Revolutionary Constitutionalism

Law, Legitimacy, Power

Edited by
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A Political, not a Legal History of the Rise of Worldwide Constitutionalism

DIETER GRIMM

Nobody will have expected that the author of *We the People*, in his turn from American constitutionalism to comparative constitutional law, would content himself with petty questions like the number of constitutional court judges in various jurisdictions or the length of the bills of rights of various national constitutions. His subject is the worldwide rise of constitutionalism in several volumes, of which we hold volume 1 in our hands. This opens up a vast and intricate field. How can we structure it in such a way that the project remains manageable? And which questions should be addressed to the material so that the result is not a mere juxtaposition of case studies, but an explanation of a development that deserves the name 'worldwide constitutionalism'? Choices have to be taken and selections have to be made, knowing that each of them excludes other options.

Bruce Ackerman makes several choices to handle the sheer number of cases, but also to give his work a distinctive face. I count six fundamental choices that characterise his work. The first is *temporal* and follows from the purpose to describe and explain the rise of *worldwide* constitutionalism. Worldwide constitutionalism in the sense of universal acceptance of the constitution as a way to legitimate and organise public authority is a rather recent phenomenon. It spread only after the Second World War. Ackerman's book is limited to this period. The beginnings of modern constitutionalism in the eighteenth century in North America and France, the struggle for constitutions in the nineteenth century in Europe and later also in Latin America are left out, as well as the constitutional movements in the first half of the twentieth century, most of which ended in failure.

The second choice is *spatial*. 'Worldwide constitutionalism' cannot mean every constitution in the world. For this we have the Chicago data bank. Nevertheless, Ackerman makes an enormous effort. The critique of many comparative works that their basis is too small does not apply to his work. Ten cases are analysed in volume 1. More will follow. No continent is left out and not only the usual candidates for comparison show up. Think of Burma and Iran in volume 1. It seems almost inevitable that there will be readers who find that an important country is

missing. I do not want to join them. Instead, I am impressed by the number and variety of the cases and the in-depth analysis that each of them gets. The reading considerably broadened my constitutional horizon.

The temporal and spatial choices narrow the field. What is needed next is a perspective on the material. This is the third choice. Ackerman is interested in constitutions as a means to *legitimate* political rule. The very first sentence of the book reads: 'Law legitimates power.'[1] He understands constitutionalism as a new pattern of legitimation and, indeed, for the longest period of time, the legitimation of power had sources other than constitutions. Power derived its legitimacy from God, from tradition or from the belief that those who governed (monarchs mostly) had superior insight in the common good. In modern times, these sources have lost much of their persuasiveness. In the absence of absolute truths, constitutions, agreements on shared values and practices, took their place. But there is no guarantee that they will succeed in legitimating power. Constitutionalism has more or less established itself. Constitutions are fragile constructions.

What is it that enables constitutions to legitimate public power? The quality of the text? It is unlikely that a bad text will generate legitimacy. But a good text does not necessarily entail legitimacy either. Legitimacy is not an inherent quality of constitutions; rather, it comes as an ascription. Legitimacy is ascribed to a constitution if, in Ackerman's words, the revolutionaries 'can hammer out a Constitution that is plausibly related to the vision of the public good that animated their long struggle'.[2] He presumes that this has something to do with the beginnings of a constitution. This explains his fourth choice. He classifies constitutions not according to their legitimating principle, democracy or other, not according to the type of government they establish, federal or unitary, parliamentarian or presidential, or whatever other classification may come to mind, but according to their *origin*.

There are, of course, as many beginnings as there are constitutions. Ackerman believes that they can be reduced to three *ideal types*, called revolutionary, establishmentarian and elitist constitutionalism. They are described as 'different pathways through which constitutions have won legitimacy'.[3] In the course of the book, this connection becomes more differentiated. Each of the three beginnings creates special conditions for the success of the project 'legitimacy through law'. But each also goes along with special risks or dangers. Many succeed, others fail. Is this a convincing choice? We will be able to answer this question only after having read all the volumes, because only then will we be in a position to tell whether the constitutions assembled under the three ideal types justify the classification or whether there are constitutions that do not fit into this framework, which would mean that it is not comprehensive, but incomplete.

