

Conservation, progress, and change. How time affects politics and democracy

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Abstract. The article develops a discussion on how time influences the realm of politics and the structure of democratic constitutionalism. In the first section, a theoretical and political-philosophical of time will be provided; in the second, the attention will be focused on the consequences of time on constitutionalism and democracy. Here, a distinction between the two concepts of *time of politics* and *time of constitutionalism* will be addressed. The theory of time in political-philosophical terms can be defined in multiple directions: firstly, in terms of political and constitutional changes, two different matters will be distinguished: a “conservative” as opposed to a “progressive” approach to politics and constitutionalism. Hence, a twofold definition of constitutionalism can be traced: on the one hand, the idea that a constitution can be considered as the product of the daily political debate and, on the other hand, the idea of a constitution as a *generational product*.

Keywords: Politics; Time; Democratic Constitutionalism; People; Consensus; Timing.

Introduction

This article aims at highlighting how time affects the realm of politics. The argument will be developed as follows: In the first section, a theoretical and political-philosophical definition of time will be provided, while, in the second section, the attention will be focused more specifically on the consequences of time for constitutionalism and democracy. Here, the principle of the so-called *time of constitutionalism* will be illustrated.¹

Against this background, the essay will show how time affects politics and democracy in many relevant ways. As Jacob Gersen and Eric Posner argue, many aspects concerning both political and constitutional theory are shaped and constrained by matters of time. The two scholars suggest that time strongly influences government action, both on legislative and executive decisions. They point out that one most obvious interpretation of time in politics concerns rules that «explicitly set a date by which an action must be accomplished (...) a date before which an action cannot take place, a period of time that separates different procedures that are necessary to accomplish an action, and so forth» (Gersen-Posner, 2007, p. 545).

Concerning political and constitutional changes, two approaches can be distinguished: on the one hand, it is possible to identify a so-called “conservative” view as opposed to a so-called “progressive” vision. Besides, constitutionalism can be perceived in two distinct ways: on the one hand, it can be considered the product of the daily political debate (in this sense, a specific and determined “time of

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¹ The investigation about time and constitutionalism is partially inspired by Massimo Fichera and his notion of *constitutional time*, although I prefer using the expression *time of constitutionalism*. I share with Fichera the idea that constitutionalism is intrinsically bound with the idea of time and temporality, especially because its promise to regulate and validate society as the rule of law necessarily incorporates the idea of future. See Fichera, 2021, p. 157.

constitutionalism” does not exist, by being replaced by a condition in which the constitution can be amended in any moment, following the will of a transient majority). On the other hand, the constitution might be assumed as a historical product to be developed and implemented through generations (this would mean that the “time of constitutionalism” does not occur daily, but in rare and specific “constitutional moments”).²

Hence, a further reflection concerns how time characterizes amendment processes in constitutional and the political evolution of society. The question here is the following: how long does (or should) an amendment or change process take? This issue is very important for constitutional theory, but the responses to this question substantially diverge. For instance, the British unwritten constitution does not establish norms or rules to amend the constitution, leaving to the Parliament the power “to (re)create” the Constitution. By contrast, written constitutions, such as the Italian and the U.S. Constitutions or the German *Grundgesetz*, present institutional mechanisms in order to be amended by also regulating the time and the modalities for such amendments to be validly enacted.

Article V of the U.S. Constitution poses stringent rules to amend the Constitution, by making a very complicated process and a very long time to reform the Fundamental Law.³ Similarly, Article 138 of the Italian Constitution establishes rules to amend the Constitution, albeit less complicated or demanding than the U.S. one. As we will show later in the article, the amendment process of the Italian Constitution takes much less time than the U.S. Constitution, especially because the procedure is easier, and it requires fewer steps to be completed.⁴

In discussing the relationship between time and politics, this article offers a comparative analysis of the topic, by presenting a wide overview to reflect on how time can strongly and directly influence our conception of politics and democracy.

1. Time and Politics. Some General Reflections.

The argument addressed here will try to show that time is one of the greatest topics in philosophical discussion and that its relevance for the theory of politics, society, and democracy is equally great. The influence of time on politics is at the core of the political-philosophical discussion about democracy since its origins. Unsurprisingly, we can find in Aristotle an important use of the concept of time in political terms. The Aristotelian democratic theory entails several considerations about time, which implies the idea that ruling positions should be organized according to a timely planned succession, which means both that rulers should renounce political power at the due time and that power should be ephemeral and transitory, held only once and not more.⁵

² On the idea of the “constitutional moments” see Ackerman 1991.

