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It was a great pleasure for me to collaborate with Professor Cesare Pinelli in contributing a chapter to this volume on the subject of 'parliamentarism'. While working on this chapter, and more so now that the volume has been published, I have been strongly aware that the project is indeed an ambitious one, in its aim of bringing together a set of papers that in a global perspective present the current state of scholarship in comparative constitutional law. The result is impressive – a book of 1400 pages containing no less than 64 chapters by scholars from across the world. The general editors, Professors Michel Rosenfeld and Andras Sajo, and of course the Oxford University Press deserve to be congratulated on the whole enterprise.

The ambitiousness of this project came home to me when I asked myself, what would an Oxford Handbook of Constitutional Law of just one country comprise – be it the Republic of Italy, the United States of America, the United Kingdom, the Commonwealth of Australia or wherever? The question raises difficult questions of definition and scope: What are the limits of a national system of constitutional law? Is it enough to concern oneself with textual analysis of the written constitution, or just to add to that interpretation of the constitution, when a supreme court or other tribunal has the authority to determine disputes about this? Or do we need to go further into questions that lawyers may not be used to addressing?

There is a good series of smaller books being published by another firm of publishers in Oxford, namely Hart Publishing. The series is entitled 'Constitutional Systems of the World' and already includes volumes for Australia, Austria, Germany, Thailand and the United Kingdom (not yet one for Italy). The expression 'constitutional systems' is significant, and in his book on the United States Constitution, Professor Mark Tushnet has added the phrase 'A Contextual Analysis' as a subtitle. At the outset, Tushnet seizes our attention with the statement:

> «Typically offered as a paradigm of a nation with a written constitution, the United States actually operates with a constitution that is more similar to than different from the paradigmatic unwritten constitution of the United Kingdom. Like the UK constitution, the 'efficient'

> constitution of the United States, to adopt Walter Bagehot's term, can be found in various written forms, but the document called the US Constitution is only one, and not the most important, of them»[1].

Tushnet explains that the written United States Constitution is «old, short and difficult to amend».

The 18th century text of the written Constitution is, Tushnet argues, very different from the 'efficient' constitution of today. In particular, the political parties are 'almost invisible' in the Constitution, although contention between the parties is the structure through which the nation's government is kept up to date. In the year in which President Obama has been re-elected for a second term, all observers of American government must be aware of the significance of the two party system: but do constitutional lawyers regard it as a high priority for them to understand how that system has played a leading role in the US since 1800, and how that system functions today?

The *Oxford Handbook of Comparative Constitutional Law* is attractively presented, and the cover contains a fine reproduction of the well-known portrayal of della Francesca's 'Ideal City'. Coming from the UK, I paused over the Editors' reference to Fra Carnavale's representation of the 'Ideal City', when they state that in this conception:

> The plan of the city is its constitution. Physical structure and the structure of rules combine under a single master plan, appropriate for the community living together in the public space carved out pursuant to the governing plan»[2].

The Editors are, of course, well aware that this ideal is far removed from reality in most cities of the world (least of all is it applicable to the city of Rome). Possibly a difficulty lies in the very word 'constitution', and in the related term 'plan'. Is 'the plan of the city' what an all-powerful city planning authority has produced on its

[1] M Tushnet, *The Constitution of the United States of America: a Contextual Analysis* (Hart Publishing, Oxford, 2009), page 1. It was in chapter 1 of *The English Constitution*, first published in 1867, that Bagehot distinguished between the *dignified* parts of the constitution («those which excite and preserve the reverence of the population») and the *efficient* parts of the constitution («those by which it, in fact, works and rules»). Bagehot explained that «every constitution must first *gain* authority, and then *use* authority».

[2] M. Rosenfeld & A Sajo, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), page 3.

drawing board – a detailed zoning scheme, that regulates and predetermines the use of land in the city, has prescriptive force and does not tolerate departures from the master plan? Or does the 'plan of the city' more closely resemble the kind of plan or map found in a satellite picture on Google Earth – a depiction (or description) of what is actually to be seen on the ground, and lacking in any prescriptive force?

The uncertainty inherent in the term 'constitution' is indeed widely understood. We know that some writers talk of the big-C 'Constitution', when they refer to a written text, and distinguish this from the small-c 'constitution', the actual system of government and politics that exists and functions in every nation of the world (except in one or two 'failed states' that have no working system of government or state authority at all). In some countries there may be close convergence between the two meanings of constitution, in others there may be very wide divergence. Indeed, even as between countries that have similar written texts (constitutions with a big-C), there may be wide differences between their system of government.

The challenge that this presents for a collection of papers based on comparative constitutional law, is that the volume must somehow deal with the various systems of government in the states of the world – while also concentrating on the *law* relating to state and government, and the role that law plays in these different systems. But even the emphasis on *law* does not go far in narrowing the potential field of study. In the current issue of *I-CON*, the *International Journal of Constitutional Law*, Professor Weiler's editorial begins with a statement of his wish to extend the reach of *I-CON* to include all spheres of public law, 'given the blurring of lines between the Constitutional, the Administrative and the Global'[3]. To take further this extension in the scope of the journal, Professor Sabino Cassese contributes a challenging article entitled, «New paths for administrative law – a manifesto»[4]. This article addresses the general issue of continuity and change in administrative law, and concludes with a call for methodological pluralism. Administrative law, says Cassese, «must reestablish its place in the field of social sciences (economics and politics) and re-connect its links with history»[5]. Cassese comments

[3] *I-CON* (2012), vol. 10, no 3, page 601.
[4] *I-CON* (2012), vol. 10, page 603.
[5] *Ibid*, page 613.

that the national isolation of legal science is anachronistic, but that this does not mean that there is only one form of legal reasoning or legal system which all countries must adopt – in other words, it is not possible to ignore or sweep away the differences between legal systems in the hope that we can thereby discover an ideal form of law that determines how states are governed.

