Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective

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1 General introduction

> 'A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to preserve.'
>
> Edmund Burke[1]

> 'In every constitutional democracy, interpretation and practice have been far more common means to effect constitutional change [than formal constitutional amendment].'
>
> Walter F. Murphy[2]

1.1 The challenge of constitutional change

Once a country has decided to adopt a written constitution and has defined it as its fundamental law, the country must then ask how the fundamental status of the constitution can be protected and maintained. Constitutional change is one of the most difficult challenges of constitutional design and practice, especially in contemporary times when the legal, socio-political, technological and environmental contexts in which constitutional documents are supposed to operate are transforming more rapidly than ever.[3]

The issue of constitutional change can be understood as a dilemma.[4] Written constitutions are designed to provide a stable and permanent framework for government.[5] They are often seen as legal instruments that compre-

1 Burke (2003), 19.
2 Murphy (2007), 498.
3 Ginsburg and Melton (2015), 688. See on constitutions in the 'age of speed': Scheuerman (2002).
4 Hesse (1995), 15 *et seq*. Murphy (2007), 497 *et seq*. Voermans (2009), 84.
5 As Bush explains, constitutions are designed for longevity: '…they are an institutional answer to the demand of stability. Constitutional provisions should not be at the disposition of the government or the parliamentary majority of the day.' Bush (1999), 8. Elkins, Ginsburg and Melton argue on the basis of empirical data that the endurance of constitutions is positively associated with GDP per capita, democracy and political stability and negatively associated with crisis propensity: 'On average, countries are richer, more democratic, more politically stable, and experience fewer crisis, as their constitution ages'. See: Elkins, Ginsburg and Melton (2009), 31–32.

hensively regulate the establishment and exercise of public power, protect minorities and the opposition against chance majorities,[6] and guarantee a distinction between the constituent power of the sovereign people and the constituted power of state organs.[7] It may therefore seem desirable to make a master constitutional text unchangeable or at least extremely difficult to change.[8] This would give the constitution an ultimate supreme status in law, making it impossible for any branch of government to legally evade the control that constitutional provisions seek to have. Even the rights of the smallest minorities would be legally protected (assuming the minorities concerned were parties to the original constitutional bargain). The people would, once and for all, fix a just system of government for all time to come, or so some early constitutionalists believed.[9]

However, contrary to what the first drafters of written constitutions hoped for, it has proven impossible for a constitutional charter to fully carve the government of a nation into stone.[10] Constitutions have appeared, like any legal code, to be 'by inescapable necessity placed in the flow of historic events', as Jellinek put it.[11] Presumably, an unamendable constitution would not last long.[12] Even the wisest drafters cannot look too far into the future.[13] Unforeseen technological, cultural and physical developments may require fresh solutions,[14] and even the most confident men and women who form a constitutional assembly might admit that they cannot create a perfect document (if such a thing could even exist at all).[15]

Moreover, it may be questioned whether an 'eternal' or extremely rigid constitution would be truly democratic at all, even if it provided for democratic law-making procedures. In a letter to James Madison on the issue of constitutional amendment, Thomas Jefferson made a case for a relatively flexible

6 Sajó (1999), 39.
7 See: Grimm (2012), 104, 109–111.
8 Madison, for example, famously believed that a constitutional law-making track should be kept open only for 'certain great and extraordinary occasions', fearing that 'every appeal to the people would carry an implication of some defect in the government' and that too frequent appeals would undermine the stability of the government depriving it of 'that veneration which time bestows on everything'. See: Madison (1987b), 313 (Federalist Nr. 49).
9 The idea of an unchangeable constitution is not only theoretical. In 1669, John Locke drafted 'The Fundamental Constitution of the colony of Carolina'. Article 120 stipulated that it was to 'remain the sacred and unalterable form and rule of government of Carolina forever'. http://avalon.law.yale.edu/17th_century/nc05.asp (accessed 30-3-2017).
10 Loughlin (2009), 297.
11 Jellinek (1906), 2.
12 Elster (2000), 95.
13 Llewellyn (1934), 11.
14 Murphy (2007), 497.
15 Levinson (2012), 331.

constitution. He asserted that 'the earth belongs to the living and not to the dead'.[16] According to Jefferson's democratic principle,

> '"the living" may govern themselves as they please, but they may not bind future generations. Therefore, Jefferson found that every constitution should 'naturally expire at the end of thirty-four years'.[17]

Noah Webster believed that it should not be overly difficult to change a constitution. During the debates on the ratification of the US Constitution, he asserted that

> 'the very attempt to make perpetual constitutions is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia'.[18]

More recently, Delinger said that 'an unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed'.[19]

Therefore, along with a stable framework, constitutions also need adaptive capacity in order to be able to endure as circumstances and demands change.[20] In the words of Elkins, Ginsburg and Melton:

> 'given the existence of exogenous shocks that change the costs and benefits to the parties to a constitutional bargain, constitutions require mechanisms for adjustment over time'.[21]

How can this paradox be solved? How can a balance be achieved between stability and flexibility? How can fixity be connected to progress and constitutionalism (limited government) to democracy (popular sovereignty)? One could argue that these questions lie at the heart of constitutional theory

16 Letter from Thomas Jefferson – 'The Earth belongs to the Living' – to James Madison, Paris, September 6, 1789. http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html (accessed 30-3-2017).
17 Ibid.
18 Webster quoted in Murphy (2007), 497.
19 Dellinger (1983), 387. See also: Albert (2010) and Jackson (2015).
20 Jacobsohn (2010), 214 and 252. Not only constitutions need adaptive capacity. Fukuyama makes the more general point that all political institutions need to be able to adapt in order to survive; see: Fukuyama (2011), 452.
21 Elkins, Ginsburg and Melton (2009), 81.

and practice[22] and are among the most influential constituent choices.[23] The task for constitutional designers is not easy. As Levinson explained,

> '[too much] [r]igidity is fatal to the constitutional enterprise because it will prevent constitutions from changing as times change. But one might argue with equal confidence that too much flexibility destroys what is thought to be the strongest promise of constitutionalism'.[24]

1.2 Amendment procedures as a solution

A solution that many countries have opted for is to include a special amendment procedure in their written constitution. This idea was invented during the American Revolution[25] and was, as Wood put it, 'a totally new contribution to politics'.[26] Since it was first introduced in the 1787 US Constitution,[27] the amendment procedure has become an almost universal feature of national constitutions; 95 percent of the constitutions that have been drafted in the past 225 years have specified one or more special constitutional law-making tracks that formally differentiate constitutional law-making from making other rules

22 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, 3–4. See also: Jacobsohn (2010), 37–39.

