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CONSTITUTIONS, CULTURE, AND HISTORY

MICHAL JAN ROZBICKI*

*Governments, like clocks, go from motion the men give them; and as governments are made and moved by men, so by them they are ruined too.*¹

The relationship between constitutional law and social reality remains a fairly grey area of knowledge, mainly because studying it requires efforts that move well beyond the separated methods employed *internally* by law, political science, anthropology, history, sociology, communication, and other academic disciplines that, collectively, might shine new light on it. At the same time, a deeper understanding of this field is vital to scholarship on international and comparative law, as well as to legal history, because of the need to understand how cultural context supplies meaning to legal texts. Two papers presented at the “Invisible Constitutions: Culture, Religion and Liberty” symposium at the Saint Louis University School of Law, “The Relevance of African Culture in Building Modern Institutions and the Quest for Legal Pluralism” by Semahagn Abebe,² and “Bringing Comparison Home: A Components Approach to Culture in Comparative Law” by Monica Eppinger,³ offer important and useful theoretical reflections about the nature of this relationship.

Abebe’s specific question is what to do with the seeming incompatibility between what he calls informal and formal institutional systems of social organization and governance in Africa, but his larger query is essentially about the conditions for a successful marriage between modern constitutionalism and existing, historically established cultures.⁴ An accurate answer would be of serious significance not only for the future political development of African states, but also for the continuing debates about the nature of globalization,

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1. William Penn, *Charter of Liberties and Frame of Government of the Province of Pennsylvania* (May 5, 1682), reprinted in *COLONIAL ORIGINS OF THE AMERICAN REVOLUTION: A DOCUMENTARY HISTORY* 274 (Donald S. Lutz ed., 1998).

2. Semahagn Abebe, *The Relevance of African Culture in Building Modern Institutions and the Quest for Legal Pluralism*, 57 *ST. LOUIS U. L.J.* 429 (2013).

3. Monica Eppinger, *Sages, Savages and Other Speech Act Communities: Culture in Comparative Law*, 57 *ST. LOUIS U. L.J.* 407 (2013).

4. Abebe, *supra* note 2, at 430–31.

most recently reignited by the popular liberation movements in the Middle East.

To begin reflecting on the prospects of such an answer, it is useful to consider the phrase “transition to democracy.” It has been gushingly used in Western media over the past three decades whenever an authoritarian regime had collapsed.⁵ Whether such events took place in Russia and Eastern Europe, Tunisia, Libya, or Egypt, the premise behind this cliché is a manifestly deterministic notion that a universalized, modern, Western-style democracy must be the preordained trajectory of development for all these countries. But democracy is not a cosmic axiom. It is not something that already exists out there and only needs to be unwrapped and put into action by removing obstacles to its flourishing. It is a historically developed, man-made product. For example, modern American democracy was not created *deus ex machina* in 1776; it took over two centuries of halting, often painful, experiences to become an egalitarian and inclusive system.⁶ Those who today fetishize the Constitution’s presumably modern and democratic “original intent” as timeless neglect the fact that not only the Constitution but also the original intent had a history, and when viewed in the context of that history this intent was *not to include* all people under the umbrella of rights and liberties. Such inclusion took place only when gradual culture change—stretching over two centuries—made full equality conceivable and actionable.

If democracy in formerly non-democratic countries is to succeed, its advocates need to draw conclusions from its historicism. *Cultural* space to accommodate it must first be created if its constitutional codifications are to be successfully implemented in real life. That is a slow and complex process, because a powerful obstacle stands in the way—the very nature of cultures. Cultures are products of long, collective experiences of a people. Cultures make sense of people’s lives, and provide stability and order in the chaos of existence. They consist largely of self-evident, taken-for-granted assumptions, which would explain why they tend to spontaneously resist changes to such assumptions. In fact, they may even be viewed as mechanisms for surviving change, and they best serve this purpose when they are reliably stable. This is why incompatibilities between different cultures with distinct histories behind

5. See, e.g., Shadi Hamid, *A Crisis of Legitimacy*, N.Y. TIMES, (Oct. 20, 2011, 11:41 AM), <http://www.nytimes.com/roomfordebate/2011/10/07/is-egypt-losing-its-regional-power/how-long-is-egypts-transition-to-democracy>; Seth Mydans, *Burmese General Says Transition to Democracy Will Be Slow*, N.Y. TIMES, Aug. 25, 2002, at 7; *Nepal Picks New Prime Minister, in Transition to Democracy*, N.Y. TIMES, May 30, 1991, at A9.