[1] Bruce Ackerman, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law 1 (2019).
[2] *Id*. at 34.
[3] *Id*. at 1.

Volume 1 is limited to cases of revolutionary constitutionalism. The specific risk of this ideal type is that it may end up in totalitarianism. 'Totalising' revolutions[4] want to change everything. Ackerman calls them 'the worst pathologies of the 20th century',[5] which have led many countries into deep catastrophe. Totalitarian systems may have constitutions, but they do not set legal limits to political power. The alternative is a 'revolution on a human scale'.[6] Revolutions of this type set out to change certain sectors of political and social life, but not everything. For Ackerman, this type of revolutions succeeds if it '*fundamentally* reorganises dominant beliefs and practices in a *relatively* short period of time'.[7] Here, constitutions play an important role because they establish the particular transformations. So, the fifth choice is to treat only constitutions on a *human scale* in volume 1.

The group that is assembled under this common denominator consists of nine countries with 10 constitutions. Their pathways towards legitimation of power are the object of comparison. The author is, of course, aware that the ways are not necessarily linear and that their result is not necessarily stable. The 'constitutional moment' can be missed. A once successful legitimation can get into trouble or fade away. In order to give his comparison a structure that takes the dynamics into account, Ackerman makes his last and perhaps most ingenious choice by dividing the process of legitimation that a revolutionary beginning has set in motion into a *sequence* of stages that he assumes repeat themselves in every case of revolutionary constitutionalism.[8]

Time 1 ('mobilised insurgency') is the stage where outsiders challenge the legitimacy of the existing political and social order, and fight under risk for life and liberty for a better order. Time 2 ('constitutional founding') is the stage where the revolutionaries gain popular support for their programme and replace the old order by a new one – constitutionalising charisma. Time 3 ('succession crisis') is the time when the departure of the charismatic leaders of time 1 and time 2 leaves a legitimacy gap and politicians less charismatic and less devoted to the constitutional principles quarrel over the succession. Time 4 ('consolidation') is the stage where judges, who had remained in the background as long as the charismatic founders were in power, assume the role of defining the revolutionary principles vis-a-vis the mediocre successors of the revolutionary heroes.

The gains of this approach are obvious. The common denominator 'revolutionary constitutions' allows a meaningful comparison of very diverse systems. It structures the comparison of seemingly unrelated cases without levelling the differences. On the contrary, it makes differences as well as similarities visible, which would otherwise have gone unnoticed or appeared as the peculiarities of

[4] *Id.* at 27.
[5] *Id.* at 28.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 43.

a single case. The illuminating and often surprising insights of this book are a fruit of the four stages. Who would have expected that a comparison between, say, Iran and Israel or Italy and India is eye-opening? Although Ackerman does not attempt to give a complete causal account of the conditions under which revolutionary constitutional projects succeed or fail – external events not related to the type of revolutionary constitutionalism may intervene – he can explain a lot of developments through his four-phase dynamics that characterises this type of constitutionalisation.

At the same time, the analysis of countries united under the rubric of revolutionary constitutionalism calls into question the realistic approach to the phenomenon, which came into fashion recently.[9] For realists, the constitutional world is dominated by rational actors who have nothing else in mind than maximising their profit in whatever currency. The actors of revolutionary constitutionalism, on the contrary, gained their credit in time 1 because they were ready to sacrifice life, liberty and property in the interest of a higher ideal, a just political and social order. This was the legitimacy resource on which they could build in time 2. This is not to say that the realistic explanation of the rise of constitutionalism is completely wrong. We will almost certainly encounter cases that support this theory in the following volumes. But Ackerman's work shows that it is not the exclusive explanation for the success of constitutionalism, as some realists would have it.

