutional Court, and the Congress of the *Associazione nazionale magistrati* (National Association of Judges) that took place in 1965 at Gardone.

Whereas most of the politicians on the Constituent Assembly were skeptical about all forms of judicial review of legislation, after the first electoral turn, the opposition parties endorsed the idea of the Constitutional Court as an institution capable of counterbalancing a very powerful majority in the government. The Communists, who had strongly resisted the idea of judicial review of legislation because it could impair the idea of parliamentary democracy, later became the main supporter of constitutional adjudication. On the contrary, the Christian Democrats, who in the Constituent Assembly had pushed for its provision within the Constitution, became more hesitant after gaining the 1948 election, and the implementation of the Court was postponed.

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[40]Vittorio Emanuele Orlando, *Studio intorno alla forma di governo vigente in Italia secondo la Costituzione del 1948* 1 Riv. trim. dir. Pubb. 5 ff. (1951). See also Francesco Gentile & Pietro Giuseppe Grasso, eds., La Costituzione criticata 137 ff. (1999).

As a matter of fact, starting with decision 1 of 1956[41], the Constitutional Court, instead of taking sides in current political disputes, emerged as a defender of the anti-fascist constitution that was hammered out at the founding through an agreement between all the political parties. Despite the personal and professional records of some of its members[42], the Constitutional Court was able to do its job and to disseminate the new constitutional principles in a legal system that was very much in need of renovation. As has already been recalled, the new Republic took her first steps in a legal environment that was shaped under fascism. From its inception, the Italian Constitutional Court started a longstanding project of renovating old legislation, cutting away all the pieces of legislation that bore the imprint of fascist culture. The Court soon became one of the most influential authorities in the Italian institutional architecture, quickly garnering the respect of all the other branches of government. Since its very origins, the Italian Court has shown solid self-awareness and high esteem for its own mission of implementing the new constitutional principles, while, at the same time, it has maintained an open and cooperative approach to other actors, both political and judicial.

This last remark on the cooperation with the judiciary brings us to another step. The judicial implementation of the Constitution in Italy was the result of a joint effort between the judiciary and the Constitutional Court. First, the Constitutional Court could not act alone[43] because the main avenue to bring cases before the Court is the incidental procedure of review, which implies cooperation with lower courts. Second, in 1965, the national congress of the judiciary marked a turning point in the very idea of the judicial function. In the final document of that Congress (where, for the first time, the judges of the *Magistratura Democratica*, or Democratic Judicary, the

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[41]Ackerman, *supra* note 2 at 173; see also Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia & Andrea Simoncini, Italian Constitutional Justice in Global Context (2015).

[42]Giuseppe Capograssi, Costantino Mortati, Tommaso Perassi, Gaspare Ambrosini, Nicola Jaeger and other members of the first Constitutional Court belonged to an older generation: they were born at the sunset of the XIX or at the dawn of the XX century and had spent their careers under the Monarchy and the Fascist time. The most astonishing example is probably Gaetano Azzariti, President of the Constitutional Court from 1957 to 1961, who had held the post of President of the "Race Tribunal" under the fascist regime.

[43]See Elisabetta Lamarque *It takes two to tango* in, Corte costituzionale e giudici nell'Italia repubblicana 101 ff. (2012).

progressive "current" of the judiciary, gained the majority) three principles were spelled out. First, the Constitution has direct effect and every court is required to apply constitutional norms to the cases and controversies under their jurisdiction. Second, parliamentary legislation which is in contrast with the Constitution is to be referred to the Constitutional Court for judicial review. Third, a new method of interpretation is to be followed, i.e., interpretation in conformity with the Constitution. In American legal terminology, this method would say that, where a statute is susceptible to two constructions, one that gives rise to doubtful constitutional questions arise, and one that is able to avoid such questions, a court's duty is to adopt the latter[44].

The old assumption of the Court of Cassation of 1948 on the programmatic nature of the Constitution was utterly rebuffed. And this "Gardone congress" soon became a milestone in the evolution of the judicial function in Italy[45].

La bouche de la loi turned out to be the voice of the Constitution, as well, in a constitutional framework where the judges are still defined as "subject to the law" (Article 101 of the Constitution).

4. Difficult Consolidation

"Revolutionary constitutionalism" describes a four stages process in which, after some phases where the Constitution is in the hands of the political actors that lead the fundamental change, the judiciary emerges on the stage. This evolution is easy to see in Italian Constitutional history.

However, the Italian experience provides some food for thought if one considers what happened after the founding period.

Before the end of the seventies, the struggle for consolidating the Constitution was heading towards success. The time of constitutional freezing had come to an end. The implementation process was almost completed, and the Constitutional Court, together with all the judicial bodies, had developed all the tools necessary to keep the Constitution alive. The most important pieces of social legislation come from those years. The reform of the

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[44]See, eg, Jones v. United States 526 U.S. 227, 239 (1999) quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 408 (1909).
[45]Meniconi, *supra* note 27 at 312 ff.

middle schools was approved in 1962[46], thus implementing Article 34 of the Constitution, which provides that, «Primary education, given for at least eight years, is compulsory and free of tuition». In 1970 the «Statute of the Workers» was passed by Parliament, establishing a long list of safeguard measures for workers that implemented Articles 1 and 35 *et seq.* of the Constitution and, around the same time, new legislation implemented Article 38, on social assistance for people unable to work and on pensions. In 1978, the public universal health care service was established[47], adding another pillar to the welfare system related to Article 32 of the Constitution, which states that, «The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent». These and other pieces of legislation passed by the Parliament, together with some crucial decisions of the Constitutional Court, were able to translate some of the promises stipulated by the Constitution in social matters into reality.