³ Article V of the U.S. Constitution declares that «The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.» See https://constitution.congress.gov/browse/essay/artV-1/ALDE_00000368.

⁴ Article 138 of the Italian Constitution states that «Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less 38 than three months and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members».

See the web site www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁵ See Gudelis 2020. On the Aristotelian view of lifetime and human being see also Vähämäki, 2003, p. 193.

As previously stated, the starting point of this article revolves around a fundamental double question: how does time influence politics, and how does it characterize decisions and choices made by political actors and institutional officers? Most generally, time intrinsically and endemically influences our lives, and it regulates human interaction both from social, political, and economic perspectives. As Barbara Adam brilliantly argues, «time is embedded in social interactions, practices, and knowledge» (Adam, 1995, p. 6).

Then, the relationship between time and politics involves a simultaneous process that Mykolas Gudelis has defined as the *temporalization of political power* by the *politicization of time*, namely the idea of shaping and constraining political power under temporal rules that transform the democratic sphere and the relation between “the people” and who holds political power, while, in parallel, time becomes an ever more political issue. In Gudelis’ words, what emerges here is «the power to shape, formulate, and structure symbolic, ideological and institutional representations and interpretations of time, in turn affirming sustaining, and temporally enabling prevailing, dominant political power structures, ideologies, institutions, and practices». ⁶

According to a famous quote attributed to many intellectuals and historical figures such as the American theologian and political scientist James Freeman and the Italian political leader and former Prime Minister Alcide De Gasperi, «a politician thinks of the next election, a statesman of the next generation. A politician looks for the success of his party; a statesman for that of his country. The statesman wishes to steer, while the politician is satisfied to drift».

This quote is interesting because it helps to highlight another feature in the political theory of time. Besides distinguishing a “politician” and a “statesman”, a party-man and a leader, it clarifies how a political actor, or a legislator, can follow two different ways: on the one hand, political choices might be fixed on the present, to privilege short-time interests. This approach is mostly targeted to a mere electoral benefit, giving much more relevance to the interest of the electorate rather than the people and the next generations. On the other hand, a statesman generally approves long-time decisions, by choosing to look to the future, instead of short-time partisan decisions. In this case, choices are made to favor the next generations and to ensure a brighter future for them, even if it means paying a cost in terms of electoral consent.

Finally, the good effects of long-time decisions are never immediate but always made “for the future”. It often implies losing votes in a short time, because people are generally considered not to have time to lose waiting for the good effects of such decisions. Then, a politician prefers the easy way of capitalizing the electoral consent, without any interest in what it implies for future and next generations, while a statesman accepts to disregard the expectations of the current electorate to privilege the general benefit of the people and the next generations. Another hint to reason about time and politics can be found in Francis Fukuyama’s *The End of History and the Last Man*, which inspires many considerations on how politics react to temporality. We might then argue about an alleged *end of ideologies* or also on the *end of politics*, or even the *end of democracy* (the latest two theses are more diffused in the current age of populism).⁷

⁶ Gudelis, 2020, pp. 3-4.

⁷ The relationship between democracy and populism is highly controversial and it is continuing to inspire a vast literature. It is not possible to develop a complete theory of populism and democracy, but it might be useful to give an overview of such a matter here. As a political issue, populism stimulates an analysis of four aspects: 1. An intrinsic and irreducible conflict between *the elite* and *the people*, with the former seen as the most radical foe of the latter; 2. An illiberal and anti-pluralist definition of democracy, that rejects cosmopolitanism, multiculturalism, and liberal-democratic values; 3. The celebration of leadership and authoritarian decision-making; 4. A nationalistic and conservative impulse, especially within right-wing approaches. Contemporary populism emerges as a form of post-ideological and post-party politics which assumes the defence of “the People”, in its national and ethnic identity, as a primary goal; at the same time, populist leaders look for an enemy, mainly economic or financial elites; minority groups or international institutions. Moreover, the populist upsurge is often associated with deep social and economic crises, that contribute to nourishing a tense and potentially conflictual atmosphere that populists are able to interpret and manipulate.

