

Book Review

Jeremy Webber: *The Constitution of Canada. A Contextual Analysis*. Hart Publishing, Oxford 2015.

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The author of this book, Jeremy Webber, is a major expert on Canadian constitutional law.¹ His many outstanding contributions reflect well the breadth and depth of themes that are discussed under the heading of Canadian constitutionalism. Webber's deep insights also permeate this book even if the book's format limits the space available for in-depth reflection, given the sheer breadth of themes it covers. Each of the six themes that the book focuses on: the territorial organization of the Canadian state; the structure and operation of democratic government; federalism; human rights; the role and status of Aboriginals; and Canada's external relations could by now almost fill a small library.

Apart from size, another obvious constraint stems from the fact that the book is part of a series on Constitutional Systems of the World published by Hart, an imprint of Bloomsbury. The justification for the series is that there is a dearth of texts 'which enable one to understand the true context, purposes, interpretation and incidents of a constitutional system [...]. This series seeks to provide scholars and students with accessible introductions to the constitutional systems of the world, supplying both a road map for the novice and, at the same time, a deeper understanding of the key historical, political and legal events which have shaped the constitutional landscape of each country'.

My comment is neither a criticism of the series nor of Webber's book, both of which are very valuable. The point is simply to say that the format is very demanding

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¹ See in particular Webber 1994, 2010.

on the author who must write accessibly almost along the lines of producing an introductory text whilst at the same time carving out sufficient space for deeper reflection. I think Webber has excelled on both counts.

Webber's position on constitutionalism is quite appropriate to a book that is concerned with situating the Canadian Constitution in a broader context. Three aspects of Webber's approach stand out. One is the strong onus on democratic constitutionalism which immediately brings in the issue of balancing legal regulation and democratic decision-making. The context requires focus on the relationship between law and politics, and what we may term the dynamic interaction of patterns of juridification and of de-juridification. A second is that '(c)ontemporary constitutional lawyers have come to think of constitutions as being primarily concerned with limiting state power. But a primary role of any constitution—perhaps *the* primary role—is not to limit collective action but to enable it' (Webber 2015, 59). A third aspect that Webber highlights is deliberation: the constitution is the product of deliberation; it is also the frame within which deliberation unfolds. In a contested polity marked by competing conceptions of community and allegiance Webber underlines, deliberation is indispensable to civilized co-existence. That clearly also marks the conception of the Constitution; it is as much a continuing conversation as a system of rules.

An important premise for Webber is that Canada has been and remains a contested country. It is also a country that 'was not constituted by a single act of will or by a set of founding fathers acting in a privileged "constitutional moment". The Canadian constitution has been a work in progress. It has never taken a thoroughly rationalized form' (Webber 2015, 1). This recognition of the Constitution as a work in progress is reflected in the living tree doctrine which entails that constitutional originalism plays a very modest role in interpretation (Webber 2015, 146).

Canada has even been on the brink of Quebec secession and possible unravelling.² The persistent presence of Quebec nationalism and the rise of Aboriginal or First Nations nationalism, Webber underlines, make Canada a political system with highly asymmetrical affiliations. Most English-speaking Canadians understand Canada as a nation (even if English-speaking Canada is not institutionally united, consisting as it does of nine provinces that the citizens have also developed allegiance to); most Quebecers understand Canada as a compact of nations. The upshot is that Canada's experience clearly runs up against nation-state constitutional orthodoxy. Stephane Dion (political scientist and former Minister of Intergovernmental Relations and former leader of the federal Liberal party) noted some years ago that 'Canada is a country that works better in practice than in theory'.³

At the same time, today the following statement by Northrop Frye finds obvious resonance. He argued that Canada: 'has passed from a pre-national to a post-national

² The late Rene Levesque, former leader of the Parti Quebecois (PQ) has referred to the relation between the two 'founding peoples' of Canada, French and British, as 'two scorpions in the same bottle'. That metaphor was earlier coined by Robert Oppenheimer (1953) who used it to depict Cold War super-power relations.

³ <http://www.economist.com/node/8173164>

phase without ever having become a nation' (Frye cited in Lipset 1990, 6). Thus, what at one point was considered a serious deficiency could in today's transnational world, be a major asset.

These aspects of the book perhaps somewhat surprisingly make it quite relevant for those interested in Europe and European developments, as I will indicate here (even if that is of course not much covered in the book). It is obvious that Europeans encounter an important aspect of their past when they look at North-America because Europe has been such a vital formative influence: it filled North America with its peoples, its ideas, its cultures and its institutional arrangements. Canada's European legacy, a legacy with a strong British accent, has created opportunities as well as engendered problems and challenges that continue to mark Canada, a fact that is well-reflected in Webber's book.