However, at the same time, a new crisis was looming, and the political institutions began showing symptoms of weakness and vulnerability. During the seventies, social legislation was translating into reality even the more "revolutionary" – i.e. progressive - constitutional principles, but the political parties, together with all the political institutions, began experiencing new problems, along with increasing political fragmentation and governmental instability[48]. Long before the present-day populist challenges, Italy has undergone a number of political crises, which reached an acute phase in the early nineties, with a massive anticorruption investigation that implicated the vast majority of political leaders, to the point that the period is commonly referred to as the beginning of the "second republic". That was not an ordinary difficult time: for a number of historical reasons, all the political forces that had led the constituent process – and notably the Christian Democrat Party and the Communist Party – were wiped away, and a new difficult transition began.

This political instability prompted the debate on Constitutional reform. Over the last forty years, an unending and perennially incomplete debate on the *reform of the Constitution* has

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[46]Law 31 December 1962, n. 1859 (Istituzione e ordinamento della scuola media statale).

[47]Law 23 December 1978, n. 833 (Istituzione del servizio sanitario nazionale).

[48]Fioravanti, *supra* note 38 at 28 ff.

produced a number of drafts that were ultimately not approved by the Parliament, or were subsequently rejected by the people in referendums (as happened with the constitutional reform promoted by the Berlusconi Government in 2006 and again, ten years later, with the one promoted by the Renzi Government in 2016). None of these projects was able to overturn the original Constitution. However, this prolonged debate has put the Republican Constitution under stress and has had detrimental effects on its legitimating authority.

5. A Revolutionary Agreement

Bearing in mind the Italian experience, a tentative remark could be added to the four-stages analysis of revolutionary constitutionalism. Time three and time four – the normalization of the revolutionary – cannot be exclusively judicial or purely political. A proper balance between the two poles is always a necessary condition for the Constitution to work. The judicial "guardians of the Constitution" – to recall a Kelsenian expression – cannot do the whole job, nor can the political actors do it alone in any of the phases, and much less so in the time of consolidation. In order for the constitution to reach stability in time, the judicial and the political bodies should work together in the implementation of the new principles enshrined in the founding text, and do so in a contextual, rather than a sequential pattern. Italian experience shows that one should avoid a reading of Ackerman's "four-time" model as if it were suggesting that "there is a time for the people, a time for the parliament, [and] a time for the judiciary" (echoing *Ecclesiastes*[49]), as distinct segments of a linear idea of time.

Constitutions are not mere political documents, nor are they ordinary legal rules. At the constitutional level, politics and law are strictly intertwined. Their effective legitimating capacity rests on the converging contributions of *gubernaculum* and *iurisdictio* alike.

The new constitutional values are polysemic and lay out a pluralistic understanding of society susceptible to a plurality of interpretations. With such a symphonic composition, none of the interpreters can play alone.

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[49] See Ecclesiastes 3.

Whereas, in many revolutionary experiences, the constituent process is founded on an act of will of a *minority* strong enough to oust the political forces in power and willing to change the historical development of the country according to a new ideology[50], the legitimation of the Italian Constitution rests, to a great extent on *agreement*. In the fight against the totalitarian regime there was not a single winner, nor may De Gasperi be considered the only charismatic leader of the constitutional momentum. The Christian Democratic Party had many souls; there was a strong Communist Party, and, again, there were strong leaders from the right-wing parties. No one questions the fact that the Italian Constitution was forged through agreement. In a way, it can be considered a "revolutionary agreement" – to remain in accordance with Ackerman's doctrine – because it involved all the anti-fascist political forces, determined to counter fascism and any form of dictatorship. However, in the absence of any single winner, the Constitution does not codify a univocal new vision of civil life. Pluralism is the stamp of the constituent process and of the Constitution itself. Therefore, in the founding of the Italian republic the new and the old, the people and the elites, the discontinuity and the continuity, the political and the legal, the revolutionary and the evolutionary are all bound together in a historical dynamic, where opposite poles are connected in a "*et-et*" rather than an "*aut-aut*" relationship.

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[50] See Paolo Pombeni, *La questione costituzionale in Italia* 56 ff. (2016); see also Harold J. Berman, *Law and Revolution, the Formation of the Western Legal Tradition* (1983).

THE EU CRISIS AND THE MULTIPLE CONSTITUTIONAL PATHS OF EUROPEAN DEMOCRACIES

*Antonia Baraggia**

Abstract

The article elaborates on Ackerman's proposed diagnosis of the European crisis. Precisely, the fact European democracies have arisen from different "constitutional paths" can help in understanding the crisis of legitimacy that afflicts the European Union. Starting from this perspective the Author discusses the role of Courts in the EU composite legal space and the "EU trilemma" of rights, identities and legitimacy.

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1. Introduction

Constitutional democracies in many countries in different regions of the world are seeing a rise of populist movements and the affirmation of autocratic trends. Many reasons, both endogenous (country specific) and exogenous, have been advanced by legal scholars and political scientists to explain the current crisis of constitutional systems[1].

Bruce Ackerman's latest book contributes to this debate with an original comparative understanding of constitutional systems around the world, arguing a better understanding of the current predicament can be achieved by going back to their foundational moments, when their power won legitimacy. In Ackerman's words

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* Assistant Professor of Comparative Law, University of Milan.
[1] See M.A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis* (2018); T. Ginsburg T, A. Z. Huq, *How to Save a Constitutional Democracy.* (2018).

"a deeper understanding of the past is especially important at this moment. With constitutional crises erupting throughout the world, it is tempting to believe that all of them are symptoms of the same disease, so-called populism - and can be cured in similar way. This is a mistake. Countries that have travelled down the three different paths to constitutionalism confront very different crises[2]".