It remains to be seen whether a similar ingenious pattern capable of analysing and explaining the constitutional development of the other two ideal types will be available. We will know that in due time. My question for today is rather what the costs of Ackerman's choice are, given the fact that even the best choice excludes alternatives. Are there aspects of revolutionary constitutionalism that remain unexplored or neglected in *Revolutionary Constitutions*? Ackerman's focus on revolutionary constitutionalism is the legitimation of political rule. Legitimation is without doubt an important function of constitutions. But it is not the only and not even the foremost function. Before a constitution can legitimate public power, it has to establish and organise public power and to regulate its exercise. This is its immediate concern, achieved through the medium of law.[10]

However, Ackerman does not write a *legal* history, but a *political* history of the rise of worldwide constitutionalism. This is, of course, justifiable, first because political analyses are much smaller in number than legal ones and, second, because constitutions are political phenomena. They are products of political decisions and they have an impact on politics. Time 1 in Ackerman's sequence is a completely political stage. There may be a constitution in time 1, but if so, it is the constitution

[9] Protagonists are Ran Hirschl, Towards Juristocracy (2007); and Tom Ginsburg, Judicial Review in New Democracies (2012).

[10] See Dieter Grimm, Constitutionalism: Past, Present, and Future (2016) 3.

of the enemy. It is legally in force, but its legitimacy is challenged by the revolutionaries, whereas their own concept of legitimate rule is not legally in force. It is at best a constitutional project, waiting for transformation into law. But the transformation is the goal because 'law legitimates power',[11] as Ackerman said in the beginning, and a new power that succeeds in overthrowing the old power sees a heightened need of legitimation because of the illegality of its action.

Hence, the constitutional project renders its legitimating service to the new order simply by becoming *law*. Legitimation presupposes legality. Legitimation by constitution depends on the successful submission of politics to law. This cannot be reached by a few fundamental principles. In order to be able to bind politics effectively, these principles must translate into specific rules. But rules are not enough. Legality is a necessary but not a sufficient condition of legitimacy. It also matters how the rules are designed and whether they take effect in practice. The legitimacy that constitutions transmit is a result of their *continuous* relevance for the political process after adoption. From time 2 onwards, the constitution must prove its relevance as law. A constitution that is notoriously disregarded or is circumvented whenever constitutional requirements collide with political interests will not convey legitimacy on politics.

Ackerman does not ignore this. For him, it characterises constitutions that they impose 'significant legal constraints on top decision-makers'.[12] This distinguishes constitutionalism from dictatorship. Dictatorships may have constitutions, but they do not impose constraints on politics. Ackerman even insists that enlightened autocracy remains an autocracy and is not a constitutional state. When I say that Ackerman writes a political instead of a legal history of constitutionalisation, I mean that he is more interested in the process than the product, and insofar as the product plays a role, he is more interested in the political system established by the constitution than in the legal constraints for day-to-day government and their implementation. He leaves this to the 'positivists', whom he regards with a certain disdain because they have nothing to say about the question that in his view really matters, namely legitimation.[13]

In this respect, Ackerman almost follows the Schmittian concept of constitutionalism. I dare say this is because every reader of Ackerman's works knows that he is immune to succumbing to Schmittian temptations. Schmitt distinguishes between constitution and constitutional law.[14] 'Constitution' means the decision of a political entity about the type and form of its political order. He calls this decision 'existential'. It is neither taken by identifiable actors nor in a certain procedure and it is nowhere textually fixed. All this follows when the existential decision is transformed into constitutional law. But what counts is the constitution, not

[11] Ackerman, *supra* note 1 at 1.
[12] *Id.* at 2.
[13] *Id.* at 36 f.
[14] Carl Schmitt, Verfassungslehre (1928) 20 ff. (§ 3).

constitutional law. Constitutional law derives its validity not from a vote taken by a constituent assembly or even the people themselves, but from the existential constitution, and it is legally binding only insofar as it is compatible with the constitution.

Unlike Schmitt, Ackerman does not mystify the fundamental decision.[15] But this decision is what he too is interested in, not the provisions and institutional arrangements in a particular constitutional text. It may be that he feels exonerated from going into the legal details of a constitution and its functioning because he decided to deal only with revolutionary constitutions on a human scale, what I understand as constitutions with a certain democratic and liberal quality. For Ackerman, revolutions on a human scale seek to prevent a backsliding into the previous system and to establish the fundamental principles of the new order. He adds: 'This point is sufficient for my purpose.'[16] But is it? The question arises at the latest when Ackerman irritatingly includes a country like Iran in the category of constitutions on a human scale.

