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THE MISSING ALTERNATIVE

Karol Edward Soltan

This is an essay inspired and provoked by two recent books¹ suggested by the editors of this issue (hence the focus on the European Union and South Africa), but also by recent important work on cosmopolitan constitutionalism by Mattias Kumm².

These two books are important in part because they are symptoms of a problem: we lack the categories for understanding of the Big Picture of the current human situation in a way that would help us be good citizens, and motivate us to be good citizens. We do not see clearly enough the new things that are happening, so we cannot help them happen.

What does this have to do with law? There are new forms of politics about, new forms of dreams for a future in which law is incredibly important. For example, the promotion of the rule of law has been transformed into a widespread preoccupation, and in the process has changed the meaning of the idea and ideal of the rule of law. It is not just law and order, and it is not just state power made predictable and constrained by general rules. It is also equality before the law and impartiality; it is also human rights and human dignity. According to this way of looking at the rule of law, an ambitious conception of justice seems implicit in the rule of law.

The role constitutional courts have played in some “color revolutions” is another visible symptom of the new place of law in humanity’s democratic aspirations. Powerful constitutional courts played a crucial role in those revolutions, notably in the great transition from communism in Europe, and from apartheid in South Africa. If we think of the “spirit of 1989” as the style of politics that dominated those great transformations, then we can say: the ideals of constitutionalism and law were central to the spirit of 1989. Given the anti-legal nature of communism that was not perhaps a great surprise in Eastern and Central Europe. Yet it was a surprise in South Africa. Instead of fighting government-by-judges (remember Paris in 1789?), this new type of revolution is at risk of *promoting* government by judges.

This is all unprecedented, it is new and difficult to understand. Law is more important as part of the great global movement of civic renewal (starting at least with the collapse of communism in 1989 and the associated events, emphatically including the

1. SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* (2010); PETER LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION STATE* (2010).

2. See especially Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 258-324 (Jeffrey Dunoff & Joel Trachtman, eds., 2009).

end of apartheid in South Africa) than we have any reason to expect. Civic renewal, we are accustomed to believe, is something for radical democrats who are also legal skeptics, who fight symptoms of juristocracy.

We need to understand better, and to articulate, the newer forms of politics which incorporate the new forms of enthusiasm about law. To the mainstream lawyer, committed in a vague way to the conventional kind of cynicism about law (realism based on experience, as it may seem), this challenge could be just as uncomfortable as the old and familiar challenge from CLS, and other radicals.

The civic alternative featuring such enthusiasm about law is poorly articulated, so I will call it The Missing Alternative, a form of politics we find at the heart of European integration, in the spirit of the great political breakthroughs of 1989-1995, and in the contemporary global movement of civic renewal (in the “color revolutions,” in the Obama presidential campaign, in the Arab Awakening).

The three works I am addressing here share a weakness, it seems to me. They all neglect The Missing Alternative. How could they do otherwise? It is missing after all. In European integration the Missing Alternative is, above all, a new kind of polity with a complex demos. It is not federal or confederal. In South Africa it is a polity committed to deep democratic transformation and to a complex form of justice, but also to a strong constitution and a strong constitutional court. At the global level, it is a Global Constitution a project developing in bits and pieces. In all these places the Missing Alternative is politically and legally a hybrid. It is not liberal, but it is not hostile to liberalism (best think of it as the next stage of liberalism). It is in various ways social democratic and conservative. Many years ago the prominent Polish philosopher Leszek Kołakowski identified himself as a conservative liberal socialist. The Missing Alternative is *his* alternative, but I propose to give it a shorter name: moderation.

This novel and challenging project is playing out in the integration of Europe and the transformation of South Africa, each with a central role for courts. The Constitutional Court of South Africa is the hero of the piece in South Africa. In Europe as the project has evolved especially since Maastricht, we might consider three courts as central: the European Court of Justice (obviously), the European Court of Human Rights (since European integration should *not* be identified only with the EU, and *should* be identified with human rights), and the German Constitutional Court. The German Constitutional Court has emerged in part through its influence on other courts, and thanks to unamendable provisions of the German Constitution, as a kind of European guardian of human dignity and democracy.