After radically innovating the narrative of the genesis and development of constitutional change in America, marked by what have been defined as "constitutional moments"[3], Ackerman adopts a more global perspective and compares the founding moment of different constitutional systems - i.e. the moment in which power acquires legitimacy - identifying three "constitutional paths" (or ideal-types): the first, the subject of this work, is defined as "revolutionary constitutionalism", by virtue of which the origin of the constitutional order is ascribed to the work of a revolutionary movement and a charismatic leader who broke with the previous regime, giving rise to a new constitutional experience; the second path, contrastingly, sees the origin of a new constitutional order as the work of establishment "insiders" who pragmatically intercept and satisfy the requests that arise from the social body; and finally, the third ideal-type path sees the origin of the constitutional order in a construction by elites, who acted in a context without popular claims.

It is on the first, fascinating, but at the same time oxymoronic path (revolutionary constitutionalism)[4] the volume in question focuses, with Ackerman challenging - with his very specific form of acumen - the traditional categories and methodologies of the phenomenon of the origin of power.

At a time in history when the term 'revolution' evokes dark scenarios filled with the affirmation of populist and even autocratic movements rising up against elites and established powers, Ackerman's serious investigation "challenges us to take revolutions seriously as a legitimate paradigm of constitutionalism, rather than a mere threat to it."[5] As Ackerman argues, "I am to show that

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

[3] B. Ackerman, *We the people. Foundation* (1991).

[4] For an in depth analysis of the phenomenon of constitutional revolution, see G.J. Jacobsohn, Y. Roznai, *Constitutional Revolution* (2020).

[5] M. Hailbronner, *Introduction: Defending "democratic populism"?,* in International Journal of Constitutional Law, Volume 17, Issue 2 (2019) 681.

revolutionary constitutionalism has been a dynamic force in the twentieth century and remains a powerful present-day reality."[6]

In Ackerman's reconstruction, revolutionary moments were at the origin of the constitutional experiences in India, South Africa, Italy, France, Poland, Israel and Iran. Obviously the author recognises the specific and heterogeneous social and economic contexts of these different countries, as well as their varied legal and political cultures; however, this awareness does not prevent him from tracing a common thread that binds these experiences together, such that they ultimately represent "variants" of the same phenomenon: "*Revolution on a Human Scale*".

Ackerman's investigation is not only relevant to explain the challenges faced by the individual countries, but it is also – and even more fascinatingly – a lens through which we can look at the crisis – or better, the multiple crises – of the European Union.

In Ackerman's words, if "the leading countries of Europe emerge from different constitutional pathways, these differences should be treated with respect if the European Union is to sustain itself as a vital force in the coming generation"[7].

This piece will focus on the implication of Ackerman's theory for the debate about the EU's current crisis and its legitimacy. However, before reflecting on the EU case, it is important to look at how Ackerman's reconstruction challenges some of the traditional methodological assumptions, especially as these constitute some of the most significant aspects, in terms of constitutional theory, of the work in question.

The first aspect is the approach Ackerman uses to examine "constitutional change" as his approach differs, at least in part, from traditional investigations that start from positivistic assumptions. Like positivists, Ackerman investigates revolutionary events regardless of their moral assessment because they all face the same problems of legitimising power, regardless of their nature. However, Ackerman's analysis stands out because of the very definition of a constitutional revolution: "the positivist does not ask how a regime legitimates itself. He simply wants to identify the

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[6] B. Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law,* cit. at 2, 43.

[7] B. Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law,* cit. at 2, 2.

fundamental rules by which a particular regime distinguishes law from non-law."[8]

The not strictly positivistic approach of Ackerman's investigation is also reflected in the extensive use of the study of political science, history and sociology[9], which makes the work a true fresco of comparative constitutional history, as well as a reference point for studies on the theory of constitutional change.

The second noteworthy methodological aspect, which also relates to the unique approach of Ackerman's research, is the overcoming of the dichotomy between civil law systems and common law systems: India and South Africa share the common law tradition; Italy, France and Poland have systems rooted in civil law. The different legal traditions undoubtedly played a role in defining the approach of revolutionary regimes in the face of the challenge of legitimising revolutionary power even if, in Ackerman's argument, this role was completely secondary. The outcome of the revolutionary experience depended pre-eminently on how political actors and parties continued along the "revolutionary path" and completed the process of legitimising power. It is this "larger framework" that looks at the role of political actors and institutions as a whole that must be considered for the study of the different constitutional paths. From this assumption comes another unique aspect of Ackerman's investigation: criticism of traditional approaches that tend to place the role of the courts at the centre of reflection and, in particular, the dialogue between them. According to the author, this approach often overlooks the fact the courts are, like other institutions, involved in the process of legitimising power and, depending on the constitutional path taken, judges faces different challenges for legitimacy. In Ackerman's words, "much recent work obscures these differences, and treats constitutional courts as if they were engaged in a worldwide conversation about the meaning of 'free speech' or 'human dignity'. This is a mistake[10]".

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[8] *Ibidem*, 36.

[9] As Ackerman argues, "We must turn from economics to sociology for interdisciplinary insight. Over the past generation, the study of social movements has gained a central place in the discipline – which has already led to a promising series of boundary-crossing conversations with legal scholars. I very much hope that this book will encourage a more intensive collaboration in the future", *Ibidem*, 43.

[10] *Ibidem*, 38.

2. The EU crisis in the lens of Ackerman's theory

The crisis of the European Union has become a sort of *topos* for studies on the EU integration process. The recent history of the EU is certainly a story of different crises: the constitutional crisis in 2005, the economic crisis in 2008, the rule of law crisis, the refugee crisis, Brexit and last but not least the pandemic with its effects on institutions, economics and above all people's lives. All these different crises have questioned the very nature of the EU, its mission and its raison d'être vis-à-vis the sovereignty and identity of Member States. The multiple EU crises act as catalysts of a profound crisis, which has its roots in the EU's foundation and legitimacy.

The issues of EU legitimacy have attracted the attention of many EU law scholars, leading to an overwhelming mass of literature analysing the EU democratic deficit, the democratic disconnect, the technocratic nature of the EU and the lack of proper accountability for EU institutions.

I do not intend to deal with such an important stream of research, but I do want to stress Ackerman's original contribution to this debate, partly looking at how he fits with some of the most insightful contributions on the topic.