These views of Professor Cassese are fully applicable to constitutional law. Indeed, they make the case for the study of comparative constitutional law that must cross national boundaries. Boundaries of another kind must also be crossed. In this subject, there is a need to understand the temporal dimension in constitutional law – to re-connect its links with history, as Cassese would put it. We are frequently tempted to forget those links. For instance, in many European countries the constitutional texts are less than 25 years old, many of whom will have passed the test (applied by the Council of Europe, typically through the agency of the 'Venice Commission')[6] of conforming to today's 'European standards'. But the fact that the constitutions of these states have passed this test does not mean that these texts will be understood and applied uniformly in all these countries, which vary so much in their recent and more distant histories.

Two obvious examples may illustrate this. The first comes from the way in which the Scandinavian Ombudsman has since the 1960s spread in one form or another across the world – first to New Zealand and the United Kingdom, then to Canada and other common law countries, and later to France and to the European constitutions of the 1990s. The evocative term 'Ombudsman' must have been a factor in the spread of this new institution. But no-one can suppose that a person who bears the title of Ombudsman, with its Scandinavian origins, will have the same significance and authority in countries with very different experiences of public administration and state bureaucracy. It necessarily takes time for a new office such as the Ombudsman to acquire the confidence and authority to grapple as may be needed with the other bodies exercising functions in the state, and in the process to discover what that new office may most usefully do.

A second example of the same phenomenon may be found (in Europe and also in many other countries) in the realisation since the

[6] The European Commission for Democracy through Law.

1950s of the importance of ensuring that the national legal system protects fundamental rights. The United Kingdom lagged behind in this international movement, taking for far too long the view that the 'land of liberty' had nothing to learn. But today, and ever since the Human Rights Act 1998 came into effect in 2000, all courts and tribunals in the United Kingdom have been able to give direct protection to the rights guaranteed by the European Convention on Human Rights. Other countries have their own histories regarding the protection of fundamental rights, and may already have experience of the courts exercising a constitutional jurisdiction. But this reform in the United Kingdom has led to a significant re-assessment of the constitutional role of the judiciary in the face of state authority, and to an open-ended evaluation of the relation between the courts, Parliament and the government.

Along with many others in the United Kingdom, I have welcomed this increased protection for human rights and I see it as a significant development of constitutionalism in the United Kingdom. One apparent effect has been the creation (or significant extension) of a form of *constitutional dialogue* that takes place between the courts, Parliament and the Government[7]. Some critics regret this, arguing that the judges are being led to make decisions that should be left to the political process, or that the independence of the judiciary will inevitably be eroded, should the supposed process of 'dialogue' lead to the politicisation of judicial appointments. Lawyers have long been likely to disagree over what the 'rule of law' and the separation of powers require in constitutional terms. But serious political implications are now being felt from the increased protection for human rights: the welcome that many lawyers give to that protection conflicts with the stance of Euro-sceptics in the United Kingdom, who see the European Convention on Human Rights as a target for their scepticism, and might prefer to see a 'British Bill of Rights'. What I must stress today is that such developments are not just of interest as a matter of law and politics within the United Kingdom, and they have counterparts in other European countries as the goal of European integration seems to become tarnished. There is certainly interest from a comparative perspective in analysing the extent to which

[7] See TOM HICKMAN, *Public Law after the Human Rights Act* (Hart Publishing, Oxford, 2010).

increased legal protection for fundamental rights has created a new and unstable balance of functions between the judiciary and the political process.

So the protection of human rights presents a rich field for comparative study. Should we go for idealism? The great British judge, the late Lord Bingham, said in concluding his book *The Rule of Law*,

«The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth [the Rule of Law] is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large»[8].

In contrast, there is an ancient remark by de Tocqueville, discussing whether the laws concerning the constitution of modern society will ever be totally destroyed and replaced by others. He doubts this but continues,

«[The] more I study the former condition of the world and see the world of our day in greater detail, the more I consider the prodigious variety to be met with not only in laws, but in the principles of law, and the different forms even not taken and retained … by the rights of property on this earth, the more I am tempted to believe that what we call necessary institutions are often no more than institutions to which we have grown accustomed, and that in matters of social constitution the field of possibilities is much more vast than those who live in each society may imagine»[9].

To suggest that the ultimate question underlying the project that has culminated in publication of the *Oxford Handbook of Comparative Constitutional Law* lies in the choice between a modified universal idealism and an open-minded attitude to social custom is another indication of both the immensity and potential profundity of that project.

[8] T. Bingham, *The Rule of Law* (Allen Lane, London, 2010), page 174.

[9] Quoted from the English translation by de Mattos of *Recollections of Alexis de Tocqueville*, 100-1. I came across it in A.V. Dicey, *Law and Opinion in England* (2nd edn, 1914), p. xciv.