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The work of Martin Krygier addresses many of the central intellectual and political issues of our times – the role of the state, the tragedy of genocide, the need for democratic institutions, and the paradoxical importance and irrelevance of law and legal institutions. The rule of law and constitutionalism, and the struggle to embed these ideals in societies post-communism, has occupied much of the thinking of Martin's work.

I. From Academia to the World

The versatility of Martin's work is evident in its reach beyond the confines of academic theory to constitutional and political practise. One example is Martin's role and leadership in the Australia-Myanmar Constitutional Democracy Project ('the Project'). The Project integrates research on the rule of law, constitutionalism, human rights and constitutional courts of a team of academics: Martin Krygier, Theunis Roux, Adam Czarnota, Wojciech Sadurski, Catherine Renshaw, and Melissa Crouch. Beginning in 2013, this educational program was designed for those involved in the development of constitutional democracy in Myanmar. This project was initiated at the request of Aung San Suu Kyi, of the National League for Democracy, and her concerns to enhance constitutional literacy and promote legal reform in Myanmar.

The Project aims to directly increase the capacity of local actors to participate positively in the process of constitutional reform in Myanmar. It does this by bringing together diverse groups within society – ethnic communities, grass-roots organisations, political leaders, members of the media, lawyers, judges and academics – and provide a forum to discuss critical issues of constitutionalism. In doing so, the Project seeks to expand the constitutional vocabulary of different groups within society through relevant comparative examples and

enhance capacity to contribute to political discourse. It also provides a forum for debate and discussion between groups and actors who may not previously have had opportunities to come together to participate in constitutional conversations. Drawing on the insights of Philip Selznick into the pursuit of valued ideals (Krygier 2012), the Project extends the teaching of academics beyond the university classroom into global sites of social need.

In these workshops, Martin would begin with a story drawn from his classic work, *Civil Passions* (Krygier 2005). Among the most relevant is his story of the door in the field – if there is a field and a door stands in the middle of it, who would bother to walk through the door? The image of the solitary door in a field emphasise the challenges of encouraging adherence to law in a context where it makes little sense to follow formal state law. His reflections lead to substantive considerations of the idea of constitutionalism and its relevance to the present.

II. On Constitutionalism

Martin's teaching and advocacy is drawn from his impressive body of scholarly work. An example of his work on constitutionalism is his piece 'Is there constitutionalism after communism?' (Krygier 1996–1997), in which he reflects upon the nature of constitutionalism and the extent to which it is possible to have constitutionalism after authoritarian rule. While Martin's work primarily refers to the post-communist societies of central and eastern Europe, it bears relevance to a range of other contexts that find themselves in the midst of a political transition, including Myanmar.

A central question of constitutional theory is the nature of constitutionalism and the relationship between constitutionalism and democracy, and by extension critical ideas of our times such as the rule of law and human rights. The predominant view of constitutionalism is the normative liberal legal view that assumes constitutionalism is inseparable from the liberal democratic state. As Martin has put it, on this view, the liberal institutions associated with constitutionalism are primarily defined as constraints on public power. That is, features such as bills of rights and constitutional courts, and principles such as the separation of powers, function to limit public power (Krygier 2005, p. 184). This constitutes a negative view of constitutionalism, one that primarily operates as a constraint on the improper exercise of power.

Another way to understand constitutionalism as limits is to also recognise the enabling function of constitutions and what is made possible when power is limited. Constitutions facilitate the role of political institutions. Constitutions offer a political road map and confer power on a range of institutions. With reference to Holmes, Martin acknowledges the idea of

positive constitutionalism to capture the reality that constitutions do far more than simply constrain power, but also channel power (Krygier 2005, p. 184). On this view, the constraints imposed by positive constitutionalism are viewed as empowering. This construction of power in a constitutional democracy is understood to be for democratic and liberal ends.

In more recent work, Martin defines constitutionalism in this way:

“Constitutionalism, as the name suggests, focuses on the ways the exercise of public power is constituted, made up. It is an ideal having to do with the legal architecture and frame of a polity, its institutional design, foundations, structure, as well as the character of its major institutions and their occupants, their interrelations among themselves and with the subjects of power.” (Krygier 2017, p. 38)

On this perspective, Martin combines the structural features of constitutionalism that facilitate limits on power, with its potential to determine and oversee the relations between branches of government and the very substance of these institutions.