Ackerman's reflection starts from the unique, hybrid nature of the EU - caught between an international organisation and a federal state, inevitably resulting in many inconsistences in the exercise of power and in the relations between the EU and its citizens. The EU cannot be considered a proper state and it has developed along a unique path, but these aspects do not prevent Ackerman from examining it in the prism of his theory about the three paths of constitutionalism.

Ackerman seems to correctly address issues of the EU legitimation process as a double tiered process: one related to the legitimacy of the EU per se and one related to the relationship between the EU and the multifaceted constitutional patterns of its Member States. It is from this twofold perspective that Ackerman sheds light on a still quite underexplored aspect of EU integration. Coherently with the method applied to the States considered – looking at the foundational moment when power gains legitimacy – Ackerman traces the EU legitimacy crisis back to the different paths taken by EU Member States: "the leading nations of Europe

come to the Union along different paths: the Constitutions of Germany and Spain are elite constructions; France and Italy and Poland have moved down the revolutionary path; Great Britain emerges from the establishmentarian tradition. Little wonder these countries have trouble finding a common pathway to a more perfect Union[11]". After the failure of the EU Constitutional treaty, with the rejection of the Treaty by voters in France and the Netherlands, the EU seemed to have taken the elite-driven path: "both the Lisbon agreement and later accords were elite constructions that tried to avoid self-conscious consideration of their merits by ordinary citizens[12]". As with all the elite constructions in Ackerman's theory, the EU is also facing the problem of "authenticity" - the lack of popular legitimacy earned by revolutionary constitutionalism.

The problem of legitimacy is key to explaining the rise of populist movements that contest EU authority and it may be interesting to briefly recall the tripartite concept of legitimacy which has been used to understand the multiple crises of the EU. As Weiler argues in his enlightening contributions on the EU crisis[13], the so-called input legitimacy, the democratic participation in a constitutional enterprise, is not in the EU's DNA[14]; the very essence of EU institutions - the Commission and the Council - is non-political and where there is no politics there is no democratic deliberation[15]. The EU construct was born in a functionalist paradigm so the EU's primary source of legitimacy would be found into the results, that is, the "goods" it would provide (output legitimacy)[16]. Such a functionalist approach might have seemed to work well in a period of economic growth, but its weaknesses became all too clear when the EU was hit by the 2008 economic crisis. The EU suddenly became not the provider of wealth, peace and stability among nations, but the main agent of austerity

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[11] B. Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, cit. at 2, 21.
[12] *Ibidem,* 23.

[13] J.H.H. Weiler. *Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law, in* Singapore Journal of Legal Studies 248–268 (2012). J.H.H. Weiler, *The Crumbling of European Democracy*, in M.A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis* 629, (2018).
[14] J.H.H. Weiler, *The Crumbling of European Democracy*, cit. at 13, 638.
[15] As Weiler argues, "Democracy without politics is an oxymoron", Ibidem 635.
[16] Ibidem, 634.

measures, impinging on Member State sovereignty, national democratic circuits and ultimately on constitutional rights. Even the EU's shift from an economic community to a community of rights was not enough to make up for the lack of a true European polity. On the contrary, the faith in a pan-European language of rights had the opposite effect, leading to a reaction at local and national level.

Even if we look at the third source of legitimacy – the telos legitimacy or political messianism[17] – we see it has progressively vanished in the EU landscape. In political messianism, "the justification for action and its mobilising derive not from 'process' as in classical democracy, or from 'result and success' but from the ideal pursued, the destiny to be achieved, the 'Promised Land' waiting at the end of the road[18]".

The promised land of a union of the People of Europe, of different types of State relations, a Union of prosperity and peace, is still far away and the contingent and multifaced problems the EU is facing exacerbate the distrust in the EU project and even cause anger at the failure of a "promised revolution". This perfectly reflects Ackerman's account of the EU's current status, troubled by the "rise of protest movements to portray the European Union as an alien force dominated by harsh technocrats, with EU politicians serving as pseudo-democratic ornaments[19]".

The constitutional tensions the EU is facing have to be analysed in the light of where EU integration stands at present: a context characterised by a growing narrative challenging EU authority, as an illegitimate constraint over the expression of national sovereignty and identity[20]. These tensions, which to a certain extent can be considered inherent in a multitier system, need to be analysed within the broader trend of a re-emergence of constitutional dissent and conflict among local, national and global

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[17] Ibidem, 637.

[18] Ibidem, 637.

[19] Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law,* cit. at 2, 23.

[20] R. D. Kelemen, L. Pech, *Why autocrats love constitutional identity and constitutional pluralism. Lessons from Hungary and Poland*, Working Paper No. 2 — September 2018, www.reconnect-europe.eu. G. Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, Review of Central and East European Law 23, 43(1), 36 (2018); L. Pech and K. Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 Cambridge Yearbook of European Legal Studies (2017).

actors. As Hirschl argues "when understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalisation, the rise of a new trans-national constitutional order and judicial class and the corresponding decrease in the autonomy of 'Westphalian' constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit's, region's, or community's unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not decline[21]".

3. The role of Courts in the EU composite legal space

In this context of distrust towards EU institutions, it seems particularly interesting to look at the role played by the judiciary on the three paths of constitutionalism. In this perspective, Ackerman's aim is to explore "the dynamic process through which courts might – or might not – play an increasingly legitimate role in the evolving system over time[22]."

Such a perspective is especially intriguing for the European Union. The Court of Justice of the EU (CJEU) has become a pivotal actor in the evolution of EU integration as a multilevel constitutional system. More recently, after the entry into force of the Nice Charter, it further strengthened its influence, becoming not only the Court for conflicts which may arise between EU and national law, but also a human rights adjudicator[23].