The Iranian Constitution undoubtedly falls in the category of revolutionary constitutionalism. But Iran is the only country in Ackerman's list that is Islamic, yet, with a constitution that, in Ackerman's interpretation, is not based on the will of God, but on the will of the people. However, the most powerful position in this constitutional order is held by the Supreme Leader, an unelected cleric chosen by the high clergy. Below the Leader, there is a President who derives his position from general elections. But his decisions are subject to a veto by the Supreme Leader and also by the Guardian Council, whose task is to guarantee the conformity of legislation with Islamic principles. The Leader may also issue binding orders. Yet, Ackerman argues that the Leader may hesitate to use his powers against a President who enjoys strong support from the electorate. So the pendulum may swing 'from democratic to religious authority and back again'.[17]

To be on the constitutional side, it is sufficient for Ackerman that no single power centre exists in a country, which can legitimately impose its commands in a top-down manner. As soon as there are 'institutional rivals for the final say over the future course of political development',[18] we are within the constitutional universe. But is hesitation to exercise a certain power an equivalent to a legal constraint of that power? And what if one of the rivals is in a clearly hierarchical position or if the rivalry remains within the small circle of the ideological leadership? Here, it appears to be a disadvantage that Ackerman does not articulate his understanding of 'constitution' more closely. To be sure, it would be unwise to limit comparative constitutional research prematurely by a narrow definition, but Ackerman's understanding may be overly broad. What remains in the end is that a constitution contains some legal constraints on top decision-makers.

[15] See a brief discussion of Schmitt in Ackerman, *supra* note 1 at 42.
[16] *Id*. at 34.
[17] *Id*. at 356.
[18] *Id*. at 360.

However, legal constraints on politics are nothing new. They existed long before the modern constitution emerged. Even the absolute state was much less absolute than it may have seemed. It had to accept legal limitations of its power. If legal limits to political power are sufficient for the existence of constitutionalism, the groundbreaking novelty of constitutions, which Ackerman himself emphasised at the beginning of his book, is obfuscated. Unlike the older legal bonds of political rule, constitutions are a particularly ambitious form of submitting politics to law. It is this specific ambition that explains the stunning success of modern constitutionalism, which finally led to the rise of worldwide constitutionalism. Ackerman's understanding, on the contrary, is a rather thin notion of constitutionalism, compared to what I used to call 'the achievement of constitutionalism'.[19]

Is it a consequence of Ackerman's preference for a political rather than a legal history of the rise of world constitutionalism that time 4 gets the least attention of all four stages in the case studies? If we reformulate the stages in terms of the relationship between law and politics, time 1 is the stage of pure politics. Insurgents attack the old system, and this does not give way, but strikes back. Time 2 is the stage of constitutional politics. The revolutionaries use their newly acquired power to hammer out a constitution as law. But it is not yet the time of judicial politics. As the comparison shows, the deference of the French Conseil constitutionnel during President de Gaulle's lifetime is not the exception, but the rule. The exception is the South African Constitutional Court, which did not hesitate to rule against the charismatic leader. Time 3 is again a stage where politics dominate. Second-generation politicians fight for the succession of the charismatic leaders. Only time 4 is mainly law.

At time 4, the judges dominate. Still, Ackerman is not so much interested in what they do as in how they gain their dominant role. He criticises traditional comparative constitutional research for being court-centred or, perhaps more precisely, jurisprudence-centred, while he wants to explore the dynamic process through which courts establish themselves as actors capable of legitimating political power under post-charismatic conditions. The ground is laid in time 3. There, the professionalisation of constitutional law begins. It is increasingly treated as law like private or criminal law. Increasingly confident judges confront increasingly normalised politicians who lack the revolutionary credentials of the charismatic leaders and are less devoted to the constitutional principles. In this situation, judges can credibly claim that they, not the parliamentarians, are 'the more legitimate guardians of the constitutional legacy of the Revolution'.[20]

However, this does not mean that the legitimation problem which is central for Ackerman is solved; it is only reformulated. How can courts fill the 'legitimacy vacuum'[21] that the charismatic leaders leave? Their only means consists in deciding

[19] Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World, in* Grimm, *supra* note 10 at 357.

[20] Ackerman, *supra* note 1 at 161 f.

