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THE POLITICS OF CONSTITUTIONAL LAW AROUND THE WORLD

Mark Tushnet and Dimitry Kochenov (eds.),
Research Handbook on the Politics of Constitutional Law,
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The editors of the *Research Handbook on the Politics of Constitutional Law* gathered almost 50 authors from around the world in an attempt to summarize the existing and inspire new thought on the interplay of politics and constitutional law. The contributions provide a noteworthy overview of the topics of the authors' choice and note the recent developments in those fields. The book offers an innovative and critical approach to a number of key concepts of constitutional law and constitutional politics and is primarily intended for scholars in the fields of law and political science, to inspire, or as the editors say, provoke, future research, but will of course be well read by students in these fields, as well as policy makers and policy analysts.

Instead of delving into the contested views on the distinction between law and politics, the editors chose to embrace them and allow the authors to provide their differing assessments of the issue. The contributions are diverse in style and methodology (from generalized accounts based on the historical and theoretical background, to detailed case studies focusing on one or more linked jurisdictions), but are still expertly organized into four consistent sections.

The topic is obviously infinite (as the editors note, "almost any matter of public policy could be treated in such a handbook") and it is hard to encompass it even with a larger number of contributions than the 37 gathered in this collection. Aware of that, the editors chose not to determine topics beforehand, but only suggested them and left how the chapters would be designed and structured to the authors. This leads to a calculated

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“sacrifice” of some topics (*e.g.*, the constitutional politics of legislative design or “fourth branch” institutions), with some being excluded from the very start (*e.g.*, the editors expressly declined including a section on regions in the Handbook). Even though the list of authors and cases covered by them can easily carry the epithet of global, the above approach did leave some territories uncovered, since the plights of the European Union itself and its member states seem overrepresented, because most of the authors who chose the case study approach write about them, with a significant representation of countries of Central and Eastern Europe, especially in Parts II and III of the Handbook. However, at the end of the day, this is not a textbook, but a research handbook, a reference work intended to invite future research and the freedom given to authors to choose their own focus and their own methods provided a commendable end result.

One of the significant features of this book is that it widens the scope of research to spheres not usually touched upon by scholarly work (*e.g.*, Martyn Krieger’s proposal to widen the scope of the rule of law wherever significant power is exerted, namely the private sphere), as well as invoking new approaches (*e.g.*, Andras Sajó’s exploration of social emotions in institution building) or identifying gaps in existing literature (*e.g.*, sovereignty of contested territories or rights of sexual minorities).

The other prominent message is the evident – but never truly embraced in constitutional and political practice – assertion that transplantation just does not do the trick in constitutional law and institution-building – one that we have seen too often in the so-called countries in transition of the Western Balkans. The soil on which the transplants are grown is as (if not more) important than the plant that prospered elsewhere. We are reminded of this throughout the handbook, in chapters in all four Parts (starting, *e.g.*, by Oklopčić’s account of popular sovereignty; Adamski referring to “constitutional ethnography”; Tushnet noting a continuity between constitution-making and ordinary politics).

Editing a collection of 37 works cannot be easy and the biggest challenge lies in organizing the contributions into thematic parts, but also planning their sequence, to keep the reader’s attention. As said, the handbook is divided into four parts, as the editors saw fit – Foundations, Structures, Rights, and Futures. The Parts are not equal in volume, the first two ones taking up two thirds of the handbook.

The absence of a template given to the authors beforehand is perhaps most visible in Part I (Foundations). The title is so broad that it allows for almost any issue, even loosely connected to the constitution or to politics, to be included and remain inconspicuous. Because who is to say, with authority, what the foundations of constitution are? There certainly isn’t a

list. For this reason, this section elegantly encompasses both the “big” or foundational concepts, elaborated in scholarship for at least centuries now – some of them flipped upside down – such as the rule of law (in Krygier’s opinion unjustifiably limited to state power and state responses), popular sovereignty (Oklopčić reminding of the importance of the context from which the notion arose), and state sovereignty. In some chapters, the big issues are contextualized. For instance, Audrey Macklin writes how state sovereignty leads to immigration exceptionalism, coupled with judicial deference to administrative discretion, at the expense of constitutionally guaranteed human rights, while Aistė Mickonytė and Benedikt C. Harzl discuss how constitutionalism differs in unrecognized states compared to full-fledged states. Viktor Ramraj deals with the constitutional politics of emergency power.

In Part I we also read about what shapes constitutions, *i.e.*, how they are developed. Mark Tushnet points to the interdependency of constitution-making and ordinary politics, while Tamas Gyofry unveils that even constitutional interpretation is not politically neutral. Julie Novkov writes about ideology shaping constitutional order; Dariusz Adamski sees behavioral research as a useful tool to understand how people think and behave, thus providing a way for constitutionalism to participate in building happier societies, while Andras Sajo points toward empirical research on moral emotions. Tokujin Matsudaira’s case study shows how Japanese society and culture actually make it difficult to amend its 1947 Constitution.