23 Fusaro and Oliver (2011), 425.

24 Levinson (2012), 364. Or, as formulated by Masing: 'Wenn und weil die Regelungen zur Verfassungsanderung die Verfassung als Grundlage der staatslichen Ordmung stabliseren wollen, hindern sie notwendig auch deren reform.' See: Masing (2008), 145.

25 As Wood explained, the early constitutional documents of American states had a fundamental status, but lacked a special amendment procedure. They were created by state legislatures so it was presumed that such legislatures could also change them. In those circumstances, it was hard to make a distinction between the constitution and ordinary legislation. The concept of the rigid amendment procedure was introduced to make this distinction effective; see: Wood (2011), 177. Indeed, Wright concluded that 'important advances have been made in the techniques of preparing the fundamental law of the states, in the process of adopting such constitutions, and in providing special processes for their amendment' (Wright (1936), 370 quoted by Loughlin (2009), 281).

26 As Wood understood it, the amending clause of the 1787 US Constitution 'institutionalized and legitimized revolution'; see: Wood (1969), 613.

27 Article V of the US Constitution provides 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.'

of law.[28] Today, almost every country in the world has a written constitution (embodied by one or a set of closely related documents[29]) that includes one or more special procedural requirements for constitutional change, such as super-majorities, a referendum, and/or the consent of states in a federal system.[30] Only New Zealand, Israel, and the United Kingdom have no solemn constitutional document that provides qualified terms for amending the constitutional text.[31]

Constitutional amendment procedures purport to solve the dilemma of constitutional change by making it difficult (at least relative to making ordinary legislation), but not impossible, to change the master-constitutional text. That is to say, constitutional amendment procedures are commonly included to perform two, potentially conflicting, functions in parallel. In the first place, the amendment procedure may have the function to entrench a written constitution.[32] Entrenching a written constitution would, among other things, render its content stable;[33] effectuate and protect its higher or supreme status in law;[34] elevate the constitution above the sphere of ordinary politics;[35] mark a distinction between ordinary rule-making and constitutional law-making;[36] guarantee that no informal sub-constitutions can emerge;[37] safeguard the rights of minorities and individuals;[38] protect regions;[39] protect institutions in the constitution,[40] and guard against 'moral panic'.[41] Furthermore, constitutional amendment procedures supposedly have an affirmative function: to make formal constitutional change possible by providing one or more institutionalized constitutional law-making tracks by which people can legitimately and effectively alter[42] or update the constitution's commitments as circum-

28 Elkins, Ginsburg and Melton (2009), 74.
29 Sweden, for example, has four documents that make up its written constitution.
30 For an overview of the structure of amendment procedures, see: Albert (2014a).
31 Which of course does not mean that these countries have no constitution in the material sense of the term. See: Kelsen (2007), 125.
32 Barber (2016).
33 Kelsen (2007), 259.
34 Wheare (1966), 7. Badura (1993), 59.
35 Loughlin (2009), 298.
36 Kelsen (2007), 125 and 263.
37 Möllers (2007), 210.
38 Barber (2016), 339. Wheare (1966), 83.
39 Barber (2016), 341.
40 Ibid.
41 Ibid.
42 It is sometimes considered that a constitutional amendment procedure may not be used to fundamentally alter the existing constitutional framework. In *Raven v. Deukmejian* (1990), the Californian Supreme Court invalidated a constitutional amendment for the reason that 'it substantially alters the pre-existing constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections'. See: *Raven v. Deukmejian*, 801 P. 2d 1077 (S. Ct., Cal, 1990). In the 1971 Keshavananda case, the Indian Supreme Court held that the Indian constitution provides certain 'basic features' that cannot by altered by way of formal amendment. The Court asserted

stances and demands change.[43] The availability of an amendment procedure would ensure the enduring relevancy of the constitutional document, as well as its enduring legitimacy of popular consent.[44] Confidence in law 'springs from a conviction that the law can be changed if it does not adequately represent popular will', as Siedentop put it.[45] Moreover, amendment procedures would promote orderly change (that is, change within the existing constitutional framework, rather than by way of replacement or overthrow),[46] systematic change (rather than ad hoc amendments),[47] deliberation[48] at the highest levels, sufficient amounts of societal support[49] before constitutional change is brought about, as well as a commitment to such principles as transparency, legal certainty, and the rule of law.[50]

It is interesting to note that an increasing number of countries have supplemented procedural requirements of constitutional amendability with substantive limitations – so-called 'eternity clauses' – that make certain types of amendments illegal.[51,52] In other words, substantive requirements may deem certain constitutional amendments unconstitutional, giving rise to the conundrum

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the right to annul any amendment that seeks to alter the basic structure or the basic framework of the constitution on the ground of 'ultra vires'. That is, it held that the word 'amend' in Article 368 only provides the possibility of bringing about changes that fit into the existing structure of the constitution. *See: Kesavananda v. State of Kerala*, 1973 (4) SCC 225. Murphy asserted that a similar argument could be used in any system that considers itself a constitutional democracy. He explained that the verb 'to amend' stems from the Latin word 'emendere', which means 'to correct' or 'to modify'. Therefore, an amendment that would de facto abolish the existing constitutional order or fundamentally change its nature would not be an amendment at all, but a replacement. And that is, by definition, not the power an amendment procedure grants, according to Murphy. See: Murphy (2007), 506.

43 'A constitution provides a protected space for institutional transformation', as Jacobsohn put it. See: Jacobsohn (2010), 214.

44 Dellinger (1983).

45 Siedentop (2001), 16.

46 Dixon (2011), 97. Indeed, when doubts were raised regarding the need to include an amendment provision, George Mason replied that amendment 'will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence'. See: The Founders' Constitution, Volume 4, Article 5, Document 2. http://press-pubs.uchicago.edu/founders/documents/a5s2.html (accessed 1-4-2017).

47 Möllers (2007), 210.

48 Griffin (1998). Wheare (1966), 83.

49 Fukuyama (2011), 273.

50 Bryde (2003), 205.

51 As Roznai argued, 'the global trend is moving towards accepting the idea of limitations – explicit or implicit – on constitutional amendment power'. See: Roznai (2013), 660.