[21] *Id.* at 8.

the cases brought before them. And they cannot hope to legitimate the political system by showing that they are the better politicians than the elected representatives of the people; on the contrary, they must convince citizens that what they do is *not* politics, but the enforcement of constitutional law. So, the jurisprudence demands attention. Ackerman would not deny this, but he gives it a specific political twist. The success of courts depends on what he calls 'judicial statesmanship'.[22] This is something quite different from legal doctrine. Statesmanship requires a clever selection of a few cases by which the judiciary can demonstrate its superiority over politics in defending the revolutionary principles.

As a matter of fact, decisions of this sort can be found in many jurisdictions. But they are rare incidents, whereas legitimation of power is a permanent process. Will a few early statesman-like judgments be sufficient or does the impression that the judges are faithful to constitutional law matter? If this is so, who guarantees their faithfulness and what does 'faithful' mean? Constitutional norms are notoriously open-ended. They cannot be applied straight away to controversial cases. There is a gap between the general and abstract norm and the individual and concrete case, which has to be bridged by interpretation. Interpretation determines the meaning of constitutional norms with regard to a certain problem. It is not only a cognitive but also a creative operation. It does not uncover a meaning that is inherent in the text of the constitution from the time of enactment. The meaning is at least partly construed, especially when the courts have to cope with problems that were unknown at the time of enactment.

The legal device to secure faithfulness is the method of interpretation. To be sure, legal methods vary greatly, but all share the purpose to separate legal from non-legal arguments and thereby contribute to the legitimacy of adjudication. Realists would probably argue that method is just a camouflage, while judges do something different from what they say they do. And certainly, there is ample evidence to support this suspicion. But one should make clear that these are pathological cases.[23] The legitimation of political power by courts in time 4 cannot be dissolved from the way in which they understand and enforce the constitution. However, adjudication is not in the foreground of Ackerman's work unless he encounters an open controversy between the political and the judicial institutions, like when the Indian Supreme Court developed the basic structure doctrine to limit the amendment power of parliament.

Furthermore, legitimation by the judiciary raises the question why post-charismatic politicians tolerate the judicial interference in politics. Have only the politicians departed from the revolutionary principles, not the general public, so that the judges who uphold these principles enjoy the backing of the citizenry and thus make it too costly for politicians to disregard court rulings? Realists would

[22] *Id*. at 159.

[23] See Dieter Grimm, *What Exactly is Political about Constitutional Adjudication?, in* Judicial Power 307 (Christine Landfried ed., 2019).

probably answer that politicians have no reason to disregard judgments because they instrumentalise courts for the purpose of shielding their power against competitors. They see judicial review as a 'hegemonic' project.[24] This may be so in a number of instances, and the French Fifth Republic is an example of this. But constitutional courts do not always render judgments that please the elected representatives. There are enough incidents where judges severely frustrate political plans. Hence, the question of why the post-charismatic politicians more or less comply with judgments even if they dislike them suggests itself.

Ackerman's analysis of constitutional dynamics ends with time 4. He does not want to think beyond this point, although he admits that time 4 will not necessarily be the end and a time 5 or a new time 1 will begin. Could it be that we have already entered this stage? The author himself remarks that some 20 years after its culmination, constitutionalism is in a crisis. In a number of democracies with various pathways towards constitutional legitimacy, constitutions are being transformed from rules of the game for democratic competition into instruments in order to shield the majority party from competition and critique. And courts are the first targets. In his chapter on France, Ackerman assumes that an attempt by a new movement party to take over the constitutional system would take years, simply because of the existence of judicial review. Countries like Poland and Hungary have shown that a few months are enough. Has the rise of world constitutionalism come to a halt?[25]

[24] See Ran Hirschl, The New Constitutionalism and the Judicialization of Pure Politics Worldwide, 75 Fordham L. Rev. 721, 745 (2006); Ran Hirschl, *The Judicialization of Mega-politics and the Rise of Political Courts*, 11 Annual Review of Political Science 93 (2008).

[25] Mark A. Graber, Sanford Levinson & Mark Tushnet (eds.), Constitutional Democracy in Crisis? (2018); Tom Ginsburg & Aziz Huq, How to Save a Constitutional Democracy (2018).