The idea of the “end of politics” has been advanced by David Held, who adopts, in his masterpiece *Models of Democracy*, the metaphor of the “music of the future” to argue that the future cannot be imagined or composed in advance, but it emerges from the ongoing struggles and movements aimed at changing and ameliorating the existing social and political context. By referring to Marx’s conception of society, Held poses that the end of politics means «the transformations of political life as it has been known in bourgeois societies; that is, the dismantling of politics as an institutionally distinct sphere in society used in perpetuation of class rule» (Held, 2006, p. 110).

Major doubts arise about what we have called the *end of ideologies*. Ideologies rise and fall, and every decade is dominated by different political, social, and economic ideologies. The collapse of the classic totalitarian ideologies, Marxism, and Fascism at first, does not imply that ideologies disappear in time because old ideologies are replaced by new ideologies and in this case, *time*, together with the social and political context, plays a central role in defining when ideologies upsurge and then collapse. Neoliberalism, capitalism, and populism might probably be considered the major ideologies of the current time.

Here, a distinction between *model* and *ideology* arises. It is to argue that the former is an ideal system, a theory of the state and institutions that are valid and reasonably acceptable for all the people. It is often grounded on an idea of politics and democracy that holds a principle of substantial equality by potentially representing a common horizon for all citizens. Then, a political model does not have divisive intentions but, by contrast, it is assumed to be a benchmark. In this sense, every general conception of politics and democracy works as a model: from modern contractarianism to contemporary constitutionalism. Differently, an *ideology* has no unifying intent.

The latter represents instead a partial vision and a partisan definition of the world and society. An ideology is divisive, it distinguishes between “us” and “they”, between friends and enemies, to use a Schmittian vocabulary. Two ideologies are usually incompatible with each other, and their aim is not to create a common ground but only to defend and affirm a partial social, moral, and political view of the world. Populism and liberalism; Marxism and conservatism; monarchism and republicanism are perfect examples of contrasting ideologies.

Against the background of the idea that time always leads to the “end” of something, another question may arise: assuming the validity of the “end of ideologies” or even “the end of history” (as Fukuyama claims), may we theorize a hypothetical, though radical, “end of politics”? Fukuyama’s thesis states that the end of history occurs when economics prevails over politics itself, by subjugating democratic rules to financial markets and capitalist power.⁸

Although the problematic relationship between financial markets, capitalism, and democracy are currently at the core of many important legal and political theorists (Frank Michelman, Luigi Ferrajoli, Alessandro Ferrara to name a few), the theorization of a radical and definitive end of politics *tout court* seems to be highly problematic.⁹ From this point of view, the classic Aristotelian definition of the human being as a pure *zoon politikon* for which the political dimension of life remains irrepressible is still undoubtedly valid.¹⁰

Further and more specific considerations about time and politics will be presented later in the article, particularly focusing on issues such as the idea of collective memory, the concept of social and political progress, and the matter of the constitutional amendment process. As time goes by, to quote a famous movie song, the world changes, and our conceptions of politics, democracy, and ideologies are supposed to change in parallel.

For a further analysis of these points see Canovan, 1981; Fabbri, 2020; Held, 2006, pp. 108-117; Marchettoni, 2018, p. 110; Panizza, 2005.

⁸ To clearly understand the point, see Fukuyama 1992, pp. 44, 125, 205-206, 235.

⁹ On the issue of financial markets and democratic institutions see Michelman, 2003, 2015; Ferrajoli, 2013, 2018; Ferrara, 2017.

¹⁰ On the issue of the *zoon politikon* in Aristotle and the idea of the individual participation to political life in the *politeia* I suggest consulting Gudelis, 2020.

1.1 How to Deal with Time in Political-Philosophical Terms?

Generally speaking, time plays a central role in politics. Not casually, temporal vocabularies are often used to define politics: it's common to tell and read expressions like a "political era" of a leader, as well as the domination of a party or a coalition can mark an entire political season. Similarly, we are used to judging a political experience in the light of the longevity and the stability of a government: the more time the government stays in office, the more stable and efficient the entire political system is supposed to be.

Commonly, the Italian institutional system during the so-called "First Republic" was supposed to be unstable and feckless because of the short duration of governments, which lasted, on average, one year. For this reason, especially in Italy, the efficiency of a government and its leaders is not only justified by the decision and acts they make but also, and above all, by the time they stay in charge.