6. U.S. CONST. amend. I (establishing freedom of speech, religion, and assembly), U.S. CONST. amend. VI (establishing the rights of the accused in a criminal trial), U.S. CONST. amend. XIII (abolishing slavery), U.S. CONST. amend. XIX (giving women the right to vote).

them are not anomalies—as the widely used concept of ethnocentrism might imply—but are inherent to the very ontology of cultures.

Yet, cultures are constantly faced with change—brought about by migrations, wars, trade, colonization, economic developments, or transformations of ecological environment. It is therefore convenient to conceptualize them in terms of perennial tensions between the tendency to preserve their structures and the necessity of adapting to new situations. The resulting adjustment is a product of the contest between these two forces, and it is not cost-free, something that may not be immediately apparent to post-modern, Western societies, where freely choosing an exotic cuisine, a dress style, or even a church seems natural and self-evident. Adopting new ways usually involves the demise—every so often painful—of old ways.

Democracy and democratic constitutions, like other cultural products, are results of peculiar configurations of collective experiences over long periods of time. Such products are stored in cultures' resource banks as capital. The informal systems of governance in Africa that Abebe is referring to are rooted in cultural patterns preceding the colonial era—in the role of the elders and their mediating functions, local organization of society, community consensus-building, traditional justice, ethnic values, and religious beliefs.⁷ By contrast, the formal systems, instituted during the post-decolonization period, are usually Western-modeled, liberal constitutions, with elections, separation of powers, and parliamentary, administrative and judicial structures based on European models.⁸ The latter systems were originally introduced as antitheses of traditional, local ways, understood as impediments to modernization.⁹ Because these local ways were not taken into account when the liberal polities were being introduced, anomalous configurations were created as the top-down, quasi-Westernization—without corresponding economic and social modernization—generated tensions between imported (“visible”) innovations and traditional (“invisible”) localism.¹⁰ The result was that patterns of citizenship and social order became incoherent, opening the way to a variety of authoritarian regimes clad in nominally liberal, Western constitutional

7. Abebe, *supra* note 2, at 436–41.

8. *Id.* at 433; C.I.A., *Botswana*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (last updated Oct. 4, 2012); C.I.A., *Namibia*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> (last updated Oct. 16, 2012); C.I.A., *South Africa*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last updated Oct. 4, 2012); C.I.A., *Zambia*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/za.html> (last updated Oct. 4, 2012).

9. Abebe, *supra* note 2, at 430.

10. *Id.* at 433.

structures.¹¹ These post-colonial systems, as Abebe points out, resembled neither traditionally African cultural ways nor modern democratic practices.

I believe that the most creative part of Abebe's thesis is that it turns the old argument in the debate over tradition versus modernity on its head. He rejects the rejection of modern liberal values as alien and incompatible with local traditions, and he rejects the rejection of traditional African practices as inherently un-liberal.¹² Instead, he points to certain ingredients in traditional African ways—such as community councils and mediation of elders (both based on reconciliation and consensus building rather than majority vote)—that are indigenous, yet consistent in certain ways with broad liberal values.¹³ As such, they could potentially serve as stepping stones to designing democratic political systems that are tailored to African cultures.¹⁴ In other words, he shows that these traditional ways hold a huge advantage in that they are already part of the *existing cultural capital*—a source of group identity and a social glue to African societies—and so have the power of prior acceptance and respect indispensable for any constitutional law to be effective. He has thus articulated something that is intellectually very timely in this post-post-colonial stage of history. Democracy in Somaliland and Botswana does not have to be the same as in Paris or London, but it should endeavor to promote democratic values. At the same time, invocations of local, customary forms of governance do not have to be mere cloaks for authoritarian regimes to hide behind. Abebe has formulated a challenge for a new generation of African legal and political leaders: devise new, pluralistic constitutions that fuse modernity with traditional cultural practices in ways that can contribute to the success of such hybrid models *as* democracies.¹⁵

Some of the newest scholarship on Western political and cultural history provides evidence to bolster such thinking. There has recently been a growing curiosity about traditional, popular, and local ways of participating in governing before political involvement became wholly identified with centralized states and modern constitutions.¹⁶ For instance, in the United States, the two dominant historiographical schools, consensus and progressive, still identify—wrongly, as I argue elsewhere—the American Revolution as a radical shift from monarchic to egalitarian society; the former seeing the founders as fully modern, and the latter denouncing them for betraying their

11. *Id.*

12. *Id.* at 442.

