

## Some Remarks on Bruce Ackerman's "*The rise of World Constitutionalism. Volume one: Revolutionary Constitutionalism: Charismatic Leadership*"\*

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1. This is a short analysis on Bruce Ackerman's new book "*The rise of world constitutionalism. Volume one: Revolutionary Constitutionalism: Charismatic Leadership*".

Despite the title (World Constitutionalism), at the very beginning of the Introduction, 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 through 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 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».

As I said, according to Ackerman there are different pathways through 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

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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 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».

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 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 (see a non-conformist analysis in G. De Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazioni*, Il Mulino, Bologna, 2010). 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 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, its 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 (see V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in a Global Context*, Oxford University Press 2016, pp. 37 ss.). 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.

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, *// futuro dell'Europa. Note a margine*, in [www.nomos-leattualitaneldiritto.it](http://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». 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.