

BOOK REVIEW

Jacobsohn G and Schor M (eds) *Comparative Constitutional Theory* (Edward Elgar Publishing Cheltenham, UK 2018)
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F Venter*

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Author

Francois Venter

Affiliation

North-West University,
South Africa

Email Francois.Venter@nwu.ac.za

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Abstract

This contribution is a review of the research handbook in comparative constitutional law, titled *Comparative Constitutional Theory*, and edited by Gary Jacobsohn and Miguel Schor. It was published in 2018 by Edward Elgar Publishing. Every law library worthy of the name should acquire it for the benefit of constitutional scholars and advanced students of constitutional comparison.

Keywords

Comparative constitutional law; comparative constitutional theory; democracy; authoritarianism.

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Review

That Edward Elgar Publishing has achieved a world-wide status among the most prominent publication houses producing leading legal scholarship is once more confirmed with the appearance of this volume written by 24 prominent professors of law from various renowned Anglo-American and European law faculties and schools, covering more than 500 pages.

As is usual with volumes of collected and edited essays, the editors - respectively from the University of Texas and Drake University in the USA - wrote an introductory chapter revealing the purpose and tenor of the work, as well as a concise overview of the contributions in the other 23 chapters, arranged in four parts. Given their shared academic domicilium, it should not be surprising that the editors' opening remarks are linked to *The Federalist Papers* written in the late 18th Century by Alexander Hamilton, James Madison and John Jay, using the pseudonym "Publius". They state on page 1 that "[t]he activity that today is conducted under the designation *constitutional design* is in no small measure attributable to the success of Publius' earlier effort." Consequently much can be learnt in this book about liberal constitutionalism, and the contributors were obviously selected with this in mind. It may be cause for relief to some that the contributors do not demonstrate a leaning towards post-modernist thinking about constitutional comparison: thus e.g. references in the index to the likes of Derrida, Foucault, Menski and Legrand are not in evidence (although Günter Frankenberg is cited briefly in three essays, mostly to benefit from some of the choice phrases and constructions for which he has become known).

On page 5 the editors indicate their intention to clarify "concepts important to the activity of comparative theorizing", and pertinently put their finger on

* Francois Venter. B Jur et Comm LLB LLD (PU for CHE). Professor and former dean of the Faculty of Law, North-West University, Potchefstroom South Africa. Email: Francois.Venter@nwu.ac.za.

one of the most challenging difficulties of the expanding field of constitutional comparison, namely the under-theorisation of "many of the ideas and analytical constructs that have become ubiquitous in the field". Indeed herein lies the greatest merit of the book, because the wide-ranging analyses in the essays all add in some way to the enrichment of the theorisation of the artefacts of constitutional law that have largely become stultified in our global comparative vernacular. On page 7 the editors characterise the work as "a compendium of theory-driven essays" related to constitutional design and interpretation.

In Part I eight essays are presented under the heading "Constitutional Structures and Rights". Stephen Gardbaum (UCLA School of Law) asks what the concept "judicial supremacy" means and seeks "to provide the systematic analysis of the concept that is mostly missing and that is a prerequisite for understanding and assessing the several debates in which it plays a central role" (page 21); Stephen Tierney (University of Edinburgh) "approaches federalism from an overtly theoretical perspective, seeking to explore the nature of federalism as an idea rather than as a particular institutional model" (page 45); Cheryl Saunders (Melbourne Law School) "seeks to tease out some of the principal variations in approaches to a separation of powers in order to examine more closely the role that constitutional theory has played and continues to play" (page 67); Miguel Schor analyses constitutional dialogue by comparing judicial supremacy in the United States and Canada; Aida Torres Pérez (Pompeu Fabra University, Barcelona) explores "the legitimating potential of judicial dialogue for the interpretation of fundamental rights in the EU" (page 103); Janet L Hiebert (Queen's University, Canada) reflects "on the criteria for determining the most appropriate jurisdictions as case studies for comparative analysis" in the context of parliamentary bills of rights (page 123); Jeff King (University College London) situates "thinking about social rights in the broader tradition and contemporary theories of constitutionalism" (page 144), and Jacob Weinrib (Queen's University,

Canada) argues that certain objections to the overarching role of human dignity in constitutional and human rights law rely "upon a presupposition about the nature of constitutional theory and its relationship to constitutional practice" (pages 167-168).

