

*Changing the rules of the game: A comparative analysis of constitutional change in France, Germany and the United Kingdom** (February 1999)

Patrick Bernhagen, *Department of Political Science, Trinity College Dublin,*

E-mail: bernhagp@tcd.ie

1 Introduction

Constitutions are basic foundational documents of modern liberal democracies. The two main functions of a constitution can be described as, firstly, a “charter for government” that sketches the fundamental modes of legitimate governmental operations and, secondly, a “guardian of fundamental rights” that protects substantive rights by limiting the scope of legitimate governmental action.¹ Constitutions provide the basic rules of the political game and thereby pose constraints to aspirations for radical change.

However, constitutions can be, and often have been, changed. Most constitutional documents provide more or less detailed prescriptions for the procedure and scope of legitimate amendment. At the same time, constitutional change is determined by the interests, strategies and perceptions of the political forces that are bound and regulated by constitutions. In the present essay I will examine the extent to which the procedural and substantial provisions for amendment predetermine political attempts for constitutional change. The analysis that follows reviews the theoretical arguments brought forward in the literature on constitutional change with respect to formal provisions and factual change (2), and then proceeds to relate the extent of procedural provisions in France, Germany and the UK (3) to the actual change that has occurred in these countries (4).

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¹ Walter F. Murphy, “Constitutions, Constitutionalism, and Democracy,” in *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. Douglas Greenberg et al. (New York / Oxford: Oxford University Press, 1993), 8.

2 The theory of constitutional change

Sources and patterns of constitutional change

It is only under certain conditions that political conflicts become constitutional conflicts.² The making of new constitutions in the former communist states of Central and Eastern Europe in the early 1990s, for example, responded to an urgent need to give an institutional framework to the far-reaching and profound transformations of economic, social and political life.³ By contrast, no such deep interruption of the everyday political process in Western Europe has occurred since the comprehensive constitutional reconstruction in the aftermath of World War Two. Yet here too, constitutional reform, review and rewriting have frequently occurred with varying degrees of intensity and range, albeit rarely of the *revolutionary* severity such as in Central and Eastern Europe. Instead of a thorough rewriting of the fundamental political institutions, constitutional change in post-war Western Europe has, on the whole, rather been concerned with the *evolutionary* adaptation of constitutional arrangements to changing economic, political and social realities.

The relative political and constitutional stability in most countries of Western Europe in recent decades suggests that the constitutions of these countries can, in large, derive a considerable amount of legitimacy from popular support.⁴ In other words, the relative absence of major constitutional change in Western Europe indicates the existence of a sufficiently well founded constitutional consensus. Moreover, the sustained constitutional stability of the post-war Western European democracies has been greatly

² Keith G. Banting and Richard Simeon, "Introduction: The Politics of Constitutional Change," in *The Politics of Constitutional Change in Industrial Nations*, ed. Keith G. Banting and Richard Simeon (Basingstoke / London: Macmillan, 1985), 6.

³ Joachim Jens Hesse, "Constitutional Policy and Change in Europe: The Nature and Extent of the Challenges," in *Constitutional Policy and Change in Europe*, ed. Joachim Jens Hesse and Nevil Johnson. (Oxford: Oxford University Press), 3.

⁴ S. E. Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Oxford: Clarendon Press, 1995), 8.

supported by the maintenance of favorable social and economic conditions⁵, as well as a stable international environment in the context of the bipolar constellation of the Cold War.⁶

The assumption of a consensus, however, is by no means a requirement for the explanation of both the successful enactment of a constitution and its stable legitimacy over time. Instead, a constitution can be conceived as the equilibrium outcome of a political power struggle among social groups.⁷ For the subsequent period during which a constitution enjoys legitimacy, fundamental aspects of the power relation of the groups involved are thus set aside. The compromise that is reached by means of constitution-making locates basic moral and procedural matters outside the scope of day-to-day political struggle, thus enabling the parties involved to concentrate on other, more salient issues in everyday political business.⁸ The ordinary legislative activities of government agencies are thus facilitated by second-order agreement over the modes of first-order legislation. A similar notion, although with a more systemic tinge, has been expressed by Preuss who asserts “if a society makes rules over rule-making it increases its capacity for rule-making.”⁹

Banting and Simeon distinguish two levels of political conflict that contribute to a renewed struggle over the validity of second-order rules and hence to the demand for constitutional change.¹⁰ At a more general level, demands for major change originate in social and economic forces that change the power constellation of different groups. This

⁵ Joachim Jens Hesse and Nevil Johnson, “The Agenda of Constitutional Change in Europe: Adaptation, Transformation, and Internationalisation,” in *Constitutional Policy and Change in Europe*, ed. Joachim Jens Hesse and Nevil Johnson (Oxford: Oxford University Press, 1995), 373.

