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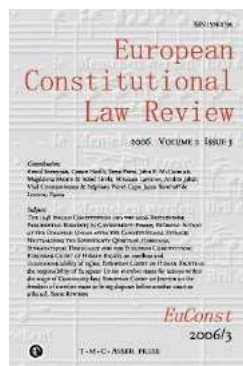
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The Case for Legal Pluralism GAVIN W. ANDERSON, Constitutional Rights After Globalization (Oxford and Portland, Hart Publishing 2005) 156 p., ISBN 1841134481

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The Case for Legal Pluralism

Arend Soeteman*

GAVIN W. ANDERSON, *Constitutional Rights After Globalization* (Oxford and Portland, Hart Publishing 2005) 156 p., ISBN 1841134481

This is a peculiar book. According to its title, it seems to deal with the problem of the existence and implementation of constitutional rights in an era where the importance of national states is diminishing. The main body of the book, however, is not about constitutional rights at all, but is a criticism of, what is called by Anderson, *liberal legalism*. This liberal legalism is, he argues, the dominant paradigm in the profession, but it is seriously flawed. Happily, Anderson has an alternative: the doctrine of *legal pluralism*, which, according to him, is the principal rival of liberal legalism (p. 44).

In the introductory chapter and in the last part of the book, constitutional rights and legal pluralism come together: Anderson believes that the doctrine of legal pluralism can provide us with a better understanding of the modern problem of rights' constitutionalism. The problem is, in his view, that political power is not only in the hands of traditional political actors (such as kings and governments) but also in the hands of powerful economic actors, who are supported by neoliberal globalization and protected by traditional human rights. Those powerful economic actors are, it seems, beyond any control.

First, let us commence with the discussion of *liberal legalism* and *legal pluralism*. As Anderson describes it, for liberal legalism law is formal state law, which seeks to protect individual autonomy (p. 40). The point of law, the protection of autonomy, requires that 'it is important to have in place a coherent set of systematically enforceable rules' (p. 40, 41). Anderson recognizes three core features in liberal legalist epistemology: law is formal (legal norms are identified by formal criteria), law is coherent and law is an effective means to protect individual rights (p. 42). Legal pluralism denies all these core features: 'law is not found solely on the processes of the state, and is neither internally coherent nor externally instrumental' (p. 44).

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As to the first feature, legal pluralism argues that there is a great deal of law that is not state-made: law in the household place, in the work place, in the market place, in the community place, in the citizen place and in the world place are distinguished (p. 51), and this list is not supposed to be exhaustive. The law in statutes or made by courts may be at variance with, for example, what is considered to be normative in the family: Anderson dedicates a number of pages in explanation of this point, which is rather obvious for all lawyers, even ‘liberal legalists’. The only question is whether all kinds of social rules can rightly be considered ‘law’. Anderson does not discuss this question: he quite often equates law with social norms.¹ One need not be a Hartian positivist to believe that this makes the concept of law unworkably broad. We usually restrict ‘law’ to norms, which are somehow more organized. This does not imply that they are organized by the state. We can have internal law of churches, or corporations, or private associations. It is doubtful that many serious ‘liberal legalists’ deny that the internal regulations of, for example, the Roman Catholic church are internal church law.

Anderson’s discussion of the second core feature is more worrisome. He attacks the idea of legal coherence by assailing Dworkin’s law as integrity. Dworkin supposedly argues that law is coherent, and Anderson in opposition argues that law is incoherent. However, Anderson misunderstands him, as Dworkin never said that law *is* coherent; he only said that judges should interpret law as coherent. ‘The law may not be a seamless web’, Dworkin argues in *Taking Rights Seriously* (1977, p. 116), ‘but the plaintiff is entitled to ask Hercules (the fictitious judge, AS) to treat it *as if it were*’ (italics added).

Anderson repeats the criticism, which was formulated by Critical Legal Scholars about 20 years ago. Dworkin has answered this criticism, for example, in *Law’s Empire* (1986), saying that it is easy to give incoherent interpretations of the law but that Critical Legal Scholars should prove that coherent interpretations are impossible. Anderson makes no attempt to follow this advice.