13. *Id.* at 432.

14. *Id.* at 442.

15. Abebe, *supra* note 2, at 446.

16. *See, e.g.*, MICHAL JAN ROZBICKI, *CULTURE AND LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 120–31 (Jan Ellen Lewis et al. eds., 2011); BARBARA CLARK SMITH, *THE FREEDOMS WE LOST* 206 (2010).

presumably modern ideals.¹⁷ But now some scholars are taking another look. Barbara Clark Smith has shown not only that significant forms of participatory liberty did exist before the Revolution, but that they offered more opportunities for ordinary people than they would have after the establishment of the new republic.¹⁸ What she claims is that people were not so much less free, as differently free, and those earlier freedoms of colonial subjects involved substantial popular participation in public affairs, practices that declined after the Revolution.¹⁹ Common people regularly served on juries, joined crowds that helped embrace or protest royal edicts, and ensured the laws were enforced at community level at a time when no professional police forces existed.²⁰ These traditions were actually widely utilized by the American Revolutionary leaders to gain support for their cause, but once these leaders became the governing political elite, they distanced themselves from many such traditions, fearing that “mobocracy” would undermine their preeminence.²¹ Grassroots participation soon became much more mediated and filtered, in keeping with the Madisonian design.²²

There is a certain analogy and a lesson here. Many authoritarian rulers in Africa fear traditional, local institutions as rivals to centralized power, and yet find themselves appealing to them by attacking Western liberal values, and by assuming the mantle of spokesmen for traditional ways.²³ They do so precisely because these institutions hold tangible and significant cultural power—the power to create an acceptable, ordered space where people feel at home. This is why Abebe’s argument about harnessing this cultural authority in the service of democracy makes so much sense.²⁴

I have only one quibble with his line of argumentation. He brings up the “universality of democratic values” as a point of reference, a premise that seems to be at variance with his overall conclusions.²⁵ It undermines the thrust of his thesis, to liberate us from the old frameworks of thinking about democratic constitutionalism as a one-size-fits-all, timeless arrangement with a teleological trajectory. There may be parallels between democratic values in different cultures, but there are no universals of liberty. No one is born with democratic values any more than one is born with the idea of trial by jury or the electric bulb. They all have a history. Someone had to invent them. This

17. ROZBICKI, *supra* note 166, at 120–31.

18. SMITH, *supra* note 16, at 206.

19. *Id.* at xi.

20. *Id.* at 18–46.

21. *Id.* at xiii–xiv.

22. *Id.* at 184, 207.

23. Abebe, *supra* note 2, at 446.

24. *Id.*

25. *Id.* at 435.

historicity of cultures and constitutions is a fact that any related analysis needs to appreciate.

In fact, it was the assumption of automatic universality of Western democracy that had caused problems in the first place. One only need recall the early UNESCO doctrine of “civilizing progress,” a concept unambiguously based on universalized Western values, and aimed at unifying world societies under its banner, rather than paying attention to the protection and preservation of deeply rooted cultural identities among non-Western peoples.²⁶ A number of contemporary African decolonization leaders—such as Kwame Nkrumah in Ghana and Jomo Kenyatta in Kenya—had studied at European universities and tried to implement in their decolonizing countries constitutional models that were products of Western historical experiences.²⁷ Yet, old, pre-colonial customs, deeply embedded in local cultures, endured because they continued to make sense to people.²⁸ This is why investing existing, local, cultural capital into the production of modern, liberal, and political practices carries a promise of success—it enables people to utilize culturally legitimated interpretative tools they already possess to domesticate the new ways.