To sum up, what remains impressive is not what kind of choices the government and the majority make, but how many times that government and that majority have been able to impose their own political vision over society, for what kind of legacy they leave to their successors and, most relevantly, for how many times they have been able to hold political power. Moreover, "political time" is the time we dedicate to politics and to what Cicero called the *res publica*, as citizens and members of the political society. From this, it follows that both political choices and actions that arise from such an engagement depend on the fusion of two aspects: the time we dedicate to politics and the place in which we are immersed, and live our political life.¹¹

When discussing politics in terms of time, memory also plays a pivotal role. Nonetheless, memory is not to be understood as "historical" or "historiographical" memory, but rather as legacy or heritage, in social, political, and cultural terms. Against this background, constitutions can be an example of political memory, or rather a legacy that unifies generations and passes from time to time. Constitutions have the scope to pass on values, principles, and rules to the next generations; likewise, constitutions also possess a historical memory, largely being the result of previous historical, often tragic, events.

In this perspective, every constitution that was born from tragic events, such as a cruel war, the collapse of a totalitarian regime, or a revolution, aims at transmitting to the next generations. The Italian Constitution is a perfect example. It arose from the ashes of the defunct fascist regime, the new Constitution was enacted in 1947 after the approval by the Constituent Assembly, and it still contains the values, principles, and rules that regulate the Italian democratic regime: antifascism, religious neutrality, separation of powers, parliamentary democracy, equality, and liberty.

At the same time, the Italian Constitution is part of a larger set of events and historical steps that form the sociopolitical as well as the historical legacy of Italian democracy: the Resistance and the partisan war, the first post-fascist and democratic government led by the National Liberation Committee (CLN-Comitato di Liberazione Nazionale), the institutional referendum that opposed Monarchic and Republican sides on June 2, 1946.

Memory and legacy and the relationship between the past and the present intensely influence constitutionalism and various contemporary constitutions are the result of historical processes, often tragic, and hold a deep hereditary character (let's think about the U.S. Constitution and the German *Grundgesetz*, for instance). Both the U.S. and the German constitutions take their roots in a strong historical legacy by recalling what Maurice Halbwachs defined as "collective memory".¹² This is

¹¹ This relation between time and political life is reconstructed by Elizabeth F. Cohen in her book *The Political Value of Time. Citizenship, Duration, and Democratic Justice*, Cambridge University Press, 2018. See particularly Cohen, 2018, pp. 112-113.

¹² See Halbwachs 1925. This historical memoirist feature of constitutionalism is perfectly pointed out by Harrison, 2004.

testified, within the U.S. Constitution, by the persistent reference to the Founding Fathers and by the idealization of the Declaration of Independence as the cornerstone of American democracy.¹³

Like the Italian Constitution, the German *Grundgesetz* was raised from the ashes of tragic events such as the Second World War and the collapse of the Nazi totalitarian regime. This tragic experience led the German constituent to construct a much rigid and entrenched fundamental law that aims at preventing any attempts to subvert democratic institutions or endanger basic rights, values, and principles of the German democracy. Thus, the *Grundgesetz* presents a list of principles and values that are explicitly entrenched by Article 79 to prevent what previously happened at the collapse of the Weimar Republic and the upsurge of the Nazi regime.¹⁴ From a theoretical perspective, politics affect everything that daily happens in our society; this means that *politics* also involves how we influence our society and our fellow citizens' lives every day and in every moment.

Politics is inevitably and intrinsically connected with the idea of progress and change, most generally. Every political choice made by officials and representatives should be aimed, at least ideally, at preventing what will come later, to face future challenges, anticipating them. Here, the quote from James Freeman Clark comes back to mind, because who is called to govern the *res publica*, the *politeia*, namely the legislator, should always work looking to the future, not only to the present, by making choices that give future generations a quality of life, more well-being, wealth, and prosperity larger and much solid than the previous ones. Thus, time strongly shapes politics, by influencing the kind of decisions that politicians and leaders made, such as short-time decisions, that may give an electoral benefit but leave future generations in trouble, or long-term decisions that may provoke discontent in the electorate but will help to enjoy a better future for all.

Eventually, time can influence politics both in a good and bad way, resolving certain problems such as lack of representativeness and democratic participation, but also creating new ones such as lack of transparency and carelessness. Gersen and Posner suggest that a delayed time in decision-making might ensure interest groups, minorities, and social and political associations participate in the process and have a say to influence or even improve the final decision. Then, a longer process would contribute to ameliorating the whole democratic system; however, it might also manifest flaws and weaknesses, such as the inefficiency of the institutions and their inability to decide about important political matters, as well as the risk of corruption and partial interests.

