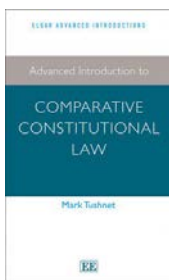




Oñati Socio-legal Series, v. 6, n. 5 (2016) – Investigations – Investigaciones – Ikerlanak  
ISSN: 2079-5971



## Book review

**Mark Tushnet. *Advanced Introduction to Comparative Constitutional Law*. Cheltenham; Northampton: Edward Elgar Publishing, 2014. ISBN (Hb) 978 1 78100 731 0 £58.50, ISBN (Pb) 978 1 78347 351 9 £12.76.**

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### 1. Introduction

Mark Tushnet is a leading scholar in the field of constitutional law. He presents a thoughtful introduction to the field of comparative constitutional law through a review of recent literature (it is almost entirely written in English)<sup>1</sup> and an analysis of the key contemporary issues in constitutional design and structure. This book goes through the study of modern constitutionalism from a general perspective to more specific issues, by focusing on the process of constitution-making, the recent changes in constitutional review, the different approaches in the analysis of constitutionally protected rights and the structure of the government.

The book is aimed at both experts in the field of comparative constitutional law and new scholars, as well as political scientists. In the chapters that follow the introduction, Tushnet attempts to touch on a number of issues that scholars of comparative constitutional law have addressed before, from the point of view of cosmopolitanism<sup>2</sup> and liberal constitutionalism<sup>3</sup>.

I would highlight three key elements that enrich the content of this study. First, grueling is provided by the examples of cases in each nation<sup>4</sup> which act as evidence to prove Tushnet's point and which show the significance of comparative constitutional law for the world nations. Second, the historical perspective with which the author points out events that allow the discussion of specific topics<sup>5</sup>. Finally, the clear and easy-to-read structure of the argumentation: Tushnet first introduces the topic, then makes his point and eventually provides an example in

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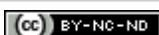
<sup>1</sup> In addition, the author makes reference to his own works. See pages 26 and 70 of the book.

<sup>2</sup> I see it appropriate to use the lenses of cosmopolitanism for this study because if one analyses constitutions and all the matters around them and taking into account that the current scenario is based in a post-Westphalian conception of the state, all human beings are part of a unique community based on a shared morality. However, this clashes with the ideas of patriotism and nationalism, so complexities and different problematic can be a matter for further research.

<sup>3</sup> Putting on the lenses of liberal constitutionalism might be tricky as it is pretty much attached to the ideas of sovereignty and democracy. These issues are usually subjects of controversy in topics as such as decision making processes as they are based in the idea that the people (the majority) provides the constitution's authority. This might entail complexities for minorities-related matters. The biggest challenge seems to be making this perspective compatible with pluralism and diversity.

<sup>4</sup> The most common examples that the author provides come from the experiences from the US, South Africa, France and Germany. Some Latin American experiences are slightly mentioned upon the study.

<sup>5</sup> See the historical waves in the evolution of the interest in comparative constitutional law in page 1 of the book.



order to illustrate how the theory explained works in practice, to give evidence that support his argument or that disprove it.

Regarding this, a summary of the chapters is presented in the following lines.

## 2. Summary of the chapters

### *Chapter 1. Introduction: comparative constitutional law – history and contours*

Tushnet starts by making reference to the historical evolution on the field of comparative law and the different interests in comparative constitutional law. There has been a shift “from the comparative study of the treatment of specific topics in domestic constitutions to the comparative study of general themes in constitutional law around the world”, he argues<sup>6</sup>. This is due to events such as WWII, the decolonization, and the democratization of Latin America and the collapse of the Soviet Union. Globalization has its influence too as legal actors had to learn about and deal with the laws of other nations.

Another issue at stake is the complexity of this field of study due to the close connection with other disciplines such as comparative politics or international law. In the case of the latter, for instance, and more particularly, international human rights law, the author states that international law has penetrated domestic constitutional law. He highlights two examples as an evidence to support this argument: “this is obviously true when international law is made part of the domestic law by treaty”; and when “the constitutions of nations direct their courts to consider international law and authorize them to consider international law”<sup>7</sup>. Tushnet uses here a good example to illustrate his point, the model of South Africa. I consider this reference is appropriate as South Africa’s constitution is a model for nations across the world, I would say it is a kind of laboratory for scholars and researchers.

Further, the author identifies some of the methodological issues in comparative constitutional law: language and translation related matters, the criteria used for choosing the units of comparison, coding difficulties and the illustrative method.

### *Chapter 2. Constitution-making*

In chapter 2, key conceptual and practical issues related to modern constitution-making are exposed. The author makes reference to the content of modern constitutions among the chapter, but only when the topics are related to the primary issues of his concern such as the need to have and to comply a constitution, the complexities involved in the notion of constituent power, the inclusiveness in the drafting and adoption stages of contemporary constitution-making processes, the general principles provided by preambles and the delegation of decision-making in constitutions. Therefore, he does not deepen in the details of the content. However, it is worthy to mention Tushnet’s impeccable ability to point out examples that illustrate the topics subject of discussion.