As did Critical Legal Scholars, but even more unambiguously, Anderson looks to law with a sociologist’s eye. He argues ‘that adjudication is better explained in terms of the variety of real pressures and motivations affecting judges ... rather

¹ He mentions this question in another context on p. 101. There he answers that legal pluralism is a rebellion against ‘essentialising’ definitions (p. 102). This is much too easy. There is a serious question whether it makes sense to include all kind of social norms in law. Anderson’s reaction does not answer this question at all but jumps to another level. There is no contradiction between rejecting essentialising definitions (whatever may be meant with this) and rejecting the inclusion of all social norms in law. See also p. 105, where we find a new invalid argument: there is no *a priori* distinction between normative orders because normative orders cannot exist outside the creative capacity of their subjects. Anderson means that legal norms, social norms, family norms and so on are all dependent on the creative capacity of their subjects. But by such an argument, we also can prove that there can be no ‘*a priori* distinction’ between football and baseball.

than as the Herculean search for principle' (p. 67). Yet, Dworkin is not a sociologist explaining the work of judges. He is arguing from the internal judges' perspective as to how they *should* solve legal problems. The 'right answer', therefore, is not an answer on which all sensible judges agree. The right answer is always contestable. Nevertheless, it is the age-old job of judges to do their best to find the right answers in the cases upon which they have to decide.

Anderson says that '(t)he major problem for liberal legalism's attempt to portray adjudication in systematic terms is that judges often (and sharply) disagree which each other' (p. 71). Here again Anderson makes a descriptive claim to refute a prescriptive thesis. In *Law's Empire*, Dworkin says: 'He (the Herculean judge) tries to impose order over doctrine, not to discover order in the forces that created it' (p. 273). Therefore, if Anderson extensively illustrates that legal scholars might disagree with Dworkin's answers on some substantial questions (p. 68-77), this completely misses Dworkin's normative point.

The third and last core feature of liberal legalism was, in Anderson's view, that law is an effective means to protect individual rights. Here he illustrates that liberal judicial decisions on, e.g., civil rights or abortion might be counterproductive from the liberal point of view. He may be right; I simply do not know. Nevertheless, his evidence is not always convincing. If, e.g., he informs us that the number of abortions in the USA did not rise (apart from the pre-existing trend) after the Roe-Wade decision of the Supreme Court, he measures the effects of this decision in terms of numbers of abortions. In the Netherlands, which also has a liberal abortion regime, the number of abortions is lower still. However, there is no one who believes that the point of liberalisation of abortion is to promote abortions. The point is, first, that women are supposed to have the right to decide for themselves and, secondly, (if there should be some empirical effects) that abortion is not done secretly anymore, under poor and even dangerous conditions. Anderson could have a standard of success or failure if he informs us of the number of serious consequences for women: how many out of hundred aborted women died or became infertile for their life before and after the liberalisation?

However, this is commenting on details. The more important point is that Anderson loads liberal legalism with a naïve instrumentalist view of law. As long as liberal legalism is his own invention, he is free to do so. Yet, in contesting his own invention, he is fighting windmills. Of course, laws do have effects on society. Law is also a part of society. Therefore, law is part of the reality upon which it is supposed to work. This creates loopholes. As the Norwegian legal sociologist Vilhelm Aubert explained long ago, we can make a statute to protect maids in our households. However, for a number of reasons, the effects can be absent or even the reverse of what was intended. We all know that the effects of the law very often are surprising. Here, though, law is not different from other fields. The US gov-

ernment may start a war in Iraq to fight terrorism and, in doing so, actually may promote terrorism. Nothing is more difficult to predict than the future. Real life liberal legalists know this, too.

Having dealt with the differences between liberal legalism and legal pluralism, Anderson claims that the last one is ‘a powerful counter to our dominant understandings of constitutional law’ (p. 99). Anderson develops ‘two competing politics of constitutional definition: classical liberal constitutionalism ... and ... “new constitutionalism”’ (p. 100). It is clear that liberal legalism is connected with the first and legal pluralism with the second of these two politics. The difference is not only that new constitutionalism sees the text of the constitution as the result of a political fight, which could have been different (which, again is not denied by real life liberal legalists). It also is that new constitutionalism considers ‘the tacit constitution’ as an equally important source of constitutional law. Moreover, and in particular, all the instruments of modern globalisation guarding the capitalist liberal economic order are also important in constitutional law. This lets us see that power not only originates in the state, but also in international organisations and international corporations. In the traditional liberal constitutionalism, big corporations are only subjects, using their constitutionally guaranteed freedoms to pursue their capitalist purposes. However, in the new constitutionalism, they are also sources of law, which have to justify their legitimacy.