⁶ Neville Johnson, “Constitutionalism in Europe Since 1945: Reconstruction and Reappraisal,” in *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. Douglas Greenberg et al. (New York / Oxford: Oxford University Press, 1993), 37.

⁷ Vernon Bogdanor, “Introduction,” in *Constitutions in Democratic Politics*, ed. Vernon Bogdanor (Aldershot: Gower, 1988), 10.

⁸ Steven Holmes, “Precommitment and the paradox of democracy,” in *Constitutionalism and Democracy*, ed. John Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), 226-35.

⁹ Ulrich K. Preuss, “The political meaning of constitutionalism,” in *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, ed. Richard Bellamy (Aldershot: Avebury, 1996) 17.

¹⁰ Banting and Simeon, op. cit., 10.

can occur through specific developments such as population shifts amongst regions, ethnic or religious groups, where the respective groups seek to redefine the constitutional lines of demarcation. Recent constitutional conflict in Belgium, Canada, Britain, Spain and Eastern Europe has often been caused by struggles of this nature. Similarly, shifts in economic strength can lead to the claiming of a greater share of power by expanding or rising social groups. Conversely, groups that are declining defend constitutional provisions that may help them to maintain their status.¹¹ The processes of constitution making in Western Europe in the late eighteenth and early twentieth centuries are examples for this type of constitutional conflict. While the politically advancing working classes made persistent claims for the extension of the franchise, the property-owning elites sought constitutional protection of property rights. Each of these developments mark a disturbance of a previously arrived-at political balance which in turn leads to an erosion of the 'truce' that underlay the preceding constitutional settlement.

The mechanisms that transform these conflicts, which could perceivably be carried out in intensified struggles over basic patterns of public policy, into constitutional conflict are, according to Banting and Simeon, located at the more proximate dimension of the 'rules of the game.'¹² The underlying *problématique* is why and how political conflicts come to take on a constitutional form. The emergence of actual constitutional conflict depends on the perception of one group that the basic constitutional provisions that regulate political conflict are systematically biased against it and frustrate it in the legitimate pursuit of its political interests. Again, it is rising groups that make demands for enhancing their political power, while declining groups are interested in the constitutional preservation of their privileges in order to avert further losses.¹³ Thus, constitutional conflict arises when the hitherto stable institutions that regulate political struggle are no longer perceived to accommodate political conflict between sufficiently powerful groups within the limits of the normal processes. As Banting and Simeon put it, "just as war may be the continuation of diplomacy by other means, so constitution-making is the continuation of politics by other means."¹⁴

¹¹ Ibid.

¹² Ibid., 12.

¹³ Ibid.

¹⁴ Ibid., 17.

The need for constitutional change does not solely evolve from the domestic struggle of different groups. Another important factor that may initiate constitutional reform can be located in the international environment of a polity. For example, the increasing scope of directly binding legislation at the level of the European Community clearly poses the need for harmonizing the bulk of European legislation with the respective national legal systems of the member states.

A further distinction between three different categories of constitutional change concerns the intensity and range of the alteration. At the lowest level, firstly, constitutional change can consist of a mere technical adjustment of constitutional provisions that have not come into question in any fundamental sense. Instances of this kind do not involve major political conflict and are hardly accompanied by popular mobilization. Examples of such ‘fine-tuning’ are the amendments of Articles 104a to 107 of the German Basic Law in 1969, and the reformulation of its Articles 72 and 74 in 1994. While the first group of amendments led to a partial reapportionment of the distribution of expenses and revenues between the federation and the states (*Länder*), they did not substantially alter the distribution of power between them. Neither did the second change mentioned affect the fundamental relationship between the jurisdiction of the federation and that of the *Länder*. It rather clarified an editorial difficulty in the original wording of Article 72 that had given rise to interpretational difficulties and disputes in the past. The amendment thereby slightly shifted the problem of concurrent legislative powers of the federation and the *Länder* towards an assumption in favor of the *Länder* jurisdiction.