While explaining the necessity of a constitution, Tushnet highlights the main reason for this is that “it is probably regarded by the international community as a prerequisite to statehood”. I would go further and point out that the study of constitutions is imperative to understanding the national and international orders of today. Within today’s nation-state system, constitutions are the ultimate source of legal and political order. They organize the state, constitute the government, and allow for representation and participation, and simply put, they establish the rules of the game in a polity<sup>8</sup>. I agree with Tushnet in his point on international community’s influence, especially if one takes into account that in a post-

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<sup>6</sup> See page 2 of the book.

<sup>7</sup> See pages 4 and 5 of the book.

<sup>8</sup> The same is pointed out by Bapir (2014).

Westphalian context the conception of the state should be understood as part of an international community.

The author also brings to the discussion matters related to nowadays issues, such as the idea of abusive constitution-making.

Constituent power is presented as the foundation of constitution-making and it is pointed out the complexities that the understanding of this notion as “the body of the people from whom the constitution’s authority emanates”<sup>9</sup> involves. For instance, the difficulties arisen when determining who constitutes the people of the nation and the power relationships provided by constitutions. At this point, one has to take into account that Tushnet is presenting this idea within the lenses of liberal constitutionalism and thus, it is pretty much linked to the idea of sovereignty. I mean, a defining feature of liberal constitutionalism is a commitment to the claim that democracy expresses the sovereignty of the people. As I see it, this point of view might be limited as the people cannot be fully sovereign if they are constrained by rights outside the reach of popular sovereignty<sup>10</sup>. So in the end it can fall into paradoxes. Even so, Tushnet’s aim is not to defend this idea of constituent power in liberal constitutionalism, but to point out the problematic around it.

Tushnet even dares to make overstatements such as the one in which he argues that constitution-making processes will either be unnecessary or ineffective due to the tensions in the power relations and the fact that the power holders will only agree to new arrangements if they do not cause them a disadvantage<sup>11</sup>. What actually shows his authoritative tone upon the book. One can appreciate Tushnet’s smart way of using the evidences to open a discussion and show objectivity as he points out the postcommunist and South African experiences as cases in which his point fails to be generalized in practice<sup>12</sup>.

Constitution-making is also a matter of time. As Tushnet claims “constitution-makers may find themselves pressed to reach some conclusion within a compressed time period. The felt urgency conduces to quick compromises without substantial attention being paid to how the constitution will operate once adopted”. Besides, it depends on the specific historical circumstances under which this process operates and this is pretty much appreciated when the author uses some historical events as examples of changes or incidences in the constitution-making of certain contexts<sup>13</sup>.

Tushnet shows preambles as characteristic of modern constitutions, which contain human rights related and national identity related issues. Although they can be subject of constitutional review, Tushnet claims that they have relatively little legal effect. I do agree with this statement as preambles are regarded as unimportant introductory chapters, despite they express the purpose and the underlying philosophy of a constitution. Further, I find it interesting how he goes through the details of the preambles and points out what he calls “backward-looking statements about a nation’s origins in struggle” and “forward-looking statements about its commitments”. Besides, the Irish and South African experiences are properly brought to the discussion as they clearly address national historical struggles<sup>14</sup>.

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<sup>9</sup> See page 13 of the book.

<sup>10</sup> This same idea is brought in by Borgebund (2010).

<sup>11</sup> This idea reminds me of what Stephen Holmes (2003) pointed out about the power relationships and groups of interest. In this chapter Holmes raises the question of why people with power accept limits to their power. He argues that this is because the ones in power will in the end have some kind of benefit. If they didn’t have such benefit, they would permit that limitation. As I see it this is why in the constitution-making process the power holders will only agree if the new arrangements do not cause them disadvantage.

<sup>12</sup> See page 18 of the book.

<sup>13</sup> See example of the drafting of the US constitution in page 19 of the book.

<sup>14</sup> See page 25 of the book.

Another idea brought by the author is that constitutions solve some significant issues but at the same time delegate some other to the later decision-makers, which are primarily the courts, but also by law as pointed out by Tushnet when bringing Dixon and Ginburg's study<sup>15</sup> to the discussion (this point is brought again to the discussion in chapter 4 when talking about the rights analysis and the limitations on constitutional rights<sup>16</sup>).

In general, what the author shows in this chapter is what he calls "the dragons that inhabit the cave of constitution-making". It seems to me that his intention is to uncover the common problems involved in the process of constitution-making. Precisely, this is one of the main topics of the book and provides an analysis of cases that makes a contribution that sheds light on matters for further research and academic debate.

*Chapter 3. The structures of constitutional review and some implications for substantive constitutional law*

Tushnet brings the old debate between the tradition of parliamentary supremacy and the constitutional review system in again to the debate and speculates with the possibility of replacing the latter with political constitutionalism's idea of leaving the ultimate decision on the determination of whether or not an enactment violates the constitution, to the parliament.

