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

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7 Concluding comments and findings

'One cannot enduringly deem the entire world unconstitutional.'
M. Steinbeiß[1]

This study explores the phenomenon of informal constitutional change. Such change takes place when the meaning of norms embodied by the written constitution changes without a (foregoing) formal constitutional amendment. This study takes a historical institutionalism view, which focuses on the interplay between formal constitutional norms and the institutional context in which these norms are embedded over time. It examines cases of informal constitutional change in Japan, the US and Germany. It asks how constitutions informally change; why significant constitutional change sometimes occurs without a formal constitutional amendment; and if, and to what extent, alternative mechanisms of constitutional change can functionally substitute for a formal constitutional amendment procedure. Regarding these themes, this study makes some comparative observations and suggests theories that might explain the differences and similarities among the case descriptions.

This study suggests at least seven important insights. First, it suggests that the historical institutionalism perspective provides an accurate understanding of how the meaning of formal constitutional norms may change without formal constitutional amendment by connecting legal-positivist and common-law perspectives on informal constitutional change. By focusing on the historical interplay between formal constitutional norms – the 'constitutional plan' – and the real-world institutional context in which these norms are embedded – the 'constitutional reality' -, the historical institutionalism perspective recognizes the multiple legal and non-legal forces that may shape the normative content of formal constitutional precepts. At the same time, the historical institutionalism perspective accounts for a written constitution's firmness of authority. It lets us appreciate that not every change in the area the written constitution addresses necessarily has implications for how we must describe the meaning of formal constitutional norms.

1 'Man kann nicht dauernd die ganze Welt für verfassungswidrig erklären'. Quoted by Goldmann 2015, 12.

Second, this study shows that the concepts of *interpretation* and *constitutional convention* are indispensable tools for identifying informal constitutional change. In the absence of formal constitutional amendments, these concepts highlight when the dynamic between the written constitution and its institutional context may have consequences for the meaning of formal constitutional norms, without blurring such important distinctions as those between ought and is; norm and fact; rule and practice; and plan and reality. The cases in this study also show that possible informal constitutional developments do not usually unequivocally take the form of interpretations and constitutional conventions. The mechanisms of constitutional change, which re-interpret the constitution or modify it by forming constitutional conventions, may go under different designations. However, in this study, the analytical framework that the concepts of interpretations and constitutional convention offer has been very helpful in giving a sense of the extent to which institutional development has affected the meaning of formal constitutional norms.

Third, the cases and comparative observations in this study confirm that, without new constitutional writing, legal or non-legal institutional developments in the context of a written constitution may have profound implications for the meaning of written constitutional norms. Contrary to that of Jellinek,[2] this study also confirms that written rules maintain some control over what happens in the real world, even in extreme cases of informal constitutional change (the Japanese case in this study). On the one hand, this study demonstrates that interpretation and the formation of constitutional conventions may significantly transform the meaning of a formal constitutional norm, even in such a way that it contradicts its former meaning or original intent. At the same time, it substantiates the idea that writing rules down in a master constitutional text may solidify them. Even if processes of informal constitutional change have significantly altered the meaning of a written constitutional rule, its original intent, or the literal meaning of the constitutional text by which this rule is embodied, may retain some shaping force. As long as the text is in place, any proposal for textual updating may still invite significant opposition. Even when contradicting constitutional conventions and interpretations have almost completely substituted the original text, its original or former meaning may remain a powerful source of authority for those seeking to challenge the validity of informal constitutional developments.

Fourth, this study verifies previous research that the most important reason why constitutional legislators do not always update the constitutional text in the face of significant constitutional change, or use the formal constitutional amendment procedure as a means of bringing about constitutional reform, is the difficulty of formal constitutional amendment. Highly formal amendment hurdles may induce constitutional actors to resort to alternative, less laborious

2 Jellinek (2000), 57.

methods of constitutional change, especially in this current fast-paced world. By pointing to the absence of a realistic amendment option, and the necessity of constitutional change, this study shows that constitutional actors may seek to legitimize the use of alternative routes for constitutional change. However, we have also seen that if constitutional actors do not adapt the constitutional text to changing circumstances and demands, it may lose some (or, perhaps, ultimately all) of its relevance and shaping force. In that way, rigid amendment procedures may undermine exactly what they aim to achieve: a balance between stability and flexibility, constitutionalism, and democracy. Therefore, acknowledging that a written constitution does not operate in a vacuum, constitutional designers may consider making it not too hard for constitutional actors to amend the document they are drafting.

