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

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6 Comparative observations

'A person who knows only one country knows no countries.'
Seymour Martin Lipset[1]

The previous three chapters provided three main findings: (1) how, without formal constitutional amendment, the meaning of the war-renouncing Article 9 of the Japanese Constitution profoundly changed as Japan developed a national defense policy; (2) how, without amendments to the War Clauses of the US Constitution, the US presidency acquired broad de facto unilateral and preclusive powers to use military force, partly at the expanse of the war powers of Congress; and (3) how the normative content of several important provisions of the German Basic Law changed as a consequence of EU law developments, without resulting in new constitutional writing. Moreover, each of these chapters explored in some detail the processes through which these informal constitutional developments came about; sought important explanations as to why these significant constitutional changes have not been channeled through the special formal amendment procedures the written constitution of these countries provide; and tried to indicate the extent to which the alternative mechanisms of change by which these changes came about have functionally substituted the formal amendment procedures of the written constitutions under which they have operated.

The present chapter has two aims. The first is to point to some recurring features, striking similarities and differences between the cases of informal constitutional change in this study. However, as already discussed in chapter 1, comparative research should not just set cases side by side; it should also seek to explain the difference and similarities as they arise from the different case-descriptions.[2] As Hirschl encouraged us, 'there is no a priori analytical reason why the study of comparative constitutional law could not engage in a more explanation-oriented mode of scholarship.'[3] Therefore, the second aim of this chapter is to confront the cases in this study with one another and suggest, wherever feasible, ideas that might explain my comparative observations. I

1 Cited by Fukuyama (2007).
2 Cf. Adams (2011). Danneman (2006). Shapiro (1981).
3 Hirschl (2014), 227.

will draw on this analysis to suggest some more general, albeit tentative, comparative lessons about the phenomenon of informal constitutional change in conclusion (chapter 7).

As explained in chapter 1, I acknowledge that generalizing from case studies is problematic[4] and that the present study has conducted a limited number of case studies. On the other hand, the case study method can be particularly helpful when testing theories and developing hypotheses.[5] Moreover, this study has not sought to provide definitive answers regarding the issue of informal constitutional change; its ambition is merely to shed some light upon the questions it raises and lay the groundwork for further research.

6.1 Processes of informal constitutional change

The cases in this study have examined in some detail how informal constitutional change takes place in practice. Setting these studies side by side and confronting them with one another, I can make the following observations.

6.1.1 Multiple interpreters

In all three cases in this study, the normative content of formal constitutional provisions has been modified through interpretation. In each case, multiple interpreters can be identified. In the American and Japanese cases, the executive played a principal role in reinterpreting the War Clauses of the US Constitution and Article 9 of the Constitution of Japan, respectively. In these countries, the legislator also played an important role in determining what new circumstances and demands would mean for the normative content of the formal constitution. In the German case, the principal re-interpreter of the formal constitution appears to be the Federal Constitutional Court, although the ordinary legislator has also played a prominent role in aligning the German Basic Law with new realities, namely when it ratified new EU Treaties and implemented EU obligations in the German constitutional order.

Accordingly, the form in which re-interpretations take place varies. In the American case, constitutional interpretations have mainly taken the form of presidential statements, policy documents, and OLC memoranda. Also, congressional resolutions have re-interpreted the US Constitution's War Clauses. In Japan, the formal constitution has been re-interpreted by government decisions, 'white papers', governmental expert-panels, CLB opinions, Diet resolutions, and ordinary legislation. In the German case, constitutional interpretation seems to have taken a more classical form, namely that of judicial

4 Murphy (2007), 23.
5 Eckstein (1992), 118 *et seq.*

decisions or ordinary statutes concretizing the import of formal constitutional norms.

It appears that in none of the cases in this study did one authoritative institution have a monopoly or final say in interpreting the meaning of formal constitutional provisions. In the US case, the battle for the meaning of the constitutional War Clauses has been fought between the executive and the legislature; the judiciary has not intervened, consistently refusing to reach the merits in war powers cases. In Japan, the dialogue about the meaning of Article 9 has been conducted mainly between the government, the CLB, the Diet, constitutional scholars, and the public. Also in the Japanese case, the judiciary has virtually been absent; judicial decisions have only played a marginal role in giving meaning to Article 9 because they have had not much to say about constitutional questions surrounding the principle of pacifism and national defense. In the German case, the implications of the evolution of European integration for the meaning of the Basic Law have crystalized in a debate mainly between the ordinary legislator, the constitutional legislator, the Federal Constitutional Court and, notably, the CJEU. Some would say that the Federal Constitutional Court has the last say in any constitutional question the evolution of European integration may raise. From a doctrinal perspective, this assertion may perhaps be true. However, taking a more empirical perspective, we may observe that the dialogue between, for example, the Federal Constitutional Court and the CJEU about the limits of European integration has not come to closure yet and it is far from certain whose perspective will ultimately prevail, if one ever will.

This is not to say that all interpretations are equally important, influential, and powerful in the cases of this study. In the Japanese, American, and German cases, at least two factors seem to determine the influence of a particular interpreter. The first is the interpreter's ability to actually deal with the developments at hand; that is, its capacity to control the unfolding of real-world developments. For example, the American and Japanese cases indicate that the executive is far better positioned to deal with military issues and matters of national security than other institutions of government. In the field of security issues, the executive has major advantages in terms of capability to actually act, and, hence to take the initiative and have the first say about constitutional questions that may arise. The legislature, by contrast, can – at least as a practical matter – often only respond after the fact. Moreover, it is commonly much harder for the legislature to take a univocal position on short notice. Due to its long response time and its need for concrete cases, the judiciary is in an even worse position to answer any constitutional questions that may arise as national security developments take place. Therefore, it is unsurprising that the judiciary hardly plays a role in the Japanese and American cases in this study. By contrast, the German case in this study concerns a development that is predominantly legal. Indeed, the European Union is what Germans call a '*Rechtsgemeinschaft*': a community of law that binds

member states solely through the medium of law.[6] Here, the judiciary is arguably the branch that is best suited to re-align the constitutional text with the new Europeanized realities. Unsurprisingly in this respect, the Federal Constitutional Court has taken a leading role in determining what the evolution of European integration means for the content of the Basic Law.