52 Seventy-five out of 194 contemporary constitutions specify one or more unamendable provisions.https://www.constituteproject.org/search?lang=en&key=unamend(accessed 30-3-2017).

of 'unconstitutional constitutional amendments'.[53] Eternity clauses clearly aim to strengthen the entrenchment function of amendment requirements.[54]

In order to be able to perform both the constraining and affirmative tasks at the same time, amendment procedures must perform a balancing act. A properly calibrated (at least from a functional perspective) amendment procedure, regardless of whether it is supplemented by eternity clauses, carefully balances and connects the potentially conflicting objectives of stability and flexibility, fixity and progress, and constitutionalism and democracy. In Madison's words, it guards

> 'equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults'.[55]

Alternatively, as Cooter put it in terms of game theory, it 'minimizes the harm when the worst political possibilities materialize'.[56] Or as Loewenstein observed,

> 'the process of constitutional amendment everywhere is kept sensibly elastic, neither too rigid to invite, with changing conditions, revolutionary rapture, nor too flexible to allow basic modifications without the consent of qualified majorities'.[57]

However, the ideal combination of requirements of alterability and the degree of rigidity depends on the intricacies and peculiarities of a country's social and political culture, as Andenas explained.[58] There is no one-size-fits-all solution; some countries need a relatively 'rigid', difficult-to-amend constitution, whereas others are better off with a more passable ('flexible') constitutional law-making route. Nevertheless, a variety of options[59] with regard to procedural and substantive requirement of amendability should allow framers to design a formal constitutional law-making track that is made to measure.

Formal constitutional amendment procedures are often considered to be a very important, if not essential, element of a modern constitutional democratic system. Sheips saw this concept as 'one of America's principal contributions to political science'.[60] Amar wrote that amendment procedures are of

53 Jacobsohn (2010), 34 *et seq*. Roznai (2017).
54 While eternity clauses could, of course, never prevent an illiberal revolution, they can perhaps prevent revolutionaries from claiming legality. See: Levinson (2012), 334.
55 Madison (1987a), 284 (Federalist Nr. 43).
56 This is what Cooter labels the 'Minimax Constitution'. See: Cooter (2000), 10–11.
57 Loewenstein (1951), 215.
58 Andenas (2000), xii–xiii. See also: Masing (2008), 142. The fact that these intricacies and peculiarities also change would arguably imply that also amendment mechanisms themselves need to be recalibrated over time.
59 For an overview see: Albert (2014a) and Barber (2016).
60 Sheips (1950), 48.

'unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced'.[61] Burgess held that the articles concerning formal change are 'the most important part of a constitution'.[62] The Venice Commission of the Council of Europe considers constitutional amendment procedures to be of great significance; 'The amending power is not a legal technicality', it asserts, 'but a norm-set the details of which may heavily influence or determine fundamental political processes.'[63] A forthcoming volume on constitutional change will define comparative constitutional amendment as a distinct field of study in public law.[64]

However, as some of the above mentioned sources by the way recognize,[65] one may question the extent to which formal constitutional amendment procedures truly regulate the course of constitutional development.

1.3 The issue of informal constitutional change

According to some people, in countries that live under a written constitution, formal constitutional amendment is the only way to change formal constitutional norms. For example, the United States Supreme Court once stated that 'nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.'[66] Cooley noted that '[t]he meaning of the Constitution is fixed when adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.'[67] And Dow argued that the Article V amendment procedure of the US Constitution sets out an exclusive mode of constitutional change.[68] A commonly stated fact is that the US Constitution has been changed 27 times, the Dutch Constitution about 23 times, the Indian Constitution about 99 times, and that the Spanish Constitution changed never.

However, while it is true that formal constitutional amendment is indeed an important way in which constitutional change has taken place in some constitutional democracies,[69] it does not generally appear to be the only one.

61 Amar (1994), 461.
62 Burgess (1890), 137. Cited by Albert (2014a), 914.
63 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, par. 3.
64 Albert, Contiades and Fotiadou (2017, forthcoming).
65 Albert (2017, forthcoming).
66 *Ullman v United States* (350 U.S. 422, 428 [1955]).
67 Cooley (1868), 55.
68 Dow (1995), 117 *et seq*.
69 The German Basic Law, for example, has been amended 63 times in the past 68 years. Some of these amendments have facilitated major constitutional developments such as rearmament, emergency regulations, budgetary and financial policy reorganisations, reunification and European integration. See: Heun (2011), 21. Bryde (2003), 206-207.

A brief tour through some national and comparative constitutional literatures suggests that, in most constitutional democracies, alternative routes for constitutional change have actually been at least as important as the formal constitutional amendment procedure.

American constitutional literature provides particular support for this claim. Griffin, for example, argued that:

> '[t]he most significant source of constitutional change in the twentieth century has not been amendments under Article V [(the amendment procedure of the US Constitution)] or Court Decisions, but changes initiated and carried out by the President and Congress.'[70]

Griffin recently explored 20th and 21st century constitutional transformations that were effected by rise of the National Security State during the Cold War and the ongoing War on Terror. Griffin contended that, in the fields of foreign affairs and war powers, 'amendment-level' constitutional developments have taken place outside of the formal amendment procedure and beyond the scope of the judiciary.[71] According to Ackerman's celebrated reinterpretation of American constitutional history, sweeping constitutional transformations associated with the 1930s New Deal and the Civil Rights Revolution of the 1950s and 1960s took place without formal constitutional amendment and largely outside of court rooms.[72] Whittington listed no fewer than 87 examples of constitutional developments that occurred outside the formal constitutional law-making tracks of the US Constitution and outside federal or state courtrooms.[73] His examples include the president's cabinet, independent regulatory commissions, congressional subpoena and contempt power, the military draft, the Louisiana Purchase, the establishment of the Federal Reserve System, the development of the welfare state, and the entrance of the United States into the United Nations. Moreover, Posner and Vermeule argued that, in the welfare and security state the US has become

> 'the central mechanism of constitutional change is not amendments, higher lawmaking, or even judicial doctrine, but episodes of conflict between institutions over the distribution of policymaking authority.'[74]

In more general terms, Harris contended that the American amendment procedure 'has fallen into disuse'.[75] Consequently, formal amendment and alternative forms of interpretation, 'to a significant degree, stand on the same

70 Griffin (1996), 28.
71 Griffin (2013).
72 Ackerman (1993), (1996) and (2014).
73 Whittington (1999), 12.
74 Posner and Vermeule (2010), 67.
75 Posner and Vermeule (2010), 67.