KUMM AND GLOBAL CONSTITUTIONALISM

But let me begin with the big picture, with global constitutionalism, the most ambitious and attractive form of the project of law that I know. Anybody who wants to discuss the subject must now, I believe, address the recent work of Mattias Kumm. So here, in an incredibly short form, is what I take to be the best starting point: an appreciative critique of some key features of Kumm’s cosmopolitan constitutionalism, leading to an articulation of The Missing Alternative.

Kumm presents his cosmopolitan constitutionalism as a Dworkinian account of

law as it is. He sees it as based on liberal constitutionalist principles. And he opposes it to the dominant statist conception of constitutionalism. By way of contrast with Kumm's theory, then: First, global constitutionalism or cosmopolitan constitutionalism is best seen as a *project*, in fact the most ambitious form of the project of law. A project is an atom or a molecule of the process of human creation. Engineering projects are familiar. But there are other projects: any statute can be seen as a project, my life and yours are ongoing projects. The transformation of South Africa and European integration are ongoing projects. Global constitutionalism is an ongoing project.

To take law and global constitutionalism as projects allows us to see law, including international law, as it now is, a moment in the development of this project, containing elements both of a Westphalian starting point and a cosmopolitan end point. Cosmopolitan constitutionalism is best not seen as an account of law as it is. It is a project developing in stages. And it is developing not simply in international law, but in regions (e.g. European Union) and within countries (e.g. South Africa).

Second, global constitutionalism *is* best seen as a *moderate* project, not a liberal one. Moderation as a generic form of politics can be seen as centered on three principles. First, it centers on opposition to forces of destruction, their power and effects. Second, it manifests an appreciation of complexity, of "unity in diversity," of polycentricity and pluralism, of various forms of attractive balance. And, finally, it supports forms of rationalism that take human fallibility seriously. Moderation can be given many forms; some are small-minded and uninspiring. Others are more ambitious and civically engaged.

And, third, cosmopolitan constitutionalism is best seen not simply in opposition to *statist* constitutionalism, but more broadly in opposition to the forms of constitutionalism that emerged out of the deep European crisis of the 17th century and were codified in the 18th century. Statism and the Peace of Westphalia are elements of a broader picture. It is just as important that the legacy of revolutions be abandoned, or at least reformulated. The idea is to reformulate the 18th century model of constitutions, which emerged in the shadow of *states* and *revolutions*.

Finally, we need something more than an alternative form of constitutionalism. We need to address a broader audience that does not care about the niceties of legal theory. We need The Missing Alternative, a new, ambitious and civic form of moderation, which incorporates and supports a moderate constitutionalism.

THE MISSING ALTERNATIVE

The Missing Alternative takes complexity and balance more seriously in its constitutionalism than does liberal constitutionalism. It also takes more seriously the struggle against the influence of the gun, and other forms of destruction. It takes democracy seriously as a project, not simply spreading the contemporary institutional forms of democracy, but also articulating the ideals behind democracy, spreading the spirit of democracy not just the letter. But that does not mean democracy is the only ideal, or the master ideal. And of course it does not mean we need to be radical democrats, participatory deliberative democrats, or democratic experimentalists.

A broader and deeper ideal animates democracy, but it also animates market

capitalism. It is the ideal of human being as creator. Projects can be seen as the atoms or molecules of human creation. And the biggest and most admirable projects are not those of one person, nor those created *ex nihilo*. Neither individual genius nor a revolutionary break with the past are the prime examples of human creative power. Rather the most admirable works of human creative power are shared projects developing over time. So if we are to take the idea of human being as creator to the hilt it would be good to take on board the influence of the Burkean tradition.

The Missing Alternative is not a project of human emancipation, neither in radical nor liberal form. It would be better to say human emancipation is part of the project. But human creation on the large scale requires *loyalty* to shared ongoing projects, not emancipation from those projects.