The CJEU has acted as a centripetal force in the context of the EU integration vis-à-vis Member States, developing the concept of the direct effect of EU Community law, introduced in 1963 by the notorious Van Gend and Loos decision[24]; in 1964 in Costa v. Enel[25], it affirmed the primacy of EU law over domestic law; and in many areas of law - even in the most sensitive and "political" issues, such as for citizenship - the Court expanded the influence of EU law over national law.

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[21] R. Hirschl, *Opting Out of "Global Constitutionalism"*, in *Law & Ethics of Human Rights* 12 (1), 5 (2018).
[22] Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law,* cit. at 2, 38.
[23] G. de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, *Maastricht Journal of European and Comparative Law,* 20(2), 168–184 (2013).
[24] CJEU, Van Gend & Loos, Case 26-62 (5 February 1963).
[25] CJEU, Costa v ENEL, Case 6/64 (15 July 1964).

This role of the CJEU is not surprisingly in Ackerman's framework: in an "elite" construction a key role in the legitimation process is played by the courts. For the EU, however, the dominant effect of the CJEU in the EU integration process has been more of a sort of counter-effect. The "constitutional" turn in the EU, fostered by CJEU case law on the primacy of EU law and on its direct effect, ultimately "accentuate the enduring legitimacy crisis of the Union[26]".

With its revolutionary jurisprudence, the CJEU has produced a shift in the balance of power from the Member State to the EU. Initially, the Court's agenda focused on market integration and, in these terms, it is a story of success. But "the economic success has a legitimacy drawback", which "manifested itself when the public became aware of the fact that the object of integration was no longer the economy alone but also the political, yet without the people or their representatives having a chance to influence it[27]".

The shift of power from political actors to non-political bodies (EU judiciary and administrative bodies) is even clearer with the new CJEU jurisprudence on fundamental rights, after the entry into force of the Charter of Nice, which was awarded the same binding force as the Treaties.

The passage of the CJEU from an international court to a quasi-constitutional court seemed to be completed with the new competences for fundamental rights adjudication and with a broad interpretation of art. 51, Treaty on European Union (TEU), which gives the CJEU jurisdiction in each dispute in which EU law is at stake.

It is certainly true that without the CJEU, the EU would have remained an international organisation like many others, maybe with more power but without become the unique entity it is today[28]. However this uniqueness came at a cost: "many citizens cannot identify with the outcome. The judge-driven development was not supported by the political will of those affected by it. Their opinion

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[26] J.H.H. Weiler, *Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy, International Journal of Constitutional Law*, Volume 12, Issue 1, 94–1035 (2014).

[27] D. Grimm, *The Constitution of European Democracy* (2017).

[28] Ibidem.

was not asked, and they have responded by withdrawing legitimation."[29]

On a more institutional level, the centripetal force of CJEU jurisprudence, the erosion of the political sphere by non-political actors, the downside of representative institutions, and the creeping erosion of Member State competences have all contributed to generate increasing tension and highlight the contrast between the EU integration path and respect for national sovereignty and constitutional identity.

Such tension is clearly evident when looking at the well-known Bundesverfassungsgeright (BVerfG) jurisprudence on EU integration, from Maastricht[30] to the recent Weiss decision[31]. From a diachronic perspective, the most recent "nullification" by the BVerfG in the Weiss case is the outcome of a jurisprudence in which the Court has built a kind of "German Compact Theory", starting from the Maastricht Urteil, where the BVerfG clearly emphasised the nature of the EU compact, which is "an association of sovereign states with a view to achieving an increasingly close union between the peoples of Europe – which are organised as sovereign nation states[32]." The EU is seen as an association with limited powers, conferred by sovereign States. This conception laid the grounds for the limits to EU integration: "if European bodies or organs were to implement or add to the Union Treaty beyond the scope of the treaty instrument on which the act of approval was based, the resulting legal acts would not be binding within the German sphere of sovereignty[33]." The courts themselves claim such a power, framing the so-called *ultra-vires* control: "the Federal Constitutional Court reviews whether acts of European bodies and organs remain within the limits of the sovereign powers transferred to them or whether they exceed such limits[34]".

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[29] Ibidem.

[30] BVerfG, 2 BvR 2134/92, 2 BvR 2159/92, Judgment of 12 October 1993.

[31] BVerfG, 2 BvR 859/15 - 2 BvR 1651/15 - 2 BvR 2006/15 - 2 BvR 980/16, , 5 May 2020. See M. Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court* (2020), https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/

[32] BVerfG, Judgment of 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92, par. 188.

[33] Press Release No. 39/1993 of 12 October 1993, Judgment of 12 October 1993 - 2 BvR 2134/92, 2 BvR 2159/92.

[34] Ibidem.

Turning to the concept of constitutional identity, the landmark case is the Lissabon Urteil[35], where the BVerfG identified the core areas of State sovereignty in which intervention by the EU would have been considered *ultra vires* in violation on the national constitutional identity.

The BVerfG jurisprudence is grounded on the conception the EU is a "union based on the multilevel cooperation of sovereign states[36]" which retain the right to declare void an act of the EU institutions if the latter exceed their conferred competences and threaten the national constitutional identity.

As has been argued, "in marking this red line (..) the Court, by implication, retained control over the expansion of the scope of conflict in the European legal arena in order to avoid, if that is its preference, a constitutional revolution of the sort that fundamentally transformed the American constitutional polity through the nationalisation of its federal structures of power. Indeed, because its constitutive choices are not dictated by a higher legal authority within a single sovereign entity, it can afford to take risks by encouraging an expansion in the scope of legal contestation[37]".

The use of the Identität-Kontrolle by the BVerfG is guided by the idea any "fundamental reorientation in constitutional essentials can have revolutionary consequences and further that these may come about through an incrementally fashioned pathway[38]".

It is in this approach, which is hostile to an open revolutionary path, that one clearly finds the elitist ideal-type to which the German experience belongs and which may explain the German attitude towards the EU integration process, particularly its resistance to any change that might lead to a revolutionary outcome.