conceptual space within the constitutional order.'[76] Strauss went as far as to assert that:

> 'Formal amendments, adopted according to Article V, are actually not a very important way of changing the Constitution. The mechanisms of constitutional change that make up the living constitution – the evolution of precedents and traditions – are much more important. The living Constitution is the primary – I will go as far as to say the all-but-exclusive-way in which the Constitution, in practice, changes.'[77]

In other countries, written constitutional norms also appear to change outside the formal constitutional amendment procedure. For example, in a 2009 report, the Venice Commission of the Council of Europe stated that:

> '[In European countries,] [f]ormal amendment is not the only form of constitutional change, and in some systems not even the most important. Leaving aside revolutionary or unlawful acts, the two most important alternative ways of legitimate constitutional change are through judicial interpretation and through the evolvement of unwritten political conventions supplementing or contradicting the written text.'[78]

For instance, the Dutch constitution has not been fundamentally amended since 1917. According to Peters, important 20th century constitutional developments regarding the role of the courts, the voting system, and ministerial responsibility have taken place without formal amendment.[79] I have argued elsewhere that the rise of political parties, the changing authority, and the influence of the king, the rise of the welfare-state and the Europeanization and internationalization of national (constitutional) law hardly show, if at all, on the face of the text of the written constitution of the Kingdom of the Netherlands, despite the fact that these developments have arguably had substantial consequences for the meaning of a number of constitutional provisions.[80] In Germany, constitutional developments have taken place by constitutional amendment or 'quiet constitutional change'.[81] As Heun explains, 'the Basic Law [that is, the German written constitution] has experienced both to a great extent making it a living constitution'.[82] In the Indian context, Sen explained that '[a]lternative and informal patterns of governance and political change seem

76 Harris (1993), 205.
77 Strauss (2010), 116.
78 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, par. 109.
79 Peters (2003), 31.
80 Passchier (2015) and Passchier (2018, forthcoming).
81 Heun (2011), 21.
82 Ibid.

to have replaced constitutional norms' during the past 50 years.'[83] Significant constitutional developments under a static constitutional document have also been reported in Japan.[84] Murphy even asserted that, in every master-text constitutional democracy, alternative forms of change have been far more common than formal constitutional amendment.[85]

Where the meaning of formal constitutional norms changes without (foregoing) formal constitutional amendment – that is, without explicit changes to the written constitution's text – the written constitution changes informally. This phenomenon, which I will refer to as 'informal constitutional change', is the central focus of this study.[86]

1.4 Research questions

The phenomenon of informal constitutional change raises at least three important questions.

1.4.1 Processes of informal constitutional change

The first question concerns the mechanisms of informal constitutional change: how does informal constitutional change occur? Constitutional literature suggests that there are multiple routes for informal constitutional change, including interpretation,[87] ordinary legislation,[88] evolving unwritten conventions,[89] customs,[90] policies,[91] political and societal practices,[92] changing political theories,[93] shifting understandings,[94] and the evolution of European[95] and/or international law.[96] It appears that the meaning of formal

83 Sen (2007), 1.
84 Matsui (2011).
85 Murphy (2007), 497.
86 Note that this study will not address 'constitutional change outside the written constitution', that is, change that can be regarded 'constitutional', but which has no real relation to the constitution text. On this topic see: Young (2005). This thesis will also not address the theme of constitutional change in systems that have no master constitutional text, on which see e.g. Oliver (2003). Loughlin (2013).
87 Harris (1993). Murphy (2007), 397. Jellinek (1906), 8 *et seq*.
88 Albert (2016). Ackerman (2014). Zippelius and Würtenberger (2005), 65.
89 Albert (2015a). Wheare (1966), 121 *et seq*. Vermeule (2004).
90 Kelsen (2007), 259.
91 Posner and Vermeule (2010), 67.
92 Strauss (1996), 905. Jellinek (1906), 10. Llewellyn (1934).
93 Murphy (1993), 12. Zippelius and Würtenberger (2005), 64.
94 Jellinek (2000), 55.
95 Pernice (2009), 373.
96 Ackerman and Golove (1995). Jacobsohn (2010), 337.

constitutional provisions may change just because the context in which the constitutional document operates changes. As Fusaro and Oliver contended,

> '[a]ny written legal text and any set of constitutional provisions, however introduced, at the end of the day produces different normative outcomes when the context in which they are embedded and to which they are to be applied significantly changes.'[97]

How can we understand these accounts? Furthermore, when we ask ourselves how informal constitutional change take place, can we explore whether such change takes place at 'moments', as maintained by Ackerman, for example?[98] Or does informal constitutional change occur gradually and incrementally? What is the (average) time span of an informal constitutional development? And is informal constitutional change something that typically takes place silently – that is, without the recognition of constitutional actors that they intend to bring about constitutional reform without resorting to new constitutional writing – as the German concept of *Stiller Verfassungswandel* suggest?[99] Or can informal constitutional changes also take place more explicitly; when constitutional actors recognize that they are indeed seeking to change the written constitution by the use of alternative means of change?

1.4.2 Explanations for textual unresponsiveness

The second question that the phenomenon of informal constitutional change raises is: what explains why, in countries that live under a written constitution, significant constitutional change sometimes takes place outside of the formal constitutional amendment procedure? Why do constitutional actors sometimes choose to use alternative means of constitutional change rather than a designated constitutional amendment procedure? Why does the constitutional legislator not always update the constitutional text when it has acquired a different meaning? In short, what explains what I call 'the absence of textual responsiveness' that written constitutions apparently sometimes show?

