

Alexander Somek

The Cosmopolitan Constitution – A Very Short Introduction

The title “The Cosmopolitan Constitution” might suggest that the book is about the constitution of the world—a global constitution, as it were. But how boring would that be? In fact, the title designates something that is simultaneously more modest and more ambitious in its aspiration.

I.

The “cosmopolitan constitution” is a name for a certain type of national constitution. It has emerged, mostly but not exclusively, on the European continent over the course of the second half of the twentieth century.

This type of constitution is defined by three characteristics:

First, the constitution is based upon the universal principles of freedom, equality and solidarity. Since the French Revolution, these have been deemed to be the normative pillars of free societies. Viewed from this angle, the cosmopolitan constitution is not new. It continues the legacy of modern constitutionalism.

Second, a national constitution that is a cosmopolitan constitution has its operation monitored by international institutions. These institutions establish mechanisms of mutual peer review among nations. Consequently, the practices and voices of sibling countries matter to the exposition and application of constitutional law.

Third, the constitution firmly proscribes any discrimination on the grounds of nationality, at least so long as compelling reasons do not support unequal treatment. This characteristic shows that a country with a cosmopolitan constitution regards the presence of foreigners as a regular affair. It is “post-national,” as it were. In these countries, the legitimacy of the constitution is believed to depend on being reasonably acceptable for citizens and non-citizens alike.

II.

Now it becomes clearer why the “cosmopolitan constitution” is not a misnomer for what this book reconstructs.

Cosmopolitans usually proclaim that they are “citizens of the world”. While saying this is a matter of course for those occupying the moral high ground in political philosophy, it cannot be denied that citizens of the world are in fact citizens without a homeland.

Despite cosmopolitans’ self-described world citizenship, there is no world republic of which they could be citizens. Consequently, what cosmopolitans can only plausibly mean by saying that their home is the world is that, subject to certain conditions, they are fully at home with occupying the status of a non-citizen. In determining whether a constitution merits the predicate “cosmopolitan,” the decisive question becomes, then, whether foreign places are sufficiently hospitable to non-citizens when exercising their authority.

Indeed, the basic principles of the cosmopolitan constitution seem to formulate the conditions under which authority over non-citizens is legitimately exercised: Non-citizens can rationally accept the authority of the legal order as long as their fundamental rights are protected and they are not discriminated against on the ground of their status as non-citizens.

III.

The emergence of the cosmopolitan constitution represents the better part of the European constitutional experience of the twentieth century (the first half of which undoubtedly was witness to the worst).

The cosmopolitan constitution, hence, marks a glorious reconciliation with a very mixed and often troublesome legacy. And yet, while the bright side of the cosmopolitan constitution indisputably is illustrious and shiny, there is also a dark side to it which is more fascinating than the brighter counterpart. The dark side comes to the fore by focusing on the core element of the cosmopolitan constitution: It is a constitution for non-citizens.

Generalizing the status of foreignness, this means that the cosmopolitan constitution fits a situation in which the people are not—or not necessarily—politically active. Rather, cosmopolitan citizens are essentially private individuals.

A cosmopolitan constitution is thus congruent with a world in which people have a keen interest in having their lives governed well and having their rights protected. Good governance and reliable courts are supposed to create stable background conditions under which they are free to pursue their private ambition.

IV.

What happens under these conditions?

People are likely to happily concede power to those who claim, with a modicum of credibility, to be in the position to address effectively one or the other crisis or to take on one or the other threat. The exercise of powers is hence likely to be cut loose from legal constraints. The people who live like foreigners in their (own) polity are likely to applaud their expert leaders—at least so long as they feel sufficiently safe and financially whole.

V.

The larger part of the book is devoted to reconstructing the fate of constitutional law. The story is “dialectical.” It observes carefully how an idea—in this case, the idea of a constitution—is turning against itself in the course of its realization.

The book studies how the modern constitutionalist idea of constraining the exercise of public power by means of law undergoes plausible transformations in order to become, at the end, the casualty of its own realization.

Since with every stage in this process the idea of the constitution becomes reprogrammed, the book uses software version designators in order to distinguish between epochs of modern constitutional law: “1.0” stands for the constitution as a charter of powers, “2.0” for the

constitution as an instrument of human rights realization and “3.0” for the constitution in its cosmopolitan form.

At the end of the historical voyage, the constitution is transformed from a system of powers that are supposed to flow in their legally predetermined channels to powers that need to be proportionate to global challenges. Powers of the latter type no longer admit to any prior legal constraints. Prior legal constraints would be argued to be too disempowering in combating global challenges. The preeminence of these powers designates the end of the project that set out to constrain powers by means of law.

VI.

Were the author of this book an American, his national character would induce him to end with a normative recommendation:

“Someone should...”

“A governance mechanism has to be found that...”

But would such posturing not bespeak the mindset of a cosmopolitan individual? Such an author would be exhorting someone else to engage in political action, implicitly claiming to be too busy for it. After all, his job is the writing of books.

Early in his life, the author has absorbed the *fin-de-siècle* spirit prevailing in his natural habitat. The end is the end. He believes, hence, that the cosmopolitan constitution obliges constitutionalism to acquaint itself with its own ending.

All the same, the book concludes, in all modesty, with a question: Perhaps it is time to return to a more venerable way of thinking about constitutional matters? Why not go back to Aristotle and Machiavelli?

Alexander Somek is the Charles E. Floete Chair in Law at the University of Iowa.