4. The EU trilemma: rights, identities and legitimacy
The focus on the role of the CJEU in the EU integration process and the resistance to the expansion of EU power in spheres

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[35] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, par. 248 – 249.
[36] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15, par. 111.
[37] G. J. Jacobsohn, Y. Roznai, *Constitutional Revolution*, cit. at 4
[38] Ibidem, 9.

that belong to the core of national sovereignty bring us to another interesting terrain of confrontation for EU studies.

The CJEU and the European Court of Human Rights (ECHR) have created one of the most advanced systems of protection for fundamental rights: individuals can claim their fundamental rights have been violated by State authorities in front of these two supranational and international courts. Indeed, judicial review in the EU has been considered "an important way of redressing some of the 'democracy deficit' within that political order, providing a voice for citizen interests and individual redress against powerful and relatively unaccountable institutional forces[39]."

However, conceived as a way to deal with the supranational democratic deficit, the judicial review and the centrality given to rights adjudication – partly following a more global trend – has turned into a bone of contention and disagreement in the EU. We are witnessing growing resistance and opposition to the phenomenon of global constitutional convergence, and to the supranational influence on national spheres of powers, driven especially (but not exclusively) by populist politicians. In a recent work, Pin argued convincingly the growth of transnational and supranational judicial fora "may have triggered or facilitated populism, its threats to the rule of law, and its illiberal agenda[40]". More broadly, the "general trend towards political and constitutional convergence, globalism and supra-nationalism have spawned an array of localist counter-movements that profess to represent a given polity's, region's or a community's 'genuine' identity. As such, the more expansive constitutional convergence trends are, the more apparent the paradox of global constitutionalism becomes as the likelihood of dissent and resistance increases[41]".

The counter reaction to global and transnational actors is particularly evident, although quite paradoxically, in the field of rights protection, the most "convergence prone area of

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[39] G. de Búrca, *Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law*, 3 European Public Law 561-562 (1997).

[40] A. Pin, *The transnational drivers of populist backlash in Europe: The role of courts*, German Law Journal 20, 225–244 (2019).

[41] R. Hirschl cit. at 21, 35.

constitutional law"[42], where CJEU intervention, especially after the Charter of fundamental rights, has been prominent.

The idea the diffusion of pan-European human rights discourse could help save the European constitutional path, creating popular commitment and recognition within the EU, was soon revealed to be an illusion. Human rights adjudication may contribute to redefine the boundaries of social conflicts, having the potential to exacerbate them and ultimately having a divisive effect. As Pin argues "they divide people: between losers and winners; between ordinary people and experts; between individuals and collectivities[43]."

The focus on rights and their judicialization, on one side, further marginalises the political and representative domain – exacerbating the EU's democratic deficit – and, on the other, helps to frame rights discourse in terms of merely individual claims, without any reference to questions of duty and solidarity.

Moreover, beside this hyper-individualisation, pan-European rights discourse also has the potential to cause a "flattening of political and cultural specificity, of one's own unique national identity[44]", handing a powerful argument to populist anti-European campaigns.

In light of the context I have tried to portray, highlighting the EU's multiple contradictions and tensions , Ackerman's diagnosis of the EU crisis paves the way for further, original reflections about the EU's history thus far. In particular, Ackerman invites us to look beyond the surface of the EU process and beyond the epiphenomena that we can see, in search of the more profound

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[42] As Hirschl argues, "whereas the wording of constitutional bills of rights around the world look more similar than ever, and a supposedly apolitical, Esperanto-like interpretive method of proportionality has become widespread, there is no jurisprudential (let alone political) consensus concerning the predominantly liberal "global constitutional canon" with respect to morally contested matters such religious expression, gay rights, reproductive freedoms, or the right to die. In fact, when one turns her gaze beyond the dozen or so "usual suspect" jurisdictions often referred to in comparative constitutional law to explore constitutional rights jurisprudence in the EU "periphery" or in U.S. states, let alone in the so-called "global south" or the "Islamic world," divergence from, and at times resistance towards, "global constitutionalism" is quite common", Ibidem, 3.

[43] A. Pin, *Comparative Constitutional Law, Rights, and Belonging in Europe* (2020) at https://www.resetdoc.org/story/comparative-constitutional-law-rights-and-belonging-in-europe/.

[44] J.H.H. Weiler, *The Crumbling of European Democracy* cit. at 13, 632.

roots of the current EU crisis and its elitist paths, being aware that "particular historical experiences may well generate counter-themes from competing paradigms."[45]

5. Conclusion

In the first book of his trilogy, Bruce Ackerman opens the way to new inquiries in comparative law – focusing on the diverse constitutional experiences in the world – and in EU constitutional law – with a new understanding of the EU constitutional crisis.

There might very well be inexhaustible and heated debate on the correspondence of the particular experiences the author examines with the ideal-types he identifies, but as Ackerman himself recognises by recalling the Weberian lesson, "no real-world polity perfectly expresses any ideal-type."[46] There is likely to be criticism and doubt about the historical reconstruction of events and their typing, starting from the conceptual schemes proposed by Ackerman. Nevertheless, Ackerman's volume offers a masterful and authoritative contribution to comparative law, and the history and theory of constitutional law.

Like all great works, it should be measured on its ability to shed light on the future, and to open up new horizons and research hypotheses, starting from a thorough analysis of the events of the past and the theoretical reflections in the doctrine. And Ackerman's work undoubtedly does this. It is especially useful in a context dominated by the effort to codify and decipher the specifications of individual constitutional realities which, however, increasingly escape the traditional categories but, at the same time, run the risk of losing sight of the context. Ackerman's work has the enormous merit of raising our gaze from the specific and inviting us to look at the phenomenon of constitutionalism as it unfolds and repeats over time and space: "My three ideal types will (..) enable a more discriminating form of transnational learning. If, as I suggest, the leading countries of Europe emerge from different constitutional pathways, these differences should be treated with respect if the European Union is to sustain itself as a vital force in the coming generation. I will also try to persuade you that my three ideal types also open up powerful insights into the dilemmas confronting

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[45] B. Ackerman cit. at 2, 23.