The old idea of a constitution, influenced by the age of revolution, is Philadelphian and documentary. The representatives of a nation or people, acting on behalf of a sovereign constituent power, create a new political order expressed in a text. A moderate alternative says instead: a constitution is a commitment to moderation. It can develop in stages and over time. Its legal aspects are complemented by political aspects. Its most serious commitments are: opposition to the power and effect of the gun, support for a complex demos, and a complex balance among legitimating principles, including complex forms of justice. It loves peaceful transformations and abhors revolutions (“color revolutions” are not really revolutions).

The Missing Alternative incorporates the most ambitious form of the project of law, moving toward a global constitution and changing in the process our understanding of constitutions. It moves incrementally toward new forms of complex polity, beyond federalism and its traditional confederal alternatives, and beyond separation of powers based on Montesquieu’s Holy Trinity (the all too familiar executive, legislative, and judicial). It moves toward new forms of balance between democracy and justice, and new forms of the constraint of justice, centering on human rights and on the elaboration of the principle of inviolability of human dignity.

So the project of a complex and balanced constitutionalism gets reformulated, and it gets combined with a new commitment to natural rights, now relabeled human rights. The dominant conception of justice shifts. The language of freedom and equality is replaced by the language of human dignity. That too is, I think, best seen as a move toward greater complexity. And now after decades, courts, as well as legal and political thinkers, have had the opportunity to consider what the equal inviolability of human dignity might mean. I think what emerges is a multidimensional idea of human dignity, and a conception of justice that is more complex than those that were seen since the Enlightenment, as different ways to combine a commitment to equality and liberty. Some of the details emerge in an illuminating way in the work of the Constitutional Court of South Africa as it considers social and economic rights (on this more below).

This is a moderate alternative whose relationship to liberal constitutionalism is roughly this. In the previous stage of modernity, the stage that emerged from the European crisis of the 17th century, liberal constitutionalism was the dominant form of the moderate project, so the new moderation continues the traditions of liberal constitutionalism. But as we begin to see a new stage of the modern transformation

emerging from the crisis of the 20th century, we should be struck by the degree to which liberal constitutionalism is not sufficiently moderate, how much it is influenced by the politics and the ideas of revolution, and the politics and ideas of the system of sovereign territorial states. So much of it is governed by arbitrary Realpolitik backed by the force of the gun, it is not moderation at all.

Moderation can do better than it has done so far, especially during the last century. In fact it really must do better. From the crisis of 17th century, the project has adopted a characteristic set of institutional means: independent courts working within a system of sovereign territorial states. We can now see that a better combination of institutional means would include independent courts operating in what we might call a constitutional union of states whose sovereignty is limited both internally and externally, and working in partnership with self-limiting social movements committed to a moderate form of civic renewal.

EU AND A COMPLEX POLITY

I learned a great deal about the project of European integration from Lindseth's new book, *Power and Legitimacy*. But he has not written it as a history of a *project*, a task he leaves to theorists. So Lindseth describes only what we might call the administrative law centered stage of the development of the EU project with only minor proposals for reform — for example, he suggests a European Conflicts Tribunal.

Lindseth rightly says the political cultures of Europe are not ready to accept federalism, and neither the theoretical literature, nor the political cultures of Europe give us any *constitutional* alternative. For Lindseth the development of EU is best understood together with the development of the administrative state. Both emerge from the depths of the crisis of the 20th century. The development of the administrative state undermines the constitutionalism based on Montesquieu's Holy Trinity domestically, and it makes possible the development of something like the European Union. Both are important features of a new moderate constitutionalism, I would happily say. But for Lindseth the only politically serious, politically influential form of constitutionalism is the old form. His central polemic is therefore against a constitutional understanding of the EU. Think of it through the lens of administrative law, he tells us. Having read his book, I agree. But I would like to ask the reader to think of it as a project of a new kind: not simply another federal or confederal state, and not simply another 18th century style constitution. Lindseth concludes that in the European Union “constitutional democracy still emanates from the state in crucial respects.”³ He sees the EU as an example of transnational administrative law, not transnational constitutionalism. But administrative law can be a stage in the development of an ongoing project. It really is enlightening to think of European integration as an ongoing project with a potential to create something new.

