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Constitutionalism beyond Liberalism

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BOOK REVIEW

Constitutionalism beyond Liberalism, edited by Michael Dowdle and Michael Wilkinson, Cambridge, Cambridge University Press, 2017, 365 pp., £ 25,99 (pbk), ISBN: 9781316285695

Is liberal constitutionalism exhausting the possibilities of our constitutional imagination? If not, how can we move beyond the There Is No Alternative (TINA)-discourse of liberal constitutionalism? These are the most pressing questions this book gives inspiring answers to, both at theoretical and empirical levels.

To do so, *Constitutionalism beyond Liberalism* ventures into overlooked streams of thought and case studies, examining historical as well as current alternatives to liberal constitutionalism, especially in the Global South.

First, the authors define the object of their critique as being legal constitutionalism in its normativist declination, referred to as ‘structural-liberal’ constitutionalism – ‘Liberal’ for its focus on values prioritising the benefit of the individual such as propriety or the emphasis on procedural or formal rights over material equality – and ‘structural’ for its over-reliance on specific structures of government such as multiparty elections or independent judicial review. The dual character of ‘structural-liberal’ constitutionalism is defined by the authors as the linkage of an ideational *telos* with a structural *nomos*.¹ Liberal constitutionalism is defined as *a belief*: ‘the belief that constitutions serve principally to constrain state power for the benefit of the individual’.²

Mastering the art of mobilizing thought-provoking constitution-related metaphors (constitutional listening, constitutional imagination), this book articulates constitutional theory with comparative constitutional law with originality.

1. The aim and promises of the book: pluralising constitutionalism

It is always difficult to review an edited volume, even more so with two editors, as there can easily be competing arguments and mismatches between chapters. Yet the aim of this book is not to develop an argument nor to offer a coherent set of case-studies for its illustration. It is rather an exploration of theories and cases whose common theme is to provide alternatives to the orthodox discourse and practices of liberal constitutionalism.

The promise of the book, laid out in the introduction and overview chapter, is very appealing. It promises not only a critique of liberal constitutionalism – a critique long started in political science and sociology – but also a patchwork of living alternatives to liberal constitutionalism. It is the necessary actualisation of James Tully’s seminal book ‘Strange multiplicity, Constitutionalism in an Age of Diversity’, published by CUP in 1995.³

The ambition of the authors is to go ‘*beyond* liberalism, not *against* liberalism’⁴, by analysing constitutional orderings that do incorporate liberal components but are not ultimately dominated by them. It would be difficult not to agree with the authors’ stance that ‘we need to expand our constitutional imagination in ways that allow us to look beyond liberalism –

¹p. 35.

²p. 1.

³James Tully, *Strange Multiplicity, Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

⁴p. 1.

not rejecting liberalism per se, but realising its limitations and developing conceptual tools that can help us transcend them'.⁵

This stance explains why the authors carefully avoid getting trapped in the common opposition between democratic and authoritarian constitutionalisms nor engage much with the currently booming and overwhelming literature on 'illiberal constitutionalism'. Adopting a value-neutral approach, the authors take liberalism as one particular ideology that can enter in tension or conversation, on an equal footing, with other ideologies likewise able to inform constitutional thought.

The book is divided into four parts, each composed of a theoretical chapter followed by one or more case-study chapters: limits of liberal constitutionalism (Part 1), constitution-society relations (Part 2), state-law relations (Part 3), and constitutional change (Part 4). In the several domains covered by the book, the authors argue that liberalism has focused on one specific aspect of constitutionalism while blinding others. To paraphrase Boaventura De Sousa Santos, the authors engage in a *sociology of epistemological absences*⁶, highlighting the invisibilization of key aspects of the structural-liberal vision of constitutionalism (what they call the 'blind spots' of liberal constitutionalism).

With regards to constitution-society relations, liberalism presumes that constitutionalism is normatively autonomous; with regards to state-law relation, liberalism focuses on constraint, and with regards to change, liberalism presumes that constitutionalism is driven by rationality.

To exemplify these blind spots, the book takes us on a journey throughout constitutional systems of the Global South: the 'usual suspects' South Africa and India, but also the less well-known Malaysia, Indonesia and Pakistan, as well as China, revealing some Asian focus. Yet given the explorative nature of the book, this somewhat odd case selection does not require any further justification. In all these countries, practices and theories deemed deviant vis-à-vis the orthodox liberal constitutionalism have indeed been developed and conceptualised.

2. Main scholarly intervention: a story of alternative constitutionalisms in theory and practice

This book is sincerely committed to an emancipatory agenda aiming to bring more diversity in comparative constitutional law and constitutional thought, resonating with the renaissance of the field under the impulse of a new generation of scholars such as Ran Hirschl.⁷

The introductory chapters to each part provide the reader with an excellent mapping of the current mainstream discourses on constitutionalism, as shaped by foundational disputes between normativism versus decisionism (the Kelsen-Schmitt debate) (chapters on constituent power by Martin Loughlin and to a certain extent on coevolution of social ideas and legal forms by Gunther Teubner), or liberalism versus republicanism (the Locke-Rousseau opposition) (chapter by Marco Goldoni on radical constitutionalism), highlighting the tensions between democracy and the rule of law as unsatisfactorily mitigated by liberal constitutionalism. The European inter- and post-war case-study by Michael Wilkinson shows how, when liberalism revealed itself as authoritarian in the 1920s, excesses of liberal constitutionalism have led to the downfall of the Weimar Republic, providing a novel narrative to the case-study that has historically been mobilised to establish the hegemony of structural-liberal constitutionalism.