In most master-text constitutional democracies, the most obvious explanation for textual unresponsiveness of the written constitution is probably the difficulty of formal constitutional amendment. Indeed, many constitutional writers have suggested that stringent requirements of amendability may force necessary constitutional change to assume alternative forms.[100] Especially

97 Oliver and Fusaro (2011), 406.
98 Ackerman (1991), (1996) and (2014).
99 See, amongst others: Badura (1993), 63; Zippelius/Würtenberger (2005), 52 et seq.; Bryde (2003), 206–207; Heun (2011), 21; Wolff (2000), 79 et seq.
100 Elkins, Ginsburg and Melton (2009), 74. Voermans (2009). Lutz (1995). Lutz (2006). 156, Elster (2000), 95. Masing (2008), 131. Griffin (1996), 30.

where the difficulty of formal constitutional amendment is further enhanced by processes of constitutional 'veneration'[101] (that is, processes in which written constitution acquire an almost sacrosanct status) or by so-called 'amendment cultures'[102] (that is, extra-institutional political and societal attitudes toward amendment which make formal constitutional amendment an ever more cumbersome process), constitutional change may be driven 'of the books'.[103] As Elster argued, '[a]ttempts to bind society very tightly could have the opposite effect'.[104] He also went on to say:

> 'The Norwegian constitution of 1814 prohibited the entry of Jews and Jesuits into the Kingdom. (The former provision was abolished in 1851, the latter in 1956.) If that ban had been unamendable, it would eventually either have been disregarded (that is, rendered inoperative by a tacit constitutional convention) or changed by extraconstitutional means. Similarly, entrenched restrictions on suffrage could not have survived the irresistible progress of equality in modern, Western societies. Ulysses would have found the strength to break the ropes that tied him to the mast.'[105]

According to some observers, amendment difficulty would be an even more important explanation for textual unresponsiveness in the contemporary context of globalisation of politics and economy, technological innovation, the increasing life-span of human beings, terrorist threats, religious extremism, and changing citizens' demands regarding constitutional, democratic and welfare state[106] arrangements.[107] Especially in times of emergency and (perceived) crisis, a formal constitutional law-making route will presumably be hardly (if at all) able to supply for necessary reforms. As Elster put it, '[t]ight constitutional self-binding may be incompatible with the flexibility of action required in a crisis'.[108]

This study will explore the significance of amendment difficulty in explaining why constitutional change sometimes takes place without new writing. It will also examine whether there may be other explanations for the absence

101 Levinson (2012), 337.
102 Ginsburg and Melton (2015). See also: Dixon (2011), 107.
103 I derive this expression from Griffin (1998).
104 Elster (2000), 95.
105 Ibid.
106 Posner and Vermeule argued that it is impossible to bind the modern administrative state to (constitutional) law. 'We [Americans] live in a regime of executive centered government', they contended, 'in an age after the separation of powers, and the legally constrained executive is now a historical curiosity'. After what they call the 'Madisonian republic' (let's say, the pre-New Deal laissez faire government), 'the central mechanism of constitutional change is not amendments, higher lawmaking, or even judicial doctrine, but episodes of conflict between institutions over the distribution of policymaking authority'. See: Posner and Vermeule (2010), 4 and 67.
107 See, generally: Oliver and Fusaro (2011), 5. Ginsburg and Melton (2015), 688.
108 Elster (2000), 163.

of the textual responsiveness that written constitutions sometimes show. After all, complex and multifarious phenomena such as informal constitutional change can seldom be explained by a single factor.

1.4.3 Alternative means as functional substitutes

The third question I will address in this study is whether and, if so, to what extent alternative mechanisms of constitutional change can functionally substitute a formal constitutional amendment procedure? As indicated above, a constitutional amendment procedure is considered an extremely important element of a modern constitutional democratic system. The instrument is supposedly able to guarantee stability and flexibility, fixity and progress, and constitutionalism and democracy. Amendment requirements are commonly attributed the task of promoting orderly change, transparency, deliberation and sufficient amounts of support for constitutional change. However, what happens when constitutional change is effected by other mechanisms than a formal constitutional amendment procedure? Can alternative mechanisms of constitutional change be (perfect) functional equivalents of a formal constitutional amendment procedure?

There is hot debate in the constitutional literature surrounding these questions. Some people believe that alternative mechanisms of change cannot substitute the constraining function of a formal constitutional amendment procedure. Voermans, for example, asserted that written constitutions are only effective if political and legal actors use the formal amendment procedure to bring about constitutional change:

> '[i]f a constitutional issue is regulated in another way, via lower ranked legislative authority (e.g. the parliamentary legislator), the constitutional restrictions on amendability become idle.'[109]

According to Voermans, constitutional engineering outside the formal constitutional amendment procedure may 'ultimately undermine or erode the value of a [written] constitution'.[110] Therefore, Voermans believed that regulating constitutional issues should be the 'prerogative (or reserve)' of the constitutional legislator as defined by the constitution's amendment provisions.[111] Along similar lines, Grimm contended that a written constitution can only fulfil its promise of comprehensively regulating the establishment and exercise of public power if it enjoys a supreme status above other rules of law. According to Grimm, this means that 'all acts of public authority have to conform

109 Voermans (2009), 84.
110 Ibid, 84–85.
111 Ibid.

the provisions of the constitution'.[112] If the constitution is not higher or supreme law, its functioning will be severely hampered: state institutions would then be able to legally evade the constitution's control. Grimm observed an indispensable relation between the essential higher rank of constitutional law and the rules for constitutional amendment:

> '[i]f a constitution allows for amendments by way of ordinary legislation, that is, without requiring a super-majority, its quality as higher law is seriously hampered.'[113]

Grimm also considered the typical requirement of a supermajority to be an essential means of furnishing a consensus basis for political adversaries and 'a framework in which the political competition can take an orderly and peaceful route'.[114] This framework needs to be protected against chance majorities; otherwise, the function of the constitution will be put at risk: '[i]t becomes a tool in the hands of the majority and ceases effectively to protect the minority or the opposition.'[115]

Other scholars have expressed concerns regarding the substitutability of the affirmative function of amendment procedures. For example, it has been questioned whether alternative means of change are able to generate sufficient amounts of support as constitutional change takes place. For this reason, the Venice Commission clearly prefers the use of formal constitutional law making tracks when constitutional changes are being brought about:

> '[p]roperly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time.'[116]

As Murphy explained, democratic theorists have denounced the use of alternative means of constitutional change, such as interpretation, as 'potentially both creative and enormous in effect'.[117] Vile, for example, believed that 'there must be a procedure at the heart of every political process'.[118] Möllers made a similar contention, stating that:

112 Grimm (2012), 109.
113 Ibid.
114 Ibid.
115 Ibid, 110. See also: Sajó (1999), 31.
116 European Commission for Democracy Through Law (Venice Commission), *Final Draft Report on Constitutional Amendment Procedures*, CDL(2009)168, Study nr. 469/2008, Strasbourg 4 December 2009, par. 199.
117 Murphy (1993), 13.
118 Vile (1998), 378.