[46] Ibidem, 23.

leading nations in Africa, Asia, the Middle East and South America - enabling comparative insights into common dilemmas that would otherwise escape the attention of national politicians transfixed by the seemingly unique features of their domestic crises."[47]

This paper has sought to further elaborate on Ackerman's proposed diagnosis of the European crisis. Precisely the fact European democracies have arisen from different "constitutional paths" can help in understanding the crisis of legitimacy that afflicts the European Union, since: "they don't even agree on the appropriate path to take in resolving the crises that threaten to rip the Union apart - with Germany, France / Italy / Poland and Great Britain predisposed to respond very differently to common problems."[48]

Ultimately, Ackerman accompanies us on a journey through time and space, giving us – the reader –tools to better understand and respond to the many phenomena that challenge contemporary democracies today, "so that citizens and political leaders might gain a deeper sense of the challenges they confront in sustaining their distinctive traditions into the twenty-first century."[49]

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[47] Ibidem, 2.
[48] Ibidem, 22.
[49] Ibidem, 2.

AFTERWORD

MULTIPLE IDENTITIES

Bruce Ackerman[*]

In writing *Revolutionary Constitutions*, I wasn't aiming to provide innovative "solutions" to the EU's current crisis. I was trying to ask new questions – questions that could provoke a conversation permitting constitutionalists to frame more constructive proposals for reform over the coming decades. I hope that the dynamic conversation begun in this Symposium is a harbinger of further engagement with the issues raised by my "three pathways" approach.

To further encourage debate, these closing remarks invite my readers to reflect on a fundamental limitation of the "three pathways" framework. In response to this limitation, I will introduce a second perspective that can help compensate for that deficiency.

I will call it "multiple identities" analysis. I suggest that, in future work, it should complement the "three pathways" approach that served as the basis for this Symposium.

To see why supplementation is necessary, consider that the "pathways" framework focuses on crucial decisions made by governing elites operating in places like Brussels or Rome or Berlin, Washington or London or Tel Aviv. Different elites confront different problems, depending on the particular pathway -- revolutionary, establishmentarian or elitist -- which frames their efforts at political legitimation. Nevertheless, each pathway asks itself the same basic question: How do *elite* choices shape *mass* perceptions of the legitimacy of governmental authority?

In short: they all take a "top-down", not a "bottom-up", approach to the question of political legitimacy.

Here is where the "multiple identities" framework makes a distinctive contribution. This model takes a "bottom-up" approach and focuses on the perspectives of ordinary people for whom politics

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in Brussels or Rome is much less important than the daily challenges involved in earning a decent income and sustaining a successful family life. Nevertheless, though they are concentrating on day-to-day realities, there are non-obvious ways in which they link up their *personal* identities to the larger *political* concerns of the governing elite. It is precisely these linkages that the "multiple identities" model seeks to analyze.

To start with an autobiographical example: Since the 1980s, my wife and I have spent many months and years living in Berlin at one or another research institute. During these decades, we have witnessed a remarkable cultural transformation of the "bottom up" kind. With the rarest exceptions, Berlin restaurants no longer serve "German" food – except, of course, for Apfelstrudel! When you go out to dinner, you are greeted instead by a gracious Italian host offering a wide range of his nation's dishes; and if you get tired of veal parmigiana, you go to a nearby Asian or Turkish competitor, whose menu gestures in the Germanic direction only when it comes to the choice of beer.

Like it or not, Berliners are cosmopolitans, not nationalists, where food is concerned. No "ultra-nationalist" political party could survive if it announced that it would force "alien" Italian chefs to leave the country and close their restaurants once the hard-right gains political power and repudiates German membership in the EU. Their nationalist followers would recoil at the prospect of so much sauerkraut in their future!

In contrast, citizens elsewhere in Europe reject dietary cosmopolitanism for a "multiple identities" approach. When Czechs or Spaniards sit down for dinner, they shift from regional to national to cosmopolitan cuisine on a day-to-day basis. This is a relatively new phenomenon. The typical consumer's diet was far less cosmopolitan, and much more regional, seventy-five years ago when the Treaty of Rome first proclaimed the "four freedoms." After two generations of exercising these freedoms, the citizens of Europe would act like horrified Berliners if extreme-nationalists broke up the Union and imposed tariffs on the import of "foreign foods" into their "sovereign" states -- requiring consumers to pay high prices to maintain their cosmopolitan/national/regional diet.

"We are what we eat," as a sage once proclaimed at a moment of revelation. This is an exaggeration, but it emphasizes a fundamental

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truth. Top-down efforts at legitimation operate in dynamic interaction with the multiple cultural identities expressed in the course of daily life.

Another sphere of great importance involves language use. With the tragic exception of the Roma, no significant Continental culture is currently the object of systematic persecution. The Italians continue to speak Italian around their dinner tables; the Poles, Polish. But everybody recognizes that they also must learn to speak English as their second language if they hope to maximize their economic opportunities. Even Parisians have grudgingly come to recognize that they are no longer speaking the *lingua franca* of the Western world.

To put the point in my own techno-jargon: the residents of the EU are *nationalist* when it comes to talking about regional matters, but *cosmopolitan* when talking with one another about Continental questions.

Once again, it is always possible for "ultranationalist" politicians to challenge the linguistic status quo. Suppose, for example, that Viktor Orban did not content himself with proclaiming Hungary an "illiberal democracy." To ensure that citizens would not contaminate themselves with alien ideas, imagine that his government prohibited the use of English in all cross-border communications. Moreover, his spy agencies respond to Orban's commands by blocking all English language messages on the internet – allowing only cross-border transmissions written in Russian, Turkish, and other suitably "illiberal" languages. Is there any doubt that this dramatic step would generate an overwhelming backlash from Orban's "populist" supporters?