⁵p. 33.

⁶Boaventura de Sousa Santos, *Epistemologías del Sur/Epistemologies of the South* (Boulder, Co., Paradigm Publishers, 2014).

⁷Ran Hirschl, *Comparative Matters, the Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014).

The case-study chapters, empirically rich and dense, give the reader an overview of non-liberal constitutionalisms such as transformative constitutionalism (Mathew John on India, Hugh Corder on South Africa), Confucian and socialist constitutionalisms (Baogang He on China), or Islamic constitutionalism (Clark Lombardi on Pakistan, Andrew Harding on Malaysia). Without ever pre-emptively deflecting any accusation of being apologetic to dictatorship – a welcome absence – the various authors take us into the constitutional thought of key lawyers or intellectuals proposing alternatives to structural-liberal constitutionalism, such as Alvin Robert Cornelius in Pakistan, Mahatma Gandhi in India, or Hua Bingxiao in China, among others. An effort is made to adopt interpretative approaches to convey local meanings.

One of the main points that come out of all case-study chapters is that if structural-liberal constitutionalism might well be suited for the homogenous nation-state, it is not for multicultural societies. The liberal State, indeed, calling itself secular, hardly conceals its favouritism of the main religion or religious tradition; as such, liberal constitutionalism, acting as an everyday homogenising machinery, is ill-suited for diversity. As Mathew John writes in the context of India, structural-liberal constitutionalism has an ‘inability to draw on autochthonous social practices and intuitions in its conceptions of political community’.⁸

Aiming to bridge the gap between constitutional thought – focused on Europe and the US – and comparative constitutional law – today quantitatively dominated by the booming research on the South –, this book is a very timely and important contribution to the field of constitutional theory and comparative constitutional law.

3. Criticism: the need to engage more deeply with epistemologies of the South

Yet fully bridging the gap would imply some reversal of the categories of object – constitutional practices in the South – and subject – constitutional theory derived from the European Enlightenment. The book flirts with such an enterprise without ever embracing it. As a result, it still remains caught in a center-periphery dynamic. This dynamic materialises at two own levels: between the US-UK-global English-speaking world and continental Europe, mainly France and Germany, on the one hand, in the realm of *constitutional thought*, and between the North and the South, on the other hand, in the realm of *constitutional practices*.

In their introductory chapter, the authors seem to be integrating in their frame of analysis the hindsight of the epistemologies of the South literature, as they state: ‘Unlike the structural-liberal vision of “comparative constitutional law”, this volume approaches these other visions and experiences, not from the perspective of a particular liberal teleotype, but by allowing them to speak, as much as possible, for themselves’⁹. In other words, the authors commit to refrain, as much as possible, to speak on behalf of others, but rather to listen to various voices through their categories of thought.

The genuine commitment to understand alternative experiences of constitutionalism are alas filtered through the posited ‘principle of charity’ or charity of interpretation¹⁰, according to which the belief that the Other makes sense must be postulated as a general working hypothesis. Referring to this working hypothesis as ‘charity’ means adopting a patronising stance. Although this attitude is one step away from the ‘sham constitutions’ positioning, it still works within the Western hierarchy of epistemologies. The emphasis on the study of *constitutional practices* rather than *constitutional thought* in the South reveals that Western

⁸p. 146.

⁹p. 6.

¹⁰p. 7.

hegemonic categories still frame the overall analysis of the book, at least in the way the book is structured.

Indeed, each part starts with a Europe-based conceptual framing chapter, to which case studies outside the West respond. As a result, these case studies do not speak for themselves but in response to the theoretical framework devised from Western categories – this is even reinforced by the positivist rather than interpretive approach used in some of the case-study chapters. The Indonesian case-study by Michael Dowdle stands out as one of the most unorthodox chapters of the book, as the author is not telling the story of how Indonesian practices deviate from Western constitutional categories, but narrates, based on the Indonesian case, how competition law escapes the structural-liberal constitutional lens of analysis. Nevertheless, there is still a(n) (in)visible hierarchy of chapters, with the West-derived theoretical chapters acting as an umbrella frame for the ‘exotic’ chapters. Calling for diversity and reflexivity, the book structure still exhibits, in spite of good intentions, some shortcomings in terms of non-hierarchical diversity and reflexivity. Therefore, one of the ambitions of the book, namely ‘proposing alternatives speaking for themselves’, remains to some extent uncomplete.