> 'democratic will is formed through procedures, there is no strictly democratic legitimate decision outside the legal order, because only formal procedures can actually guarantee the change of the kind of equal participation that we may call democratic.'[119]

Murphy himself suggested that 'democratic governance would seem to require that establishing or amending a constitutional text be done openly, not by stealth.'[120] Furthermore, we may note that alternative means of change may lack the effectiveness that formal amendments expectedly have as instruments to bring about necessary constitutional reforms. As Dixon observed, the transformative effects of potential amendment substitutes may be less rapid than the effect of formal constitutional amendments.[121] Moreover, constitutional change that takes alternative forms may be less enduring than formal amendments.[122] Indeed, the constitutional status of fundamental reforms may remain contested for generations if they are not casted in written constitutional form. As Livingston suggested:

> '[t]he formal procedure of amendment is of greater importance than the informal processes because it constitutes a higher authority to which appeal lies on any questions that may arise. It provides the ultimate authority and is the final arbiter of all disputes.'[123]

Other writers have seen alternative mechanisms of change as valuable – and sometimes even necessary – substitutes for (overly laborious) formal amendment procedures. Wheare pragmatically suggested that 'one reason why the process of formal amendment has proved adequate in most constitutions is that it does not operate alone'.[124] According to Loughlin, a process of constitutional change 'often appears to be puzzling and somewhat mysterious', but this is only because maintaining the constitution's utility 'requires that it be capable of silently adjusting itself to change.'[125] Loughlin presented Walter Lippmann's sobering argument that 'only by violating the very spirit of the constitution have we been able to preserve the letter of it' as a general insight regarding informal constitutional change.[126] And Gerken suggests that in-

119 Möllers (2013), 76.
120 Murphy (2007), 485.
121 Dixon (2011), 100.
122 Vermeule (2004), 2–3.
123 Livingston (1956), 14.
124 Wheare (1966), 99.
125 Loughlin (2009), 305.
126 Ibid.

formal channels of constitutional change can be more productive than formal constitutional amendment procedures.[127]

Strauss put forward a more principled defense of the capabilities of alternative means of change, arguing that, 'in a fledging society' – that is, one that 'lacks well-established understandings, traditions and patterns of mutual trust and accommodation' – the formal constitutional amendment procedure may indeed be regarded as the only usable institution to bring about legitimate constitutional change.[128] By contrast, in what Strauss calls a 'mature constitutional regime', formal amendment procedures and actual formal amendments to a written constitution are more or less irrelevant.[129] Such a regime has developed mechanisms other than formal amendment supported by supermajority to bring about legitimate change; those alternative mechanisms exist because 'over time people have developed institutions that they trust.'[130] Moreover, in Strauss's view, alternative forms of change are not, by definition, undemocratic. Contrary to old and static written constitutional provisions, constitutional developments that have taken place through what Strauss calls 'the common law method' are 'not likely to stay out of line for long with view that are widely and durably held in society.'[131] Moreover, the 'common law approach' would provide more effective constitutional constrains than textualist or originalist approaches. It would restrain judges more effectively, it would be more justifiable, and it would provide a better account of a nation's actual constitutional practices.[132] The German constitutionalists Zippelius and Würtenberger seemed to more or less share Strauss' view when they argued that informal constitutional developments can be legitimized through legal discourse and the 'consensus readiness' (*Konsensbereitschaft*) of society.[133]

127 Gerken (2007), 927.

128 Strauss (2001), 1460. See also: Strauss (2010).

129 Strauss contended that the American constitutional system would look the same today if the US constitutional document had not contained any special provision for formal constitutional amendment. In an attempt to prove this thesis, Strauss established four propositions. First, he asserted that constitutional matters sometimes change while the text of the written constitution remains unaltered. Second, he contended that constitutional changes occur even though formal amendments that would have facilitated these changes are explicitly rejected by the constitutional legislator. Third, he claimed that when constitutional changes are brought about by way of formal amendment, they often do nothing more than ratify changes that have already taken place in a different form, without the help of a formal amendment. Fourth, Strauss argued that formal amendments are sometimes systematically evaded: '[t]hey end up having little effect until society catches up with the ambitions of the amendment'. See: Strauss (2001), 1461.

130 Ibid, 1462.

131 Strauss (1996), 929.

132 Ibid, 879.

133 Zippelius and Würtenberger (2005), 65.

The present study tests some of the arguments made in this debate. Is one of these camps right? Can we regard alternative mechanisms of constitutional change the functional equivalent of formal constitutional amendment procedures? Or does the substitutability of formal constitutional amendment procedures depend on certain circumstances? Alternatively, we may conclude that there are some important tasks that only an amendment procedure can perform.

1.5 The design of this study

In an attempt to shed light on these questions, I will conduct and compare three detailed case-studies of major constitutional developments in three different countries. In particular, where this study takes a 'functionalist turn' – that is, where I seek to identify institutions (such as formal constitutional amendment procedures and alternative mechanisms of change) and doctrines that exist in multiple constitutional systems and explore the functions they perform – the case-study method has important advantages.[134] As Jackson argued,

> '[a] benefit of the case study method in the comparative setting is the ability to explore how different features of the system may interact with and affect the operation of seemingly similar institutions or doctrines, that is, to see particular institutions or doctrines "in action" in their own legal contexts'.[135]

More specifically, the method of 'structured comparative case studies' that this study largely resembles should enable me to provide 'a set of comparative perspectives on how seemingly similar issues are (or are not) addressed in different constitutional systems.'[136]

1.5.1 Three case studies

The first case study (chapter 3) will explore the Japanese national defense and pacifism issue. Article 9 of the 1947 Constitution of Japan renounces war 'as a sovereign right of the nation' and 'threat or use of force as means of settling international disputes'. It also stipulates that, in order to accomplish this aim, 'land, sea and air forces, as well as other war potential, will never be maintained.' This so-called 'pacifism clause' was originally drafted to prohibit Japan from maintaining armed forces for all purposes, even self-defense. However,

134 Jackson (2012), 62.
135 Ibid, 64.
136 Ibid, 65.

in 1952, without formal constitutional amendment, the Japanese government established 'Self-Defence Forces' (SDF). Ever since, the size and capability of the SDF has been significantly extended to the point where the SDF is currently counted among the five most powerful militaries in the world. Along the way, the Japanese government reinterpreted Article 9 twice: in 1952 to allow the government to use military force in 'individual self-defence', and in 2014 to allow the government to use military force in 'collective self-defence'. Meanwhile, while Japan refrained from sending troops abroad, since the early 1990s, the country has conducted an ever-more assertive defence policy, also without formally amending the Article 9 constitutional commitment to pacifism. The case study will examine how these developments have taken place, the extent to which they can be understood as informal constitutional change, why Article 9 has never been amended, and to what extent (if any) the alternative mechanisms of constitutional change that have modified the content of Article 9 have substituted some of the most important functions that may be attributed to the formal amendment procedure of the Japanese Constitution.

