BOOK REVIEW

Gyorfi T *Against the New Constitutionalism* (Edward Elgar Publishing Cheltenham, UK 2016) ISBN 9781783473007.

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Abstract

This contribution reviews the book entitled Against the New Constitutionalism authored by Tamas Gyorfi. He challenges the pivotal role given to judges in constitutional adjudication.

Keywords

Judicial review; constitutionalism; constitutional interpretation; constitutional deference; legitimacy.

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Review

This notable addition to the series *Elgar Monographs in Constitutional and Administrative Law* is a thought-provoking contribution to the "legal versus political constitutionalism" debate. The author, a Hungarian scholar working in the UK, takes a sceptical view of constitutional judicial review. He presents a rich text on the apparent assumption that his readership will not be found among the uninitiated, but rather at desks of advanced constitutional scholars, and hopefully in the chambers of senior judges around the world.

The customary quality that one has come to expect of the products of Edward Elgar Publishers is evident in the handsome presentation of this work. Its content is scholarly by design, in places slightly irritatingly so, for instance in the use of domestically fabricated acronyms such as "PEP", "RF", "LPL", "AEP". Although the absence of an explanatory table of labels of this nature for complex concepts is a shortcoming, the editing and design of the publication are otherwise impeccable.

As characteristic of new democracies that emerged after the Second World War, Gyorfi identifies four "institutional features", the first being "dualist constitutional architecture". This characterisation is interesting, not only because of its descriptive potency, but also because the distinction between constitutional monism and dualism is such an important, and underutilised instrument in constitutional analysis. "Monism" describes what Gyorfi calls the orthodox model of parliamentary supremacy represented by the British Westminster system which lacks a supreme[*] constitution against which legislation and executive and administrative actions can be tested for validity. This leaves it to the electorate to decide in regular popular elections whether the manner in which the incumbent executive steers the legislative process and government policy, deserves continued support.

"Dualism" typically describes the constitutional model of the United States, whose supreme Constitution serves the purpose of a lasting guide for the determination of the supreme will of "the people", especially by the judiciary when weighing the constitutionality of executive, administrative and legislative conduct. Such determination is assumed to be done regardless of the periodical political reconfiguration of government. For the monism/dualism distinction Gyorfi rightly acknowledges Bruce Ackerman's analysis in his book *We the People* of 1991 (which is, incidentally, also

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where Ackerman coined the phrase "constitutional moment", being a point i[1]n history where "the people" are persuaded to change their foundational stance by means of constitutional amendment or the adoption of a new constitution).

Gyorfi prefers to refer to the US-type model of dualism as "the new constitutionalism", which has, according to him, become a widely accepted norm around the globe. In addition to dualism, its other institutional features are described to be a codified bill of rights, judicial supremacy and the robust exercise of judicial review. Although this book is not intended to be a commentary on any specific constitutional order, the dualism/monism dichotomy is an important factor in the analysis of post-war constitutions in former British colonies (where monism was the pre-constitutional norm) which have embraced the "new constitutionalism" with all its institutional features, including presidentialism (see eg Venter F, "Parliamentary sovereignty or presidential imperialism? The difficulties of identifying the source of constitutional power from the interaction between legislatures and executives in Anglophone Africa" in Fombad C (ed) *Separation of Powers in African Constitutionalism* (OUP Oxford 2016) Chapter 3). Gyorfi does not substantially address the potential of robust judicial review in jurisdictions where constitutionalism has only recently been adopted as a stabilising and developmental constitutional mechanism useful for countering undemocratic government conduct and political patriarchy. His slightly elitist focus on the well-performing democracies (especially in chapter 3) is nevertheless legitimate for the purposes of developing an abstract theory on the ideal role of the judiciary in an ideal constitutional order.

Gyorfi's approach is rigorously structured, as is evidenced by his formulation of six hypotheses in the first chapter, based on a wide and well-informed reading of the literature on constitutionalism and constitutional comparativism. In the last section of the chapter one finds the research question posed for the study, namely whether strong judicial review is justified, and a hugely abstract explication of his proposed methodology, ending (at 39) with the following rather intimidating conclusion:

> Although the theories of constitutional interpretation, institutional design and political legitimacy are relatively autonomous, there is a complicated interplay between them, and an adequate theory must be able to handle the complexity of these interrelationships.

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On this basis the book proceeds in chapter 2 to develop a *via media* in the debate about the justification of judicial review, the opposing poles being the "principle of equal participation" and "rights foundationalism" respectively. According to the author the former is to be preferred, but is also not fully adequate. What he rather proposes is "political liberalism" which, if appropriately understood and applied, significantly confines the range of political decisions that may legitimately be made. He prefers (at 71) an "arbitrator conception of authority" which supports the principle of equal participation, but "maintains real respect for moral disagreement".