A second factor that seems to determine the influence of a particular interpreter is authority, which means the extent to which other constitutional actors tend to accept and follow the view of this interpreter. The German Federal Constitutional Court, for example, appears to be one of, if not the most authoritative interpreter of the German Basic Law. The Basic Law itself recognizes the Court's power to review the constitutionality of new developments. The Court traditionally plays a very active role in explaining and determining the meaning of the Basic Law and German constitutional actors widely recognize the authority of the Federal Constitutional Court's decisions. From this perspective, it seems only natural that the Constitutional Court also plays a leading role in adjusting the Basic Law to the development of the EU. By contrast, the Japanese Supreme Court is known as the most 'conservative' court in the world.[7] The Constitution of Japan recognizes its right to review the constitutionality of legislation, but it has hardly used these powers in the past seven decades. If it would intervene in such a delicate and fundamental issue as the issue of national defense and pacifism, this would be a major break with tradition in itself. Instead, in Japan, it is the executive-related Cabinet Legislation Bureau (CLB) that is seen as the most authoritative interpreter of the Constitution of Japan. From this perspective, it not surprising that CLB interpretations of Article 9 have significantly influenced the way constitutional actors in general have understood the meaning of Japan's constitutional commitment to pacifism. In the US case, we have seen that presidents have often asked the Office of Legal Counsel (OLC) to confirm the constitutionality of their actions, presumably because the opinions of the OLC are – because of its relative independence – being held in higher esteem than the (partisan) opinions of the presidency itself.

6.1.2 Two sorts of conventions

In none of the countries that form the context of the cases in this study is the term 'constitutional convention' part of common constitutional parlance. However, we may observe that in all three cases, the actual formation and acceptance of standards of conduct that do not coincide with the normative content of the formal constitution – indeed, the phenomenon the term constitutional conventions refers to when used in the context of constitutional change

6 Loughlin (2013), 79.
7 Law (2008).

(see chapter 2) – have had profound implications for the meaning of formal constitutional provisions.

The cases in this study suggest that constitutional conventions may form in two ways. In the American and Japanese cases, governmental practices may gradually become concrete standards of conduct – usually when they crystalize in some decision, policy document, or memorandum – and, bit by bit, these standards of conduct are being accepted as valid and obligatory by other constitutional actors as well. In the US, for example, the presidency first asserted a unilateral and preclusive power to initiate war in the early 1950s. However, it is only since around the time of the 9/11 terrorist attacks that Congress has also to some extent accepted the validity of this claim and expected the president to move unilaterally if national security is (allegedly) at stake. In Germany, by contrast, the evolution of European integration is for the most part accepted and perceived as obligatory on the basis of an agreement, namely the principle of 'open statehood' as *inter alia* embodied by the Preamble, Article 24 and Article 23(1) of the Basic Law and the ratification of the EU Treaties.

In all three cases in this study, no single constitutional actor seems to have a monopoly in determining whether or not a certain practice ought to be treated as a constitutional convention. In the American and Japanese cases, it is has predominantly been the executive that has driven the evolution of constitutional practice. In both cases, the validity and binding nature of new practices have been subject to difficult debates amongst constitutional actors. The community of constitutional actors has only gradually come to treat them as constitutional conventions. In the German case, changes in the constitutional practice that have been effected by the evolution of European integration have, at least so far, been accepted by virtually the entire community of constitutional actors. The theory of 'open statehood', which is the basis upon which these practices are recognized, was originally established by the constitutional legislator, but the exact understanding of this theory – and the limits of open statehood – has been shaped and reshaped by multiple constitutional actors.

6.1.3 Silent *vs.* explicit informal constitutional change

Furthermore, the cases in this study suggest that informal constitutional change can take place both explicitly and silently. 'Explicit informal constitutional change' takes place when constitutional actors explicitly recognize that what they are doing is at odds with the constitutional plan. 'Silent informal constitutional change' takes place when constitutional actors – deliberately or otherwise – do not explicitly recognize or actually deny that their moves have called

into question the meaning of formal constitutional norms.[8] In the Japanese case in this study informal constitutional change has mostly taken place explicitly, in the sense that, in reinterpreting Article 9 or in following and accepting standards of conduct incongruent with the meaning of Article 9, Japanese constitutional actors have explicitly acknowledged that these provisions once had a different normative content and were therefore bringing about constitutional change. In the German case, change has sometimes taken place explicitly – when constitutional actors recognized that EU developments may effect 'material' modifications to the constitution – and sometimes silently. Especially in cases that concern the core identity of the Basic Law or in cases where the development of the EU has transgressed the plan of Treaties as ratified by the German legislator, constitutional actors favoring these developments have acted as if change had not taken place.[9] In the American case, informal constitutional change has largely taken place silently. While asserting broad unilateral and preclusive war powers, modern presidents have often claimed that such assertions were nothing new and that the presidency has had such powers since the founding of the United States. Recall Nixon's veto of the 1973 War Powers Act. He argued that the 60-day clock was 'CLEARLY UNCONSTITUTIONAL', because it was an 'attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.'[10] Interestingly, Nixon found that the

> 'only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution – and any attempt to make such alterations by legislation alone is clearly without force.'[11]