The second case study (chapter 4) will explore the relationship between real-world shifts that haven taken place since the Second World War in terms of how American constitutional war powers have been divided between the President and Congress, on one hand, and the War Clauses of the US Constitution on the other. The War Clauses vest in Congress the power to 'Declare War', 'To raise and support Armies', and 'To provide and maintain a Navy.'[137] Furthermore, they make the president the 'Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.'[138] In the period between the adoption of the US Constitution (in 1789) and the Second World War, these clauses facilitated a system in which the *de facto* and *de jure* ability of presidents to use military force depended to a great extent on congressional approval. However, during the Cold War and the War on Terror, a development occurred whereby the president, as commander-in-chief, acquired an increasingly independent and powerful position in the field of national security. Although this development has a strained relationship with the pre-WWII constitutional plan, the judiciary has hardly interfered, because it has consistently refused to hear the merits in war power cases. The result is that a contemporary American president, as commander-in-chief, is hardly bound by checks and balances anymore. As an empirical matter, at least, the president has a broad preclusive and unilateral authority to deploy conventional weapons, intelligence units, and use nuclear arms. The case study will explore whether the extent to which the increased scope of presidential capacity to use military force can be understood as informal constitutional change. I will argue that, as a consequence of post-WWII developments in the allocation

137 Article 1(8) US Constitution.
138 Article 2(2) US Constitution.

of constitutional war powers, the pre-WWII meaning of the US Constitution's War Clauses no longer holds true, even though these clauses have not been formally amended. I then ask why, despite significant constitutional change in the area the War Clauses of the US Constitution address, these clauses have never been the subject of formal constitutional amendment. Moreover, I will seek to provide a sense of the extent to which alternative mechanisms of change that have affected the shifts in the allocation of constitutional war powers have been functional equivalents of US Constitution's Article V formal amendment procedure.

The third case study (chapter 5) will explore the relationship between the evolution of European integration and the German Basic Law. Some of the constitutional implications of this evolution show on the text of the Basic Law. However, even after several formal amendments to the Basic Law in connection to the development of the EU have been brought about, the contemporary text of the Basic Law does not seem to reflect all – and perhaps not even the most important – constitutional implications of almost seven decades of European integration. In fact, it has been widely recognized in German constitutionalism that the evolution of European integration has effected substantial 'material' modifications of the contents of the German Basic Law; that is, changes in the meaning of Basic Law provisions outside of the Article 79(2) amendment procedure of the Basic Law. The case study will explore some important examples of informal constitutional developments that have taken place in connection with the evolution of European integration; these include changes pertaining to the principle of federalism, human rights, and the powers of certain state institutions. I will then ask why it is that some constitutional developments connected with European integration have been channeled through the formal constitutional amendment procedure, while other important changes have come about solely through alternative routes of constitutional change. I will also explore whether and, if so, to what extent alternative mechanisms of constitutional change have been able to substitute some of the most important functions that are being attributed to the formal constitutional amendment procedure of the Basic Law.

1.5.2 Selection of the cases

The selection of cases for this study has been constrained by the languages with which I am familiar (namely, Dutch, German, and English) and the availability of materials in these languages. However, even within these constraints, the cases for this study have not been selected randomly.[139] In the first place, the countries that form the context for the cases in this study

139 On case selection in comparative constitutional studies, see: Hirschl (2014), ch. 6. Jackson (2012), 65. Saunders (2006).

may be regarded as stable constitutional democracies.[140] That is to say, they seemingly share some basic ideas and deeply rooted traditions about the tenets of just government, ideas, and traditions that can briefly be summarized constitutionalism (limited government), the rule of law, human rights, and democracy (popular rule).[141] While, on a concrete level, the constitutional systems of Japan, the US, and Germany differ significantly from each other, they share the assumption that, in Murphy's words, 'although the people's freely chosen representatives should govern, those officials must respect certain substantive limitations on their authority.'[142] In making these potentially conflicting ideas work, constitutional democracies encounter comparable problems.[143] For example, the phenomenon of informal constitutional change raises similar questions in countries that take constitutional norms seriously; that is, in countries in which the branches of government at least pretend to let themselves govern by constitutional precepts. Conversely, in countries that live under authoritarian rule, questions regarding the way constitutional change takes place, regarding explanations for the absence of textual responsiveness of written constitutions, or regarding whether the form of change matters would get a totally different dimension – if such questions would be relevant at all.

A second and related observation that may be made about the countries that form the contexts of the cases in this study is that, in each of these countries, the idea that the written constitution is a source and measure of legitimacy figures prominently.[144] In Japanese, American, and German constitutionalism we encounter the (modern) idea that the written constitution provides the foundation of legal order, establishing itself as 'the pivot on which the legitimacy of legality turns,' as Loughlin put it.[145] One important explanation for this common characteristic is that the Americans exported this tradition of written constitutionalism to Japan and Germany after the Second World War. Indeed, in both Germany and Japan, the Americans were deeply involved in the post-war constitution-making processes.[146] The Japanese charter was

140 I.e. countries that have been constitutional democracies for more than 20 years. See: Lijphart (2012), 47. In listing stable constitutional democracies, Lijphart relies on the rankings of Freedom House and Dahl's classical criteria: (1) the right to vote, (2) the right to be elected, (3) the right of political leaders to compete for support and votes, (4) free and fair elections, (5) freedom of association, (6) freedom of expression, (7) alternative resources of information, (8) and institutions for making public policies depend on votes and other expressions of preference.

141 Koopmans (2003), 6.

142 Murphy (2007), 10.

143 Koopmans (2003), 7.

144 The cases of the United Kingdom, Israel, and New Zealand suggest that a country does not necessarily need to have a written constitution in order to be a successful constitutional democracy.

145 Loughlin (2012), 276.

146 Murphy (2007), 200.

even drafted by Americans before it was handed over to the Japanese government.[147] It may be true that both the German Basic Law of 1949 and the Constitution of Japan of 1947 utilized many existing institutions. It may also be true that, as we will see, Japanese and German constitutionalism have treated their post-war constitutional systems in their own ways in the decades to follow. Yet, in both Japan and Germany, the idea that the written constitution is supposed to 'plate political power with the gold of authority'[148] seems to have made a lasting impression.

