

demarcations. The commitment to an identical analytical framework for most chapters also means that the content is occasionally fairly abstract and speculative. For much of Chapter 2, the conclusion is that international treaties really have very little to say about overlaps and permit them through inadvertence. Similarly certain sub-categories of overlaps (negative and a posteriori in particular) have not been considered by courts or scholars in any detail, yet they appear repetitively across the chapters. However, if one were to approach this as a reference work or something akin to a treatise which is to be dipped into, then these would be unfair criticisms; perhaps that is the intention here. Finally, one prominent and controversial overlap – that of Trade Marks and Geographical Indications, where both regimes regulate the use of geographical signs used in commercial contexts – has been questionably denied overlap status (5). Yet these are minor quibbles as this book will be a genuinely valuable addition to the bookshelves of both practitioners and academics. It responds to a gap in the current scholarship by identifying rules and principles to mediate overlaps, is exceptionally well researched, meaningfully comparative and clearly structured. It should become the established reference point on this topic and one hopes that an updated second edition is being contemplated.

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Dawn Oliver and Carlo Fusaro (eds), How Constitutions Change: A Comparative Study, Oxford: Hart Publishing, 2011, 510 pp, hb £55.00.

In 1895, Charles Borgeaud's *Adoption and Amendment of Constitutions in Europe and America* was published. This ambitious attempt to explore the theory and practice of constitutional amendment in a comparative perspective was welcomed in Britain with great pleasure due to the importance of its subject. In a review of the book, A.V. Dicey contended that 'the plain truth is that a thinker who explains how constitutions are amended inevitably touches upon one of the central points of constitutional law' ('Constitutional Revision' (1895) 11 LQR 387, 388). This is no less true today. The question 'how constitutions change' goes to the core of constitutionalism and democracy. The 'rule of change', to use Hart's terminology, is not merely a technical apprehension of balancing constitutional stability and flexibility; rather it directly implicates the nature of system of government. It touches upon critical topics such as 'sovereignty', 'constitutional rights' and 'judicial review'. It is relevant both to old and new constitutions, monarchical and republican, parliamentary and presidential, federal and unitary, written and unwritten. Raising practical issues as well as theoretical concerns, it goes to the very foundation of any legal system. A great deal could be achieved, then, by a comparative study.

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How Constitutions Change seeks to explore the topic of constitutional change in 15 jurisdictions. More precisely, it aims to identify '(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' (5). Therefore it seeks to explore not only *how* constitutions change but also *why* they change.

The book contains three parts. The first part is an introductory chapter, written by the book's editors. The editors explain what they mean by the book's two main terms, 'constitutions' and 'change'. The term 'constitution' refers not only to a state's 'Constitution', ie the fundamental document, but also to those constitutional rules located in legislation or court decisions in addition to 'constitutional conventions, codes, guidance, concordats and memorandums of understanding which set out how certain aspects of government are or should be conducted' (3). This wide definition is important. Although 'Constitutions' are more easily evaluated and compared, and so simplify the comparativist's work, focusing solely on the 'Constitution' risks telling only part of the constitutional story. The editors' choice to focus on 'constitutions', in the wider sense, is therefore praiseworthy. Likewise admirable is the editors' decision to emphasise 'change' and not solely 'amendments'. Constitutional amendments are those formal textual changes to the document which occur according to the procedure specified in the Constitution. Formal constitutional amendments remain an essential means of constitutional updating, but major – and often more important – constitutional changes also take place outside the formal amendment process, for instance, through judicial interpretations or practice. Lastly, the editors aim to identify a range of pressures, internal and external, for constitutional change. These include internationalisation and Europeanisation, terrorism, religious fundamentalism, migration, and citizen demands (5).

The opening chapter, which consists of three and a half pages, seems a little too concise for such an extensive project. A paragraph on the importance of the balance between constitutional rigidity and flexibility does appear in the final chapter (425), but the book might have benefited from an early discussion on the essential balance between the ability to change constitutions and constitutional stability. An overly flexible constitution puts at risk fundamental constitutional principles and institutions, which might cause instability, uncertainty and undermine faith in the socio-legal order. Although the constitution must be sufficiently stable, there is a general recognition of the importance of allowing constitutions to change. John Locke famously treated the Constitution he drafted for the colony of Carolina in 1699 as unchangeable. Nowadays, any such 'delusions of unamendable grandeur' no longer exist (S. Levinson, 'Designing an Amendment Process' in J. Ferejohn et al (eds), *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge UP, 2001) 271, 272). Constitutions ought to be sufficiently flexible to allow future generations to respond to changes in a society's circumstances and values. Also, there is often a need to correct flaws or shortcomings revealed by time, practice and experience in the constitution. This was Jeremy Bentham's criticism of unamendable constitutional laws in his 'Necessity of an Omnipotent Legislature' (1791). Moreover, the ability to modify the