8 Drawing on the German concept of '*stiller verfassungswandel*'. See, e.g.: Heun (2011), 21. Wolff (2000), 79 et seq.

9 As Voermans noted, European institutions occasionally adopted further rules concerning subjects included in the TEU or TFEU, without an explicit Treaty mandate to make such rules. They also created rules and procedures that concern subjects that have not been governed by the Treaties at all. For example, the *trilogues* system in the legislative process has arguably emerged without a Treaty mandate. The comitology procedure, which played a prominent role in the legislative process prior to the 2009 Lisbon Treaty, was arguably even inconsistent with Article 202 of the TEC. Landmark CJEU judgements, such as *Van Gend & Loos*, *Costa/Enel* and *Handelsgesellschaft*, may be perceived as transgressions of the limits of the integration program as laid down by the treaties (see: Voermans (2009), 100-102). Also, in less major cases, the CJEU has allegedly broadened the scope of the Treaties beyond the limits of European competences. For instance, the *Mangold* case (Case C-144/04, *Mangold* [2005] ECR I-9981) of the CJEU was criticised by a group of German law professors because it supposedly invented a European prohibition against age discrimination (see: Kokott (2010), 110). Ultimately, the German Constitutional Court did not agree (see: 2 BVerfG 2661/06) – arguably easing its ultra vires test somewhat (Woelk (2011), 165) – but this does not necessarily mean that informal constitutional did not take in fact take place.

10 Richard Nixon: 'Veto of the War Powers Resolution,' October 24, 1973. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=4021. [caps in original]

11 Ibid.

The present study contains no better illustration of what ultimately amounted to 'silent informal constitutional change.'

Why do some informal constitutional changes take place silently, while others come about much more explicitly? In the first place, the clarity of the constitutional text and its original intent may be important factors. In the Japanese case, the explicit way in which the meaning of Article 9 has been modified appears to have had a lot to do with the clarity of the constitutional text and the straightforwardness of its original intent. It was simply impossible for the government to convincingly maintain that the SDF was in accordance with the original constitutional plan; therefore, the content of this plan had to be modified explicitly. In the US, by contrast, the text of the constitutional War Clauses is hardly specific and its original intent is ambiguous. Therefore, it was not necessary for constitutional actors to explicitly claim that in the new circumstances of the Cold War and later the War on Terror, the constitutional plan for war had changed. What's more, it seems that the constitutional text and the ambiguity of its original plan made it possible for presidents to maintain that, even after their extended claims to the war power, in essence nothing had changed and that they were just exercising powers that had been attributed to the presidency for more than 200 years. Moreover, the existence of doctrines with regard to the permissibility of informal constitutional change seems capable of influencing whether such change takes place explicitly or silently. The informal Europeanization of the Basic Law seems to have generally proceeded explicitly where this development was covered by a Ratification Act. However, as soon as developments transgressed the plan of the Treaties as ratified by the German legislator, constitutional actors willing to accept the constitutional implications of these developments deny that such a transgression has taken place. In that case, developments in European Law have still affected the material meaning of the Basic Law because constitutional actors have generally followed and accepted the validity and binding nature of EU standards of conduct. However, the actors have not explicitly admitted, or indeed denied, that these developments have actually gone beyond the doctrinal limits of informal constitutional change.

6.1.4 Change on 'moments' *vs.* gradual change

The cases in this study also suggest a distinction between informal constitutional change that takes place at certain identifiable 'moments' and change that takes place more gradually. For example, the Japanese government has issued two 'official' reinterpretations of Article 9 of the Constitution of Japan (in 1952 and in 2014) that have significantly changed what a meaningful description and explanation of the meaning of Article 9 looks like. On the other hand, in this case, the meaning of Article 9 also changed gradually; for example, when the Japanese government gradually expanded the capacity

of the SDF between the 1950s and the 1990s and when it deployed the SDF abroad in an increasingly assertive manner from the 1990s on. Also, moments can be identified in the German case at which constitutional actors use designated instruments of constitutional change; for example, when they ratify new EU Treaties or when the judiciary changes its views. At the same time, the evolution of European integration has been incremental, such as when powers originally reserved for the states gradually migrated to the federal government and then to the EU. It is only in the American case that it is difficult to identify moments of informal constitutional change. The ever-broader unilateral and preclusive war powers the presidency has acquired have hardly showed up on the face of judicial decisions or landmark statutes. On the contrary, one important statute – the 1973 War Powers Resolution – purported to restore the original division of war powers between the president and Congress by re-circumscribing the powers of the president. It is true that by starting a war in Korea, President Truman created a precedent that constituted a decisive break with American constitutional tradition. However, the validity and binding nature of this precedent have only been accepted over time by other constitutional actors.

6.1.5 Time span

The time span of the constitutional developments reviewed in this study varies greatly. In two of the cases in this study, we see that informal constitutional change takes place over a relatively long period of time. In the Japanese case, it has taken more than four decades to prepare the constitutional road for sending troops abroad and another 20 years before the Japanese government could assert the right to deploy the SDF in collective self-defense. Even after 60 years of defense reforms that ultimately sought to make Japan a 'normal' country again, the Japanese government can still, as a legal matter, not maintain a military and use military force without being subject to a number of limitations that do not apply to the governments of most other countries. In the American case, it has taken more than five decades before the larger part of the constitutional actors acknowledged that a president, as commander-in-chief, can launch major military operations abroad without explicit congressional approval. In the German case, by contrast, constitutional implications of the evolution of European integration have readily been accepted by constitutional actors. Again, this has arguably something to do with the doctrine of open statehood the Basic Law embodies, which quite clearly allows for significant material modifications to the content of the Basic Law without formal constitutional amendment. As a more general matter, however, the process of Europeanization is open-ended and may, at least in theory, continue indefinitely.