A second and more intense category of constitutional change concerns the substantial alteration of one or more important constitutional provisions with the intention of accommodating new social and economic realities in order to ensure the durable legitimacy and viability of the constitution as a whole. In the aftermath of World War Two, Western European societies underwent the considerable expansion of welfare-state activities, a development that posed the need for a thorough redefinition of the legitimate boundaries of state action, in particular with respect to economic interventionism and redistributive policies.¹⁵ By contrast, the 1980s were marked by the - at least

¹⁵ Dieter Grimm, “Constitutional reform in Germany after the Revolution of 1989,” in *Constitutional Policy and Change in Europe*, ed. Joachim Jens Hesse and Nevil Johnson (Oxford: Oxford University Press, 1995), 145.

rhetorical - dominance of the reverse, neoliberal politics of 'rolling back of the state'; a process that is still going on and that has brought into question the continued legitimacy of traditional welfare state instruments.¹⁶ The politics of economic liberalization and privatization have been joined by an enhanced role of human rights on the political agendas of nation states.¹⁷ The related tasks of constitutional change consist of providing a response to the question of "how a constitution can be rendered flexible whilst at the same time maintaining its quality as a reliable, permanent basis for the regulation of political, social, and economic life."¹⁸ This 'medium intensity' category of constitutional change also contains the constitutional amendments that have been undertaken by the member states of the European Communities and the European Union. They have had to find ways of accommodating the constraints on national sovereignty that have emanated from the Treaties of Rome, Maastricht and Amsterdam, while still retaining statehood as such, as well as the overall validity of national constitutions and the nature of the political regime.

Thirdly, the most comprehensive and far-reaching form of constitutional change is the drafting and adoption of an altogether new constitution. Constitution making at this level is aimed at an entirely new definition of such fundamental issues like the structure of the state, the prevailing modes of representation, the relations among social groups and the relation between the state and society.¹⁹ Although instances of this category have been rare in recent Western European history, the democratic transitions of Portugal and Spain in the 1970s, as well as the founding of the Fifth Republic in France clearly remind us of the fact that the 'pre-eminently political act of constitution-making'²⁰ in its most fundamental meaning is confined neither to history nor to Central and Eastern Europe or the former Soviet Union. In the following comparison I will neglect

¹⁶ Cf. Hesse, *op. cit.*, 8-9; see also Klaus H. Goetz, "The Federal Constitutional Court," in *Developments in German Politics 2*, ed. Gordon Smith, William E. Paterson and Steven Padgett (Basingstoke / London: Macmillan, 1996), 113-4.

¹⁷ Johnson, *op. cit.*, 40-1.

¹⁸ Hesse, *op. cit.*, 9.

¹⁹ Banting and Simeon, *op. cit.*, 8.

²⁰ Daniel J. Elazar, "Constitution-making: The Pre-eminently Political Act," in *The Politics of Constitutional Change in Industrial Nations*, ed. Keith G. Banting and Richard Simeon (Basingstoke / London: Macmillan, 1985), 232.

the more technical constitutional adjustments and focus on the second and third level of intensity of constitutional change.

Delineation of the comparative analysis

Hesse has justified the need for the comparative study of constitutions with the particular problems that result from the economic and political transformations in Central and Eastern Europe.²¹ The new democracies there, as he correctly asserts, have been in search of viable models for constitutional reconstruction and have generally found them in Western Europe. Conversely, the advisory and assistant roles of Western experts in the transition processes of Central and East European countries impose a need to examine closely the West's own institutions.²² While the processes of constitution building in the East are by now largely completed, the comparative study of constitutions and of the patterns of their renewal continues to generate valuable insights in a variety of interrelated problems. Although the processes of constitutional change are intimately tied to historical and national peculiarities, the questions remain whether there are commonalities in constitution making, and if generalizations across the varieties of national experiences are warranted.²³

Most, if not all, advanced industrial nation states in the West have undergone at least some form of constitutional change in the past fifty years. For instance, constitutional debate in Belgium throughout the 1960s and 1970s has occurred against the background of profound ethnic-linguistic cleavages, and led to regionalisation with a tendency towards a "quasi-federal" model.²⁴ Similar problems have dominated the Canadian constitutional agenda ever since the 1960s, accompanied by the task of final "patriation" of the constitution.²⁵ Post-war constitutional issues in the United Kingdom have included devolution to Scotland, Wales and Northern Ireland, electoral reform, a

²¹ Hesse, *op. cit.*, 3.