In Part II the authors deal with structures. Even though many contributions in the Handbook touch upon the constitutional position and role of the judiciary, four of them in this Part are solely dedicated to this field – judicial independence (Vanberg, Broman and Ritter see it as a political choice and explore what sustains it), judicial governance (Kosar and Šipulova unveil the pitfalls of judge-dominated judicial governance), and judicial dialogue, in both its variants (Law and Tushnet). Two texts are dedicated to Latin America (the failed constitutional design of checks and balances between the legislature and the executive, resulting in hyper-presidentialism, by Roberto Gargarella, and the unexpected effect of federalism in the emergence of decentralization and wider local autonomy, by Juan González Bertomeu). Europe, here mostly equated with the EU (since many authors disregard the geographic evidence against this) is the focus of another four texts: an interesting account on the dubious biographies of the first two advocates general of the EU (by Margot Horspool); the EU’s “administrative constitutionalism” in which EU governance never attained its own autonomous democratic and constitutional legitimacy (in the view of Peter Lindseth); the decisive influence of corporate power on the constitutional

design of the EU (by Jacquelyn D. Veraldi and Matthew R. Hassall); and how the European Left failed to incorporate the social democratic perspective into the EU constitutional order (by Bojan Bugarič).

Franita Tolson's contribution stands out as a case study of the effects of the 12th amendment to the US Constitution, but provides a conclusion that is probably applicable globally – that political parties are to be treated as state actors. Finally, Elena Bashkeska looks at the structure of the UN Security Council and its failure to oppose the international law exceptionalism of states with greater factual power.

In Part III readers will not find a catalogue of rights, but rather a flagging of significant human rights issues of concern and deserving of further research. Following a general account of the politics of constitutional rights by Adam Chilton and Mila Versteeg, the editors have lined up the analyses of several unconnected human rights issues. Mariam Begadze recognizes the need for judicial scrutiny of pretextual rulemaking in two areas: large-scale judicial reforms and recentralization policies. Ioanna Tourkochoriti explores how the historical meaning of religion affects constitutional arrangements between states and religious groups worldwide. Sarah Ganty provides a compelling case that merit, instead of promoting equality and democracy, actually plays a central role in maintaining the same elites in power. Kamala Sankaran's case study on how minority issues were dealt with in Southeast Asia in postcolonial constitutions also explores the politics surrounding constitutional design. Alina Tryfonidou explains how European institutions, both the Council of Europe and the EU, fail to protect the rights of sexual minorities, due to reliance of national execution and protection of rights, and refrain from directly legislating these rights, while Eastern European countries take regressive steps and fail to sanction the existing socially accepted homophobia. Closing this Part of the handbook, Dimitry Kochenov's contribution on citizenship as a direct opponent of human rights, as being deeply opposed to equality.

The fourth Part of the handbook (Futures) might as well have been titled Threats, depicting the return of "clouds" after the promise of a bright future of constitutionalism in the late 19th and early 20th century. This is the editors' picturesque description of "democratic decay, abusive constitutionalism, the crisis of constitutional democracy, and the like." Aziz Rana writes about the inadequacy of the approach to constitutional law developed in the US during the Cold War, focusing on the analysis of federal caselaw dealing with the new challenges. Aleksandra Gliszczyńska-Grabias provides three case studies on mnemonic constitutionalism, with differing aims: one on securing the democratic order, and two on introducing illiberal democracy and justify aggression. Similarly, Petra Bárd, Nóra

Chronowski, and Zoltán Fleck give examples of uses, misuses and abuses of the concept of constitutional identity in several EU Member States. Paul Blocker analyzes the relation between populism and constitutionalism, particularly focusing on backlash movements. After illuminating militant democracy, Violeta Beširević assesses whether, adequately understood, militant democracy can help fight democratic backsliding. She reminds us that classical militant democracy measures can be effective in combating extremism, while at the same time acknowledging the risks that this may entail. Returning to the topic of citizenship, already tackled in the third Part, Suryapratim Roy and Rahul Sambaraju offer reterritorialization to describe India's transformation into a Hindu state. The handbook ends with frightening, but also inspiring, accounts of constitutional meltdown (by Paul Craig) and a reminder of how evil law can be and how it can easily coexist with the rule of law (by Anna Lukina).

To conclude, Tushnet and Kochenov's Handbook offers an innovative approach to an array of key concepts and topics related to the politics of constitutional law. It is read with ease, inspires the reader to connect the dots, invites reflection, and is a valuable contribution to scholarship.

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