6.1.6 The significance of a constitutional text

In all three cases in this study, constitutional change has taken place without formal constitutional amendment. As we have seen, re-interpretations and the formation of constitutional conventions have had significant implications for the normative content of formal constitutional provisions. However, in none of the three cases in this study does this imply that the special form in which the rules embodied by the constitutional text were cast has not mattered. All three cases confirm that writing rules down adds to their firmness of authority. In other words, it gives them a quality of stickiness: even if their meaning has changed significantly, their original intent may retain normative appeal and any proposal for their removal may still invite significant opposition or even open up old wounds. Indeed, over the past 60 years or so, German constitutional law Europeanized significantly, but its content can still not be understood without reading the Basic Law. In recent years, some constitutional actors have utilized the Basic Law to defend German national sovereignty. Although the Declare War Clause of the US Constitution lost most of its meaning during the Cold War and the War on Terror, it still leads some people to believe that modern presidential claims to the war power are unconstitutional. Moreover, it is apparent that the Declare War Clause could provide authority to any future attempts to restore the prerogatives that Congress once had in decision-making processes surrounding matters of war and peace. Even in the Japanese case, in which interpretations and constitutional conventions have plainly contradicted the text and original intent of Article 9 of the formal constitution, the constitutional text still makes a significant difference for anyone who seeks to expand the capacity and scope of activity of Japan's Armed Forces.

6.2 Explanations for textual unresponsiveness

Subsequently, all three case studies in this thesis have examined why, in these cases, most (Germany) if not all (US and Japan) of the constitutional developments that have taken place have not left an imprint of the face of the constitutional text. In other words, the case studies have explored what might explain 'the absence of textual responsiveness', as I have referred to the situations in which the constitutional text remains unaltered, while the meaning of this text has significantly transformed (chapter 1). The cases in this study suggest the existence of some general factors, and some that are specific to each case.

6.2.1 The difficulty of amendment

One explanation for the absence of textual responsiveness in all three cases is amendment difficulty. In the Japanese, American, and German cases, the difficulty of formal constitutional amendment seems to be an important hurdle preventing constitutional actors from bringing about constitutional change by way of formal constitutional amendment or preventing the constitutional legislator from updating the text of the formal constitution to the new meaning it has acquired.

In the cases of this study, we may observe that amendment difficulty may stem from at least three different sources. The first is the constitutional text itself. The Japanese and American constitutional documents contain very difficult formal amendment procedures; the American document demands large majorities in both houses of congress and the support of a large majority of the state's legislatures, while the Japanese document demands a large majority in the Diet and a national referendum. The larger part of the German constitution is formally somewhat easier to amend than the American or Japanese constitutional documents. Amending the Basic Law requires a two-thirds majority in both houses of the German parliament. However, the Basic Law also contains so-called 'Eternity Clauses', which make it legally impossible for the constitutional legislator to bring about any textual changes in the Basic Law that tamper with the values and provisions that are considered part of the Basic Law's core identity (Article 1, 20 and 79(3) BL).

The second source of amendment difficulty we have encountered in all three cases is a cultural persistence against formal constitutional amendment. In the US and Germany, a deep veneration of the constitutional document and a culture of constitutional patriotism makes it hard to sell proposals for constitutional amendment in politics and society. In Japan, we have seen a related form of entrenchment: particularly the principle of pacifism has become deeply rooted in Japanese society. On the other hand, we have seen that forces in society are opposed to formal constitutional amendment because that would (further) legitimate what they view as, the 'imposed' constitution.

In the Japanese case, we also encountered a third source of amendment difficulty that could partly explain why Article 9 has never been amended despite significant defense shifts, namely an unwritten – or implicit[12] – doctrine that deems the principle of pacifism unamendable. Some Japanese constitutionalists believe that even though the formal constitution of Japan does not provide any explicit eternity clauses, the constitutional legislator cannot alter the principle of pacifism, because this principle is part of the fundamental core of the post-war Constitution of Japan. It appears that only a small proportion of the Japanese community of constitutional actors recognize

12 For a distinction between implicit and explicit doctrines of constitutional unamendability, see: Passchier and Stemler (2016).

the existence of this doctrine, but the mere suggestion that any amendment to Article 9 would be unconstitutional may delegitimize any effort to textually revise Japan's constitutional commitment to pacifism.

In the American and Japanese cases, the difficulty of formal constitutional amendment is indicated by the extraordinarily low amendment rates of these countries' written constitutions: the US Constitution has only been amended 17 times in 225 years, and only a few times in connection with something truly fundamental, while the 1947 Constitution of Japan has never been amended. The German Basic Law, by contrast, has been amended more than 60 times – one author even counted 193 amendments. However, some writers put this amendment rate into perspective by pointing to the fact that, in German constitutional history, the number of truly fundamental amendments that have been brought about has been relatively limited.

In all three cases, it seems possible to establish a relationship between the absence of textual unresponsiveness we have encountered to amendment difficulty. It appears that, at least partly as a result of the difficulty of constitutional amendment, American constitutional actors have never seriously considered updating the War Clauses of the US Constitution. Japanese actors have tried to amend Article 9 of the Constitution of Japan many times, but all attempts have failed before they could even be submitted to the people in a referendum. In Germany, the difficulty or impossibility of constitutional amendment seems to ensure that the rules, values, and principles associated with the Basic Law's core identity can, at least as a practical matter, by definition only transform outside the Basic Law's formal amendment procedure.

At the same time, the German case indicates that amendment difficulty does not always explain why countries sometimes do not update the text of their constitution, even if the meaning of this text has changed significantly. In the German case, some changes associated with Europeanization have taken place informally, although it would presumably not be too hard to codify these change in the text of the Basic Law. For instance, it would probably not be very difficult to adapt the texts of the so-called 'German fundamental rights' – which grant 'all Germans' the freedom of assembly, the freedom of association and occupational freedom (Articles 8(1), 9(1) and 12(1) BL) – to the new situation under EU law in which these rights also apply to non-German citizens on German soil. However, these constitutional implications of European integration – which seem to have been widely accepted – have not shown on the face of the Basic Law's text.