²² *Ibid.*, 3-4.

²³ Banting and Simeon, *op. cit.*, 3.

²⁴ *Ibid.*, 4.

²⁵ *Ibid.*

Bill of Rights and the role of the House of Lords.²⁶ Constitutional development in West Germany has stretched from rearmament in 1955 to the major task of incorporating the former German Democratic Republic into the area of application of the Basic Law.²⁷ France has installed a new constitution in 1958, which in turn underwent a substantial change in 1962, thereby adopting a semi-presidential system of government. In the Netherlands a completely redrafted constitution was enacted in 1983. Italy changed its constitution in 1994 and replaced the hitherto valid electoral system of proportional representation with an additional member system.

A brief glance at the outer-European world reveals that New Zealand's electoral system, albeit coming from the opposite extreme of a single member plurality system, underwent a similar change after a referendum in 1993. In Israel, basic laws that regulate constitutional matters like the role and jurisdiction of the organs of state can be enacted by the Knesset by half plus one of the votes of its total membership. Thus every Knesset can serve as a constituent assembly and since the 1950s many Knessets have made use of this prerogative.²⁸ In the United States, finally, formal constitutional amendment at the federal level occurred only on five occasions: in 1951 (limitation of the presidential tenure) and between 1961 and 1971 on issues such as voting rights for citizens of the District of Columbia, the abolition of the poll tax in federal elections, the status of the vice president and the lowering of the voting age.²⁹ Most other constitutional change in the United States has been brought about through diverse forms of *adaptation*, with judicial constitutional review among the most prominent of them.

The following comparative analysis will be restricted to France, Germany and the United Kingdom. The major similarities of these countries consist, firstly, in the fact that all three of them belong to the economically most advanced industrial nations. Secondly, apart from periods of interruption in France and Germany during the Nazi rule

²⁶ Ibid.

²⁷ Stuart Parkes, *Understanding Contemporary Germany* (London / New York: Routledge, 1997), xi-xvii.

²⁸ Elazar, *op. cit.*, 238.

²⁹ Steven L. Schechter, "Amending the United States Constitution: A New Generation on Trial," in *The Politics of Constitutional Change in Industrial Nations*, ed. Keith G. Banting and Richard Simeon (Basingstoke / London: Macmillan, 1985), 165.

and occupation, universal suffrage has been effectively established in these countries since 1928.³⁰

Although all three countries were most directly involved in the Second World War, post-war constitutional reconstruction - and this is where the dissimilarities start - occurred in France and Germany, whereas the United Kingdom's constitutional tradition remained uninterrupted. The United Kingdom represents the Anglo-American legal tradition of common law. It is also, together with Israel and New Zealand, one of the few countries in the world that do not have a codified constitution in the form of a single document. In terms of Elazar's classification of basic constitutional models, the case of the United Kingdom represents the "constitution as a modern adaptation of an ancient traditional constitution."³¹ This model is characterized by its "piecemeal development, virtually uninterrupted at least since the Norman Conquest."³² Both the French and the German cases, by contrast, belong to the continental-European tradition of civil law. Their constitutions can, in Elazar's taxonomy, be conceived as examples of detailed "state code", designed to organize and structure government in the context of a pre-existing polity.³³ Thus, of the three cases, two have basic commonalities with respect to their constitutional tradition, and one case differs considerably in most respects.

3 Mechanisms and procedures of constitutional change in France, Germany and the United Kingdom

The text of virtually every constitution explicitly provides for the modalities and procedures required for their own amendment.³⁴ These often consist in the requirement of stipulated majorities in parliament, the consultation of special bodies, the holding of a referendum or some combination of these devices. Whatever the particular nature of the provisions, they are in any case the expressed will of the constituent power (*pouvoir*

³⁰ Göran Therborn, "The Rule of Capital and the Rise of Democracy," *New Left Review* 103 (May-June 1977): 8-17.