constitution provides a peaceful method for change without recourse to a forcible revolution. It also preserves the government's legitimacy, for an unchangeable constitution established in the past can scarcely be regarded as manifesting the consent of the governed. Lastly, constitutional change provides flexibility, and flexible constitutions are likely to endure over time (Z. Elkins, T. Ginsberg and J. Melton, *The Endurance of National Constitutions* (Cambridge: CUP, 2009) 81–103). The authors are right to conclude that 'a constitution totally unsuited for changes sooner or later is doomed to become an instrument incapable of serving its purpose, bound therefore to be superseded' (433).

Part Two is comprised of 15 case studies. The jurisdictions covered are diverse: within the European Union one can find a common law country (UK), civil law systems (Germany, Italy, and Spain), a former communist state (Czech Republic), and a Nordic state (Finland). It includes parliamentary systems and a hybrid system (France). One essay concerns European Union constitutionalism. Non-EU case-studies include two countries without a formal written Constitution (New Zealand and Israel), two developing countries (South Africa and India), a presidential system (the US) and three federal systems (Switzerland, the US and Canada).

The chapters are written by eminent constitutional law scholars. Since each author was asked to address approximately 10 issues, ranging from the basic features of the constitutional arrangements to the formal and informal ways by which their constitution can change, some lack of harmony – as can be anticipated in such a project – exists in the style and emphasis of the different chapters. Some are more descriptive than others, some are more theoretical. Overall, they are very well written, informative and useful. The chapter on Canada (Tsvi Kahana) provides a meaningful section on the typology of Canadian constitutionalism. The chapters on Finland (Markku Suksi) and Switzerland (Giovanni Biaggini) are particularly valuable due to the uniqueness of those states' constitutional design and the relatively limited literature on these jurisdictions in English. The chapters on India (Mahendra Pal Singh) and Germany (Jens Woelk) are particularly beneficial for those interested in substantive limits on constitutional amendments. In that respect, the chapter on the Czech Republic (Maxim Tomoszek) devotes an important section to the controversial decision of the Constitutional Court on Shortening the Term of Office of the Chamber of Deputies, in which the Constitutional Court, for the first time, declared a constitutional act to be unconstitutional. The discussion on communist constitutionalism and the transition to democracy is also useful. Extremely interesting is the Israeli example (Suzie Navot), in which the entire constitutional project has been an on-going process since the state's establishment. The 'constitutional revolution' which transformed the state from a parliamentary sovereignty model to a constitutional state in the mid-1990s left many basic questions unresolved. All the contributions offer notable insights on the connection between formal and informal mechanisms for constitutional changes.

At first blush, this project resembles an earlier study from the British Institute of International and Comparative Law – Mads Andenas (ed), *The Creation and Amendment of Constitutional Norms* (London: BIICL, 2000). One cannot avoid comparing the two projects. Both attempt to explore constitutional change in

comparative perspective. Both include single-jurisdiction studies. They overlap too in their coverage: in both books, chapters are dedicated to the US, UK, South Africa, Italy, India, Germany, Canada and France (in both cases written by Sophie Boyron). While *How Constitutions Change* presents unique chapters on Switzerland, Spain, Israel, the Czech Republic, Finland, New Zealand and the EU, *The Creation and Amendment of Constitutional Norms* includes chapters on Rwanda, Burundi, Nigeria, Malaysia, Ireland, Hungary, Brazil and Australia. In light of the comparison, and if one considers the editors' attempt here to 'formulate some hypotheses . . . which might contribute to a theory of constitutional change' (405), one wonders why no Asian or South/Central American states were included. Such a contribution would have enhanced the value of this publication. All the editors tell us about case-study selection is that the book covers 'a range of democratic countries and the EU' and that they have 'deliberately selected countries whose arrangements seem to us to reflect the basic requirements of modern constitutionalism from which comparative analysis is possible' (5). While a more comprehensive rationalisation may have been warranted, one should not overestimate the importance of the existence of a similar project. The novelty of *How Constitutions Change* derives from the third and final part of the book, which is a comparative analysis of the ways in which constitutions change based on the case studies (381–403), and an exploration of whether an overarching theory of constitutional change can be constructed (405–433), both chapters written by the editors.

In the comparative analysis, the editors evaluate on the basis of the case studies the ways in which constitutions change. This resembles more a catalogue of observations from the case studies rather than rigorous comparative analysis. They itemise the ways that constitutions are adopted, various procedural requirements for changing constitutions, the role of courts within the constitutional scheme, and other ways in which constitutions change.

