Author/s:
Arban, E;Bottini, E;Samararatne, D

Title:
Revolutionary Constitutions: Charismatic Leadership and the Rule of Law

Date:
2020-09

Citation:
Arban, E., Bottini, E. & Samararatne, D. (2020). Revolutionary Constitutions: Charismatic Leadership and the Rule of Law. MODERN LAW REVIEW, 83 (5), https://doi.org/10.1111/1468-2230.12520.

Bruce Ackerman, **Revolutionary Constitutions: Charismatic Leadership and the Rule of Law**, Belknap Press: Harvard University Press, 2019, 472pp, hb £28.95.

Bruce Ackerman's latest work, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Cambridge, MA: Harvard University Press, 2019) offers a fresh and novel perspective in the analysis of constitutional legitimation. In the opening chapter, Ackerman presents his 'grand claim' which he promises to establish through the publication of a future trilogy. The 'grand claim' is that the legitimation of constitutionalism occurs along one of three different pathways (ideal types): through revolutionary outsiders, through pragmatic/responsible insiders, or through the elite. *Revolutionary Constitutions* focuses on the first ideal type. It categorises the four moments (or times) leading to a constitutional revolution in India, South Africa, France, Italy, Poland, Iran, Burma, Israel and the United States of America. The range of jurisdictions examined by Ackerman makes the task of reviewing *Revolutionary Constitutions* a daunting one. Few, if any, could claim the expertise that Ackerman asserts in this work.

In an engaging and accessible style, Ackerman theorises two concepts: (constitutional) revolution and (constitutional) charisma. He concludes the analysis by arguing that the constitutional culture of the United States of America (US) is indeed exceptional but not unique. He encourages 'a rooted cosmopolitanism' (a prudent use of comparative law), arguing that other constitutional revolutionary moments can offer useful insights into the US's own constitutional revolution (362). Ackerman clearly builds on his US specific pathbreaking work presented in *We the People* (Cambridge, MA: Harvard University Press, 1993): in this sense, *Revolutionary Constitutions* seems to be an extension of his thesis on 'successful constitutional politics' (*We the People: Foundations*, 17) to a global context. Ackerman's insights into 'constitutional revolutions' and charismatic leadership are unique, and his claims are bold. They seek to re-define the field.

Because of the novelty of the perspective, the book prompts a set of questions that, in our opinion, are relevant to the field of comparative constitutional law and will be the focus of this review. They relate to theory and conceptualisation, methodology, and the disciplinary boundaries of comparative constitutional law.

This is the author manuscript accepted for publication and has undergone full peer review but has not been through the copyediting, typesetting, pagination and proofreading process, which may lead to differences between this version and the Version of Record. Please cite this article as doi: 10.1111/1468-2230.12520.

In describing the 'road to constitutional legitimacy' (362) over the past century, *Constitutional Revolutions* focuses on the first ideal type: revolutionary movements led by outsiders against the existing regime. This ideal type can be (but is not necessarily) associated with the leader's will to constitutionalise his revolutionary charisma. In certain cases, such as India and South Africa, the leader's revolutionary charisma is contrasted with the charisma of the revolutionary movement.

Revolutionary movements and charisma are the two main concepts discussed in the book. Ackerman's treatment of these concepts raises questions about their definition and their effects on how constitutional history is conveyed. First, the lack of conceptual clarity of *revolution* and *charisma* might undermine Ackerman's claims. Even though chapter 1 provides definitions for both concepts, those definitions seem sometimes to get lost in the multiple categories Ackerman draws. Three ideal types exist for the legitimation of constitutional change. The first one, modern revolutions, is divided into two broad types (totalising and on-a-human-scale); the second type is organised into a four-stage dynamic: the insurgency, the creation of a new constitution, the succession crisis and the consolidation of the revolution. One of the difficulties is that all those categories are not systematically applied to the comparative examples and therefore their usefulness is not clear. Beyond this mostly formalistic concern, seeing the founding moments of the regimes selected by Ackerman through the lenses of constitutional revolutions and charismatic leadership has at least two 'secondary effects' on the historical accuracy of his central claim.