³¹ Elazar, *op. cit.*, 237.

³² *Ibid.*

³³ *Cf. ibid.*, 234-5.

³⁴ Murphy, *op. cit.*, 13.

constituant) about how its own creation may be changed.³⁵ Furthermore, some constitutions declare certain of their basic provisions to be unamendable and thereby remove them from the jurisdiction of the sovereign.

Beside these formal procedures there are the various informal ways in which the meaning of a constitution is changed over time, such as usage and interpretation. Murphy holds the latter to be the more important routes of constitutional change: There “can be little doubt that some legislative, executive, and judicial interpretations have affected the constitutional order far more radically than many formal amendments.”³⁶ Additionally, Murphy hints at a possible “hierarchy of efforts at legitimate constitutional modification”, according to which “the more fundamental the respective change [is], the more weighty the reasons for resorting to formal processes and the more weighty the reasons for directly involving the people themselves.”³⁷

Provisions for formal amendment

The constitution of the Fourth French Republic (1944-1958) stipulated in Article 90 that amendments could be made only by an absolute majority of the National Assembly, combined with a similar subsequent majority of the second chamber, the Council of the Republic.³⁸ Curiously, and maybe unique in the history of European constitutions, this provision itself was modified in 1955 in accord with the original procedural requirements. The resulting Amendment Act of June 1958, however, was an entirely new provision for the replacement of the existing constitution with a new one. The Act also provided the exact procedures required for the adoption of the new constitution.³⁹ These requirements entailed the submission of the draft proposal to a constitutional consultative committee and, above all, the approval on the text of the French people by means of a referendum. There was no role for an elected constituent assembly - a clear break with

³⁵ *Finer, Bogdanor and Rudden, op. cit., 13.*

³⁶ *Murphy, op. cit., 13.*

³⁷ *Ibid.*

³⁸ *Johnson, op. cit., 30.*

³⁹ *Finer, Bogdanor and Rudden, op. cit., 13.*

the French tradition of constitution making.⁴⁰ Thus, the new constitution derives its legitimacy both from a vote by the French people as the ultimate sovereign and from a continuum of constitutional legality in the form of the amendment of Article 90 of the old constitution – where the legal neatness of the latter device is certainly debatable.

As a result of the referendum in September 1958, the Fifth Republic came into being in January 1959. The new constitution contains its own provisions for amendment, Article 89, which is the only constituent provision of Title XVI on amendment. According to this rule both houses of parliament must pass a proposal for amendment in identical terms. The further proceeding depends on whether the amendment has been proposed by government or by one or more members of parliament. If it is a parliamentary proposal the bill has to be approved by referendum. If it is a governmental proposal, i.e. one that has been introduced by the president on the proposal of the prime minister, the president can choose to either submit the bill to a referendum or to Congress, a joint meeting of both houses of parliament, which must approve it unaltered by a three-fifth majority.⁴¹ In addition, Article 89 forbids any amendment that jeopardizes the integrity of the French territory. Finally, the republican form of government is removed from the scope of amendment.

According to the tenor of the constitution, as well as the overwhelmingly prevailing view among French constitutional lawyers, Article 89 sets out the only valid amendment procedure.⁴² Yet an alternative procedure seems to have gained constitutional legitimacy through usage and can hence only be understood by reference to historical realities. In 1962 de Gaulle used a constitutional knack for changing the method of electing the president from election by an electoral college to direct election by the people. In order to bypass parliament de Gaulle invoked Article 3 of the Constitution, according to which national sovereignty belongs to the people who exercise it through their representatives and by referendum, in combination with Article 11, which permits

⁴⁰ Cf. Peter Morris, *French Politics Today* (Manchester: Manchester University Press, 1994), 21.

⁴¹ Anne Stevens, *The Government and Politics of France*, 2nd ed. (Basingstoke / London: Macmillan, 1996), 45.

⁴² Morris, *op. cit.*, 27; Stevens, *op. cit.*, 47.

the president, on the proposal of the government, to submit to referendum any government bill dealing with, *inter alia*, the organization of the public authorities.⁴³

This device has been successfully employed only once, and in that case its success relied heavily on the normative power of the facts it created through the referendum. A second attempt by de Gaulle to amend the constitution in this way in 1969 failed at the referendum stage, and led directly to his resignation.⁴⁴ Since then no president has attempted to bypass parliament either by means of this doubtful procedure or by the referendum option set out in Article 89.