In the same way, short-time processes have strengths and weaknesses: they would increase efficiency and rapidity in decision-making, transmitting a sense of trust and reliability to citizens. Nevertheless, rapidity would nourish distrust and doubts about the transparency of the entire process, by reducing ways and times for external control and contribution.¹⁵

2. The Influence of Time in Democratic Constitutional Theory

The second section of this article focuses on a more specific aspect of the relationship between time and politics, namely the implications of time for constitutional theory. Accordingly, the concept of the time of constitutionalism will be drawn; it goes hand in hand with the concept of the time of

¹³ On this point see Ackerman 1991. On the reference to the Founders see originalism and foundational theories in Balkin, 2011. For the recalling to the Declaration of Independence see Tushnet, 1999. On originalism and the role of 1954 U.S. Supreme Court sentence *Brown v. Board of Education* in contradicting the originalist vision see Harrison, 2004, p. 1601.

¹⁴ Article 79 of the German *Grundgesetz* declares that «his Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification. Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat. Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible».

¹⁵ This analysis is inspired to what illustrated in Gersen-Posner, 2007, pp. 573-574.

politics, even holding specific peculiarities and features that are specifically “constitutional” rather than “political”.

Generally speaking, from a mainly legal perspective, constitutions contain rules and procedures that constrain and limit legislative power and majoritarian rule; in many cases, these rules explicitly or implicitly regulate the timing of the amendment process or institutional activities. Against the background of the U.S. constitutional order, Gersen and Posner indicate that many articles and clauses of the Constitution give deadlines and timing rules by which actions must be taken, as well as Article V implicitly dictates time rules by which an amendment might be enacted.¹⁶

The first element that contributes to developing a temporal definition of constitutionalism relates to what we can identify as the “classic liberal-democratic principle”, originated by John Locke, and the idea that the legitimacy of a government should be grounded on the so-called “consent of the governed”. This notion is present in the most important contemporary political philosopher and liberal thinker John Rawls, according to whom «our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason».¹⁷

In the Rawlsian perspective, considerations from a time-perspective play an essential role and they mainly influence our conception of democracy, so much that stability over time is a fundamental character of any democratic regime and this aspect strongly separates *modus vivendi* from overlapping consensus, where the former is a weak, temporary, and unstable kind of consensus that is characterized by a shallow range of interests and that is subordinated to the precarious balance of forces.

Modus vivendi lies on exclusively prudential motivations; it merely focuses on short-time interests and decisions, not on future generations' benefits. Moreover, *modus vivendi* is an unstable consensus that may have extremely short durability, until one of the parts involved considers itself strong enough to break the compromise and impose its own conception of the good.

By contrast, an overlapping consensus is a much deeper, wide, deep, and stable kind of consensus, that is aimed at constructing a just and stable “well-ordered” society based on principles of justice and constitutional essentials. This agreement is based on reasonable presupposes that convince people to set aside their reasonable comprehensive doctrines and to cooperate in a condition of reciprocity to embrace a common point of view and share a common idea of democracy and society. This moral standpoint gives the overlapping consensus and the democratic society stability and durability over time, something that *modus vivendi* is unable to do.¹⁸

More generally, within the constitutional theory, the concept of time and its definition assume a pivotal function in the debate over liberal-democratic constitutionalism, especially concerning the processes and the ways in which constitutions are amended. Thus, the debate over the so-called time of constitution may follow two directions: I call the first a conservative model, that poses strict limitations to the possibility for constitutions to be amended; while the second, which I indicate as a progressive account, leaves much more room for modifications and it makes the amendment process easier to be settled.

Nonetheless, it does not follow that a constitution remains unamendable because both the conservative and the progressive approaches contain procedures to amend the constitution in a formally correct way. Consequently, as we will show more accurately some lines beyond, the difference lies in the way in which the two models intervene: the conservative one espouses an “aggravated” method that prevents political forces to amend the constitution without following formal rules precisely dictated by the constitution itself. Differently, the progressive standard conceives the

¹⁶ For a deep analysis of the point see Gersen-Posner, 2007, pp. 549-550.

¹⁷ Rawls, 2005, p. 137.

