Book Review: Towards Juristocracy: The Origins and Consequences of the New Constitutionalism

Shannon Roesler, Oklahoma City University School of Law
BOOK REVIEWS

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Shannon M. Roesler, University of Wisconsin–Madison

In Towards Juristocracy, Ran Hirschl addresses important questions at the heart of a growing body of comparative literature on the politics of constitutionalism and judicial review. Through in-depth case studies focused on recent constitutional reforms in Canada, New Zealand, Israel, and South Africa, Hirschl investigates the causal mechanisms that explain the timing and the consequences of recent reforms that constitutionalize rights and empower courts to enforce them. In particular, he challenges the assumption that constitutional rights revolutions are a result of the popular will and a progressive commitment to human rights. According to Hirschl, the strategic interests of hegemonic elites substantially determine the origins and consequences of the constitutionalization of rights and the expansion of judicial power. He describes his “hegemonic preservation” theory as a realist approach concerned with the political benefits elite actors receive as a result of these reforms. His central hypothesis is that hegemonic political elites, in strategic alliance with economic and judicial elites, advocate the constitutionalization of rights and judicial review to protect their increasingly threatened political power.

Hirschl opens the book by describing the global trend to constitutionalize rights and empower the judiciary, a movement toward what he terms a “juristocracy.” But Hirschl challenges the conventional view that constitutional rights and judicial empowerment protect minority groups from the tyranny of majority rule. To uncover the actual cause of judicial empowerment, he chooses three cases that allow him to investigate the causes and consequences of legal reforms while controlling for the influence of unique historical and regional variables, such as war, decolonization, and regime change. He selects Canada, New Zealand, and Israel because the recent constitutionalization of rights in these countries was not accompanied by political or economic change. Hirschl also examines what he identifies as a more difficult case for his theory: the case of South Africa, where the transition from apartheid to constitutional democracy seemingly signaled a significant change for the majority of people. Through a detailed account of the historical origins and consequences of the constitutionalization of rights and judicial review in these four countries, Hirschl demonstrates how threatened elites (namely elected officials) initiate legal reform and delegate political power to the courts as a means of preserving their own interests. Instead of enforcing core social and economic rights, such as housing and health, judi-
cial elites routinely use their new powers to enforce rights to private property, thereby perpetuating a neoliberal economic agenda that serves elite interests and further disadvantages disenfranchised groups. Hirsch argues that constitutional reform and judicial empowerment have not helped solve problems of systemic social and economic inequality.

Hirsch's inquiry into the political nature of judicial review is an important contribution because it questions the assumptions surrounding movements to constitutionalize rights and forces us to consider what meaningful protection of minorities from majority rule should look like in a constitutional democracy. Civil and political rights to property and individual autonomy are widely accepted cornerpieces of constitutional rights documents. But if courts interpret these rights to prevent the state from regulating certain social and economic issues, they strengthen society's elites at the expense of traditionally disenfranchised groups. Hirsch's account highlights the ways in which courts serve the elites' interests at the expense of an egalitarian vision of distributive justice. In addition, Hirsch's careful case selection allows him to pursue questions that other comparative case studies have not asked—such as why political elites choose to relinquish policy-making power at certain moments in time. Although other studies have explored the political nature of constitutional courts, Hirsch's study persuasively demonstrates the political origins of constitutionalization by focusing on the incentives for reform absent other influences, such as postwar reconstruction and democratization. In this respect, he lends support to scholarship that posits a similar role for political elites in the constitutional design of emerging democracies. For example, Hirsch's theory supports the notion that judicial review serves as a form of insurance for potential electoral losers (i.e., threatened political elites) as they transition to democratic government (Ginsburg, 2003).

Hirsch's work, therefore, illuminates a significant part of the story of judicial empowerment. But his focus on hegemonic elites leaves much of the story untold. Although Hirsch supports the general contention that political elites play an important role in the origins of judicial empowerment, his emphasis on hegemonic preservation necessarily downplays the role of oppositional and competing forces. Because rights struggles continue beyond a particular court decision, "losing" positions undoubtedly shape future debates and have important consequences. But because he largely tells the story from the perspective of dominant groups, we know little about the varied dynamics behind an issue.