The procedures for constitutional amendment set out in Germany's Basic Law are, by comparison, straightforward and have rarely given rise to interpretational dispute. Article 79 of the Basic Law stipulates that any statute amending the constitution requires a two-thirds majority of the federal parliament (*Bundestag*) and the federal council (*Bundesrat*) respectively. Any amendment that curtails the federal nature of government, the inviolable status of human dignity (Article 1), the binding of the state authorities to the basic rights as set out in Articles 1 to 19 (Article 1), the principles of republican and democratic government (Article 20), the rule of law, popular sovereignty, the separation of powers or the right to resistance against tyranny is declared inadmissible.

In addition to these regulations of and restrictions on the ordinary course of constitutional amendment, the Basic Law is equipped with the quite unusual Article 146. This provision stipulates that the Basic Law itself shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force. It thus takes account of both the fact that German popular sovereignty was not fully warranted at the time of the enactment of the Basic Law and of the division of the country in East and West.⁴⁵ The Basic Law thereby also provides a unique and constitutionally legal way of terminating its own rule.

The constitution of the United Kingdom, by contrast, contains no formal provision for its amendment. This fact is consistent with the mainly uncodified, indeterminate and unentrenched nature of the constitution, as well as with its indistinct structure.⁴⁶

⁴³ Finer, Bogdanor and Rudden, *op. cit.*, 14; Stevens, *op. cit.*, 47.

⁴⁴ Stevens, *op. cit.*, 47.

⁴⁵ Johnson, *op. cit.*, 30-1.

⁴⁶ Finer, Bogdanor and Rudden, *op. cit.*, 40-3.

According to the fundamental constitutional principle of the supremacy of parliament, the constitution can be amended by means of a parliamentary bill, resolved with a simple majority vote.⁴⁷

Constitutional change through interpretation and usage

The evolution and adjustment of the constitution by way of usage and interpretation, a phenomenon that is of pre-eminent importance in the constitutional history of the United States⁴⁸, is not at home in the French constitutional system. The rigid and detailed constitutional code requires precise and deliberate formal textual change to be modified.⁴⁹ Indeed, with the sole exception of de Gaulle's aforementioned shortcut to amendment, all considerable constitutional change in France after 1958 has followed the formal procedural routes of Article 89. The constitutional legitimacy of that particular move has been implicitly acknowledged *ex post* by the Constitutional Council, whose acquiescence was, however, motivated by political pragmatism rather than the application of strict constitutional jurisprudence.⁵⁰

The situation is similar in Germany. Here too the detailed, highly specific and explicit constitutional code leaves little room for further evolution through judicial interpretation or usage. It can be argued, however, that the Federal Constitutional Court (FCC) in its role as the sole authoritative interpreter of the Basic Law does in effect often create constitutional items rather than merely interpreting existing ones. Over the past decades the FCC has developed a number of unwritten constitutional devices and principles that are neither explicitly listed in the text nor can they be attributed to the subjective intentions of the framers. Examples are the principle of "practical concordance" between separate basic rights and values, the construct of an "objective order of values", the notion of "unconstitutional constitutional law" or aspects of an "hierarchy-

⁴⁷ Cheryl Saunders, "Evolution and Adaptation of the British Constitutional System," in *Constitutional Policy and Change in Europe*, ed. Joachim Jens Hesse and Nevil Johnson (Oxford: Oxford University Press, 1995), 74.

⁴⁸ Elazar, *op. cit.*, 246.

⁴⁹ *Ibid.*, 234.

⁵⁰ Stevens, *op. cit.*, 47.

cal system of values” – altogether *products* of constitutional interpretation.⁵¹ To this extent the court has on occasion effectively assumed a creative function not unsimilar to that of the American Supreme Court.

