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REVIEW

The Foundations and Traditions of Constitutional Amendment

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Richard Albert, Xenophon Contiades & Alkmene Fotaidou (eds.).

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Foundations and Traditions of Constitutional Amendment is undoubtedly a thought-provoking book edited by Richard Albert (Boston College Law School), Xenophon Contiades (Panteion University of Social and Political Sciences; Centre for European Constitutional Law) and Alkmene Fotaidou (Centre for European Constitutional Law).

To better understand what a book is, it is sometimes important to point out what a book is not. Hence, this book is not an ungainly *bricolage* of random papers, but rather the most accomplished project of comparative constitutional amendment of the past few years. The embryonic stage of the book can be traced to a reflection about Comparative Constitutional Amendment, held in May 2015 at Boston College Law School. The discussion continued outside the workshop and resulted in 20 fascinating essays, which offer a solid and comprehensive inquiry into the historical evolution and the current challenges of amendment rules.

The *vexata quaestio* of how to balance an old constitutional text with new historical, societal and political scenarios has occupied the mind of legal and philosophic scholars for decades. One can remember how Karl Löwenstein, in his famous book *Verfassungslehre,* tried to discover the "magic formula" of a lasting Constitution. Löwenstein's perception of how a constitutional text can lack normative content and have no strength to block the violation of fundamental rights encouraged him to develop the theory of the normative force of the Constitution.

However, nowadays, the possibilities and limitations of constitutional design may be broader than in the last century. These motivate us to reflect upon the Constitution and its essential values. Although informal amendment has received substantial attention, there is an upsetting lack of profound studies on formal amendment and its implications (David Kenny, Kate Glover, Lael K. Weis, Richard Albert and Oran Doyle). One of the many merits of this volume is precisely a far-reaching commitment to formal amendment possibilities and limitations.

Another merit is the voice given to new comparator legal systems, which gives attention to a sometimes hidden cross-border interaction between either new or well-established jurisdictions. As Laurence Tribe eloquently wrote in *The Invisible Constitution*: "the long-run costs of wearing global blinders – and even of pretending to wear them while in fact peeking across the seas (…) – would outweigh the short-term tactical gains of mollifying those who fear that such glances at other lands are but the harbingers of an abandonment of our sovereignty and of our exceptionalism". In confirmation, Otto-Brum Bryde, former Justice at the German Federal Constitutional Court, held that even jurisdictions from consolidated democracies and with highly respected constitutional courts should benefit from legal comparison.

The fact that the editors have explicitly chosen to trace relevant developments in comparative public law regardless of the State's constitutional popularity (if one may even use that expression) is a form of intellectual humbleness that must be praised and pursued.

The book is divided into two parts: Part I: The Foundations of Constitutional Amendment; Part II: The Traditions of Constitutional Amendment. The first part develops the underpinning elements of constitutionalism. The second part explores the traditions of constitutional amendment, by means of several comparative studies.

An endogenous feature of Law is that its object tends to focus on a limited time horizon: the near past, the present and the immediate future. As Peter Häberle and António Castanheira Neves once described, this temporal trait is especially evident in constitutional lawmaking, since constitutions share static and dynamic characteristics. In a retrospective view, the Constitution aims to maintain historical heritage. In a prospective look, the normative force of the Constitution has an umbilical connection with its openness to adapt to the evolution of the constitutional reality.

For this reason, constitutional-makers should try to undertake a task of *actio in distans*, seeking to concentrate their normative efforts not only on their foreseeable "people", but also keeping in mind the future generations. Still and echoing Gianluigi Palombella concern, the main question remains unanswered: why are present and future generations bound to comply with rules dictated by "a dead people"?

If, in fact, as Thomas Jefferson famously observed, "the earth belongs to the living", then one should not be surprised that constitutions as intergenerational pacts struggle with inevitable asymmetrical ponderation. Like other legislative acts, constitutions also reflect the endogenous day-to-day reasoning that characterises democratically approved laws. Democracy is a *pro tempore* phenomenon which envisions the possibility of political, idiosyncratic or societal change. At the same time, constitutional design is not immune to synchronic reasoning, therefore favouring present generations, to the detriment of future ones.