He argues that the system of constitutional review has been maintained because it serves as an "insurance model" for political parties which have lost office; and that this triumph does not ensure its effective exercise. Further, the author provides some accounts on strategies to establish an effective power of constitutional review and points out the risks its exercise can entail for the courts as there may be politically controversial decisions. In addition, different cases in the constitutional courts of the US, South Africa and Russia are provided to see how his theoretical explanation works in practice.

Tushnet, then, alludes issues of structure by describing and contrasting the US and the Kelsenian models of constitutional review. He explains that "the Kelsenian model was widely adopted after WWII, mostly in systems strongly influenced by the civil law tradition, but the US model remained available and was adopted elsewhere, mostly in systems with a strong common law heritage"<sup>17</sup>. Here, the author touches on the shift (which affects both models, but mainly the Kelsenian) in the focus of constitutional review from government structure related issues being the primary concern, to the violations of fundamental rights. In relation to this, he insists on the development of mechanisms to allow claims against these right violations reach constitutional courts. Besides, as modern constitutions embody the three rights generations, Tushnet also puts out the complexities in the judicial enforceability of second and third generations of rights.

Further, in order to respond to the countermajoritarian difficulty in constitutional theory, Tushnet brings to light the recent development in structures of constitutional review (the dialogic review, the weak-form constitutional review and the new Commonwealth model of judicial review).

In conclusion, this chapter seems to be more theoretical and constitutes one of the central topics of the study: the detailed exploration of matters related to the independence of the courts and the exercise of constitutional review in democratic societies.

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<sup>15</sup> A study on the delegation of the resolution of some issues to the law, instead of to the courts. See page 33 of the book.

<sup>16</sup> See page 90 of the book.

<sup>17</sup> See page 51 of the book.

*Chapter 4. The structure of rights analysis: proportionality, rules and international law*

The analysis of rights-protection in domestic constitutions is one of the central topics of study in the field of comparative constitutional law for Tushnet. This chapter focuses on its general structure and on the method provided by the doctrine of proportionality as the best one to analyze constitutional rights violations. Besides, it is slightly pointed out the necessity to bear in mind the rise of the international human rights regime and the hierarchical complexities this entails in relation with national constitutions. Thus, the author sets a discussion around three different approaches to determine rights violations: proportionality, balancing and rule-based analysis.

Once again, this chapter seems to be more theoretical than the others as Tushnet makes more emphasis in conceptualizing and comparing the three key ideas subject to the discussion, but setting it around the proportionality analysis. He explains that the balancing technique consist of the court deciding on the considerations at stake from its own point of view and that this depends on several factors; that the proportionality analysis is simpler, constrain judges more effectively and provides a structured form of analysis that balancing lacks; and that as it seems to him, the rule-based analysis and the proportionality analysis are "extensionally equivalent"<sup>18</sup>.

Further, Tushnet provides an alternative to the proportionality approach, which, in fact, is structurally similar to the latter: "the due process of law-making" (also called subconstitutional review and semiprocedural review as pointed out by the author). This idea consists of analyzing the compliance with constitutionally required procedures to determine if there is a right violation.

*Chapter 5. The structure of government*

In this chapter, Thushnet provides a re-conceptualization of the Montesquiean tradition's branches of government in modern states.

He highlights several accounts proving the existence of a forth category (which is generally accepted but not reflected in constitutions) and proposes a fifth branch in the structure of the government to overcome the problems of corruption (that is to say, the need of a degree of independence of the general political system; besides, he proposes ad hoc institutions to deal with these problems but also points out the difficulties than could be found in the practice) and the fact that the three-branch is an obsolete model.

*Chapter 6: Conclusion*

The author addresses in the conclusion the emerging issues and opportunities for research regarding constitutions and constitutionalism.

Besides, he suggests that the legal scholars on comparative constitutional law should learn from the insights brought by political scientist on how constitutions operate and how to pluralize the object of study in this field.

Tushnet points out that, unlike in the past; ethno-nationalism does not provide national unity as some nations are divided internally and that the examination of constitutions as a source of national unity constitutes a field of research for scholars. With this basis, the author sets a discussion on thin constitutions as national unity sources and on the different understandings of this notion of thin constitutions, for which he broadcasts further research might be developed.

Therefore, "comparative constitutional law is likely to remain a discipline deserving continuing attention", he concludes. In this way, the author successfully closes the

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<sup>18</sup> See page 73 of the book.

very first idea mentioned in this book: the historically growing interest in the field of comparative constitutional law.

### 3. Conclusion

On the whole, I would say that this book represents a rigorous and up-to-date information source on a very wide topic, which touches upon law and politics. As the detailed examples shown upon the study constitute the author's main source of evidence, I would say that an overview of the main contemporary problems and issues is successfully provided. Besides, Tushnet makes a realistic and current connection between theory and practice. The reader will have a historical insight into specific cases which show the "dragons" in the fields of constitutions and constitutionalism.

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