

*Dawn Oliver and Carlo Fusaro (eds), How Constitutions Change: A Comparative Study*, Oxford: Hart publishing, 2011, pp. 510.

The question of how constitutions change lies at the core both of the practice of contemporary constitutional democracies and of the related theories. These democracies have abandoned the pretention of founding the polity on eternal and perfect constitutions, thus admitting different kinds of constitutional changes. On the other hand, constitutions are believed to prevail over the laws, not necessarily and not just on procedural or formal grounds, but because of the presumption that the laws, being the contingent product of a certain political majority, should not encroach constitutional principles and rules that are intended to endure through diverse generations, although not in perpetuity.

It should also be recalled that, in the practice of these democracies, the exertion of fundamental rights is inextricably connected with the democracy's functioning and vice versa, to the point that the latter is unconceivable without the former, and vice versa. Citizens' rights are there recognized outside the realm of politics, and in the meanwhile citizens are provided with the opportunity of ensuring the legitimacy of such realm through the exertion of their own political rights. The spheres of rights and politics are thus both intrinsically connected from the perspective of citizens, and in the meanwhile structurally divided on the ground of the institutions to which such spheres respectively refer to, namely those of the judiciary and of government.

Conversely, these institutions play a leading role in the major constitutional changes, that in most democracies consist in constitutional interpretation and in constitutional amendment procedures, whose dialectical relation engenders shifting balances between stability and change. While courts are empowered to afford interpretations of the text as far as amendments on the matter are not enacted, the meaning of these might in turn be shaped from judicial decisions over time. Such process should be presumed as open-ended, since constitutions fail to designate a depository of the final word. Conflicts opposing constitutionalism to democracy appear then physiological within the framework of democratic constitutions, to the point that genuinely authoritative constitutional interpretations, or decisions, are virtually banned from their perspective.

Furthermore, these conflicts depend on the interplay of the authorities that are variously enabled to pursue constitutional principles, and demonstrate once again that constitutional democracies rely on time. Exactly at the opposite of the 'eternal present' that permeates postmodernity, memories are thus differentiated over time, and transformative virtues and self-correction among citizens are correspondently enhanced, with a view to preparing the future.

The above afforded elements suffice to demonstrate that the question of how constitutions change is likely to be treated on theoretical not less than on empirical grounds, provided that their mutual connection is not neglected. The comparative study edited by Dawn Oliver and Carlo Fusaro is clearly based on an empirical approach. It is structured into three parts, namely the editors' introduction, the analysis of constitutional change in 15 different jurisdictions, 14 states (Canada, The Czech Republic, Finland, France, Germany, India, Israel, Italy, New Zealand,

Republic of South Africa, Spain, Switzerland, The United Kingdom, The United States of America) and the European Union, and the editors' conclusion, comprehending a comparison of the above mentioned practices and a theoretical reconstruction ("Towards a Theory of Constitutional Change").

While the choice of the mentioned jurisdictions reveals the editors' intention of focusing on "liberal democracies" (or constitutional democracies), no reference is made to the reasons of that choice, namely to why these have been preferred to, say, China, or Venezuela, or Iran. These reasons, as well as the success of democracy, should not be taken for granted, in light of the current worldwide flourishing of the so called 'illiberal' and/or 'façade' democracies. And, first and foremost, some reference to that phenomenon would have provided the editors with the opportunity of outlining, by contrast, the main features of liberal democracies, particularly in light of the volume's general issue. Constitutional change acquires of course a very different meaning according on whether general elections are periodically taken but citizens' fundamental rights are not guaranteed, or both these elements are instead recurring.

At any rate, the editors' project consists in identifying: "a) the factors which influence changes to constitutions, and b) the processes and procedures by which change takes place, and to obtain insights into these issues by making comparisons between a range of differing countries and constitutional arrangements. These matters will be influenced by factors such as the existence or absence of an entrenched constitution, the legitimating constitutional justifications that are current in a particular country, the question whether constitutional laws are directly or indirectly effective and the role of 'soft law' in the system" (p. 5). Therefore, the volume is not exhausted in exposing the procedures and devices that drive constitutional change within each country, departing from the difference between countries where the constitution is or is not entrenched (Israel, New Zealand, and the United Kingdom). It also includes the analysis of the factors that are believed to influence such changes, and needs therefore to take account of a huge array of elements.

