

The Relentless and the Unfathomable. Constitutional Amendments in Pursuit of the Constitution's Soul

di *Benedetta Barbisan*

Abstract: L'inesorabile e l'imperscrutabile. Emendamenti costituzionali alla ricerca dell'anima della Costituzione - The article comments on Prof. Albert's book by articulating a taxonomy of some kinds of nature of constitutional amendments, while investigating how the issue of (im)mutability of constitutional provisions affect the consolidation of a specific and peculiar soul of constitutional texts.

Keywords: Constitutional (im)mutability; Paedagogy of a Constitution; Transformative amendments; Soul of a Constitution; Constitutional Amendments.

1. - According to an old joke we are, I'm sure, acquainted with, a patron goes into a library and asks for a copy of the latest French constitution, only to be told that the library doesn't stock periodicals.

It is an old apocryphal anecdote, popular especially in the United States, where they tend to look down on other constitutions with a much less durable lifespan than theirs. But, although disguised behind the frivolity of an old joke, this little story brings to the fore a seminal topic that has accompanied me throughout my reading of Richard Albert's book - and this topic is the relation between constitutions and time.

The aspiration at the infancy of every constitution is to endure – if it's not going to last, there's no point in enacting it – even though Tom Ginsburg has calculated that, since the last scrap of the Eighteenth century, the average duration of a constitution doesn't exceed 17 years. But constitutions are inextricably correlated with time, and it's been with this recurring theme in mind that I went through the captivating pages of this volume. I want to thank Richard for the opportunity he's given me and his readership to enjoy his multi-layered, knowledgeable and eloquent *opus*. Likewise, I'd like to thank the convenors of this book launch Lorenza Violini, Antonia Baraggia, Arianna Vidaschi and Claudio Martinelli for their kind invitation.

Constitutions and time, then. Richard's book is on *how* a given constitution has been altered. I think I subconsciously translated the core question into *why* a constitution is amended. I cannot but merely touch on this colossal matter with few, perhaps rhapsodic considerations. But it's looking through the kaleidoscope of constitutional amendments that we watch constitutions "set in motion", and in this movement we acknowledge

the pursuance of their most foundational, far-reaching aspiration: to “master the time”, to “own the time” so to be able to fulfil their pledges, to connect with the future and eventually last longer than the generation that drafted it.

Mastering, owning the time: how can it be possible to master or own the time which is, *par excellence*, an untameable variable? Let me offer two opposite examples - the extremes of the possible spectrum: on one side, we find the *Erwigkeitsklausel* of the German Basic Law (*Grundgesetz*), the ‘eternity clause’ enshrined in Article 79, para. 3 GG that aims at making “perennial” the federal and social state, Article 1 and the human dignity protected in it, and democracy, rule of law, fundamental rights - all the features of the constitutional state listed in Article 20 GG. This is the constitutional model that jumps to mind to prove how time can be mastered through *immutability*.

On the other opposite side, there is Article 28 of the 1793 French Constitution: «Un peuple a toujours le droit de revoir, de réformer et de changer sa constitution. Une génération ne peut assujettir à ses lois les générations futures». In this instance, we have a constitutional model that masters the time by the utmost “mutability”.

But what lies in between these two extremes? Richard’s book overwhelmingly, profusely reviews what lies in between. But for the purpose of these few comments of mine, I’d like to linger on three groups.

The first is what I call constitutional amendments serving the *paedagogy* of a constitution. When recently reformers in France deleted the word “racism” from Article 1 of the 1958 Fifth Republic Constitution and supplanted it with the term “gender”, two visions of how paedagogic the French Constitution should be were argued: the critics of the reform, determined to keep ‘race’ in the text to warn the French people against the errors of the past, and the allies of the reform, endorsing its removal to purge the Constitution from an archaic, reactionary legacy. In this case, constitutional amendments serve the objective of keeping on teaching the people, assuming that the constitution ought to be a “perennial source of public education” for its citizens.

The second group entails the “transformative” amendments, those in which “political discontinuity” occurs within a formal or partial or fictitious “constitutional continuity”. These major constitutional transformations are validated by the “sociological legitimacy” of the people that, affirmatively or by acquiescence, accept them. What has happened, for instance, to the 1976 Portuguese Constitution with the 1980s constitutional reforms for its demarxization and demilitarisation, replacing the Council of Revolution with a proper Constitutional Court, is testament to this kind of constitutional amendments.

The third group of constitutional amendments is what I could call, reversing a Latin motto, «I bend but I do not break» (*flectar non frangar*). These amendments are in order to avoid the ultimate failure of the constitution and its final collapse, like the Belgian conversion from unitarism to federalism.

These are only three possible classes of constitutional amendments to illustrate the incessant, multifarious and never-ending mission of constitution to endure and last. But what are these constitutional

amendments in pursuit of exactly? Is it only a matter of lasting for lasting or is there something more?

At some point of the volume, Richard aired that constitutional amendments ‘open a window into the soul of a constitution’. It’s a really riveting notation. Still, I suspect there is even more than that: constitutional amendments “unearth” that soul - a soul that is ancient but possibly new, immanent but shimmering, set in stone but written in water. To paraphrase Oscar Wilde’s striking paradox on fox hunting, constitutions ever move to stay the same: the relentless (constitution) in pursuit of the unfathomable (soul).

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