

# BOOK REVIEWS

## CONSTITUTIONAL IDOLATRY AND DEMOCRACY: CHALLENGING THE INFATUATION WITH WRITTENNESS

(EDWARD ELGAR, 2020) ISBN 9781788971102 E-BOOK, 210 PP

BY BRIAN CHRISTOPHER JONES

This thought-provoking book by Brian Christopher Jones entitled *Constitutional Idolatry and Democracy* begins by retelling the moment when, during the highly disputed election period of 2016 in the United States of America, an elector waived his pocket-sized *United States Constitution* before Donald Trump. The gesture was a symbol. A silent but taunting manifestation against the president-to-be, and his supposed lack of understanding of the Nation's 'most sacred values and principles'.<sup>1</sup> The whole scene and the events that followed (including the spike in sales of pocket Constitutions) were an expression of a deeper sentiment common, but not exclusive, to the United States: *constitutional idolatry*.

Constitutional idolatry is defined in the book's first pages as 'drastically or persistently over-selling the importance and effects of written constitutions'.<sup>2</sup> The broad definition is intentional. It recognises a plurality of forms of idolatry, worship or veneration of written constitutions. From the definition onwards, what follows is an analysis of why societies have worshipped written constitutions, the motives that first led citizens to use written constitutions as political truncheons, the justifications people have found for venerating the text of the constitutions, and why we must end this idolatry.

The book, albeit written with the context of the United Kingdom's unwritten constitution in mind, is neatly transplanted into the reality of any modern nation-state that claims to be a constitutional democracy. Constitutions cited throughout the book include the written constitutions of the United States, Australia, Germany, Taiwan, South Africa, and Brazil, and the unwritten constitutions of Israel and New Zealand, just to name a few. In fact, to say that the author is merely promoting a defence of the 'unwrittenness' of the United Kingdom constitution would be to miss the point. The main argument presented is that constitutional idolatry has turned the veneration of the text of the constitution and its interpretation by the courts into the ultimate representation of a genuine constitutional democracy when, in fact, the Westminster system provides for

---

<sup>1</sup> Brian Christopher Jones, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness* (Edward Elgar, 2020) 1.

<sup>2</sup> Ibid 2.

more effective use of public powers coupled with a more complete political accountability. What Jones does in this book is to make a bold statement: written constitutions have become idols, and the time is past due for us to put aside the false faith that they are the saviours of society.

In Chapter 1, the author invites us to acknowledge that constitutions have become the rule in Western societies today. The written constitution phenomenon occurs not only because of the symbolic side of constitutions in representing certain values and aims of a particular political community, but also because they simply look good. Constitutions have a sort of 'aura of magic' that allure the citizenry.<sup>3</sup> They have a political and cultural significance that often supersedes their legal relevance. Whereas written constitutions have become associated with modernity and innovation, their absence is now taken as indicating antiquity and staleness. But this is an unfounded belief. Thus, the quasi-sacred role of constitutions in society forms the essence of constitutional idolatry.

Notwithstanding their high regard, constitutions are not easy to define. There are still controversies about the nature of constitutions, particularly of the unwritten ones (a controversy that the author refers to throughout the book in terms of constitutions with or without a capital 'C'). Moreover, Jones draws an analogy between constitutions and complex cog machines (such as the one on the book cover): one can understand the importance of the machine's individual pieces, but one cannot fully comprehend the complexity of the whole system by consulting those pieces alone.

Constitutional idolatry serves, at least, to inspire the citizenry to pursue a better society. That is the main point of Chapter 2. Although the veneration of constitutions is generally deleterious, the author argues that some benefits are still identifiable in certain tenets of constitutional idolatry. For him, the community's engagement with the political process as a unified body, a will to understand democracy and its effects, and a growth in interest and participation of the individuals in the common life of the state are all possible good effects of worshipping the text of the constitution. These benefits, however, only exist to a limited extent: the negative side-effects of constitutional idolatry far outweigh its benefits.

Written constitutions can be regarded as educative tools, but they do not determine the overall knowledge of a society's public power mechanisms and political institutions. As Jones argues in Chapter 3, constitutional idolatry does not produce a deeper civic education in the people. The veneration of the text of the constitution is incapable of guaranteeing an advanced knowledge of the political structures of society. On the contrary, the author draws our attention to research that demonstrates how individuals in countries with written constitutions may have a worse understanding of their constitutional apparel

---

<sup>3</sup> Ibid 7.

than those in countries with non-codified constitutions. Indeed, the idea that written constitutions serve as a significant educational device is misleading. As the author says, 'idolisation does not equal knowledge'.<sup>4</sup>

In Chapter 4, Jones demonstrates that the reproduction of the expression 'We the People' has also contributed to the widespread idolatry of written constitutions. Whereas individuals in countries with written constitutions with a 'We the People' articulation tend to think they have more political influence and authority than others, the author argues that a genuine instantiation of popular sovereignty is, for example, more genuinely seen in the notion of the United Kingdom parliamentary sovereignty. All in all, enacting a constitution with a 'We the People' articulation as a means of increasing popular sovereignty is a fiction. At most, the expression 'We the People' serves to sell to the citizenry the notion of constitutional supremacy.

The author argues that constitutional idolatry devalues politics and the political process, bringing the true expression of popular sovereignty to its knees. The worship of the constitution subjugates the political realm to the constitutional realm, ultimately rendering the text of the constitution supreme over the sovereignty allocated to the people. In this sense, the 'We the People' articulation seems like a Trojan horse.