¹⁸ On *modus vivendi* and *overlapping consensus* see Rawls, 2005, pp. 140-168.

constitution in a flexible way, and it implies the possibility to amend the Supreme Law *as it was* an ordinary law.

Considerations about time and its effects on democracy and constitutionalism are also present in Costantino Mortati's theory of the "material constitution", for which both the rigid and the flexible constitutions miss a stable and durable benchmark; this means that, for Mortati, a material conception of the constitution might merely depend by the historical moment in which the constitution itself is settled. It lies in the fact that, if we consider it possible to amend the constitution in any way, also in the most radical one, the temporal validity of the constitution is limited by its formal rules of revision.¹⁹

According to the *conservative* account, a constitution is a fundamental text, almost sacred, hierarchically superior to any other legal text, and conceived to be much more difficult to amend. From this conservative perspective, a constitution can be amended only in specific moments and manners, for very specific reasons, and through particular rules that are generally indicated by a precise article of the constitution itself. Here, Rawls comes to help to clarify the point. According to him, an amendment to the constitution is not merely a change but a specific and time-limited intervention that is aimed at adapting basic institutions to new social and political conditions, by correcting the weaknesses of such institutions, and the flaws of formal procedures that emerged in the constitutional and institutional practice during decades, or at reinforcing and widening the conception of fundamental principles and values to give them a stronger and more inclusive definition.

Rawls suggests looking at the history of the U.S. Constitution, in particular the XVI and XXII amendments. These two amendments corrected two major weaknesses in the U.S. constitutional system by meeting precisely what Rawls is suggesting: the first one was enacted in 1913 under Wilson's Presidency to give the government the power to impose an income tax, and the second one was instead approved in 1951 wanted to resolve a flaw made evident by President Roosevelt's four-time re-election, by deciding to limit Presidency to two terms in office.²⁰

Against this background, the constitution cannot be amended at any moment to reflect the will of a transient majority. According to the dualist account of democratic constitutionalism, for which we identify two stages of democratic decision-making: the supreme/constitutional and the ordinary/political stages. In this scheme, the constitution is different from ordinary law but hierarchically superior to it. In the Rawlsian framework, the constitutional interpretation is left neither to parliament nor to the Court. The constitution is the higher law, the supreme law, and it is supposed to be much more rigid than ordinary law. However, as Rawls states, «the constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is». Then, as Rawls remarks, both parliamentary and judicial supremacy should be rejected.²¹

¹⁹ It is not possible to expand here Mortati's theory of the "material constitution", but this theory is one of the most relevant contributions in contemporary theory of law constitutionalism and philosophy of law, especially in the Italian and European context. Mortati distinguishes between a formal and a material account of the constitution: similar to the Kelsenian idea of formal democracy, the former is shaped by the forms and the procedures dictated by the constitution itself. Instead, the latter is conceived by Mortati as the result of the will and the influence of the social context and the will of the political parties. As Alessandro Catelani stresses, this "material" constitution would exist regardless of any formal rules or legal statements. Against this background, the material constitution would incarnate the *real* constitution and it would depend more directly on temporal aspects by binding the meaning of the constitution to the will of the people and the society in the present time. This kind of Constitution would shape society and it would be rooted in it and justified by the society itself. By contrast, the formal constitution would lack this social ground, by being reduced to rigid and abstract set of norms, rules and limits. See Catelani, 2010, and Mortati, 1998.

²⁰ See Rawls, 2005, pp. 238-239.

²¹ Rawls, 2005, p. 237.

Conversely, a so-called “progressive” account of constitutionalism considers a constitution as a “living body”, always and continuously in progress, to be modified and amended at any time, also outside the formal amendment procedures dictated by the constitution itself. Moreover, two further distinctions arise: on the one hand, we might also intend a constitution of the product of the daily political debate within representative institutions, without any legal implications, and on the same stage with the ordinary lawmaking, underpinning the constitution to the majority rule.