6.2.2 Formal amendment perceived unnecessary

In two cases in this study, the American and German one, we have seen that constitutional actors have not (entirely) aligned the constitutional text with

its new meaning, because they believed that amending their constitution was unnecessary.

In each case, however, actors have different reasons for believing that the formal constitution does not have to be updated. In the American case, we have seen that a proportion of the constitutional actors denied that change had been going on. They believed that the president, as commander-in-chief, has had unilateral and preclusive constitutional war powers ever since the founding of the United States. Others had learned from experience with the New Deal that alternative methods of engineering constitutional change were far more effective than the laborious formal amendment procedure of the US Constitution. A third group of Americans relied on a strong form of living constitutionalism, arguing that the allocation of war powers could change outside the US constitution's amendment procedure. In Germany, on the other hand, constitutional actors have considered it unnecessary to channel all constitutional change effected by European integration through the Basic Law's formal amendment procedure, because German legal doctrine quite unequivocally accepts that European integration may imply 'material' modifications to the content of the Basic Law and that such modifications do not legally require formal constitutional amendment. Indeed, some prominent writers have argued that the formal constitutional amendments that have been made in connection with the development of the EU have not been brought about on legal-doctrinal grounds, but on political grounds or grounds of constitutional 'aesthetics'. The doctrine of 'open statehood' or 'European friendliness' of the Basic Law would entirely waive constitutional change connected with European integration from any obligation (cf. Article 79(1) BL) to reflect constitutional change in the constitutional text.

It is only in Japan that constitutional actors have generally recognized the necessity of amending Article 9 to (fully) legitimize the defense shifts that have taken place. Indeed, successive governments have launched efforts to textually revise Japan's constitutional commitment to pacifism. At the same time, faced with the (near) practical impossibility of formal constitutional amendment and the (alleged) necessity of constitutional change in light of the (perceived) changing security environment surrounding Japan, a significant proportion of the Japanese constitutional actors have accepted that, at least for the moment, the content of Article 9 can be modified without new writing.

In the cases of this study, at least five factors seem to have influenced whether or not a country's constitutional actors deem it necessary to bring about constitutional change by way of formal constitutional amendment: (1) the clarity of the constitutional text and its original intent; (2) the perceived urgency of change; (3) the extent to which a realistic amendment option is available; (4) the extent to which alternative means of constitutional change are available; and (5) the presence of a permissive legal doctrine of informal constitutional change.

6.2.3 Judicial deference or acquiescence *vs.* judicial involvement

In two of the case studies, the absence of formal constitutional amendments in the face of significant constitutional change may be explained by pointing to the fact that the judiciary has not legally forced constitutional actors to settle constitutional questions by way of formal constitutional amendment before they could continue to pursue their effort to revise the constitution. In both Japan and the US, the judiciary has refused to address the tensions between formal constitutional norms and the institutional reality on the ground, declaring the questions that are being raised as being 'political' in nature. It is true that, in Japan, the CLB has occasionally stood in the way of governments that sought to conduct a more assertive defense policy, but seemingly not to the extent that formal amendment became necessary to amend the constitution. With regard to the most recent security shifts, we may observe that it was apparently easier for the government to 'pack' the CLB by transferring and replacing some of its personnel than to bring about constitutional change through the formal constitutional law-making route of the Constitution of Japan. The exception in this study is perhaps the case in Germany. After the German Constitutional Court started to develop 'counter-limits' to European integration from 1974 on, the constitutional legislator apparently not only found it necessary to codify some of these limits in the Basic Law, but to also confirm and highlight Germany's commitment to the development of the European Union (see Article 23(1) BL) at the time the Treaty of Maastricht was signed. While it may be true that these amendments were legally unnecessary – also after the more European-critical decisions of the German Constitutional Court – Article 23(1) can still be understood as a response to the more critical stance towards Europeanization the Constitutional Court had taken from 1974 on.

6.2.4 Polarization vs. consensus

In the American and Japanese cases, polarization may explain why constitutional changes in the field of the war powers and pacifism and national defense, respectively, have never been subject of formal constitutional amendment. In Japan, for example, there is hardly any consensus about the question of what a new Article 9 should look like. So, even if sufficient constitutional actors would agree that Article 9 has to be amended, it would be very hard to agree upon a specific constitutional text. Likewise, in the American case in this study, the debate about the war powers issue is so deeply divided between 'presidentialists' (those who favor a strong presidency in the field of national security) and 'congressionalists' (those who favor a strong(er) Congress in the field of national security) that even if a realistic amendment

option would be available, the issue of the war powers would probably be too controversial to be the subject of a formal constitutional amendment.

The German case, by contrast, indicates that polarization does not provide a universal explanation for the lack of textual responsiveness. As we have seen in the German case, there seems to be such a high degree of consensus about the validity and desirability of constitutional change connected with European integration that formal constitutional amendment is generally not considered necessary at all.

6.2.5 Constitutional cultures

A final comparative observation about absence of formal amendment in the face of significant informal constitutional transformation in the cases of this study is that such textual unresponsiveness may have something to do with political and societal attitudes toward the written constitution. Constitutional patriotism may be a reason for arguing both for and against amending the constitutional text. In the American case, forms of constitutional patriotism are common reasons for people to argue that the constitutional text should not be 'tampered' with. In the German case, on the other hand, constitutional patriotism may be a reason for arguing exactly the opposite. Many German constitutional actors seem to prefer that constitutional change (eventually) takes the formal amendment route. Also in Japan, the arguments for or against amending Article 9 are sometimes based on how the written constitution is perceived. However, unlike in the American and German cases, in Japan it is the idea of an 'imposed' constitution that seems to sometimes influence how people think about formal constitutional amendment. For some, the idea of an imposed constitution is sufficient reason to argue that Japan should rewrite or even replace its 'American' written constitution. For others, this idea is reason to contend that amending the constitutional text does not make any sense, because it is not theirs anyway.