First, focusing on constitutional revolutions has the effect of presenting the break with the previous regimes as more 'revolutionary' than it sometimes is. Ackerman defines a constitutional revolution as the reorganisation of dominant beliefs in a relatively short period of time. This reorganisation is brought about by a movement led by a charismatic leader resulting in a frontal attack on the state. This vision omits the possibility of continuity in constitution-making: in Italy, for example, the Resistance does not break immediately with the previous constitution (the *Statuto Albertino*), but only with the Fascist regime (see D. Tega, 'The Constitution of the Italian Republic: Not revolution, but principled liberation' (2019) 17 *International Journal of Constitutional Law* 690). And even that is a *political* break – because the new values come from the Anti-Fascist movement – rather than a *legal* break. In fact, the Criminal and Civil Codes, adopted during the Fascist Regime, remained in force after the Liberation and the adoption of the Republican Constitution (and remain valid

to date). Many of the provisions contained in those Codes affected constitutional freedoms after the constitutional revolution, and it was only through subsequent case-law of the Constitutional Court and legislative amendments that the Codes were purged of the most authoritarian provisions, thus aligning them with the Constitution. If Italy is an illustration of what Ackerman refers to as 'unconventional adaptation' (in his own words, when 'older traditions continue to operate, but only in ways that recognize the legitimacy of the revolutionary effort to mark a "new beginning" in political time'), he should have perhaps made it clearer (34).

Second, focusing on charismatic leadership has the effect of overlooking many alternative explanations for revolutionary outcomes in the sense that Ackerman employs. Elements such as legal texts (constitutions, reforms, laws), parliamentary debates, the role of 'the people' and the military, institutions, structural problems of the country, or the rule of law seem to be marginal to his account of constitutional revolutions. For example, the French Fifth Republic – that is the result of De Gaulle's charismatic leadership as Ackerman correctly shows – cannot be explained without also mentioning the change in the electoral law from a proportional system to a majoritarian system. This change, although not formalised in the Constitution but in an ordinary law, was central to the stability De Gaulle desired for the new regime. Similarly, the Indian and South African regime changes can hardly be accounted for without considering the inequality and violence that characterised their societies. Furthermore, the 'charismatic reengagement' (365) that revolutionary leaders such as De Gaulle and Washington share is another example of how the standpoint of *Constitutional Revolutions* selectively ignores structures that are not commanded by the will of single individuals, such as electoral systems. By using public speeches of the leaders as proof and sources, this account tends to forget not only that the reactions of the people (as an electoral body or public opinion) are based on many other reasons, but especially that those reasons may lie outside the scope of human intentions.

The way in which Ackerman undertakes the defence of his meta-narrative also raises questions about methodology, particularly in relation to case-selection and the use of sources. As comparative constitutional law scholars well know, case-selection is a recurring concern: the choice of jurisdictions, the level of detail, the types of sources to be used, and the numbers of jurisdictions to be included (*large-n* study or a *small-n* study). Ackerman opts for a *small-n* study of nine different jurisdictions. It is extremely significant that this case-

selection is broad and inclusive, building a bridge for the traditional divide between the Global North and the Global South. Ackerman is clearly sensitive to the much felt need to look beyond the so-called 'usual suspects'. He weaves together a historical account of the political and constitutional developments in these jurisdictions to confirm his theory of 'revolutionary constitutions'. However, it is not apparent how Ackerman determined why the political histories of these different jurisdictions should be presented in that particular way. For instance, how did Ackerman conclude that Nelson Mandela's charisma rather than the popularity of the African National Congress (ANC) had the greater influence in the democratisation process in South Africa? Was the ANC's popularity secondary to Mandela's charisma in that constitutional revolution? In addition to raising questions about methodology, these questions also influence the way we view the conceptualisation of 'constitutional revolutions' and charisma.

