Editorial

Benito Aláez-Corral

Department of Public Law,
University of Oviedo,
Campus del Cristo s/n, Oviedo, 33006, Spain
Email: benito@uniovi.es

Biographical notes: Benito Aláez-Corral is a Full Professor at the University of Oviedo, Spain.

This special issue contains 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.

A group of expert researchers on constitutional theory and comparative constitutional law addresses in eight papers from diverse methodological perspectives a set of aspects related to the constitutional provisions regulating constitutional amendment, its enforcement through judicial review and the role played by all of this for the defence of democracy as a major feature of modern constitutional design.

The first paper of this special issue examines how the constitutional amendment power became an answer to the need to articulate a formula of understanding between the peoples of the states and the federal nation in the first democratic and federal constitution born in history, the US Constitution. The paper makes this analysis based on two main ideas: the first one, the idea that the constitutional recognition of the amendment power replaces the classical right of rebellion – which became a right to secession – of member states with a 'constitutional right to block constitutional amendments', one of the characteristics of federal states. The second idea this paper is based on refers to the affirmation that the state is a reality that precedes and conditions the constitution as a law, which is why implicit limits may be inferred to the power of amendment from this state's pre-existence. The paper, thus accepting the close relationship between the two realities, rejects the differential preference between the two, and constrains the possible implicit limits upon constitutional amendment to what the paper calls 'the principle of congruence': the only acceptable implicit limits are those derived from the democratic nature of the constitution (popular origin of power, separation of powers and fundamental rights).

The second paper of this special issue analyses the role of direct citizen participation in constitutional amendment procedure. The paper, in opposition to a non-legal understanding of people's sovereignty that conceive the people as a real meta-constitutional sovereign, argues that citizen participation – which can take place at the input (deliberation) or at the output (decision) of the amendment procedure – only makes sense if understood as a legal mechanism aimed at reinforcing the sovereignty of the legal system itself.

The third paper of this special issue focuses on three concrete aspects of the constitutional provisions regulating the amendment procedure in the Spanish Constitution of 1978: ownership and exercise of the parliamentary initiative, single reading and urgent procedures, and qualified majorities at the decision stage. The paper argues that if those constitutional provisions aim to be implemented in a truly democratic way, minorities should be integrated in all the stages of the amendment procedure, although not always with the same degree of intensity. Once some deficiencies have been verified *de lege lata*, this paper offers *de lege ferenda* some legal changes such as conferring the initiative to propose constitutional amendments to the same number of members of parliament that hold the legislative initiative; eliminating the special and summary parliamentary procedures when dealing with constitutional amendments; and linking the requirement of qualified majorities to pass constitutional amendments only in those cases which affect the essential elements of the democratic principle.

The fourth paper of the special issue considers the relationship between the principle of equality between men and women within the constitutional amendment power. After revisiting the 'original sin' of the modern constitutional state which, despite its pretensions of equality and universality, excluded women from active citizenship, the paper reviews from a gender perspective the women's participation during the 1977 'constituent assemblies' in Spain and afterwards analyses the main issues that, according to legal scholarship, should be addressed in a hypothetical reform of the Spanish Constitution (1978). Finally, the paper examines to which extent the principle of equality between men and women, currently enshrined in the democratic principle, could be considered as a limit to constitutional amendment.

The fifth paper opens a part of the special issue devoted to the role of judicial review regarding constitutional amendment. This paper concretely examines whether the silent constitutional change practised by constitutional courts when interpreting the constitution is a legally adequate way to manage the tension between the vocation of endurance of the constitutions and the need to adapt to the socio-political changes in their environment. The paper not only argues that it is a hard task to identify the cases in which the constitutional interpretation by the judiciary is actually a silent constitutional change, but also that the literal text of constitutional provisions is the only certain border between interpretation and the silent constitutional mutation by the judiciary. The paper concludes further that the institutionalisation of change through formalised constitutional amendment procedures is the only democratic way to resolve the tension between durability and change.

The sixth paper of this special issue, focusing on Brazil's Supreme Court as case-law study and using rational choice theory, deals with two of the most significant trends in world constitutionalism: the rising power of courts to review the 'constitutionality' of formal constitutional amendments, and political backlashes –- as part of democratic erosion – aiming to curtail court's authorities. The paper argues that the power to *ex post* review constitutional amendments gears the court toward a 'sincere' approach to constitutional adjudication, i.e., allowing the court to primarily decide according to its own policy preferences, rather than an 'insincere' approach, searching for second-best solutions considering possible political overrides and backlashes. Consequently, the paper considers that a court with the final word has less to fear from backlashes and overrides.

The seventh paper of the special issue addresses a subject that, according to the arguments exposed therein, conforms a subtle constitutional paradox: the conceptual tensions in the democratic principle that arise with the creation of an instrument that is as necessary as it is problematic, such as the judicial review of constitutional amendments by a counter-majoritarian body (i.e., the constitutional court). In view of the impossibility to address in a uniform and universal manner the potential compatibility between this judicial review and the democratic principle, the paper argues for an *ex ante* judicial review of constitutional amendments and proposes a gradual or blurred approach to the question, taking into consideration how each constitutional system defines the limits upon constitutional amendments.

Finally, the eighth and last paper of the special issue focuses in the concrete possibilities of judicial review of constitutional amendments by the Spanish Constitutional Court. After explaining that the Spanish Constitution (1978) does not contain any rules regarding the judicial review of constitutional amendments, the paper looks for solutions to this supposed deficiency, by exploring the possibilities of using the existing constitutional review procedures and by keeping in mind that the constitutional self-restrained role corresponding to the constitutional court as a constituted and not constituent body allows only for an *ex ante* review.

In sum, the special issue aims at enriching the theoretical analysis of the legal implications that concrete regulations of constitutional amendment procedures, as well as judicial review of constitutional amendments, may have for the defence of constitutional democracy.