



## *Book Review:*

### *Courts in Federal Countries. Federalists or Unitarists?*

**Book Review: Nicholas Aroney and John Kincaid (eds), *Courts in Federal countries. Federalists or Unitarists?* (Toronto Buffalo London, University of Toronto Press 2017) 583 p., ISBN 978-1-48-750062-7**

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Over the past 20 years, there have been indications that scholarship on comparative judicial practices is undergoing intellectual revision. Besides disciplinary boundaries becoming more blurred, there is a drift toward studies of 'dialogue', not only between courts, but also between courts and politics. The most notable study involving this subject thus far is Tim Koopmans' groundbreaking *Courts and Political Institutions* (Cambridge 2003).

*Courts in Federal Countries: Federalists or Unitarists* charts a new course to this brand of scholarship. Nicholas Aroney and John Kincaid's collection of essays aims to add greater insight into the role of judicial power in relation to federalism. To that extent, this book examines whether high courts in federations lean in a unitary direction by stimulating the powers of the general government, or in a federalist direction by fostering powers of – what is in a name – regions, cantons, Länder, or provinces.

A great part of this latter task is left to Aroney and Kincaid, who summarise, compare, and analyse the work of the collection's contributors in their conclusion. They observe that the predominant leaning of 11 of the 13 selected high courts has been in favour of the general government – although no contributor explicitly frames his or her high court in this way.

While Aroney and Kincaid intimate that this might have something to do with the design of the particular constitutions, they draw our attention to the importance of attending to the basic constitutional foundations of each country's federal system. The point is made that these conceptions, underlying the federal polity, are important in shaping the orientation of courts in a federalist or unitarist direction. These conceptions are influenced by history as a path-dependent evolution or revolution ('Never again!'), formation by integration or devolution, cultural and political homogeneity or heterogeneity, constitutional and institutional structures, and legal traditions and culture. The primary finding of this comparative analysis is that the courts in most of the selected federations do not regard federalism as especially important. Surprisingly, federalism is, except for in Switzerland, little more than an instrumental value.

In this context, the present volume is indeed a welcome addition to existing literature. Peter Russell, as stated in the foreword of the collection, makes a plausible case that modern scholarship failed to focus adequately on courts and federalism. Yet it would be a mistake to suggest, as he does, that scholars have not examined this connection. *Courts in Federal Countries: Federalists or Unitarists* resonates rather strongly with Edmond Orban's foundational collection of essays *Fédéralisme et Cours Suprêmes* (Bruylant Presses de l'Université de Montréal, 1991).

The collection under review, however, widens the angle of coverage. Analysing a wide array of themes, the individual contributions address a common set of questions with an impressive geographical reach. They all analyse the evolution of the particular federal system, the mode of the constitutional delineation of legislative, executive, and judicial powers, the country's court system, as well as its broad legal traditions and judicial culture, and the influence and importance of the courts within the federation. These essays are straightforward articles that easily stand on their own.

Not all of the contributors are in agreement, however, on questions of definition. The volume lacks methodological coherence. For example, the paragraphs on judicial culture form a mixed bag. Some of the contributions regard the concept as an invitation to study judges. Others present the concept in a more broad way: judicial culture as a shared idea — the image of the role of the judge in society. While there might be some truth in using both characterizations, it makes it relatively hard to facilitate comparison.

The book contains 13 essays, written by scholars from all selected countries, stretching from Australia to Belgium, and from Ethiopia to Canada. This very wide range of federations enables the analysis of judicial power in relation to federalism in the most general way. The cases which the contributors researched include, for example, cultural heterogeneous versus homogeneous countries (e.g. India versus Germany), common-law versus civil-law systems (e.g. U.S. versus Mexico), established versus

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emerging democracies (e.g. Switzerland versus Nigeria), and quasi-federal systems (Spain and South-Africa). This angle rescues this research from a narrow Western focus and allows for new reflection and, in doing so, makes a significant contribution to the existing literature.

Yet such a broad approach runs the risk of diluting the contextual position of courts and, moreover, attaching too much relevance to the term federalism. The concluding observations are not in dispute, but more equal cultural comparisons would have allowed a more precise assessment of the nature, meaning, and relative importance of the role of judicial power in relation to federalism.

None of this is entirely new for the editors. Aroney and Kincaid argue in their conclusion that the variations in approach displayed by courts can be explained by the courts' legal and institutional context. They note that 'history admittedly covers a broad swathe of explanatory terrain' and 'there is, as a consequence, a kind of path dependency at play in many cases'.

Maybe a tantalizing example of such path dependency concerns the fact that the only high courts described as being consistently balanced between centralisation and decentralisation are those of Belgium and Germany. The question arises whether this is because of their shared northern continental legal cultural background? Perhaps it is, perhaps not. In other words: the problem with the chosen broad approach is that it is very difficult to untangle the relationship between courts and federalism from the economic, social, and cultural processes occurring simultaneously.

This is not to say that the countries analysed in this collection are irrelevant. Several essays warrant special attention. Suberu does a masterful job explaining how the Supreme Court of Nigeria functions as an arbitrator between the federal government and the states, and the oil-producing states and non-oil-producing states. Hessebon and Idris offer, among other things, a thoughtful account of the political and sociological reality of the new Ethiopian constitutional order after 1994, in which there was a huge gap between those who were framing the Constitution and those who staffed the judiciary. These constitutional systems, which have been insufficiently researched in the past, give intriguing insight into the relation of constitutional courts and the conflicted constitutional status of local governments in Africa.

In a more traditional vein, Casanas Adam (Spain) and Brouillet (Canada) offer clear insight into how a relatively centralised constitution can be federalised over time. And, even if the story is familiar to scholars acquainted with the literature in German, Benz gives a good overview of how institutional structures of German federalism have contributed to make the German Federal Constitutional Court a key player in politics.

Regardless of the described omissions, those interested in courts, federalism and comparative law will find in *Courts in Federal Countries* much of value. This rich account is likely to become a touchstone for future debates about the nature of courts in federations.

