Inclusion, Exclusion, Constitutionalism and Constitutions

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Introduction

Margaret Davies' paper is within a school and framework of thought that is not mine. I want to be tolerant of it, to respect those who participate in it and acknowledge its importance in the context of 20th-century legal philosophy and constitutional discourse. I presume she thinks for herself and that her paper is well-intentioned, nevertheless there are some thoughts which provoke me to engage with her in an adversarial way. What I share with her is the belief that hospitality and kindness are good things to experience and to give. Similar sentiments are expressed in Jürgen Habermas's latest book *The Inclusion of the Other. Studies in Political Theory.*[1]

I see two methodological errors that underlie the entire argument of the paper. First of all, Davies looks at constitutionalism only from a particular geographical point of view, specifically an Australian point of view. There could be nothing wrong with that but her message and thesis are formulated as universal. I agree with her that constitutionalism is a Western idea, but unfortunately, or perhaps fortunately, we do not have *any other* constitutionalism.

Second, she ignores ideas developed in more than two hundred years of history of constitutionalism and creates a strawman that she attacks from her theoretical position. Again there is nothing wrong with somebody adopting a particular normative and theoretical position as long as they seriously treat other positions and do not reduce them to suit their own arguments.

There are also normative differences between her and my position regarding the social function of law. It seems to me that Davies believes in a salvational role for law yet at the same time her proposals are directed to the dismantling of law and its important social role. She wants and expects too much from law and if law were really to follow her suggestion it would lose its identity and cease playing its social function.

The majority of illnesses for which law is responsible don't have a legal character. They could be cured *only* by democratisation of civil society.

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1 Jurgen Habermas, *The Inclusion of the Other. Studies in Political Theory,* (Cambridge, Massachusetts: The MIT Press, 1998)

Paradoxically, Davies is close to seeing law as a tool of social engineering. In effect traditional instrumental rationality, hidden but present in the paper, prevails. I rather want to see it as an infrastructure that opens the possibility for conversation between different social groups and interests. I do not share the author's belief in a salvational role for law. I am attached and committed to the more and more abandoned ideas of civil society, rule of law and constitutionalism, as the proper legal framework for discussions and conversation. This leads us to the crucial problem in her paper: the exclusionary character of a constitution.

Constitutionalism

As Andras Sajo, the prominent Hungarian constitutional lawyer, has observed in his recent book, 'constitutionalism is a rather conservative idea'.[2] The question is why so? In the history of humankind we learned that our fellow citizens could be dangerous and nasty and in countries which have constitutions based on constitutionalism they are always based on bad experiences from the past. In other words of Sajo's, constitutionalism is always 'constitutionalism of fear' but at the same time constitutionalism of hope that wrongdoing from the past can be, if not stopped or eliminated, at least restricted.

Not every constitution in the world is based on constitutionalism understood as limitations imposed on political power. It is not surprising that societies in the former communist bloc, for example, despite all the shortcomings in their new or heavily amended constitutions, embarked on classical constitutionalism. It was due to the experiences of the repressive and exclusionary character of a regime including law and constitutions, but not constitutionalism.

The main function of constitutions based on constitutionalism is integration and preservation of social peace. Development of love and more intimate relationships within society is left to processes and forces of civil society. Law provides a proper framework but I do not think that law is able to change people's minds.

Unitary and Static Nature of a Constitution

Probably one of the most important assumptions in the paper is the unitary nature of a constitution. The consequences are that it helps to describe only a constitution's negative dimension—exclusion—and neglects its positive, inclusive and incorporative dimension. The critique is thus one sided. This is due to a very narrow perception of law and negation of its multidimensional character.

Davies uses the expression 'Western positivist law'. 'Positive law' is acceptable, but 'positivist law' is an elision. Law becomes positivist when it is positivistically conceived, institutionalised and practised. That is to say, when its

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2 Andras Sajo, *Limiting Government: An Introduction to Constitutionalism* Budapest, Central European University Press, 1999) 9.

intuitive dimension is excluded. But this exclusion is not an accomplished actuality. As a matter of fact the intuitive dimension of law cannot be excluded. On the basis of this tendentious argument, Davies sets up a straw man and authorises herself by critique of this straw man.

I come from the tradition, starting with Leon Petrazycki and developed by Adam Podgórecki, which did not reduce law to official law promulgated by the sovereign but recognises the importance of so-called intuitive law in social and political life.[3] Quite recently, the leading Polish legal sociologist Jacek Kurczewski published a book, *The Resurrection of Rights in Poland,*[4] in which he stressed that a constitution is a process of interrelation between 'real' and 'written' constitutions. By 'real' I mean social structure, beliefs, attitudes, values and social norms generated by civil society. Written constitutions are positive constitutional norms, provisions and institutions as described in the constitutional documents and existing constitutional practices.

In each society and political community there are never-ending tensions between these two elements of the broadly conceived constitution. That generates the dynamic of constitutional reforms and stimulates changes—including inclusionary changes—in written constitutions.

Theoretically speaking, the relationship between the two different constitutions could be that:

1. The real constitution supports the written constitution or,
2. The real constitution is neutral from the point of view of the written constitution, which means it does not support but at the same time does not create practices contradictory to the provisions in written constitutions or,
3. The real constitution is in opposition to the written constitution and in such situations there is a gap between provisions and institutions of the written constitution and practices, norms, beliefs and social institutions generated by society.

Identity and the Exclusionary Character of the Constitution

Just to follow the line of reasoning from the former part and take into account the social background of constitutions, Davies claims that constitutions from the very beginning are exclusionary even if in fact, some of them create identity. I am not so sure that is possible to make such a general claim if we take into account social reality. It was the case in the so-called new world in winning independence from former colonial powers, but even in this case only with limitations and restrictions. I am not sure that constitutions in post-colonial Africa succeeded in establishing such a new national identity. Even in the case of the United States it was only after

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3 Adam Podgórecki, *A Sociological Theory of Law*, (Milano: Dott. A.Giffre Editore, 1991).