6.3 Alternative mechanisms of change as functional substitutes?

All three countries in this study live under a written constitution that includes a special amendment procedure making it harder to change the constitutional text than to make or change other types of legislation. In all three countries, a number of functions have been attributed to this procedure. Generally, a constitutional amendment procedure should guarantee that the constitution is not tampered with easily and that constitutional change cannot take place without extraordinary support. The procedure should also provide a means for bringing about constitutional change effectively and provide a means to update the constitutional text. Each case study in this thesis has sought to give

a sense of the extent to which alternative mechanisms of constitutional change can substitute these functions.

6.3.1 Perceived legitimacy of change

As we have seen, in all three cases in this study, developments effected by alternative mechanisms of change – outside of a formal constitutional amendment procedure – have taken place that have nevertheless been accepted as valid by a significant proportion of the community of constitutional actors. However, does this also mean that, in these cases, alternative means of change were able to generate amounts of legitimacy for constitutional change commonly associated with formal constitutional amendment?

The extent to which the informal constitutional developments studied in this thesis have been viewed as legitimate varies significantly from case to case. The Japanese pacifism and national defense issue has been recognized as the most controversial issue created by the Japanese constitution. While a large proportion of the constitutional actors seems to have accepted the validity of the defense and pacifism shifts that have taken place, the mechanisms through which these shifts have come about seem to not have generated the amount of support for constitutional reform a permissive constitutional amendment of Article 9 presumably would have. For example, one commentator held that the fact that Prime Minister Abe used a cabinet decision to change the meaning of Article 9 is 'by its very nature' invalid:

> '[i]t not only stands in direct violation of the explicit constitutionality mandated amendment procedures, but it also violates democratic principles, given that the Diet and the public are cut out of the process.'[13]

Also, in the American case, the legitimacy of informal constitutional change has been contested because it has taken place outside the formal constitutional amendment procedure. In both cases, we can observe that even if most constitutional actors have accepted a certain reinterpretation or threat certain practices that are incongruent with the constitutional plan as constitutional conventions, the (perceived) lack of formal constitutional amendment provides a strong point of departure for anyone who seeks to contest the legitimacy of these informal constitutional amendments. Obviously we cannot be certain, but it appears that both in the Japanese and American cases, only a formal constitutional amendment could settle the most important controversies that the informal constitutional developments have raised.

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13 Martin, ''Reinterpreting' Article 9 endangers Japan's rule of law', *The Japan Times*, 27 June 2014. See also: Martin (2017).

In Germany, by contrast, the legitimacy of informal constitutional change connected to the evolution of European integration has hardly been contested at all. Constitutional actors, including most notably the German constitutional court, have virtually universally recognized that the Basic Law embraced the concepts of 'open statehood' and 'Europe-friendliness'. Drawing on these concepts, German constitutional actors have accepted that European integration may incur substantial 'material' constitutional modifications outside the formal amendment procedure of the Basic Law. In the first few decades of European integration, the legitimacy of these modifications was accepted virtually without question. It was only from the 1970s, as the process of European integration intensified, that some began to take a more critical stance toward the legitimacy of European integration under the Basic Law, and the doctrine of supremacy of EU law in particular. Notably, in 1974, the German Constitutional Court broke with the clear concept of supremacy of Community Law and started to develop 'counter-limits' to European integration, instruments to defend German sovereignty and the core identity of the constitution. Today the Court accepts that European integration may incur substantial informal constitutional change, but only on the condition that EU acts comply with the plan of the Treaties and European integration remains within the boundaries set by the unchangeable core of the German Basic Law. Some commentators have criticized the Court for placing too much emphasis on the defense of national sovereignty, and too little on Germany's constitutional commitment toward European integration. The review powers asserted by the German Constitutional Court have certainly forced the CJEU to take the German constitutional reservations seriously.[14] At the same time, it should be noted that the Constitutional Court has set limits and conditions that have so far remained theoretical: until now, it has accepted 'de facto-monism', as one author put it,[15] with regard to the relation between the German and EU legal systems, and thus accepted that the development of the European Union may have consequences for the meaning of the Basic Law, even outside the formal constitutional amendment procedure.

What explains this difference between the (perceived) legitimacy of informal constitutional change in the Japanese and the American cases on the one hand, and the German case on the other? One possible answer may be provided by pointing to the fact that, in Germany, European integration was endorsed by the Basic Law from the beginning, and further endorsed by the constitutional legislator in 1992 when it included a special EU Clause in the Basic Law (Article 23). As a consequence, German constitutional actors and commentators have virtually universally recognized that European integration may effect informal constitutional change. Any controversies about Europeanization outside the formal amendment procedure surround the questions how far

14 See: Heun (2011), 188.
15 Woelk (2011), 165.

Europeanization may go. In the US and Japan, on the other hand, the constitutional legislator and the courts have never really developed a legal doctrine of informal constitutional change. Therefore, in these cases, there has remained ample room for constitutional actors and commentators to base their choice for a certain perspective on their ideological preferences with respect to the concrete topic at hand.

6.3.2 Effectiveness of change

In all three cases in this study, we have seen that constitutional actors have used instruments other than the formal constitutional amendment procedure to bring about constitutional reform. Have these instruments been successful in producing the desired or intended result? If so, to what extent?