For now, it is important to consider that the similar ways in which written constitutions are perceived in the countries that form the contexts for the cases selected for this study may allow us to better appreciate the significance of the differences between the way informal constitutional change is appraised in Japan, the US, and Germany.[149] Indeed, the selection of these countries resembles, in a way, what Hirschl called the 'most different cases approach', which involves comparing cases that are 'different for all variables that are not central to the study but similar for those that are'.[150] Doing so, Hirschl explained, 'emphasizes the significance of the independent variables that are similar in both cases to the similar readings on the dependent variable.'[151]

Another observation that support the selection of case studies made for this study is that both the Japanese, US and German constitutions are highly resistant to change. As we shall see, the Japanese and US constitution provide a particularly rigid constitutional amendment procedure. The German Basic Law's formal amendment procedure does not provide too high hurdles. On the other hand, it does include several eternity clauses which make parts of the text formally unamendable. In each of the countries selected for the study, a cultural persistence against constitutional change makes formal amendment even harder than it already is as a purely formal matter. The relatively high resistance to constitutional change we can observe in each country selected for this study may allow for the argument that if informal constitutional change is possible in such systems, it is possible everywhere.

Furthermore, consider the difference in age between the constitutions of the countries selected for this study. The US Constitution (of 1789) is oldest surviving constitution in the world. Both the Japanese (1947) and German (1949) constitutions are relatively young and modern. This selection may therefore allow to test whether 'old' constitutions rely more on informal constitutional change than relatively young ones.

If we then focus on the cases themselves, we may also make several observations that indicate that they have been selected with due care. In the first

147 See, generally: Koseki (1998) and Moore and Robinson (2002).
148 Murphy (2007), 199.
149 See: Jacobsohn (2010), 29.
150 Hirschl (2014), 253. Also quoted by Jacobsohn (2010), 29.
151 Ibid.

place, the cases selected for this study may be regarded as 'prototypical'[152] cases of informal constitutional change in the sense that they take the typical form of a mounting tension between developments taking multiple – legal and non-legal forms – and original intention of written constitutional norms. Indeed, the idea here is that the lessons learned from studying these major cases of informal constitutional change may apply to – or at least be relevant for – other cases of informal constitutional change as well.[153] Moreover, the cases selected for this study have sparked a lot of scholarly and societal debate about what indeed appear to be similar questions. More in particular, in the Japanese, American and German case, constitutional actors have extensively debated the status, validity, and legitimacy of developments that have taken place in areas the written constitution addresses, but have not resulted in new writing – indeed, developments that could be informal constitutional change. These debates will be helpful, if not vital, in exploring some of the questions I have raised above. Lastly, consider the fact that all three cases touch upon issues of vital foundational importance, such as war and sovereignty. If informal change in such areas is accepted as 'constitutional', informal constitutional change could be possible in other areas as well.

Obviously, selecting cases for a comparative study always remains a rather intuitive enterprise. Furthermore, most writers should presumably admit that their personal preferences and interests play a role in the selections they make.[154] On the other hand, anyone who would carefully read some of the recent comparative volumes about constitutional systems in general and constitutional change in particular would have to agree that the Japanese, American, and German cases selected for this study appear to be amongst the most fascinating cases of constitutional change in the world's constitutional democratic systems.[155]

152 Hirschl (2014), 256.

153 Ibid.

154 As Tushnet also seems to admit. See: Tushnet (2014), 11.

155 Prior to this study I conducted a 'quick scan'. That is to say, I scanned the literature about Lijphart's 36 stable constitutional democracies for the existence of a scholarly, political, or societal debate about the issue of informal constitutional change in general or about developments that might be classified as informal constitutional change in particular. For this preliminary exploration, the comparative volumes of Contiades, Oliver and Fusaro about constitutional were very helpful (see: Contiades (2013) and Fusaro and Oliver (2011)). Also, the series on the constitutional law of the EU Member States were of great help (see: Prakke and Kortmann (2006) and Kortmann, Fleuren and Voermans (2006)). I also used *Google Scholar* and the digital catalog of the Leiden University library (catchwords 'constitution [constitutional democracy]' and 'constitutional change [constitutional democracy]'. These search engines provided an indication of the amount of available material on the topic per country.

1.5.3 Explaining similarities and differences

Each of the cases selected for this study is interesting on its own, may shed new light on existing and highly topical debates, and may provide valuable insights regarding the phenomenon of informal constitutional change. However, comparative constitutional law is not only about presenting descriptions of a number of cases side by side.[156] Comparative research should also explain the different and similar manifestations of phenomena it finds.[157] As Dannemann argued,

> 'generally speaking, the [comparative] analysis should seek to explain differences and similarities as they arise from the description of the legal systems under consideration, so that whoever has predominantly found similarity, will predominantly have to explain similarity, whereas those who have predominantly found difference, will predominantly have to explain differences.'[158]

Therefore, in the present study I also seek to make some more general comparative observations (chapter 6). I am to point to some recurring features, striking similarities, and differences between the cases of informal constitutional change in this study, and purport to confront the cases in this study with one another and suggest, where feasible, ideas that might explain the comparative observations I have made.

The conclusion to this study (chapter 7) will draw on this comparative analysis to suggest some general comparative lessons regarding the phenomenon of informal constitutional change. I am fully aware that generalizing from case studies is problematic[159] and that I have examined a limited number of cases. On the other hand, the case study method can be particularly helpful for testing candidate theories.[160] Moreover, this study does not seek to provide definitive answers regarding the issue of informal constitutional change; my ambition is merely to shed some light upon the questions raised. My objective in this study is to show the importance of the issue, provide some insights into it and, above all, lay the groundwork for further explorations of the theme.

1.5.4 Understanding informal constitutional change

However, before I can start reviewing and comparing actual case studies, it is necessary to evaluate the different perspectives on informal constitutional

156 Adams (2011), 189 following Shapiro (1981), vii.
157 Cf. Adams (2011). See also Hirschl (2014), 227.
158 Danneman (2006), 416 cited by Adams (2011), 192.
159 Murphy (2007), 23.
160 Eckstein (1992), 119.

change that have been taken in constitutional literature and see which one provides us with the most comprehensive and accurate understanding of the phenomenon (chapter 2).