As Xenophon Contiades and Alkmene Fotiadou very eloquently wrote, "the fragile balance between constitutionalism and democracy is constantly reassessed through constitutional amendment, which is an ongoing attempt to reconcile the two". Sofia Ranchordás argues that the "legitimacy of this inter-temporal binding" will depend on the willingness of the constituent power to dialogue with the future generations. One possibility that should not be immediately rejected is the contribution of sunrise clauses, which allow constitutional contingency.

The seminal distinction between primary and secondary constituent power is revisited (Luisa Fernanda García López, Thomaz Pereira and Zoran Oklopcic).

In response to the democratic paradox of unamendability, it is stressed that neither the Constitution nor the unamendability clauses themselves can block the primary constituent power and its sovereignty (Joshua Braver, Mark Tushnet and Yaniv Rosnai). Despite the "seduction of constitutionalism" (Juliano Zaiden Benvindo), the constitution is not just a precious piece of paper and should also be perceived through tridimensional lenses, which include constitutional reality and constitutional values as well.

Furthermore, the paradox of constitutionalism ought to be seen as a (semi) conscious rejection of "alternatives to the vocabulary of peoplehood" (Zoran Oklopcic) and attention should be given to the extent to which constitutional constraints disempower current majorities in favour of former generations (Oran Doyle). Keeping in mind the idea of "the people", Jean-Phillipe Derosier suggests a distinction between the social people and the legal people.

Yet this puzzling constitutional challenge lies in the definition of "the people" and in the fact that the ethereal and mythical concept of "people" asks for some palpable content. A potential dialogue between the real people and the imaginary people can be achieved through inclusive participatory mechanisms (Jurgen Goossens and Yaniv Rosnai).

In an innovative perspective, Yaniv Rosnai states that constitutional amendment powers should not be regarded in a binary perception (limited or unlimited), but as a spectrum of scope: the more/less the democratic traits of the amendment power resemble those of the primary constituent power, the less the democratic power should be bound by limitations. Thus, the democratic consistency of primary constituent power is inversely related to the breadth of legislative constraints and judicial scrutiny.

Xenophon Contiades and Alkmene Fotiadou sustain that empirical studies and the use of metrics in the field of constitutional amendment should be interpreted *cum grano salis* and attention should be given to the specific constitutional culture. For this reason, constitutional quality cannot be measured simply by its low amendment rate, frugality or even by its duration.

Adopting a different perspective, James E. Fleming argues that the goal of constitutional amendment is to correct imperfections of a given Constitution. In this sense, a frequently amended Constitution is far from being a good one. In many African States, constitutional amendments were instrumentalised for securing an immediate political advantage (Duncan Okubasu). In an interesting study about the Commonwealth Caribbean, Derek O'Brien stresses the relevance of culture as resistance to constitutional change.

Concerning aspirational constitutions, characterised for having a generous and exhaustive fundamental rights' catalogue, this kind of prolixity can lead to restriction of governments' freedom of action or to an uncontrolled judicial

activism. If the constitutional text is a kind of *totem* which regulates everything until exhaustion, it is the Constitution itself that is at stake. We can, thus, infer that the normative force of the Constitution is intrinsically related to the idea of essentiality.

To conclude, we agree with Richard Albert's clairvoyant observation that constitutional amendment scholarship should be equally devoted to formal and informal amendment, to their interaction, "and also to the costs and consequences of privileging one over the other".

As the brilliant Portuguese poet Fernando Pessoa once wrote: "every gesture is a revolutionary act". Clearly, at the end of the book one is left with the certainty that its open-minded and enriching ideas will have a significant, positive impact in comparative legal scholarship. For the present reviewer, it has been an enjoyable learning experience which reveals with admirable clarity and accuracy the challenges of constitutional amendment as a distinct field of study in public law.