Hirsch's descriptions of the debates surrounding property rights illustrate his tendency to construct a one-sided account of political struggle. In his discussion of the Canadian rights revolution, Hirsch notes that dominant neoliberal elites supported the adoption of a civil rights charter as a means of pursuing their interest in economic deregulation. Although he briefly acknowledges that "fierce political resistance prevented the inclusion of a property clause in the Charter," he does not elaborate on this nonhegemonic victory (p. 77). Instead, he quickly moves on to emphasize that neoliberal (hegemonic) forces subsequently succeeded in advocating the passage of NAFTA and using the Charter to advance their interests. We can contrast his treatment
of the property-clause debate in Canada with a similar debate in South Africa in which he emphasizes the political elite's "hard line and ultimate victory" in securing a constitutional property clause (p. 94). Hence, although he describes his theory as "actor oriented" with an emphasis on "human agency," he privileges the agency of specific (elite) actors and downplays the agency of others (p. 49). If the resistance in Canada was indeed "fierce," such forces warrant further discussion; they will likely contribute to the ongoing, dynamic debates regarding economic rights and equality. Similarly, Hirsch's emphasis on the elites' victory in South Africa (in securing their property rights) discounts the agency of nonhegemonic forces. Given South Africa's instability and history of violence, less powerful groups may have engaged in strategic compromises to preserve personal security while working toward equality.

Furthermore, if we fail to look behind the outcome (e.g., a high court opinion) of a particular struggle and fail to consider the multiplicity of actors involved, our understanding of both the origins and the consequences of the hegemonic victory is incomplete. This is apparent in another line of court cases Hirsch uses to argue that courts define rights according to the elites' agenda. He describes cases in which courts emphasize a public-private dichotomy, interpreting constitutional rights as negative rights that protect the private sphere from state action, rather than positive rights guaranteeing social and economic equality. But in focusing on the written products (judicial decisions) of this larger debate, he does not raise crucial questions regarding competing viewpoints and nonelite strategies. For example, Hirsch discusses several decisions prohibiting discrimination based on sexual orientation. He concludes by downplaying their "progressive" significance; for Hirsch, because the judicial rationales "fit a preexisting pattern of protecting negative liberties," they are somehow less remarkable (p. 125). Because he focuses solely on hegemonic interests, he does not explore key consequences of these judicial decisions. Although he argues these decisions limit only state action and do not advance substantive equality, they in fact extend beyond state action and a strictly negative view of rights. Some decisions actually impose obligations on private actors; for example, the extension of employment benefits to same-sex partners affects both public and private entities and guarantees economic rights that Hirsch would otherwise label as "positive" (pp. 122-125). These incremental victories by nonhegemonic groups warrant further investigation; in challenging rigid dichotomies, such as private and public, they create openings for future advocacy and can have long-term effects. The support structure for constitutional rights advocacy may play a crucial role in the timing and nature of rights revolutions (Epp, 1998).

A more critical assessment of the dynamics of various struggles may also weaken Hirsch's final normative argument that, in democracies, courts should have less authority to consider "the very definition and scope of a given polity's constitutive values" (p. 188). We are more likely to accept his indictment of judicial authority if we believe his conclusion that courts tend to favor the interests of political elites. With the passage of time, however, the dynamics underlying ongoing rights debates, as well as the relative independence of judicial institutions, are likely to erode the elites' influence with regard to the judiciary (Stone Sweet, 2000). Moreover, Hirsch character-
izes cases involving questions of restorative justice (e.g., land rights cases) as "moral and political dilemmas" best resolved in the "political rather than in the judicial sphere" (pp. 190-191). But in the realm of tort and contract law, individuals regularly claim to have been wronged in some way and seek to be restored to their prior positions or compensated for their injuries. Does Hirschl conclude that these cases are unfit for judicial resolution simply because they affect large numbers of people? Again, courts frequently resolve analogous disputes (e.g., class action law suits). Furthermore, as a practical matter, elected officials may be unable or unwilling to handle certain controversial issues. If they refuse to resolve these conflicts, the judiciary may be the best forum for resolution. But even if the reader does not agree with Hirschl's final thoughts, his thought-provoking conclusions will inspire questions regarding the role of the judiciary in constitutional democracies and encourage critical reflection regarding the future of judicial review.

REFERENCES


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Franklin Hugh Adler, Macalester College

Fascism is one of the most contested terms in comparative historical studies. In the famous essay "What Fascism Is Not: Thoughts on the Definition of a Concept," Gilbert Allardyce (1979) argued that the term should be banned from our political vocabulary for all cases other than Italy, where it originated. Others have maintained it should be restricted to Italy and Germany, which, unlike other Right authoritarian cases, were revolutionary in that they sought to radically reconstitute society and culture, not merely conserve the given order. Here, too, there are significant differences, and had it not been for the fatal alliance between Italy and Germany, it is unlikely that the two would ever have been placed unproblematically in the same sack. Italian fascism emerged as a heretical movement of the so-called subversive Left and unlike its Nazi counterpart, maintained a durable Left that Communists themselves never dismissed or took for granted. In 1936, the PCI (the Italian Communist Party), led by Palmiro Togliatti, issued an appeal "to our brothers in black shirts" calling for Communists