Accordingly, a conception is afforded of 'constitutional change' that ensures insights into the legal framework and the practice of the countries concerned, and justifies the very choice of devoting a chapter to the EU, that might appear *prima facie* difficult to compare with states. As Renaud Dehousse clearly demonstrates, the EU treaties remain only formally in the hands of the states that have ratified it, since they have been largely interpreted "in the same fashion as constitutional documents, more attention being paid to the integration *telos* than to the 'original intent' of the signatories" (p. 84).

Finally, a comparative account is given of the experiences of constitutional change as singularly analyzed in Part II. A series of distinctions is here made with respect to recurring features of change, namely how and why new constitutions come into being, ideas of sovereignty, the rule of law's conceptualisations, the range of procedural requirements, the role of courts, the function of conventions and practices, the ways of EU Member States' compliance with EU obligations (p. 381).

Most of these distinctions are generally well known, and don't need to be recalled here. An exception should be made for the question of whether "a quest for a perfect constitution" might endanger the constitution's legitimacy. According to the authors, "Problems may arise if a constitution is designed to provide a long term 'perfect' entrenched political programme or manifesto and is not easily amendable". They make the example of the 1948 Italian Constitution, on the premise that it "was conceived as a sacred and virtually untouchable text which was later interpreted by many as setting out the legitimate policies for the country", adding that "the invention of more and more implied limits on possible amendments that have been elaborated in activist or radical interpretations of the Italian Constitution" have further contributed to make it "a target of criticism" (p. 384).

While concluding the volume, the authors insist on the same point: "constitutional patriotism is best served by ensuring that a given set of constitutional arrangements can be adapted and incrementally changed rather than making out of it a petrified object of devotion" (p. 433).

These statements appear abstractedly reasonable. By tightening the procedural requirements for constitutional amendments, or through interpretations of the text aimed at inventing implied limits on these amendment, the "quest for a perfect constitution" is likely to bar the possibilities of legal change, with the effect of paving the way to increasing and unforeseeable tensions between constitutional law and current political and institutional practice.

Unfortunately, this is far from corresponding to the Italian case. The requirements for the amending procedures provided by Article 138 of the 1948 Constitution are not more difficult, and sometimes easier, than those established in the Constitutions of the countries to which the volumes refers to. This is *inter alia* demonstrated from the fact that, in sixty years, the Italian Constitution has been amended more frequently than the US Constitution has been in more than two centuries. Moreover, it remains obscure what "the invention of more and more implied limits on possible amendments" has to do with the country's constitutional situation. The Constitutional Court's reference to "supreme principles" of the Constitution that might function as parameters for reviewing constitutional amendments (see p. 399) does not of course impede these amendments, nor could amount to an "activist or radical interpretation" of the text. And, in the political arena, such interpretation has vanished in the last decades. The fact that the Constitution still remains a field of political battle depends on the parties' instrumental attempts of involving the Constitution into their own games, rather than on the "quest for a perfect constitution".

The further account of the Constitution as a political programme laid down by the Constituent Assembly misconceives the fact that, being deeply divided on ideological grounds, the Framers decided to suspend their discussions on policies and programmes while elaborating the content of the Constitution, with a view to lay down principles and rules capable of enduring beyond the particular contingencies of the time. The practice has fully confirmed the rightness of such choice, with the effect that the Italian Constitution stands among the products of post-World War

II's European constitutionalism as well as those of the democratic countries inserted in the volume's comparison.

My objection does not refer only to the accuracy in describing a certain constitutional situation. To recognize that those European Constitutions express the legacy of constitutionalism even through the changes that they have known presupposes that constitutional change needs to be connected with that of constitutional stability. The question of how constitutions change becomes thus the question of how constitutions succeed, or fail, in maintaining their principles through change.

Such notion appears almost alien to the volume's basic inspiration, its authors being driven by the sole aim of finding out, and analyzing, whichever factor of constitutional change might affect the democratic countries they have chosen to compare. Hence derives a flat exposition of cases and materials, that fails to give some account both of the constitutionalism's legacy, and of whether it is at stake in the first decades of the XXI century.

Cesare Pinelli