In Europe, Canada is very often overshadowed by the U.S.; thus a book that more accessibly explains Canada to Europeans is valuable unto itself. But that is not the only reason why Europeans should find this book interesting. In today's globalized world, Canada's cosmopolitan leanings, its distinctive form of 'rooted cosmopolitanism' (Kymlicka and Walker 2012), might hold valuable lessons in living with diversity that Europeans are well advised to look more closely at. Canada's long tradition of accommodating diversity is a core component of Canada's distinctive constitutional tradition. Webber refers to that as 'agonistic constitutionalism'⁴:

(i)t acknowledges that parties often do disagree over fundamentals—indeed, may push very hard to have their view of the world accepted—and yet find a way to collaborate nevertheless. The principles remain important. The parties are deeply committed to them [...] But the parties place the maintenance of the relationship ahead of agreement on the fundamental structure of sovereignty. (Webber 2015, 263.)

One way of reading the book, then, is as a kind of microcosm of constitutional issues and challenges, with particular emphasis on how they have been discussed and addressed within the distinctive setting of Canada. The book's thematic structure helps to sort out the most important themes, how they manifest themselves, and what they signify within the broader ambit of Canadian constitutionalism. The first chapter introduces these dimensions. The second chapter provides a historical overview of the development of the Canadian constitution, from the British-French battles over ascendancy in the latter part of the 1700s, with the Royal Proclamation of 1763 as a major milestone. That proclamation set the tone of many of the developments to come. It marked the ceding of New France to Britain; it also set down procedures that shaped Aboriginal treaty processes in Canada. A general push for responsible government in the colonies combined with French-speakers' insistence on retaining

⁴ I have argued elsewhere that 'Europeans might usefully set up Canada as a mirror of themselves, as Canada is the state that comes closest to the EU in several critical respects. Canada might be a useful mirror also because it speaks to how far we can "stretch" the state form in diversity accommodation terms' (Fossum 2009, 498).

political institutions that would operate in French made the 1840 merger of Upper and Lower Canada unworkable. The obvious solution would be federalization, because that would also be an important means of ensuring Westward expansion and territorial consolidation. No doubt the American Civil War affected the timing of federalization, which was codified in the 1867 British North America Act (BNA-Act). The British North America Act laid the constitutional foundations of Canada, but it remained an act of the UK Parliament. The period between then and its eventual patriation in 1982 may be termed a gradual transition from colony to independent country. That process was not however marked by a homogenizing nation-building impetus. Instead, there were several important centrifugal developments that preserved the need for accommodation and even reconciliation. The period saw the consolidation of Quebec as a French-speaking province. From the 1960s Quebec underwent a major political and social transformation generally referred to as the Quiet Revolution. Key was secularization and an étatiste policy program centered on province-building. The political mobilization crystallized around the definition of Canada as made up of two Founding Peoples, the English and the French, a symbolic framing that made the country's large portions of non-British and non-French immigrants feel left out. The response was to label Canada multicultural. That in turn did little to placate Aboriginals, who had long been marginalized and discriminated against. Aboriginals suffered denial of recognition; lost out in re-distribution terms; and lacked adequate political representation. In other words, they were marginalized on all the three dimensions of justice: recognition, re-distribution and representation (Fraser 2005).

This complex scene set the stage for the 1982 patriation of the Constitution. The Constitution Act, 1982 included a Canadian Charter of Rights and Freedoms. The Charter was designed with a dual objective. As a rights-based legal-constitutional vehicle it was intended to reinforce the constitutional symbolic status of individuals (and groups). As a political-identitarian instrument it was intended to foster nation-building through attaching citizens to Ottawa and bypassing provinces. It was thus intended simultaneously to foster an inclusive bilingual Canadian nationalism, and at the same time, to undercut a French-focused Quebec nationalism.

In this connection it is interesting to note that the main architects drew on nationalism as the symbolic frame even if one could argue that the complex conception of Canada that the Constitution Act actually sought to manifest had a strong cosmopolitan flavor. An interesting issue is whether a more pronounced or explicit cosmopolitan normative framing instead of the national one would have helped carry it through or not.

In any event, the province of Quebec ended up not signing the Constitution Act (even if most of Quebec's federal parliamentarians did), which prompted several major constitutional rounds to obtain the province of Quebec's consent. The first round was framed as a 'Quebec Round', aimed at gaining acceptance of Quebec as a 'distinct society'. It resulted in the Meech Lake Accord 1987, which failed as much on account of its closed and secretive process as on account of its substance. The

next round which ended in the Charlottetown Accord (1992) was far more open and inclusive and would have led to the entrenchment of ‘an inherent right to Aboriginal self-government’ (Webber 2015, 51) had it passed. It was rejected in two popular referenda (one in Quebec and the other in the rest-of-Canada), however. The Meech Lake and Charlottetown Accord failures gave impetus to Quebec separatism. In 1995 Quebec held a referendum on secession from Canada. The result was a very narrow ‘no’. In response, the federal government referred several important questions to the Supreme Court whose landmark decision Webber terms ‘a masterstroke. By sidestepping the amending formula, by denying the constitutionality of a unilateral declaration of independence, and yet by holding that there was an obligation on Canadian governments to respect the democratic will of Quebecers, it left room for the concerns of all, exhorting all parties to collaborate in the search for an agreed outcome’ (Webber 2015, 53). The 1999 federal Clarity Act provided further procedural guidelines in the event of a new secession referendum.