While Abebe deals with problems of integrating new political and legal structures into existing cultural systems, Monica Eppinger’s essay looks at the methodological and theoretical instruments for interpreting the relationship between culture and law.²⁹ She specifically considers the efficacy of using the tools of linguistic anthropology to respond to the critical question of how constitutions constitute; that is how language, including legal language, creates reality for people.³⁰ This is a very timely issue, for at least two reasons. First, legal scholars rarely take this approach because they tend to focus on the legal text’s presumed internal indicators of meaning. The proposed methods thus carry a promise of freeing them from the traditional confines of originalism and textualism. Second, disciplining these tools into a usable analytical framework is a worthy goal because current usages of the term “culture” have become too capacious and imprecise.

Her propositions derive from postmodern epistemologies that reject structuralist, unifying belief in cultures as systems of linked signs.³¹ This rejection of totalizing ideas as unknowable has led to an emphasis on probability, relativity of meaning, difference, and the construction of reality by

26. CLAUDE LÉVI-STRAUSS, RACE AND HISTORY 30–33, 46–49 (1952).

27. Edmond J. Keller, Decolonization, Independence, and the Failure of Politics, in AFRICA 156, 160–61 (Phyllis M. Martin & Patrick O’Meara eds., 1995).

28. Phyllis M. Martin & Patrick O’Meara, Africa: Problems and Perspectives, in AFRICA 3, 7–9 (Phyllis M. Martin & Patrick O’Meara eds., 1995).

29. See generally Eppinger, *supra* note 3.

30. *Id.* at 415–20.

31. *Id.* at 420–23.

means of symbolic communication.³² These methods—now a half century mature and still evolving—continue to carry considerable potential for fresh interpretations of the bonds between law and culture.³³ They helped to eliminate outdated and arbitrary approaches like Marxian determinism, or Levi-Straussian deep and timeless structures. A concept of constructed, instituted meanings has been instrumental in replacing logocentric discourses that rigidly rested on the assumption that words are reflections of a stable, objective reality.³⁴ To mention one example, scholars have spent decades arguing—otherwise rightly—that exceptionalism as an arc of history unique to America did not objectively exist.³⁵ Only recently they began to understand that American exceptionalism consists of widespread *consciousness* of exceptionalism, and, accordingly, shifted their interpretative efforts to such subjectivities.³⁶ Postmodern epistemology is also valuable in its insistence on our limitations—by raising the awareness that scholars are an inalienable part of their cultures—and that the way they represent things not only structures the depicted reality but also reflects their authors as much, if not more, as their subjects.³⁷

In her argument, Eppinger largely limits herself to the sphere of language, taking her cues from linguistics and semiotics, especially from John Austin's theory of performative speech acts as social actions.³⁸ Because such acts must operate within conventions (frameworks of what is possible and thinkable) and require authority to create social reality, she recommends them as useful prisms through which to interpret the ways in which constitutions—when treated as categories of communicative action—constitute social reality.³⁹ She also enlists practice theory and Irving Goffman's micro-sociological theory of performance as a communicative exchange between the actor and the observer to elaborate on the performative strength of speech acts.⁴⁰ She makes the case that the ability of speech acts to constitute social inclusion and exclusion, authority, and cultural reproduction make them effective tools of interpreting the impact of constitutions on different communities (one of the concerns of

32. *Id.* at 418–20.

33. *Id.* at 415–20.

34. *See* Eppinger, *supra* note 3, at 415–20.

35. *See generally* Peter Onuf, *American Exceptionalism and National Identity*, in 1 AMERICAN POLITICAL THOUGHT 77 (2012).

36. *Id.* at 79–80.

37. Jerry Topolski, *A Non-postmodernist Analysis of Historical Narratives*, in 41 POZNAN STUDIES IN THE PHILOSOPHY OF SCIENCE AND THE HUMANITIES 9, 9 (Jerzy Brzeziński et al. eds., 1994).

38. Eppinger, *supra* note 3, at 418–20.

39. *Id.* at 419–20.