Second, the ten – all male – authors, many of them part of the common law tradition (based on their own trainings and/or the countries they study) advocate for the ‘excavation’¹¹ of European constitutional thought to counteract the dominance of US visions of constitutionalism. The introductory chapters assert that the ‘structural-liberal vision of constitutionalism is associated primarily with US constitutionalism’¹², while the book mostly engages with John Locke and Jean-Jacques Rousseau, Karl Marx, Hans Kelsen and Carl Schmitt. Such ‘digging’ is indeed urgently needed from the point of view of ‘global’ law scholars versed in the myth of ‘American exceptionalism’, but in continental Europe, where law scholars mostly publish in their own languages and with their own presses, continental European constitutional thought does not need to be excavated as it is very much mainstream. An example would be the conceptual distinction between original constituent power and derived constituent power – based on French constitutional theories developed in the 1920s and 1930s and recently discovered in the English-speaking world through the prism of ‘unconstitutional constitutional amendments’.¹³

Also, a common theme of *Constitutionalism beyond Liberalism* revolves around rehabilitating Rousseau’s constitutional theory, calling for ‘radical’ or ‘republican’ constitutionalism as a viable alternative. One could wonder if there could not be better ways to engage with alternative ideas, emanating or derived from experiences outside of the West and its Enlightenment period, rather than through the Rousseau against Locke, Political against Legal constitutionalism debate, articulated some time ago by Richard Bellamy in his book on ‘Political Constitutionalism’.¹⁴

Another point is whether a constitutionalism based on liberal-structural constitutionalism can truly act as an alternative to structural-liberal constitutionalism, or if it is merely a declination or improved version of it. For example, when it comes to transformative constitutionalism, as Mathew John points out in his chapter on India, ‘the very logic of contemporary constitutionalism in India (ie transformative constitutionalism) is founded on the need to transform Indian social categories so that they may become serviceable for the particular

¹¹p. 3.

¹²p. 5.

¹³Yaniv Roznai, *Unconstitutional constitutional amendments* (Oxford University Press, 2017); Georges BURDEAU: *Essai d’une théorie de la révision des lois constitutionnelles en droit positif français*, th. Droit Paris, Mâcon, J. Buguet-Comptour imprimeur, 1930; Raymond CARRÉ DE MALBERG: *Contribution à une théorie générale de l’État, spécialement d’après les données fournies par le Droit constitutionnel français*, Paris, Recueil Sirey, t. II, 1922, p. 495 et s.

¹⁴Richard Bellamy, *Political Constitutionalism, A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

kind of national political community authorised by the liberal-constitutional imagination¹⁵; as Hugh Corder shows in his chapter on South Africa, ‘the transformative agenda’ is ‘based on a liberal democratic foundation’.¹⁶ Some chapters touch on alternatives that reject structural-liberal constitutionalism more categorically, such as developmental constitutionalism sometimes embedded in the Asian Values discourse, but none of the chapters make the case that, for instance, illiberal constitutionalism could be a credible or serious alternative to liberal constitutionalism, as Li-Ann Thio wrote on the case of Singapore.¹⁷

Clark Lombardi, in his chapter on Islamic Constitutionalism, rightly states that ‘Western theorists dismiss constitutions that fail to conform to the structural-liberal vision as sham constitutions’¹⁸, and that this needs to change. Alternatives discussed in the book are only those based on liberal-structural constitutionalism, what also can be deemed to limit constitutional imagination to a certain extent.

4. Conclusion

One cannot disagree with the fact that the ‘structural-liberal vision enjoys a virtually hegemonic pre-eminence in a number of important international and geopolitical settings: including law and development, law and economics, human rights, comparative constitutional law, and the global model of constitutional rights’.¹⁹ Hopefully this book will convince those who still believe in the current structural-liberal constitutionalist model as the ultimate public good, and reject calls for research into its limitations and possible alternatives in the name of scientific rigour – law being a ‘pure science’.

The dangers of such blind faith in Western structural-liberal constitutionalism brings us back to the collapse of the Weimar Republic. As Michael Wilkinson wrote in his chapter, ‘the structural-liberal tradition often attributes the collapse of the Weimar Republic to its inadequate constitutional institutions, particularly its lack of judicial review’²⁰. This misguided reading of the rise of Hitler must instead be understood as the tragic outcome of *an excess of liberalism* rather than *a lack of liberalism*. Let the echoes of the current European Union crisis and the rise of antiliberal right wing parties in several regions of the world resonate ... In that context, the excavation of Hermann Heller’s concept of authoritarian liberalism is particularly welcome. When liberal excesses meet democratic deficits – populism grows.

Constitutionalism beyond Liberalism is a compelling book broadening our horizons. Hopefully, many more books of that calibre and global outlook will follow, with even more diversity in the range of voices heard – and perhaps, more reflection on epistemologies of the South.

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¹⁵P. 146.

¹⁶P. 313.

¹⁷Li-Ann Thio, ‘Constitutionalism in Illiberal Polities’ in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).

¹⁸P. 195.

¹⁹P. 20.

²⁰P. 26.