The simple answer for all three cases is that alternative means have indeed been successful in bringing about enduring constitutional reforms. On closer examination, however, the answer is more complicated. In all three cases, constitutional actors have managed to bring about significant constitutional reform without altering the text of the constitution. That is not to say that alternative means seem to be as effective in bringing about change as a formal constitutional amendment would have been. In the US, presidents have significantly extended their powers as commanders-in-chief by asserting and exercising a preclusive and unilateral power to use military force. Re-circumscribing their powers or restoring Congress' powers would presumably be extremely difficult, as the experience with the 1973 War Powers Resolution has shown. However, as long as the new allocation of war powers has not been entrenched by the text of the US Constitution, it remains ambiguous. Moreover, while shifts in allocation of war powers have clearly had a great degree of staying power, alternative forms of change, such as executive interpretation and ordinary statutes, seem unable to guarantee the same amount of stability as a formal constitutional amendment could supposedly provide. Significant shifts in the allocation of War Powers – either favoring the presidency or Congress – can probably take place again, also without requiring formal constitutional amendment. In the Japanese context, it is unlikely that the government will disband the SDF and restore the principle of pacifism as originally understood. In fact, it seems that the larger part of the defense shifts that have come about during the past 70 years have the kind of staying power that may be associated with a formal constitutional amendment. On the other hand, Japan could probably have reformed its national defense policy much more quickly if it had been able to amend Article 9 of the Japanese constitution. Furthermore, as long as Article 9 is in place, it will make it harder for the government to conduct an assertive and effective defense policy. Indeed, the Japanese case indicates that engineering constitutional change without formal constitutional amendment may involve some very specific problems and

difficulties in governance. Also in the German case, we have to give a twofold answer to the question of effective of alternative means of constitutional change. On the one hand, we may see that alternative means of constitutional change have been effective in adapting the Basic Law to the evolution of European integration. On the other hand, we may observe that it is not at all certain whether the scheme for Europeanization (de jure dualism, de facto monism) that has been followed by German constitutionalism so far will remain an effective scheme for constitutional change in the future. In particular, it can be doubted whether German constitutional actors will continue to be able to find a workable balance between 'Europe-friendliness' and the protection of national sovereignty without new constitutional writing.

When are alternative means of change relatively effective and when are they not? The three cases in this study suggest that the effectiveness of alternative means of change depends on myriad case-specific factors. However, one factor that seems to stand out is the sheer persistence of the factual situation that has been created. In the security situation that has surrounded Japan for the past 60 years or so, it would be almost unthinkable that the Japanese government would return to pacifism. Once the SDF was established, there was simply no way back. In the US, post-WWII institutional reforms have greatly favored the position of the presidency, partly at the expanse of the powers of Congress. It would be a herculean operation to reorganize this apparatus to restore the war powers of Congress. One thing it would probably require is a major defense cut – so the president cannot launch major military operations again without first obtaining congressional funding. However, in a country in which militarization is politically, economically, socially, and culturally entrenched to such a significant extent as it is in the US, cutting funds for the military is an extreme measure indeed. Also in the German case we see the (normative) power of facts at work. New EU developments raise often raise difficult constitutional questions, which are occasionally brought before the Federal Constitutional Court.[16] Where EU institutions have quite clearly transgressed the plan of the Treaties, the Court has sometimes 'barked', although it has so far continued to live up to its reputation as the 'Dog that Barks but does not Bite', as Weiler once noted.[17] Apparently, the evolution of European integration is a moving train that can hardly be stopped, let alone reversed. As Bryde noted, no constitution can preclude that its provisions become substantively incorrect by evolutions that lay beyond the control of its state organs.[18]

16 E.g., 2 BVerfGE 2728/13 – OMT. ECB, Press Release of 6 September 2012 on 'Technical features of Outright Monetary Transactions'. http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (accessed 5-4-2017).

17 Weiler (2009), 505 (caps in original).

18 Bryde (2003), 208.

6.3.3 Informal constitutional change and the constitutional text

Informal constitutional change takes place where the meaning of formal constitutional precepts change, though not the constitutional text itself. Some have hypothesized that informal constitutional change might ultimately render the constitutional text irrelevant.[19] However, the cases in this study suggest that this might only be the case when informal constitutional change takes place by way of constitutional conventions that substitute or repudiate the text. Other methods, like void-filling, refinement, or power transfers (see chapter 2) seem to have less rigid consequences for the relevancy of the constitutional text.

Consider the American case in this study. Shifts in the allocation of constitutional war powers have nearly repudiated the congressional prerogative to authorize and regulate the use of military force by the executive embodied by the Declare War Clause. At least the part of Article II of the US Constitution that vests in Congress the power 'to Declare War' lost much of its relevance, although it continues to be a source of inspiration for those who seek to restore the power congress originally had under the US Constitution. On the other hand, the interpretations and constitutional conventions that have refined the prerogative of superintendence embodied by the Commander-in-Chief Clause have made this clause more relevant than ever. In the Japanese case, constitutional conventions have partly substituted and repudiated the text of Article 9, and interpretations have given it a meaning that can hardly be traced in Article 9's text. At the same time, Article 9 has not yet fallen into disuse and it still provides a significant normative barrier for anyone who seeks to reform the Japanese national defense policy. In the German case, we see that where informal constitutional change connected with the evolution of European integration refines the Basic Law, as was the case with regard to several provisions that constitute the core identity of the Basic Law, the text of these provisions remains very relevant indeed. The evolution of European integration has modified the meaning of federalism, for example. However, the federalism clause of Article 20 still has a central meaning in German constitutionalism. On the other hand, where Basic Law provisions have been substituted or repudiated, they lost at least part of their relevance. Indeed, as a consequence of the general acceptance of the autonomy and supremacy of European law, even above national constitutional law, the Basic Law must be interpreted in light of EU law; in case of conflict, EU law takes precedence over the Basic Law. This implies that the Basic Law remains supreme (and relevant) with regard to issues that are solely regulated at a national level, but once powers are transferred to the European level, the Basic Law provisions that regulate or establish these powers lose (part of) their impact and relevance.