40. *Id.* at 417.

comparative law).⁴¹ Eppinger's reasoning is articulate, sophisticated, and elegant. It is also judicious; for instance, with an eye on the usefulness of the methods for interpreting constitutions, she appropriately identifies and discards the static character of Goffman's performance theory, and corrects his error with more recent understandings of continuous cultural reproduction.⁴²

Nonetheless, cultures have more dimensions than the linguistic and the performative. With all their seductively fertile explanatory advantages, these two approaches have certain limitations that deserve our attention. First, the focus on language and communication should not mean that socio-economic factors are excluded from the analysis. This, of course, is often easier said than done because poststructuralist theory tends to be allergic to macro-scale concepts.⁴³ Second, the same theory strongly stresses the independence of language from its outside referents, but lived experience also involves realities that are more than mere perceptions of experience. Even if one accepts that there is no knowable, independent, absolutely objective reality, not everything can be thought of in terms of imagined realities—even if so much of culture rests on them. To use an example once offered by Susan Sontag, cancer—when it occurs in lived experience—is just a disease, and not a metaphor of anything.⁴⁴ Third, the relativism of meanings need not be absolute. The number of meanings that words can take is not infinite, as some of the scholars quoted by Eppinger have claimed.⁴⁵ Auschwitz was Auschwitz—it cannot be read to mean “cumulus clouds” or “Hawaiian vacation.”

To put it another way, we should be wary of pursuing too much of a *laissez-faire*, de-centered, micro-scale analysis, because this kind of inquiry is eminently capable of not only atomizing knowledge, but also of paralyzing *systemic* thought. The very talk of systemic patterns can bring about charges of *naïve realism* and of *essentializing* the concept of culture (two real dangers, but currently also serving as liturgical terms used to signal a lack of theoretical sophistication).⁴⁶ Anthropology and behavioral sciences are not usually disposed to put much emphasis on the diachronic perspective, but to study and understand culture's long-term role, not to mention the ability to explain causality, we do need systemic reflection that goes beyond the rather confined and present-oriented focus that characterizes speech act and performance analysis. Just as importantly, to comparatively investigate constitutional law,

41. *Id.* at 419–20.

42. *Id.* at 418–20.

43. *See, e.g.*, JACQUES DERRIDA, *OF GRAMMATOLOGY* 158 (Gayatri Chakravorty Spivak trans., The Johns Hopkins University Press 1976).

44. SUSAN SONTAG, *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 3, 3 (Anchor Books ed., Doubleday 1990) (1978).

45. *See, e.g.*, Derrida, *supra* note 43.

46. Eppinger, *supra* note 3, at 420–22.

broader systemic concepts are required in order to even envision the yardstick we need to assess the commensurability of different constitutions in their different cultural contexts. Finally, we need some sort of a systemic concept of the whole, not fragments, to anticipate any broader conclusions of our comparative analysis.

Cultures are hard to define and exceedingly difficult to capture; they are multifarious, subtle, crafty, and deceitful entities. It is too easy to dismiss their existence and replace them with Derridan fluctuations of vacuum, or with assemblages of disembodied, individual acts. There are other ways of disentangling this challenge. For instance, it is quite possible to envision a non-naïve concept of reality that acknowledges the investigating scholar's influence—through the representations employed—on the narrative being produced. Jerzy Topolski has usefully suggested that we do so by distinguishing as clearly as possible between three levels of a narrative: the informative, the persuasive (rhetorical), and the ideological (controlling).⁴⁷ Similarly, it is also possible to fashion a concept of non-absolute, non-final truth that accepts the existence of many versions of the reality being investigated, without rejecting the very notion of truth as nothing more than a metaphysical millstone.⁴⁸

In curious but mutually consistent ways, cultures and constitutions share a similar *raison d'être*. To operate as engines that organize people's lives, they both depend on imagined reality. They both rest on the fiction that their provisions are timeless, stable, true, even absolute (no de-centering for them). They both seek to force humans to conform to their presence and demands. They both cannot exist without proper respect for their authority (imagine the unwritten British constitution without the deference and authority accorded to it). In all this, they are both capable of absorbing and containing diverse and even contradictory ingredients in non-contradictory ways. It is this set of magical attributes that enables them to constitute order and make sense of people's lives.⁴⁹

47. Topolski, *supra* note 37, at 9.

48. *See id.*

49. On the enabling mechanisms of constitutions, see JACK M. BALKIN, *LIVING ORIGINALISM* 4–5 (2011). On the structuring power of cultural symbols, see PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 166 (John B. Thompson ed., Gino Raymond trans., 1995).