Apart from some terminology, this is the most convincing part of the book. There indeed exists a problem about the legitimacy and control of international power. This (as Anderson agrees) not only applies to big corporations, it also applies to international organisations, such as the United Nations and its Security Council, to WTO and IMF, and to the EU. Unfortunately, however, Anderson does not make true his claim that ‘a legal pluralist perspective provides us with a richer basis for assessing constitutionalism’s counter hegemonic potential than the normative method favoured by liberal legalism’ (p. 116).

This is partly due to the fact that he again creates his own enemy. He opposes a rather libertarian liberalism (which defends that rights are protections accorded by law primarily to individual economic activities) with a pluralist liberalism (which acknowledges that if left to itself, the economic market will generate injustice and inequality) (cf. p. 132). Yet, modern mainstream liberalism (John Rawls, Ronald Dworkin) tries to regulate the market so that every individual has equal opportunities. It tries to prevent the shortcomings of the libertarian market. Mainstream liberalism should be considered here as an ally, not as an enemy.

Another failure is due to the fact that Anderson uses an incorrect methodology. To prove that legal pluralism is preferable to liberal legalism, Anderson refers to a number of legal decisions which are supposed to be inspired by liberal legalism. If

some legal decisions are better than other ones, still the 'deep grammar' of judicial thought that accompanies them is flawed (p. 140). This author is not competent to judge how representative is the selection of decisions, but even if the picture is completely reliable, it does not establish that liberal legalism is wrong. It is possible that a better understanding of liberal legalism could produce all the results Anderson desires. To establish his point, Anderson should choose between two different strategies. He either should try to prove that liberal legalism is inconsistent with any serious and sensible attempt to deal with the problem of non-state power, or he should try to prove that, even if liberal legalism were consistent and coherent with the desired positions, it in fact would promote incorrect decisions. Yet, Anderson does neither. The fact that legal decisions are wrong could very well be explained by the well-known slowness of the judiciary to adapt to new circumstances or by the poor political-philosophical education of judges and lawyers or by a number of other causes.

An important point of Anderson's criticism of liberal legalism is the 'divisions' it makes between public and private, state and civil society. Yet, it is not clear what exactly is Anderson's target. Sometimes he suggests that protection of the private sphere itself is ill conceived (e.g., p. 140). Sometimes he argues that these 'divisions' can have no *a priori* status (p. 147). If he means to say that there are borderline cases where private and public, state and civil society come together, he is right. If he means to say that the labels mentioned are themselves a result of political and normative decisions, he is right again. Calling something *private* or *public* is an evaluative act itself. When we call something public, we indicate that we judge that it involves some collective responsibility of the political community. Calling something private indicates an individual responsibility of an individual person (or group/association of individual persons), but not of the state. These labels are not given once and for all: our insights may change over time. Domestic violence (discussed several times by Anderson) used to be private, but it is not today. Homosexual intercourse used to be public, but is private today (at least in liberal legalist countries). Nevertheless, liberals need this distinction, in one interpretation or another. It is the central idea of liberalism that individuals have the right, as much as possible, to be the master of their own lives. This implies that state competences should be limited. If Anderson were to reject this idea, he would be wrong or, at least, in opposition to liberalism.

However, if he did, what would be the alternative? The first alternative is that there is no individual responsibility at all: the political community has to decide on all points. This is the view of dictatorial regimes (and of respected philosophers, such as Rousseau). The second alternative is that there is no collective political responsibility at all. This leads to anarchy. The third alternative is that one's

theory is muddled. One would hope that none of these would apply to Anderson; however, no fourth possibility is apparent.

In the last paragraph of his book, Anderson demands a paradigm shift: legal pluralism should provide the new paradigm. However, new paradigms do not arise on command. They will become attractive only if they appear to be useful in solving problems. Clearly, Anderson still has some work to do.

