
Editorial

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This special issue contains a bunch of revised and shortened versions of the keynote speeches presented at the conference ‘Reforma constitucional y defensa de la democracia’, celebrated in Oviedo from 26th to 31st of May 2019 and published in Spanish in the book ‘Reforma constitucional y defensa de la democracia’ by the Centro de Estudios Políticos y Constitucionales. All of this has been possible thanks to the research grant of the Spanish Ministry of Economy and Competitiveness MINECO-18-DER2017-82196-P.

The issue deals from diverse methodological perspectives with a set of aspects related to the constitutional amendment theory and its role for the defence of democratic legal systems. The contributors, a group of nine expert researchers on constitutional theory and comparative constitutional law, seek in their respective papers to bring some clarity to the relationship between the fundamentals of constitutional amendment and the defence of democracy, using for that purpose theoretical, historical and comparative constitutional law approaches.

The first paper of the issue considers that the fundamental theoretical questions that constitutional amendment poses will receive a different answer depending on the formal or material concept of the Constitution used for the analysis. After a critical examination of both concepts and their implications for constitutional amendment, the paper proposes an alternative formal-functional concept of the Constitution as the better way of assessing in modern fully differentiated legal systems the theoretical implications of constitutional amendment. From that perspective it concludes that constituent power and amending power cannot legally be differentiated, that substantial limitations upon the amending power are contingent, that constitutional polymorphism requires derogatory consequences to have legal relevance, and that the role of judicial review of constitutional amendment is only compatible within a formal-functional understanding of the Constitution as an *ex ante* review, but not *ex post* the entry into force of the constitutional amendment.

Precisely in connection with this conceptual dychotomy the second paper of this special issue makes a critical analysis of the so called ‘constitutional replacement doctrine’, a case-law doctrine of the India Supreme Court and the Colombia Constitutional Court, which based on a material concept of the Constitution differentiates between constitutional amendment and constitutional replacement in order to protect what are considered the Constitution’s essential elements (its basic structure), among them democracy. The paper shows critically how this doctrine justifies the power of the courts to *ex post* review the substance of constitutional amendments and so to prevent constitutional amendment power from changing the Constitution’s essence – even when

there are no expressed substantial limitations upon it-, and how by doing so it weakens the Constitution's normative value and thus democracy as one of its legal characteristics.

The third paper considers from the perspective of legal positivism, that democracy is being increasingly protected through complex constitutional design, but that this complexity adds to paradoxically weaken that protection as its standards become ever more undetermined and vaguer. The paper reconstructs the steps of this evolution from constitutional criminal law to constitutional formalisation up to the introduction of higher order constitutional law, getting to the conclusion that what most strengthens democracy may also weaken its working and promote ideological instead of legal scholarship.

The fourth paper deals with the implications for constitutional amendment theory of the so-called 'abusive constitutionalism', which according to the US legal literature often carry out constitutional changes with the aim of undermining democracy. The paper considers that the abuse of democratic procedures with the aim of undermining democracy was already analysed by the European legal scholarship of the 20th century under the concept of 'constitutional loyalty'. By conceiving the abuse of democracy to undermine democracy as a legal infringement of the rule of constitutional loyalty instead, the paper aims at studying whether the constitutional rule of loyalty can also be used to declare unlawful the abuse in constitutional changes and the consequences thereof.

The fifth paper of this special issue focuses on the influence of international human rights standards in constitutional review procedures, by taking the internationalisation of the constituent function as the main premise in parallel with the internationalisation of human rights. With this in mind, the paper scrutinises the positive impact of both universal (United Nations) and regional human rights standards (including comparative approaches to the European and Inter-American human rights) on the adoption of new constitutional provisions (with a special focus on Spain). From this perspective, the paper also emphasises the complementary synergies between international and national jurisdictions as an ordinary mechanism to defend the national constitutional order in the light of international human rights instruments, concluding that, while international human rights standards are modified to adjust themselves to new needs and realities, such external modifications may require at state level constitutional amendments via a positive exercise of the constituent function.

The sixth paper of this special issue starts a row of three papers focused on three different constitutional jurisdictions. This first one analyses the relationship between Article 79.3 of the German Constitution, which expressly bans constitutional amendments affecting 'the principles laid down in Articles 1 and 20', and Article 20.1 of the same constitutional text, which defines the Federal Republic of Germany as 'a democratic and social federal state'. The paper makes an exhaustive and deep review of the German legal scholarship and the Federal Constitutional Court's case-law regarding the understanding of the protection of democracy through the application to constitutional amendment of the eternity clause set in Art. 79.3, as well as regarding its eventual application to the exercise of the constituent power of the German People foreseen in Article 146 of the same Constitution.

The seventh paper, making a huge geographical and legal tradition change, deals with constitutional amendment in Argentina, whose Federal Constitution establishes an extremely rigid amendment procedure that remains unchanged since its original drafting in 1853. The paper highlights how, as a result of this rigidity, there were only three reforms in the 19th century and three more during the 20th century, and how the last amendment of 1994 introduced the maintenance and development of the democratic

system as a material limit to constitutional amendment. Nevertheless, the paper argues that the earth-shattering economic, social and financial crisis faced by Argentina makes these constitutional provisions on democracy look like normative vocabulary of a biblical promised land rather than truly lay and constitutional writings of citizens in peace.

The eighth paper of this special issue remains in the American continent and examines the exercise of original constituent power in Venezuela between 1999 and 2019, through the lens of the classical political doctrine of constituent power, in order to examine its influence in this praxis. In particular, the paper analyses the 1999 constituent experience, and the activation of the original constituent power in 2017 by President Maduro, to finally arrive at the idea that the design of Art. 347 of the 1999 Venezuela Constitution could be at the root of the political-institutional dysfunction the country suffers from today.

Finally, the ninth and last paper of this special issue turns back the sight to the history of constitutional amendment design in Spain and tries to draft three models upon it. The paper shows how constitutional amendment in Spanish History was seen from three different points of view, linked to three different concepts of the Constitution – the Aristotelian, the historical and the rational-normative-, namely: an unawareness about constitutional amendment (Enlightenment); the exclusion of constitutional amendment and its replacement by the exercise of the original constituent power (conservative ideology); and the complementarity constitutional amendment with the exercise of the original constituent power (liberal-progressive ideology).

In sum, we believe that this special issue can help to better understand the theoretical fundamentals of constitutional amendment and its role for the protection of democracy as a major feature of modern constitutional design.