4 Jacek Kurczewski, *The Resurrection of Rights in Poland* (Oxford: Clarendon Press, 1995).

a long process of constitutional reforms, and historians claim that American identity was established only after the Civil War.

In the part of the world I come from, broadly speaking Central-Eastern Europe and more precisely Poland, there are some pre-constitutional and pre-legal bonds, namely national culture, which found identity, and constitutions are obliged to take these into account. There was a trend that still is to some degree present in constitutional law in some countries which could be called constitutional nationalism. Such constitutions based on nationalistic ideas presuppose the existence of pre-legal or super-legal structures and are based on exclusions. The 'spirit of the nation' manifests itself in the constitutions and law of the nation-state at the expense of 'Others'. Others are those who are not part of the nation and there are two options:

- to force them to become a part of the nation or,

  to eliminate them.

Examples of the former option are policies of forced nationalisation based on state power, coercion of the state, which try to change the identity of group(s) within the state's borders. An example of the latter is ethnic cleansing, known not only in recent history. That is precisely the reason why constitutionalism plays not only an exclusionary but also an inclusionary role. And why not holistic ideas of the will of the nation but sceptical distrust and restrictions imposed on political power in different forms such as division and separation of power, judicial review and system of constitutional rights, are seen as inclusionary.

Davies is right that law itself is exclusionary, so from the constitutional point of view it is important who is producing law and how. An unrestricted legislature based on majority rule, recently defended by Jeremy Waldron in his *The Dignity of Legislation*,[5] could adopt law which was purely exclusionary in both senses elaborated by Davies: foreclosure and repression. It would be able to exclude and/or repress others. The system of division and separation of powers, checks and balances, as well as judicial review, create a constitutional infrastructure in which exclusionary law is not eliminated but is much more difficult to create. Again principles of constitutionalism cannot change and make people happy, wealthy and healthy overnight but if we look at the change in constitutionalist ideas over two hundred years we could see that they were able to enlarge inclusion and limit exclusion.

There is a hope in the process, taking place for some time in Europe, of the creation of a new type of super-constitution of the European Union. This new type of polity has been heavily criticised for lack of transparency and democracy but it works and includes new members, enlarges itself, and is reducing hatred between traditional enemies. For anybody who knows the history of the continent that produced two world wars it is an extraordinary achievement. At the same time it was a long process with plenty of hiccups, that's true. It is based on a new type of

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5 Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

constitutionalism that has slowly undermined the sovereign nation-state through creation of multi-layered law that upholds national and/or regional self-identity and at the same time creates a new inclusionary constitution for citizens of Europe. I do not want to elaborate at the moment and leave it for another occasion, but the new European constitutionalism is mainly based on division of judicial power between the European Court of Justice and nation-member states' supreme or constitutional courts.

Davies should also notice that exclusionary constitutional practices and law play positive and not only negative functions which later lead to inclusion not exclusion but nevertheless apply the practice of foreclosure and suppression.

It seems to me that in the contemporary world we can observe interesting processes with constitutional consequences, whereby changes from political situations of stalemate have occurred through so-called 'round table talks'. This was the case in the 'escape from communism' in Poland, Hungary and Czechoslovakia but it also occurred in South Africa, Northern Ireland and for some time Israel regarding the Palestinians.

How did it proceed? It started with secret exclusionary talks between conflicting parties. The first outcome was exclusion of radicals who are not able to impose any self-restrictions on themselves. Then there were talks about exclusion of some practices. Then usually signing an agreement that became a founding document for the new constitutional culture, through imposing self-restriction of both sides, and then creation of a new constitution that established institutions more inclusive than the institutions of the former regimes. Then the question is: could we condemn totally all-exclusionary practices? I think not, since at least people are not killed, tortured, and excluded from expressing their interests in the political process. So exclusionary practices embodied in talks became a super-constitution of a new constitutional culture that excludes at least less than former constitutions.

Davies is right that a constitution is based on exclusion and also provides identity. Only our evaluations differ. A constitution based on constitutionalism that includes rich and extensive practices is 'based upon the idea of limitations on governmental powers'.[6] Is this good or bad? I think that that very fundamental idea of restrictions imposed on political power is a double-edged sword. It plays an exclusionary as well as inclusionary role in the operation of the polity. Exclusions are *necessary* in constitutionalism. They underlie constitutional thinking due to experiences in history. The problem is what sort of practice is excluded and how the mechanism works?

Conclusion

I think that ideas presented in Davies's paper are ideas of a dreamer. However politically, since she has presented her dream, this work helps to leave everything in its place. I can't see any happy ending on the horizon but there are new,

6 Davies above 298.

optimistic elements in constitutional thought with strong liberating potential, such as for instance 'grass-roots constitutionalism' suggested by Grazyna Skapska.[7] This is a situation where constitutional principles originate from everyday experience of the citizen's participation in civic organisations. Grass roots constitutionalism I believe is compatible with principle of classical constitutionalism and could enrich our constitutional tradition.

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7 Grazyna Skapska, 'Paradigm Lost? The Constitutional Process in Poland and the Hope of a Grass Roots Constitutionalism' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, (Aldershot-Brookfield USA, Singapore, Sydney: Ashgate/Dartmouth, 1999) 149-175.

8 Grazyna Skapska, 'Paradigm Lost? The Constitutional Process in Poland and the Hope of a Grass Roots Constitutionalism' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, (Aldershot-Brookfield USA, Singapore, Sydney: Ashgate/Dartmouth, 1999) 149-175.