The general character of the British constitution as a mix of norms and rules that are not located in a single document, but rather emanate from a broad range of written and unwritten sources, suggests that it is in a permanent state of flux, even if - or perhaps precisely because - no formal provisions for explicit constitutional change exist. In particular, there is a considerable body of case law that is germane to a wide range of constitutional issues.⁵² While it may in the extreme depend even on single individual actors whether the conventions of constitutional and political life are adhered to, it is at the end of the day up to the courts to decide if non-adherence to constitutional convention is unconstitutional or, conversely, if it is acceptable and thus represents the beginning of a new mode of constitutional law.⁵³ Yet such instances of case law can in turn be overridden by legislation that is sufficiently clearly expressed.⁵⁴ Therefore, the important non-formal aspects of constitutional change and evolution in the United Kingdom are best captured by Peele’s characterization, according to which the British constitution is one that “relies very heavily for its interpretation and its operation upon the norms which are contained in the conventions and practises of everyday politics.”⁵⁵

4 Actual constitutional change in France, Germany and the United Kingdom

The history of the French Fifth Republic saw little constitutional change at the medium level of intensity. After the final consolidation of the semi-presidential system by de Gaulle in 1962, the constitutional principles of the Fifth Republic proved to provide a

⁵¹ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham / London: Duke University Press, 1989), 52-5.

⁵² Gillian Peele, “Comparing Constitutions,” in *Comparative Government and Politics*, ed. Dennis Kavanagh and Gillian Peele (London: Heinemann, 1984), 197.

⁵³ *Ibid.*, 199.

⁵⁴ Saunders, *op. cit.*, 75.

⁵⁵ Peele, *op. cit.*, 199.

firm frame for relatively stable political development.⁵⁶ Since 1973 numerous half-hearted attempts have been made to reduce the presidential term from seven to five years. None of them succeeded.⁵⁷ A successful amendment move in 1974 accorded to the opposition the right to submit a bill to the Constitutional Council for judicial review.⁵⁸ However, the attempt by Mitterrand to further extend the right of submission towards a complaint of unconstitutionality by any citizen failed. Carcassonne blames the failure of most amendment moves on procedural and circumstantial impediments.⁵⁹ The former consist mainly in the veto power of the Senate, a body that is traditionally dominated by conservative members. The circumstantial impediments to amendment have a lot to do with the real or perceived lack of salience of the issue.⁶⁰ This finding supports Banting and Simeon's claim that constitutional change occurs only when the issues at stake cannot be resolved within the limits of the normal political process. Accordingly, one of the few completed amendments was the one necessitated by the ratification of the Maastricht Treaty in 1992.⁶¹ Three years later, Jacques Chirac appeared to have perceived the need to respond to the far-reaching amendment proposals that were propagated by his second-round opponent in the 1995 presidential election campaign, Lionel Jospin. After his re-election, he promptly succeeded with two amendments that extend the scope of referendum issues and institute a single nine-month annual session of parliament. Both topics had been latent for many years.⁶²

The German Basic Law has undergone a relatively large number of amendments that were controversial at the time. Among the most important changes after rearmament in 1955 were the provision for emergency legislation in the 1970s and the virtual abolition of the right of asylum in 1993. The constitutional change that has contributed to a long-lasting change of the entire country, though leaving the Basic Law as such in

⁵⁶ Morris, *op. cit.*, 37.

⁵⁷ Guy Carcassonne, "The Constraints on Constitutional Change in France," in *Constitutional Policy and Change in Europe*, ed. Joachim Jens Hesse and Nevil Johnson (Oxford: Oxford University Press, 1995), 169.

⁵⁸ *Ibid.*, 163.

⁵⁹ *Ibid.*, 166.

⁶⁰ *Ibid.*, 168.

⁶¹ Saunders, *op. cit.*, 45.

⁶² Stevens, *op. cit.*, 46.

place, has been the accession of the five new *Länder* of the former East Germany on the basis of the provisions of the old Article 23 and the Unification Treaty of 1990. The constitutionality of the procedure of ratification of the Unification Treaty, which directly involved constitutional amendment, had to be constructed *ex post* by the FCC. Prior to unification, German sovereignty had been restored as a result of the Two plus Four Talks.

Following unification, and in fulfillment of a recommendation of Article 5 of the Unification Treaty, the Bundestag and Bundesrat set up a Joint Constitutional Commission. Its task was to thoroughly review the Basic Law with respect to the changed realities brought about by reunification and, where appropriate, make recommendations for amendment. Of the 23 rather timid proposals for constitutional change stated in the Commission's report from 1993, 22 were fully or partially adopted by the two houses of parliament and incorporated into the Basic Law in 1994.⁶³ Among the most spectacular were constitutional declarations of will to strengthen the obligation of the state to protect the environment and to eliminate gender discrimination.