Furthermore, Jones argues that, with the lower ranking of statutes and legislation to the detriment of the supremacy of the constitution, comes an infatuation with the role of judges and the judiciary. The result is a perpetuation of some sort of 'juristocracy' — an overvaluing of the text of the written constitution, and diminished powers of the people. Consequently, we seem to be treading a nefarious path: the 'We the People' articulation increases the veneration of the constitution; which leads to regarding the constitution as supreme; which, in its turn, strengthens juristocracy; and that, finally, reinforces the idolatrous stance. Thus, it is a vicious cycle.

Another question raised by the author is whether written constitutions and bills of rights can inspire and invigorate democracies. The answer is quite surprising. Although it is possible that constitutions and bills of rights might enhance a citizenry's perception of democracy, in some cases they are hindering factors. Chapter 5 explains how Jones has arrived at that conclusion. The author identifies a number of cases that make the reader question the widespread feeling that written constitutions are bulwarks of individual rights.

Perhaps one of the biggest myths arising from the conception of constitutional idolatry is the belief that having a 'good' constitution is essential for society. Jones does not deny the significance of written constitutions in directing the political community, and he is clear in saying that he will not

---

<sup>4</sup> Ibid 44.

propose a full-fledged challenge to that thought. However, what he does criticise in Chapter 6 is the suggestion that not having a constitution would make a country unprosperous or unable to pursue democratic ends.

The worship of constitutional texts has led to the impression that a 'good' constitution has a good balance of powers or a list of rights. But history tells us that 'poor' constitutions have also thrived. Why? Jones presents us with the reasons for such a distorted perception about 'good' and 'bad' constitutions. While constitutional scholarship has focused on identifying the elements of 'good' constitutions, 'the single most important factor that determines whether a constitution succeeds or fails is a human element: the degree of commitment to the bargain'.<sup>5</sup> In touching on the legitimacy aspect of constitutions, the author reminds us that legitimacy is not something that simply leads to an enhanced commitment of the citizenry to the constitution.

One of the examples in Chapter 6 is the protection of rights in Australia. As the author says, 'by contemporary standards Australia's Constitution is deficient' because it 'remains the only democratic nation without an entrenched bill of rights or human rights statute at the federal level'.<sup>6</sup> Jones, however, shows that this 'poor' constitution is not insufficient at all. According to research, Australia is among the top three countries in the world in achieving the highest standards on freedom, political rights, and civil liberties. This is not to say that Australia is immune from difficulties. On the contrary, it is clear that Australia has mismanaged the rights and freedoms of groups of people, especially First Nations peoples. Nonetheless, Australia provides more rights and freedoms than many countries with 'good' constitutions. The argument of an Australian exceptionality is taken into consideration but rejected by the author when he analyses the case of Australia against those of the United Kingdom and New Zealand. In sum, he demonstrates that 'unwritten, partially written, and un-entrenched constitutions can still succeed, even thrive, in contemporary times'.<sup>7</sup>

In Chapter 7, Jones makes a case against the use of the term 'constitutional guardian'. This is, in his opinion, one of the forms of constitutional worship. As he argues, this is a factional, overly paternalistic way of shielding the citizenry from participating in genuine constitutional ownership. He takes a strong position against the juristocracy that flows from an unconditional veneration of the constitution's text. Jones is sceptical about empowering the judiciary, even if by the continuous use of the language of 'constitutional guardianship' so present in today's legal environment. Ultimately, the judiciary as 'constitutional guardian' becomes solely responsible for upholding the values and norms of society. The people, as the true benefactors of the political community, delegate

---

<sup>5</sup> Ibid 114.

<sup>6</sup> Ibid 125.

<sup>7</sup> Ibid 129.

their responsibility to the courts. Instead of potentializing democracy, societies with a 'constitutional guardian' discourse may subject their people to a purely judicial interpretation of their constitutions.

The book's final proposition is that constitutional idolatry puts too much weight on historical modes of interpreting the constitution. Consequently, there is a devaluing of the need for constitutional maintenance through constitutional amendments. In Chapter 8, the author posits that one should value regular, practical constitutional change over the 'constitutional moments' (an idea that views constitution-making as superior to the realm of ordinary politics). This is another of the author's position against the conception of constitutional idolatry. The constitution is not an untouchable, sacred instrument: 'no part of a constitution is too delicate, too special or too integral to the constitutional system, to be changed'.<sup>8</sup>

One does not have to agree with all of Jones's arguments to recognise the relevance of this work. The author uses interdisciplinary research, case law analysis, historical investigation, knowledge of contemporary sources of constitutional law scholarship, and comparative constitutional methodologies to arrive at his conclusions. Overall, he prompts us to question whether written constitutions matter, and if they really shape people's lives, as much as we think they do. Perhaps even more importantly, he makes us wonder: 'do written constitutions fulfil the lofty promises provided by many of their advocates, or are they more akin to being the false gods of the legal and political realms?'.<sup>9</sup> As Jones observes, there are many substantive reasons not to put one's faith entirely in the written constitution. That should be the case for all, unless the conventional wisdom is so tempting that one cannot help but fall into the sin of constitutional idolatry.

*Renato Saeger M Costa*  
*Casual Academic and PhD candidate*  
*TC Beirne School of Law*  
*The University of Queensland*

---

<sup>8</sup> Ibid 172.

<sup>9</sup> Ibid 11.