19 E.g. Griffin (1996), 32.

More generally, alternative means of constitutional change cannot preclude that, in the process of informal constitutional change, a written constitution will move away from the ideal that a constitutional text should be a comprehensive codification of the body of rules that governs the government.

6.4 Remaining observations

6.4.1 Informal constitutional change as precedent

From the cases in this study, we can also learn that if alternative methods of constitutional change are being used in one area the written constitution addresses, this could induce constitutional actors to use the same techniques of engineering constitutional change in other constitutional areas as well. In Japan, for example, we have seen that the strategy of reforming national defense outside the formal amendment procedure has also been employed in the field of education. In the US, some who have sought to reform the constitutional war powers regime have drawn inspiration from the way the constitutional reforms associated with the New Deal were brought about.

Only in the German case did I find no evidence to suggest that informal constitutional reform associated with Europeanization triggered informal reform elsewhere. This difference should probably be explained by pointing to the specific mandate the German Basic Law and German doctrine has provided for informal constitutional change by Europeanization. By specifically exempting constitutional change connected with European integration from the textual change commandment of Article 79(1) of the Basic Law – and thus making it clear that the European developments could legitimately alter the meaning of Basic Law provisions without formal constitutional amendment – the German legal doctrine has perhaps prevented alternative reform strategies from being employed elsewhere.

6.4.2 A general irony for constitutionalism?

In all three cases in this study, developments that question the meaning of one or more formal constitutional norms without formal constitutional amendment may give rise to a more general irony for constitutional democracy. In the Japanese case, this phenomenon is very apparent and explicitly noted by scholars on the pacifist and national defense issue. In the American case, while some have endorsed the development towards a stronger executive in the field of national defense, prominent authors have used the term 'imperial' president to address their concerns about the extent to which the expansion of presidential war powers can be reconciled with the principles of constitutional democracy. In Germany it was mainly the German Constitutional Court has warned

that informal constitutional change effected by the development if the EU may undermine the constitutional democratic state. Indeed, informal constitutional change taking place at the European level has been connected to the 'democratic deficit' the EU is supposedly facing. As Voermans observed, substantial informal constitutional change in the EU constitutional order 'contributes to the feeling of a bureaucratic, undemocratic, uncontrollable Union with an agenda of its own.'[20]

6.4.3 Limits to informal constitutional change

Finally, we may observe that in only one case in this study does legal doctrine provide some guidelines regarding the permissibility and limits of informal constitutional change. In short, pursuant to Article 79(1) of the Basic Law,[21] German legal doctrine demands a certain degree of fidelity to the words of the Basic Law and reserves the right to bring about constitutional changes from a certain point for the constitutional legislator. However, EU Ratification Acts are exempted from this so-called 'textual change commandment'.[22] German legal doctrine quite explicitly recognizes that, as long as the evolution of European integration does not transgress the integration plan of the Treaties as ratified by the German legislator, it may validly change the normative content of the Basic Law outside the Basic Law's formal amendment procedure. Informal constitutional change that is connected with European integration is only subject to the much broader limits of Article 73(3) of the Basic Law,[23] which in any case provide the lower limits of any constitutional change.

Although the limits of informal constitutional change by European integration appear to be flexible, they also seem to have an impact on the way the constitution develops. For example, the doctrine that addresses the permissibility of informal constitutional change by the evolution of European integration is occasionally used to review the constitutionality of European developments by the German Constitutional Court.

By contrast, Japanese and American constitutionalism hardly provides 'objective' legal handles that may guide whether a certain development that is incongruent with the content of the formal constitution should be regarded

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20 Voermans (2009), 103. See in connection to this theme also Albert (2015b) on the concept of 'Constitutional amendment by Stealth.

21 The first sentence of Article 79(1) of the Basic Law provides that '[t]his Basic Law may be amended only by a law expressly amending or supplementing its text.'

22 See Article 23(1) Basic Law.

23 '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 [Human dignity – Human rights – Legally binding force of basic rights] and 20 [constitutional principles] shall be inadmissible.'

valid or not. Here, different philosophical theories – generally drawing on forms of originalism and living constitutionalism – compete with one another and actors seem to *ad hoc* select the one theory when reviewing the case at hand that best fits their existing political and ideological preferences. In the US, for example, conservatives commonly present themselves as originalists, while the theory of living constitutionalism is popular among liberals. However, with respect to the debate about the constitutionality of change that has taken place in the field of national security, the roles seem to be reversed. In this debate, conservatives, who typically seem to favor a broad and preclusive prerogative for the executive in the field of national security, have necessarily rested on a strong form of living constitutionalism. Liberals, on the other hand, have contested the constitutionality of shifts in the allocation of war powers in the American system by using originalist-like arguments.

One important (partial) explanation for why German constitutionalism has a legal doctrine that indicates the permissibility and limits of informal constitutional change, while Japanese and American constitutionalism do not, may be found in constitutional history. Germany has apparently had some bad experiences with having unclear restrictions on informal constitutional change. Indeed, the rule of Article 79(1), which prohibits 'breaching the constitution' (*Verfassungsdurchbrechungen)* by an ordinary statute without explicitly changing the text of the constitution, even if this statute is supported by a two-thirds majority, can be understood as a direct rejection of the Weimar practice.[24] Under the previous constitution of the Germany, the Weimar Constitution (1919-1945), the use of alternative means of change was not exceptional. For instance, it was acceptable for the legislator to deviate from the constitutional text – without explicitly amending it – by way of an ordinary statute if this statute was adopted by a qualified majority required to amend the constitution. However, the Weimar Constitution's 'informal turnover' prompted the framers of the post-war Basic Law to take precautionary measures. It was mainly considered that, in a constitutional democracy that operates according to the rule of law, a more strict distinction had to be drawn between the *pouvoir constituant* and the ordinary legislator.

24 Bryde (2003), 205 and Kotzur (2013), 126-127.