In many respects, Martin’s work on the challenges posed by constitutionalism after communism are in response to the realities of authoritarian constitutionalism and its legacies. Constitutions may be used by authoritarian regimes, including communist regimes, to construct and channel power. This leads us to the variations that are the preoccupation of scholarship today, such as authoritarian constitutionalism and illiberal constitutionalism. Martin’s work has been one of envisioning and imagining both the potential and limits of constitutionalism post-communism, while acknowledging that constitutions are used by communist regimes to entrench their power. Martin’s view of constitutionalism is a socio-legal one that emphasises the importance of context and local perspectives.

III. Constitutionalism after Authoritarian Rule

Considering that communism is in effect a form of authoritarian rule, Martin’s work on constitutionalism after communism also sheds light on other kinds of post-authoritarian regimes. Martin identifies two trends among scholars who consider whether it is possible to speak of constitutionalism after communism: institutional optimism and cultural pessimism (Krygier 1996–1997). Martin notes both the limitations and insights of these views. The first, institutional optimism, focuses on the promise of institutional design and foreign models, but often overlooks cultural specificity. He criticises theorists of constitutionalism whose

“underlying social theory is individualist, their mode of procedure is rationalist and their ambitions are literally unbounded” (Krygier 1996–1997, p. 23). His concern lies in the fact that a sole focus on institutional design does not require one to know anything about the society that is the recipient of foreign or expert advice. He calls for cultural sensitivity, but is quick to acknowledge that this is not the same thing as cultural determinism.

The second view, cultural pessimism, is premised upon scepticism of the potential of legal transplants. For Martin, constitutions need viable and functioning institutions to embody “the spirit of constitutionalism”. Often, models can be found in other contexts. He notes that institutions of the rule of law are often foreign to post-communist societies and efforts at reform must go beyond a simple universalism that remains at odds with the local context.

In many ways, Martin’s work calls us to acknowledge the ways in which the past lingers in the present and influences the present. Constitutionalism after authoritarian rule is a challenge. Neither institutional optimism nor cultural pessimism alone are sufficient to generate and foster a culture of constitutionalism after authoritarian rule. Contemporary Poland attests to this.

Martin calls for a constitutionalism of moderation, which is more than just the constraint of the egregious exercise of power. As he suggests:

“Many aspects of both constitutionalism and the rule of law are intended to encourage such virtues of moderation and thoughtful self-knowledge, not merely to curb wild power. They are encouraged by constitutional and rule of law practices and institutions, not contained or constrained by them.” (Krygier 2017, p. 47)

There are different kinds of power, and a flat view of constitutionalism as a limit on power fails to recognise these differences. Martin’s work calls for a view of constitutionalism as tempering power. He is under no illusion of the damage and hurt caused to people and societies by unbridled power. As he notes “Keeping evil in mind locally requires attentiveness to domestic complaints of evils done and harms inflicted, paying particular heed to the perspective of the people who have been hurt” (Krygier 2005, p. 153). But he also works and writes in the hope that constitutionalism can create the conditions necessary for democratic dialogue in society.

This leads us back to the case of Myanmar and other countries that have yet to make a full transition from authoritarian rule. Building constitutionalism is hard work. It takes years if not generations to foster and renew understandings about the use of law or the legitimacy of legal institutions. Yet Martin’s work suggests that this is work that is intrinsically worthwhile

and primarily an effort based on local knowledge. This is not to say there will not be setbacks, and certainly there is a sense of collective despair at the contemporary direction of both Poland and Myanmar. Yet Martin's recent collaborative efforts in Myanmar embody his claim that the rule of law and constitutionalism cannot be left solely to lawyers. Perhaps therein lies our hopes for the future of constitutionalism after authoritarian rule.

Reference List

Krygier M (1996–1997) Is there constitutionalism after communism? Institutional optimism, cultural pessimism and the rule of law. *IJS* 26(4): 17–47

Krygier M (2005) *Civil passions: selected writings*. Black Inc, Melbourne

Krygier M (2012) *Philip Selznick: ideals in the world*. Stanford University Press, Stanford

Krygier M (2017) Tempering power. In: Adams M, Meuwese A, Hirsch Ballin E (eds), *Constitutionalism and the rule of law: bridging idealism and realism*. Cambridge University Press, Cambridge, pp 34–59