Nor would they be satisfied if their charismatic leader offered them a "compromise" which allowed them to use French and German, but continued to ban the use of EU-contaminated English. Even if his followers generally applauded Orban's super-nationalist program, they would still rebel against his initiative since its "anti-liberal" rejection of linguistic cosmopolitanism posed a clear and present danger to their family's economic future.

Multiplicity is even more important when analyzing the sources of intergenerational conflict. Europeans between 18 and 35 are among the most educated people in the world. Vastly increased numbers attend university as they prepare themselves to take advantage of the

socio-economic opportunities available on a Continent-wide basis. Moreover, when they attend their national or regional universities, students increasingly engage in courses of study which recognize that they no longer restrict their career aspirations to the countries in which they were born. Indeed, many participate in cross-border exchanges like the Erasmus program. Once again, the traditionally nationalist university system is becoming nationalist/cosmopolitan.

In contrast, older generations living in the same countries have more limited educations and more modest trans-border expectations. Although they may well applaud their children's "success" in finding a wonderful job thousands of miles away from home, their admiration is tempered by the loss of day-to-day contact with loved ones that previously sustained the meaning of their lives.

Parents may try, of course, to conceal their bitter sense of loss when their grown-up children return home for an occasional visit; they may also appreciate their generosity in sending money back home. Nevertheless, when given the choice on election day, it is hardly surprising that they cast their secret ballots in a way that repudiates their children's cosmopolitan vision in favor of nationalist political movements.

This is, alas, one of the indisputable factors behind the intense political polarization dividing the British people as they struggle over their relationship to the European Union. Over the past three years, the nationalist/cosmopolitans under the age of 35 have overwhelming voted to Remain while the nationalist/nationalists over-65 have closed ranks behind Brexit. These high-visibility political struggles have channeled different bottom-up experiences in ways that have dramatically escalated intergenerational polarization and alienation.

 Which leads to my final point. While the "multiple identities" approach sheds important and distinctive light on current crises, it can only serve as a supplement, not a substitute, for "three pathways" analysis.

Brexit serves as a case in point. Even if one views the nationalist arguments for Leave sympathetically, Brexit is likely to have disastrous long-term consequences for the overwhelming majority of Britons. While the UK would be a major player with Germany and France if it remained in the EU, it will be in a weak bargaining position if it leaves and tries to induce Brussels to provide British businesses

with privileged commercial access to the 450 million citizens remaining within the Union.

What is more, the UK's departure will require the country to surrender the great gains Britons have-obtained by speaking English as their native language. This linguistic privilege not only gave London an immense advantage over Frankfurt as a financial center, but it helped British industry play a central role in the EU's increasingly integrated system of production.

At the same time, it is very unlikely that these great costs will be out-weighed by the benefits that a sovereign Britain will gain in international trade negotiations. Even assuming that Scotland and Northern Ireland remain within the United Kingdom, Westminster will only represent 60 million people – smaller than the population of Japan or Russia. Even these larger countries will play a minor role in shaping the future of world trade. The big decisions will be made by the EU and USA, for the West; and India and China, for the rising East. Britain will be a third-rate power maneuvering for advantage from the sidelines.

Nevertheless, despite Brexit's devastating long-term impact on the economic future of most Britons, Boris Johnson will claim a "popular mandate" to leave the EU on the basis of his triumph at the recent parliamentary election. Yet Johnson's victory is entirely a result of Britain's "first-past-the-post" electoral system – as a scrutiny of the actual vote count reveals.

The Conservatives gained a decisive 35 seat majority in the Commons, but they won only 46% of the vote -- even when the supporters of their coalition partners are included. In contrast, the political parties opposing a quick Brexit gained the support of 52% of the electorate. Looking at the raw numbers, more than two million people favored Remain over Leave.

This raw vote count may well be deceiving. Some pro-business Conservatives wanted to Remain, but voted for Johnson because Corbyn-style Socialism seemed even worse than Brexit. Similarly, some traditional unionists stuck with Labour even though they favored Johnson's break with Europe.

Only one thing is clear: a "bottom-up" emphasis on Brexit's likely impact on daily life cannot be the key factor explaining Johnson's political success in dramatically reasserting British sovereignty.

Here is where my "top-down" perspective plays a key role. In accounting for Johnson's fateful step despite the 50-50 split amongst the British people. As I suggest in *Revolutionary Constitutions*, a crucial element in the Brexit story is the "establishmentarian" predicaments generated by David Cameron's decision to call for a referendum by "We the People of Great Britain." It is this appeal to direct democracy which generated the next three years of crisis as governing elites in Westminster tried and failed to reestablish their accustomed role as the authoritative representatives of the popular will.

If my account of the tensions between the model of establishment parliamentarianism and the practice of populist referenda is valid, this not only illuminates the dynamics of political polarization in Great Britain. It also provokes further reflections on the role of referenda in other countries which have embraced elitist models of legitimacy. Most obviously, what are the similarities and differences between David Cameron's use of a referendum on Brexit and the on-going struggle in Spain over the legitimacy of a popular referendum on Catalan independence?

I will take up this question at greater length in my next volume, *Elitist Constitutions*. But I haven't finished writing this book, and there is no need for you to wait until I complete the final draft. To the contrary, I would profit immensely from learning your views.

The same is true when it comes to the "bottom-up" issues sketched by my "multiple identities" model. I enthusiastically invite fellow members of the international juristic community to address the complex relationships between "bottom up" mixes of nationalism/cosmopolitanism and the variety of "top down" efforts to sustain Enlightenment constitutionalism at this moment of grave crisis.

Don't hesitate to send me your thoughts – whether they are written in English, French, German, Italian, Portuguese, or Spanish. Perhaps predictably, I can't read Russian or Turkish.