Therefore, the constitution loses its “special status” of supreme law, albeit maintaining its place at the top of the legal order. In a nutshell, the constitution becomes amendable without aggravated procedures, as in the case of the ordinary law; the constitution would be now considered to be amendable at any time, by following what the people, or even the electorate, want here and now. Thus, what we called “the time of constitutionalism” would lose its peculiarity and would fail, by being diluted within the more general and less specific *time of politics*. We may define this approach as a “monist” definition of democracy; it can be found in theorists of political constitutionalism *à la* Richard Bellamy and Jeremy Waldron.²²

On the other hand, dualist theorists defend the double nature of democracy by distinguishing higher from ordinary lawmaking. For this reason, the constitution cannot be amendable as the ordinary law is, otherwise it would not be “the constitution” anymore. Liberal theorists such as John Rawls, Ronald Dworkin, Frank Michelman, and the Italian legal scholar Luigi Ferrajoli share the same common ground, even with differences and disagreements on single points: they agree on the idea that the constitution is a generational product, something that endures for years and passes by generations. This precludes interpreting the constitution from the standpoint of merely political or majoritarian interest; the constitution is not made to give government stability or to follow the will of a transient electorate masked as *we, the People*. The constitution is made to be loyal to democracy and to make it stable for ages because voters pass, and the People stay.²³

The People are other than the electorate: the former stays almost unaltered, the latter is only a small part, and it is unstable and temporary. Hence, the electorate changes quickly, since the consent around a party or a leader suddenly raises and vanishes, and time influences politics and makes it precarious. Parties and leaders emerge and disappear together with their electorate; sociopolitical and cultural conditions that animate political debates are equally changeable and the popular support that surrounds a political leader is always precarious, and it quickly changes together with public opinion and the political context.²⁴

By contrast, the *time of constitutionalism* is much more stable; it does not follow public opinion or the needs of an electorate; the *time of constitutionalism* takes into consideration only *the people* and the generations. It is more extended; it does not change suddenly as in the *time of politics*; it results to be regulated by precise “constitutional moments” that, as Bruce Ackerman teaches us, occur rarely. During the interval between these moments, the People remain silent, since the Constitution stays unamended, and the constitutional debate is interrupted. Here, the U.S. Constitution comes to help again, showing that amendments are very rarely, by being enacted in very long-time intervals;

²² To deepen political constitutionalism and monist theories of democracy see Goldoni, 2012; Bellamy, 2007; Waldron, 1999.

²³ On the peculiarities of the “electoral consensus” and the political decisions made to follow voters will see Gibson, 1999, pp. 492-493.

²⁴ On the difference between “the people” and “the voters” see Ferrara, 2021.

the last valid amendment has been approved, for instance, in 1992, during the first term of Clinton's Presidency.²⁵

In contexts of rigid constitutions, such as the German *Grundgesetz*, the Italian, and the U.S. Constitutions, the chance to amend the text and change articles of the Fundamental Law is complicated by specific articles that dictate specific procedures and formal rules that prevent the majoritarian forces in parliament to modify or even overturn the constitution for their own interests. In the German system, Article 79 prohibits any amendment to the fundamental values expressed by Articles 1-21, that result to be explicitly entrenched. Similarly, the Italian Constitution expressly denies any possibility to modify the republican form of the State (Article 139),²⁶ while the U.S. Constitution imposes the inviolability of the equal suffrage of the States in the Senate (Article V). The fundamental values and principles, albeit non "explicitly" entrenched, are considered to be "implicitly" inviolable due to their relevance to the whole democratic system of these nations.²⁷

Article V of the U.S. Constitution prescribes complex and temporally long procedures that entail multiple steps and obstacles, both in Congress and the States, to create the widest and most successful social and political other than constitutional debate in the Nation. The second reason to justify a rigid and complex procedure is to prevent a party or a legislative majority to be able to modify or even subverting the intrinsic spirit of the Constitution by imposing a parochial view of the fundamental values of democracy.

Due to the rigid rules of Article V, the amendment process in the U.S. system has so far taken about eight years on average to be completed.²⁸ As we have seen, Article V poses that an amendment, before being approved and becoming part of the Constitution, should be proposed by Congress, or by a constitutional Convention called *ad hoc*. After the proposal, an amendment must be voted by the States to be ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof, according to what mode the amendment has been originally proposed.

As we have seen, the amendment process might also be very long, taking many years or decades, as well as centuries (see the XXVII Amendment); generally speaking, it is supposed that the process would occupy two presidential elections from its initial proposal to the final enactment, then eight years.²⁹ The length and complexity of the amendment process reflect the generational character of the Constitution, which should not reflect the interest and desires of the current electorate, but generate a deep debate for a long time. This is because an amendment is supposed to pass and overcome a precarious and unstable political situation that will inevitably change over eight years, together with the spirit of society and public opinion.