The following oversimplification can describe the integration of Europe as a project.. The locomotive has been above all the Monnet method: incremental and technocratic, pragmatic, “functionalist,” centered on solving specific narrow problems, mostly involving the regulation of some aspect of the economy. It was inspired by the

3. LINDSETH, *supra* note 1, at 282.

New Deal, in part, and by the TVA; it has been opposed to formalism.

Side by side with the workings of this locomotive we have seen a sequence of battles. Many of the Founding Fathers, and many of the Euro-enthusiasts since, have had a federal state as their goal, with all the characteristic features of a federal state. But the federal idea for Europe has been defeated again and again. If it is federalism, it loses. If it even vaguely looks like federalism, it loses. This was true in the founding period immediately after WWII, and it was true again in the most recent efforts to enact a Constitution or a Constitutional Treaty.

The great constitutionalist enthusiasm after Maastricht could be read again as a struggle between two tendencies. One aimed to move closer to constitutional federalism, or more broadly to constitutionalism on the Philadelphia model. It is reasonably clear what that means. The Missing Alternative is not fully articulated. The effort to develop a constitution failed in large part, it seems to me, because this alternative is simply not there except as a target of groping. Among legal and political theorists, it does not really exist. It exists even less in the political culture at large, as Lindseth points out many times in his book. We need here not simply a novel constitutional theory, but a formulation of the Alternative in a way that can be taught in high schools, a formulation that can appeal to minds and hearts. Lawyers' or technocrats' codification is not enough.

An articulated form of The Missing Alternative would allow us to oppose the Federal Europe project, without being a Eurosceptic. By supporting it, you can be a Euro-enthusiast, truly loyal to the project of European integration, while being opposed to the idea of European federation. And you need no longer support the goal of "ever closer union." Perhaps the most ambitious form of the project of European integration (the best form, the form with the greatest significance for the world, for the longer term) actually involves on some fronts *less* integration than is now in place.

I suspect so. The Lisbon Non-Constitutional Treaty commits EU to a form of double majority voting system, and this was one of its most controversial elements. This voting system is taken from federal systems, and reflects a compromise that is at the heart of federal systems. These systems balance domestic law — with its principle of one person-one vote, supporting the equal dignity of all people — and international law — with its principle of equality of states, which has a moral foundation only if you think of all states as equivalent to persons with equal dignity. That is taking state worship a bit too far. This principle of international law may be useful for peacemaking among states (the way splitting the difference 50-50 is an obvious compromise), but it has no serious moral foundation. So the federal form of democracy mixes on an equal footing a serious moral principle and a useful idea for diminishing bargaining costs. It is strange, though by now familiar.

We need an alternative more deeply rooted in democratic principles, but taking a *complex* demos as the ideal type of a demos. A complex demos is really a demos, but it also has significant internal boundaries separating its sub-demos. So it also really has sub-demos. The double majority voting system expresses the federal idea. A democracy with a complex demos, defined by the principle of unity in diversity, would have a *different* voting system: to pass you require a majority of the encompassing demos, and some prescribed substantial minority in each of the sub-demos.

Europe can develop a complex demos; it most likely already has one in fact. It just does not have — and probably will not have, nor should it develop — a *simple* demos, of the kind most people imagine in these discussions.

At the heart of the new constitutionalism is the idea of balancing between legitimating principles, and between institutions whose function is to act on behalf of those principles. Within that large scheme we have constitutional courts representing principles of justice, and various elected bodies (plus referenda) representing principles of democracy. A balanced constitution requires mutual oversight among them. The courts constrain the people, the parliaments constrain the courts. Decisions of parliaments can be overturned in the courts. Decisions of the courts can be overturned (by some supermajority, say) by the parliaments. The people's sovereignty is limited by principle, and not all powers are delegated *from* the people. All powers are delegated from a system of legitimacy-giving principles. This is not a plural constitutionalism but a complex constitutionalism: a constitutionalism that takes seriously the motto "unity in diversity," and elaborates from it a new form of complexity, not the crude and statist complexity of a federal state.