Part II, which is headed "Constitutional Interpretation" contains five chapters. David Robertson (University of Oxford) reveals the fact that the "counter-majoritarian thesis" is primarily an American pre-occupation and argues that it is not desirable "to take the constitution away from the courts" (page 189); David Landau (Florida State University) considers the role of legal pragmatism in comparative constitutional law, "which has much to offer the dominant reasoning templates in comparative constitutional law, such as proportionality" (page 208); Victor Ferreres Comella (Pompeu Fabra University, Barcelona) endeavours to illustrate the need for substantive theory regarding the "hard normative issues that judges must address when they adjudicate cases", which "are somehow 'external' to the mechanics of the principle of proportionality" (page 231); Howard Schweber (University of Wisconsin) compares the ways in which the constitutional "textualist mandate" is understood in respectively the US Supreme Court and the European Court of Human Rights regarding "religious establishment" (page 251), and Heinz Klug (University of Wisconsin) theorises about the nature of cross-national comparative influence on constitutional jurisprudence, and concludes (page 291) that it is through the "understanding of their own constitutional identity that domestic courts translate, apply and hybridize cross-national jurisprudence".

The next five essays in Part III deal with "Constitutional Change". Yaniv Roznai (Herzliya Interdisciplinary Center, Israel) revisits the meaning of "constituent power" and argues that, despite being "one of the most abstract concepts of constitutional theory" it should not be abandoned but further studied and conceptualised (page 296-297); Mark Tushnet (Harvard Law School) examines the tension between amendment theory and constituent power with reference to the American and French constitutions; using the

ancient thought experiment of the identity of Theseus' ship that had undergone numerous renovations and replacements while lying at anchor, Gary Jacobsohn addresses the abstract question whether "revolutionary change" of constitutions bring about "something other than it once was" (page 334), comparatively dealing with the German and Indian constitutions; Joel I Colón-Ríos (Victoria University of Wellington) proposes "a typology of the rules of change found in Latin-American constitutions", and then proceeds "to consider some of the main theoretical premises" reflected in the categories of his typology (page 354), and, with a focus on the constitutional transitions in 1989-1990 in Eastern and Central Europe, Gábor Halmai (European University Institute, Italy) discusses "the theoretical challenges that legal regulation of transitional justice in transitional constitutions raises when it attempts to reconcile past abuses of constitutionalism" (page 372).

The final Part IV of the volume is headed "Issues in Constitutionalism". This theme is dealt with in five essays. Taking the cases of the USA and Britain, Janet McLean (University of Auckland) considers "some of the different ways in which constitutions are unwritten (regardless of their form)" in order to "help us think about the nature of what it means to be 'constitutional' " (page 395); Jan-Werner Müller (Princeton University) discusses the revival of interest in "militant democracy", being "the idea that democracies should take pre-emptive measures against political actors committed to the abolition of democracy through non-violent means" (page 415) – the recent rise of populism figures prominently in his analysis; John E Finn (Wesleyan University) concerns himself with "the extent to which the participatory turn in constitution-making is likely to result in constitutional orders in which citizens have a direct, significant and ongoing role in and responsibility for achieving and maintaining a constitutional way of life (page 437); Mark A Graber (University of Maryland) surveys "the developing debate in comparative constitutionalism over American exceptionalism", details "the distinctive ways in which racial concerns and politics have influenced

American constitutional development and contemporary doctrine", and highlights "the importance of incorporating constitutional politics . . . into comparative constitutionalism" (page 457), and finally the chapter on "constitutional dissonance" in China jointly authored by Wen-Chen Chang (National Taiwan University) and David S Law (University of Hong Kong and Washington University) argues "that it is a mistake – for both the field of comparative constitutional law and the development of constitutionalism in China – to define the core concepts of 'constitution' and 'constitutionalism' in a manner that excludes China (page 478).

The publication of collected volumes of this nature presents, by its nature, certain challenges to editors and publishers, perhaps the most common being the justification of the diversity of topics and themes addressed by the range of authors, each from their preferred perspectives, emphases and specialisations. Due to the rich spectrum of themes, albeit commonly related to comparative constitutional design and interpretation but largely limited to liberal scholarship, readers will find it fruitful to prospect this constitutional treasure trove for the wide range of gems and resources accessible between its covers, ready for further scholarly beneficitation.

The price of the book is such (likely not so much due to the publisher's desire for profit than to the rising cost of publication on paper) that only really well-resourced individual constitutional comparatists would be able to afford it. However, every law library worthy of the name should acquire it for the benefit of constitutional scholars and advanced students of constitutional comparison.