In the final chapter, Oliver and Fusaro present first a typology of constitutions and constitutional change. Some of the claims they make are questionable. For example, when discussing 'eternity clauses', the authors argue that unamendable constitutional provisions 'enhance the distinction between *pouvoir constituant* and *pouvoir constitué*, and 'impose limits on . . . politics' (411). However, if unamendable provisions truly aim to be 'eternity clauses', arguably they *diminish* rather than *enhance* that distinction since they aim to block even the constituent power, treating it as a restricted and limited power. I doubt that unamendable provisions have the capacity to limit original constituent power. Nor do unamendable provisions necessarily limit politics. That unamendable provisions exist in the constitution does not necessarily mean that they will be judicially enforced. The examples of France and Norway (missing from this collection) are salient in this respect. Such provisions can sometimes be understood as instructions to Parliament, seen as the eventual interpreter of their content.

The authors then continue to elaborate on the 'regional, international and cultural contexts of constitutional change'. Subsequently, they list 'the drivers of constitutional change', a list that includes the people, legislative assemblies, the courts, governments and their leaders, and supra-national institutions. The reader is left wondering, 'who is not involved in constitutional change?' While the

authors briefly explain the role of each actor, this section was under-developed. Is there a nexus between, for instance, how constitutions are changed and how they are adopted? Which actors are particularly influential? The authors include a later section on the different degrees of legitimacy that accompany each actor when involved in constitutional change (416–421). But the chapter does not contain any broad conclusions regarding ‘the factors which influence changes to constitutions’, although this was promised in the Introduction.

The second part of the final chapter aims to present ‘a coherent set of hypotheses’ which might contribute to the future development of a theory of constitutional change. The chapter does not present an overarching theory – perhaps, recalling Joseph Raz’s doubts about universal constitutional theory, a grand theory of constitutional change is in any case unattainable. But it is debatable whether the chapter can even be seen as a step ‘toward’ such a theory. It formulates a list of hypotheses that might contribute to an understanding of constitutional changes, but not toward the construction of a theory of constitutional change. The editors do not explain what they mean by a theory of constitutional change. Is it one that elucidates the optimal conditions or process for such a change? Is it a normative theory, or one which suggests certain constitutional designs? The question merits a closer explanation.

Critically, some of the hypotheses offered by the editors are trite or rather obvious, such as ‘all constitutions are political to some extent’ (424) or ‘incremental and limited constitutional changes are easier to achieve than comprehensive revisions’ (426). Others seem obscure and in need of elaboration, for example ‘Constitutional indeterminacy can facilitate anti- or un-constitutional activity’ (429–430). It is true *prima facie* that the more vagueness in a constitution’s provisions, the more maneuvering space the constitution allows. But it does not follow that these activities will be ‘anti- or un-constitutional’. Some other hypotheses are questionable. One states that ‘constitutional change appears easier to achieve under the pressure of internal and external emergencies’ (427). The authors illustrate this hypothesis (in two lines) with reference to Germany after World War II, Spain after the death of Franco, and South Africa after the end of apartheid. But they do not try to reconcile it with the fact that many constitutions, old and new, provide restrictions on the amendment of the Constitution during times of emergency. In fact, the temporal limitations which refer to emergency situations are the most common limitations on the constitutional amendment power (see European Commission For Democracy Through Law (Venice Commission), ‘Report on Constitutional Amendment’ Study no 469/2008, CDL-AD (2010)001, 14). Similarly, the hypothesis that ‘all constitutional arrangements include supraconstitutional provisions or principles which are regarded as unamendable’ (428) demands further explanation. What is meant by unamendable? Are they unamendable for all times? Does this unamendability necessarily lead to judicial review over constitutional amendments? It is one thing to claim that the amendment power is limited; it is quite another question whether such limitations are subject to substantive judicial review by courts. As noted earlier, in some countries, unamendable provisions are merely declaratory. In others, even while acknowledging certain basic principles as implicitly unamendable, courts have ruled that such limitations are to be enforced by the body

politic and not the judges (eg Pakistan). Lastly, some states have simply rejected the idea of implicit limitations as exemplified by the Indian 'basic structure doctrine' (eg Malaysia, Singapore and Sri Lanka). Perhaps the inclusion of any of these Asian countries among the case studies would have shed more light on this point.

The book's final part includes a useful jurisdiction-based chart summarising each jurisdiction's main constitutional features.

In conclusion, this refined comparative study is to be welcomed. Although it is not clear that it achieves its aim to consider 'whether any overarching theory or theories about constitutional change in liberal democracies emerge', those interested in the comparative study of constitutional law will find much of value in the authoritative accounts of constitutional change.

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