A fifth, related insight of this study is that amendment difficulty may not be the only important explanation for informal constitutional change in a given constitutional order. For example formal constitutional amendments may be perceived as unnecessary, even if the meaning of formal constitutional norms have changed significantly.

Sixth, this study shows that alternative mechanisms of constitutional change can sometimes serve as functional substitutes for a formal amendment procedure. Many constitutional actors may perceive constitutional changes initiated by mechanisms other than a formal constitutional amendment procedure as valid. Moreover, alternative mechanisms of constitutional change can be effective, in the sense that they produce relatively stable, enduring outcomes. However, contrary to what some studies have asserted, this one suggests that alternative mechanisms of change are typically not functional equivalents or 'perfect substitutes' of formal constitutional amendment procedures.[3] It is important to appreciate that alternative mechanisms of change can alter the meaning of a written constitution, but not its text. This implies that certain constitutional questions or controversies that institutional change may raise can sometimes only be settled by new constitutional writing. Moreover, as long as constitutional change has not been explicitly crystalized in the constitutional text, it may not have the authority associated with a change that results from a formal constitutional amendment. In bringing about constitutional reform, constitutional actors may come a long way by using alternative means of change, but rewriting (parts of) the constitutional text may be a necessary (final) step to bring a particular reform to a conclusion.

Lastly, this study reveals that a legal doctrine of informal constitutional change, which specifies when constitutional provisions can change without a formal constitutional amendment, may have a powerful mitigating effect on debates surrounding the legitimacy and validity of such change. In this study, only Germany has such a doctrine. This doctrine can answer many constitutional questions that arise when institutional practices and understand-

3 See Griffin (2016) and Griffin (2006).

ings no longer coincide with the constitutional text. Of course, ambiguities remain, if only because the doctrinal limits of informal constitutional change are, by their very nature, flexible. However, the German case shows that a legal doctrine of informal constitutional change can prevent, to a significant extent, that informal constitutional change undermines the clarity of constitutional norms; debates about the permissibility of change outside the amendment procedure become polarized and politicized; and the status of informal change remains ambiguous. Constitutional democracies facing problems similar to those addressed in this study may want to consider developing their own legal doctrine of informal constitutional change.

Since this study has only explored three cases, these considerations are necessarily tentative. Nevertheless, they may function as valuable starting points for further, more comprehensive studies. Additionally, this study has many unexplored questions regarding the phenomenon of informal constitutional change. Perhaps most importantly, future studies may seek to answer more precisely what 'change' and 'amendment'[4] exactly entail. More precise definitions and categorizations of these basic yet undertheorized concepts are essential if the emerging field of comparative constitutional change is to fully mature. Furthermore, future studies may examine in more detail the dynamic between written constitutions and their institutional context through the analytical framework which the concepts of interpretation and constitutional conventions provide. One question is: which constitutional actors should precisely follow and accept a particular institutional understanding or practice before we can, in the absence of new writing, recognize it as informal constitutional change? A future study may also examine in closer detail drivers of informal constitutional change, specifically if informal constitutional change has different drivers than formal constitutional amendment. Future studies may look into the question of how we can improve the design of formal constitutional amendment procedures so they can actually function as a means to engineer constitutional change and maintain the constitutional text. Future research may want to further investigate what a legal doctrine of informal constitutional change could be in contexts other than Germany. A related question is: who can develop such a doctrine for it to become universally accepted by the community of constitutional actors?

Finally, future research could explore the more normative questions that the phenomenon of informal constitutional change raises. How should we appraise the fact that significant constitutional developments take place outside the formal constitutional amendment procedure in constitutional democracies that supposedly live under a written constitution? How should we evaluate the legitimacy of informal constitutional change in such countries?[5] How can we preclude that we, while answering these normative questions, let our

4 See on this concept Albert (2018, forthcoming).
5 See Albert (2014b) and Martin (2017).

analytical frameworks be shaped by (personal) political or ideological preferences?