SOUTH AFRICA AND A COMPLEX JUSTICE

European integration involves the development of new forms of complex polity. So, for example, in the breakthrough years starting in 1989 post-communist Central and Eastern Europe joined the EU, and the other European and North Atlantic institutions. There was no equivalent to European Union for South Africa, but certainly one of the distinctive features of the South African constitution is the explicit role it gives to international law. So limits to state sovereignty are written into the South African Constitution, too.

South Africa and Europe are part of the same global project of developing new forms of complex polity, integrating the state into a thicker web of law. They are also both parts of the global project of human rights. Here the South African Constitution and its Constitutional Court have gained some prominence, especially in the way social and economic rights are handled.

South Africans speak of having a transformative constitution. The author of *Socio-Economic Rights*, a distinguished participant in South African constitutional struggles, paints a project of transformational constitution whose theoretical outlines in politics are defined by various radical and participatory forms of deliberative democracy. But this does not seem plausible. This is a constitution with a central commitment to democracy and human dignity, an explicit opening to international law, and an important role to play for the Constitutional Court. Its project for transforming South Africa is best understood, it seems to me, by observing its roots in the "spirit of 1989."

It is a project that is not at all skeptical about law. It embraces the constraints which constitutional courts inevitably impose on freewheeling democratic processes. Karl Klare may have been the author of the tag "transformative constitution," but, to this outsider at least, Klare's (and Liebenberg's) radical democracy is not really what the constitutional project of transforming South Africa is about.

The notion that radical democracy is South Africa's constitutional project can seem plausible mainly because an alternative is missing in our conceptual framework. If the only form of energetic democracy and civic renewal is the radical form, so be it. But here too recognizing our Missing Alternative can make a big difference. It is a more plausible candidate for the best account of South Africa's transformative constitution. This constitution is not really post-liberal. It is liberal and social democratic, and in some ways conservative, drawing on and renewing important African traditions. It is, in short, a hybrid, with its roots in "the spirit of 1989."

It is one of the prime locations in which the global constitution's commitment to human rights, human dignity and new complex forms of justice is elaborated. In South Africa's struggle to develop and articulate the project of human dignity, we are not going to be helped by Habermasian radical democratic agnosticism about the content of the ideal of justice. It would be better to articulate a theory of justice that codifies a complex set of constraints on democratic processes based on human dignity. The practice of constitutional courts around the world, but perhaps especially the practice of the South African Constitutional Court, can provide us some guidelines about what such codification would look like.

I find persuasive Andrew Clapham's formulation of the four dimensions of human dignity, giving rise to four principles: prohibition of humiliation, equality of autonomy and respect, the provision of fundamental needs, and the protection of what gives lives meaning.⁴ With that formulation as a starting point, we can construct a theory of justice with four principles, not the two characteristic of recent liberal egalitarianism (Rawls most famously). And we can establish priorities among them in ways more flexible than Rawls's lexical priority — through limitation clauses. So I would suggest this: a complex conception of justice favors the division of human rights into categories based on the four dimensions of human dignity, and it favors replacing general limitation clauses with dimension-specific limitation clauses. As it turns out, this reflects the South African constitutional practice, if not the text.

The protection of rights in South Africa is subject to a general limitations clause (Article 36), but the key rights guaranteed in Article 26 (Housing) and Article 27 (Health care, food, water and social security) are also subject to Article 26.2 and Article 27.2 respectively, which both read: "The state must take reasonable legislative and other measures, within the available resources, to achieve the progressive realization of this right."⁵ In practice it is 26.2 and 27.2 that constitute the effective limitation clauses for these rights, added to the general limitation clause. The strongest justification for this practice, I suggest, is that it reflects the priorities of the underlying complex ideal of justice. In effect those dimensions of human dignity subject to the protection of the general limitation clause are given higher priority than those subject to 26.2 and 27.2.

A complex polity, a complex demos, a complex justice: those are the central features of a new moderate constitutionalism, and of a new moderate form of the project of civic renewal. This is The Missing Alternative, an alternative to both liberal

4. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 545-46 (2006).

5. See S. AFR. CONST., 1996.

constitutionalism and to various forms of radical democracy. It is a project worth supporting, worth articulating, and also worth recognizing, even if you do not support it, to help us understand some of the novel features of the law and the politics of the last decades.