This leads to our second question, which is prompted by the diversity of the selected jurisdictions: the use of sources. For example, how to deal with sources that are not available in English (or in another language the author is familiar with) and how to determine if the chosen sources are authoritative. The sources that Ackerman relies on are limited in number and seem to offer an incomplete or partial representation of the picture. A brief account of the process he followed to select the sources would have strengthened the claims that he makes. They are perhaps not the best representatives of the rich scholarship available for and in each jurisdiction studied. For example, in the chapter on France, Ackerman relies on non-legal sources to explain the technical legal debate about the constitutional amendment in 1962 (188, endnote 49). Furthermore, the use of sources determines the ways in which different accounts of history are represented by Ackerman. For instance, he describes the Indian Supreme Court as 'the ultimate defender of the nation's revolutionary constitutional legacy' without acknowledging the alternative and critical perspectives about the work of that Court (44) (see M. Suresh and S. Narrain, *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal Indian* (Hyderabad: Orient BlackSwan, 2014)). The use of a limited range of sources combined with neglect of different or contrasting perspectives results in omissions or imperfections in Ackerman's narratives.

Related to the methodological points made above, another question worth asking is the relevance and value of Ackerman's project for the field of comparative constitutional law.

What are the disciplinary boundaries of comparative constitutional law today? Where does Ackerman wish to place his work?

The first aspect of this question is interdisciplinarity. More specifically, *Revolutionary Constitutions* seems to belong to the category of 'Law and …' approaches, in this case, law and history, and/or law and sociology. One of the aims of this approach is to complement the study of law with the research methodology of the other discipline. As with his previous work, Ackerman couches his narrative in historical and sociological accounts. *Revolutionary Constitutions,* however, presents two concerns. It is not clear which historic method is applied, as the facts that are selected for the narrative seem to be cherry-picked to confirm the argument. In Waldron's words 'it seems that Ackerman's narratives are held together by nothing much more than similarities that happen to occur to him' (J. Waldron, 'Quibbling, Wrangling' *London Review of Books* 12 September 2019). Assuming that Ackerman did intend for this work to be interdisciplinary, to what extent should he have balanced his historical discussion with an engagement of applicable constitutional law? To us, his work reads more in the tradition of constitutional sociology – that is to say, an explanation of the evolution of a constitution through a reading of its social context. However, the structure of the book suggests a historical account as it has been organised by jurisdiction (and for each jurisdiction, events are in chronological order) rather than by theme. Ackerman's discussion of constitutional law, in each of the selected jurisdictions, is significantly less than his discussion of political developments. To what extent must comparative constitutional law scholarship engage with 'law' per se, in order to fall within its disciplinary boundaries? The question thus become: where does the threshold lie between a 'Law and …' approach and a historical, sociological or political narrative?

The second aspect of the disciplinary question is that of authorship. Ackerman's acknowledgments (443) are a clear indication of the human and other resources that a scholar should ideally have at her command in aspiring to comparative work of this scale. In theorising across multiple jurisdictions, the scholar is required to work over a long period of time (in his case more than three decades) and to have access to research funds and research assistants drawn from across the world. These resources have enabled Ackerman to overcome barriers that the comparative scholar is regularly faced with (such as language barriers). Furthermore, as with *We the People,* Ackerman intends to develop his thesis over a trilogy.

This suggests that theoretical claims in this field may also demand scholarly work that is developed over multiple volumes.

In conclusion, Ackerman's comparative enterprise revives conceptual and methodological debates in the field of comparative constitutional law and reveals some of the challenges we face in working in this field.

Author note: We were inspired to write this book review having discussed it in a reading group convened under the Laureate Program in Comparative Constitutional Law 'Balancing Diversity and Social Cohesion in Democratic Constitutions' at Melbourne Law School, University of Melbourne. We would like to thank its participants for their insights and discussions. The Program is fully funded by the Australian Government through the Australian Research Council (ARC).

Erika Arban[*]
Eleonora Bottini[**]
Dinesha Samararatne[***]

[*] Postdoctoral research fellow, Centre for Comparative Constitutional Studies, Melbourne Law School & Lecturer, Faculty of Law, University of Antwerp.

[**] Professor of Public Law, University of Caen Normandy, Centre de recherche sur les droits fondamentaux et les évolutions du droit (CRDFED).

[***] Postdoctoral research fellow, Centre for Comparative Constitutional Studies, Melbourne Law School & Senior Lecturer, Department of Public & International Law, Faculty of Law, University of Colombo.