²⁵ In this respect, it is interesting to cite a case study published on the following website <https://introductorystats.wordpress.com/2011/02/02/a-statistical-look-at-theammdments-to-the-united-states-constitution>. Here we find an interesting and well-detailed analysis of the duration of amendment process that led to the approval of every 27 amendments of the U.S. Constitution. This analysis takes, for every single amendment, the initial proposal and the final enactment to compare the time every single amendment took to be approved and implemented into the Constitution. We can infer that the latest amendment – the XXVII – has the record for longest amendment-process, by having been firstly proposed on September 25th, 1789, and finally approved on May 7th, 1992, almost 200 years later.

First ten amendments took two years and three months to be definitively approved (from 1789 to 1791), while the XVI and the XXII took almost four years. In general, any other amendments have been approved in a period from six months (the XII amendment, for instance) and two years (XIV, XVIII, XXIV e XXV amendments).

²⁶ Article 139 of the Italian Constitution declares that «The form of Republic shall not be a matter for constitutional amendment».

²⁷ On the issues of entrenchment in the U.S. constitutionalism see Harrison, 2004, pp. 1608-1610.

²⁸ Here, the case study illustrated on note 13 can clarify the point.

²⁹ Here, see Ackerman, 1991

Conclusion

This article has been aimed at showing how strongly and deeply time affects and influences politics, by dictating how it develops and what kind of decisions are made, and how they are made. At the same time, the article has tried to explain how democracy and constitutionalism are specifically determined by considerations about time; it has been specified that democratic politics can privilege two different categories: on the one hand, decisions can be made to satisfy the will of the people (or better, the electorate) in the short time, here and now.

It is to follow a contingent and temporary consensus that may give an immediate but precarious benefit. On the other hand, leaders and democratic officers might decide to sacrifice the easy, fast and attractive profit to protect and advantage next generations to construct a better, stronger, and possibly fairer society. Here the distinction between *the electorate* and *the People* should be called into question to postulate that the former is continuously in change; it is a temporary, precarious, and constitutionally unrepresentative part of the People, that, for their part, can evolve socially, politically, culturally, but it never changes through generations.

It has been also said that constitutions should necessarily be distinguished from ordinary laws and then subjected to a certain form of rigidity that makes it impossible to amend them through ordinary legislative means. Nevertheless, this is not to argue for the unamendability of constitutions *tout court*, since if, on the one hand, a flexible constitution would be the same as an ordinary law, on the other hand, a rigid constitution would be democratic nonsense. It is impossible to prevent generations from adopting or ameliorating their own constitution, so it is impossible to freeze it over time to preserve a “simulacrum”.

Time makes sense, within democratic constitutionalism, if it is continuously moving, and never fixed; to be truly democratic, a constitution should be both protected from manipulations from present transitory majorities and open to generations and future amendments. In this sense, the *time of constitutionalism* makes sense only if constitutions are inherited and also re-interpreted by generations of people, following what Fichera has called “cyclical time” (Fichera, 2021, p. 157).

“Cyclical time” refuses both originalism, according to which constitutions should not deviate from the founders established at the beginning, and the realist conceptions of democracy, that consider constitutions as the reflection of the will of the majority here and now. “Cyclical time” designs a normative constitutional legal system that poses interpretative but not merely transformative rules, looking at the past to protect fundamental values and interpreting the constitution to adapt it to future conditions and resolve institutional weaknesses.

Fichera infers that “cyclical time” is typical of the so-known “legal” variety of constitutionalism (see Ackerman; Dworkin; Rawls), whilst its opposite version, the so-called “political” model, prefers a “linear” approach to time, by which politics and democracy assume a daily character, rather than a future generational perspective. However, both legal and political constitutionalism does not refuse linear and cyclical approaches to time. In legal constitutionalism, the dualist conception of democracy combines the constitutional and supreme stage, where cyclical time dominates, with the ordinary and legislative side, characterized by linear time. Contrariwise, political constitutionalism is more prone to present time rather than future, but cyclical time is present in some sense, albeit subordinated to the interest of the present majority and the majoritarian consensus arising in linear time.³⁰

³⁰ This point echoes both Rawls, 2005, pp. 238-239, and Fichera, 2021, pp. 160-161 and 172-173.

Closing notes

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