In the next chapter, which covers more than a third of the book, Gyorfi makes his case against the strong form of judicial review. He argues that, because of the abstract nature of the typical constitutional language protecting rights, the adjudicator of such rights is placed in the position of "a moral arbitrator". This puts the authoritative interpreter of a bill of rights in the position to make choices between moral beliefs, without necessarily having to conclusively justify the eventual choice. The author challenges (at 80-91) the idea that judicial review allows for equal participation by countering the arguments that courts "track public opinion" and that they have a "democratic pedigree", and by emphasizing the weaknesses of the democratic political process, contrasting the representative functions of elected legislatures to the position of the courts whose decisions are assumed to be insulated from the political process. But he points out (at 101-102) that judges do act strategically and make compromises, causing them to take their "second-best options":

> Sometimes this bargaining is necessary to have a binding precedent. On other occasions, they make compromises in order to make a unanimous decision that gives additional authority to the court's decision. But they can also make strategic decisions by anticipating and factoring in the potential reactions of the other branches.

Based on various empirical studies, Gyorfi states his view (at 151) that "in mature democracies there is no compelling reason to introduce the strong form of judicial review", to which he adds (at 168) that "the power to specify the meaning of abstract human rights provisions should be conferred on the legislature."

Facing the reality that the pervasive implementation of "new constitutionalism" has created widespread "strong" judicial review, Chapter 4 focuses on constitutional interpretation. The author raises the question (at 170) whether "judges can avoid the moral reading of the constitution", despite the widely-held view that they merely interpret and apply the constitution, declaring what the law is. This is indeed a valuable insight given the illusion of judicial "neutrality" which is often, and wrongly, assumed

to be possible, especially in cases involving cultural and religious controversies. Gyorfi's response is that judges cannot avoid a moral reading of the constitution, and then goes on to substantiate this view by exploring the reasons for divergent judicial findings and the strategies behind the phenomenon in various constitutional courts. One of these is the issue of balancing and limitation of constitutional rights (discussed at 183-185). The chapter culminates in the author making a case, in line with the focus of the central argument of the book, for courts not to assume exclusive authority to interpret, but to show deference to the views on the interpretation of the constitution put forward by the other branches of government.

Chapter 5 is devoted to the postulation of "a theory of weak judicial review. The author interestingly distinguishes three categories of examples: limited judicial review due the absence of a bill of rights, such as in Australia, where judges can only employ "structural-organizational norms"; "penultimate" judicial review, where judicial findings on the constitutionality of legislation can be overridden by the legislature (as in Canada); and deferential judicial review, where the courts are either required constitutionally, or traditionally do defer to the other branches, as in Sweden and Finland. Gyorfi identifies (at 230-236) four models of inter-institutional interaction, namely monological interaction between the institutions of the state; conflict between the will of a defiant parliament and the reason of the judges; shared responsibility to interpret rights, which does not compel the legislature to accept the judiciary's other, or alternative or inconsistent interpretation; and the "emergency break" model, where "the primary function of judges is not to develop what they believe to be the best interpretation of a given right, but to police the boundaries of reasonableness" (235).

The short concluding chapter ends with the author's own characterisation (in two different paragraphs on 258) of his "pleas", namely "for both institutional conservatism, and institutional experimentalism", and also "for institutional innovation and radicalism".

This book is indeed a thought-provoking challenge of conventional thinking on judicial constitutional review. The provocation is well-justified because the literature on the subject is so diffuse and seldom clearly focused. Gyorfi's research is very thorough, wide-ranging and penetrating, and he constantly explicates his choices and criticisms. His perspective is obviously European, but his analyses and theorization are of global import. Although the approach is one of high-level scholarship, requiring the reader to set aside some time to absorb and understand the sometimes abstract structuring and classification of the author's postulations, it would be a pity if the primary readership would not be judges around the world, especially

those who bear the responsibility of constitutional jurisdiction. Even if readers may not be fully convinced by Gyorfi's "pleas", the text can be expected to induce some serious judicial (and scholarly) introspection. The challenges that Gyorfi poses to the conventions of constitutional adjudication must certainly confront any reader who lives under the illusion that constitutional justice can be based on neutral technicalities, at least with the urgent need to reconsider their understanding of the nature of constitutional adjudication which has become such an important global phenomenon in 21st Century constitutionalism.

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