Chapters Three through Five focus on the three main institutions of parliamentary democratic governance, where the relations between the former two—legislature and executive—are fused and regulated by the notion of responsible government, and the latter—the judiciary—is regulated by the norm of independence. Chapter Six focuses on federalism, Chapter Seven is devoted to rights and freedoms, and Chapter Eight is devoted to aboriginal peoples.

Canada is a parliamentary federation. The British influence highlights the key principle of parliamentary sovereignty, and an active state presence in society. But given that Canada is made up of parliamentary systems of government at both of the two main levels of government in a complex federal structure, which privileges executives and which has since 1982 also been subject to the provisions in the Charter, many analysts claim that parliamentary sovereignty is deeply constrained. Webber is not quite that pessimistic. He on the one hand points to the merits of parliamentary institutions in working out disagreements and responding to public pressures and concerns. On the other hand he also points to a number of mechanisms that ensure an inter-institutional dialogue, among which are Section 33 (the so-called notwithstanding clause) and Section 1 (reasonable limits clause). Further, Webber also points to the fact that legislatures have played an important role in supporting rights development, especially in the pre-Charter period but also in those areas not covered by the Charter, in the areas of social and economic rights. He notes that ‘(i)n rights terms, the Charter is a conservative instrument; it focuses overwhelmingly on civil and political rights’ (Webber 2015, 179). Webber also points to the area of social rights to underline the limits of law:

When judges adjudicate the merits of social programmes, they have, in effect an implicit preference for non-intervention. This is not the result of malevolence, deliberate decision or a conservative understanding of rights (at least not necessarily); it is a function of courts’ institutional strengths and weaknesses: what courts are and how they operate. It is significant that in the early years of the Charter, when the Supreme Court was most attentive to this bias, its

correction took the form of deference to legislative action, not the pursuit of positive rights. (Webber 2015, 221.)

We see from this how sensitive Webber is to the vital need for political systems to find a viable balance between patterns and processes of juridification and de-juridification.⁵ That balancing takes on a special significance in the state's relations to Aboriginal peoples, which pertains to the need to rectify past injustice, and establish viable arrangements for Aboriginal/non-Aboriginal co-existence. Critical issues pertain to Aboriginal title and self-government. Webber rightly sums up the incisive chapter in the following manner: 'Here too, the adaptation of principles of equality and individual rights to a culturally diverse polity remains one of the great challenges of Canadian constitutional law' (Webber 2015, 258).

We see from this very sketchy overview that Webber has taken the task of providing adequate context very seriously. There is a chapter specifically devoted to historical context and each of the subsequent chapters provides historical background and major developments up to the present. There are good grounds for dividing the book into thematic sections. And yet, the book's division comes with the cost of downplaying one of political science's obsessions, namely the role and importance of constitutional process. In that sense the patriation and the insertion of the Charter had important implications for the manner in which constitutional settlements were negotiated in Canada. Prior to the patriation it is reasonable to talk of a built-in executive dominance in the sense that heads of governments negotiated constitutional accords in relative secrecy and with very little direct parliamentary and societal input. The reaction to the Meech Lake Accord showed that this view was no longer accepted in the post-patriation period.

The structure of the book makes it difficult to convey the magnitude of transformation that this entailed for Canadian constitutional culture which abandoned its previous deference. In that sense I would argue that one of the many merits of the book, which I would call its 'institutional sensitivity', in the sense that organizations are living institutions imbued with cultures and values does not fully incorporate the 'shock' or critical juncture that the patriation process represented. My point is that this has bearings on how we talk about agonistic constitutionalism. I would argue that the patriation and the so-called Canadian Charter revolution (Morton and Knopff 2000) represented a case of 'cathartic constitution making' (Fossum 2007; Fossum and Menéndez 2011). It reconfigured the prevailing conception of constitutional justice through giving constitutional recognition to a range of weak and/or constitutionally disenfranchised groups. In the pre-Charter period federal accommodation was particularly focused on the need to accommodate Quebec nationalism. The Charter Revolution meant that this had to compete with the need to rectify historical injustice wrought on Aboriginals, as well as the accommodation of demands from other groups in Canadian society (*i.e.*, women's groups, gays and lesbians, and disabled people). As such, the Charter served to

⁵ For an excellent overview of the different forms of juridification, see Blichner and Molander 2008.

open up the process of constitution making and helped to rank-order conflicts and concerns more in line with people's intuitive conceptions of justice (rectification of historical and contemporary injustice especially inflicted on Aboriginals, Inuits and Métis). The Charter Revolution also heightened constitutional reflexivity in that the Canadian political system appears to have developed a more principled approach to the settlement of issues that have not gone away. In some cases, such as Quebec separation, we see clearer procedures.

This is not to deny the relevance of the notion of agonistic constitutionalism; it should rather be seen as a way of inserting a form of periodization because patriation and the Charter have set the various institutional realms of Canada onto different path dependencies after the initial shake-up. One issue is therefore whether we face greater agonism now than before.

Another issue is that the relations among the three core components of justice that Nancy Fraser (2005) underlines, namely recognition, redistribution and representation have changed. Canada is interesting because all three dimensions are in play, not the least with regard to the Aboriginal peoples.

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