The more profound amendments, however, have been debated and enacted independently of the workings of the Joint Constitutional Commission. Amendments have been made in 1993 and 1994 to facilitate the privatization of the railways and of post and telecommunications services, in an attempt to promote the structural and economic change implied in the neoliberal agenda. In order to accommodate a partial transfer of sovereign powers to the European Communities that has become reality with the Maastricht Treaty, Article 23 of the Basic Law has been newly written in 1992.

British entry into the European Communities required substantial change of the constitution of the United Kingdom too. Most importantly, the 1972 European Communities Act has effectively curtailed the supremacy of parliament like no other constitu-

⁶³ Arthur Benz, "A Forum of Constitutional Deliberation? A Critical Analysis of the Joint Constitutional Commission," in *Constitutional Policy in Unified Germany*, ed. Klaus H. Goetz and Peter J. Cullen (London: Frank Cass, 1995), 110-5.

tional move until today.⁶⁴ UK courts are now obliged to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.⁶⁵

The agenda for constitutional change put forward by the British Government since the Labour Party's electoral victory in 1997 covers virtually the entire terrain of the United Kingdom's constitutional structure.⁶⁶ Most of the issues have been recurrent throughout the past decades. It was, however, not until recently that at least some of them have been transformed into substantive constitutional policy.

Devolution to Scotland did not become an issue of significant nationwide salience until it was granted the status of an important factor of campaigning between the two major political parties. Furthermore, against the background of the changing tasks of national governments in the context of globalization and European integration, the devolution process can be regarded in practical terms as a way of reducing administrative overload at the center.⁶⁷ The same can be said for Welsh devolution, where pressure for change took on an even more practical and managerial character. Devolution to Northern Ireland has been granted and suspended several times since 1920.⁶⁸ The installment of the "Power-sharing" model according to the terms set out in the 1998 Good Friday Agreement represents an instance of major constitutional change, as well as a novelty in the typology of constitutional arrangements. While it may be impossible to comprehend and outline the possible cracking of the stalemate that characterized the situation in Northern Ireland for most the past thirty years, recent developments clearly underline the major importance of 'political climate' as a facilitating factor.

⁶⁴ *Finer, Bogdanor and Rudden, op. cit.*, 44-5.

⁶⁵ Geoffrey Marshall, "Lions Around the Throne: The Expansion of Judicial Review in Britain," in *Constitutional Policy and Change in Europe*, ed. Joachim Jens Hesse and Nevil Johnson (Oxford: Oxford University Press, 1995), 191.

⁶⁶ Robert Blackburn and Raymond Plant, "Introduction," in *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, ed. Robert Blackburn and Raymond Plant (London / New York: Longman, 1999), 1.

⁶⁷ Graham Leicester, "Scottish and Welsh Devolution," in *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, ed. Robert Blackburn and Raymond Plant (London / New York: Longman, 1999), 252.

Constitutional change with respect to the House of Lords has reached the completion of the first step of parliamentary reform with the removal of most hereditary peers in November and December 1999. Once again, this development can only be understood against the background of the British two-party system. The incorporation into UK law of the European Convention of Human Rights as of January 2000, while leaving the fundamental supremacy of Parliament untouched, marks a significant departure in the UK constitution's treatment of human rights.⁶⁹ By contrast, the future of the reform of the electoral system for the elections to the House of Commons or the enactment of a homemade Bill of Rights appears to remain open for the time being.⁷⁰

5 Conclusion: formal procedures and factual change

The outline of the cases suggests that provisions for the formal amendment procedure determine actual constitutional change only to a limited extent. Although the requirements for the amendment process in France clearly impede the chances of proposals for change to be successful, aspects of salience of the respective issue, as well as the strategic position of the political actors appear to be at least equally important. The recent history of constitutional change in Germany also suggests that the legal constraints of Article 79 have hardly ever posed a major impediment on amendment. At the same time it has turned out that the common constitutional traditions of France and Germany are not accompanied by qualitative similarities of constitutional change in the recent past. In the case of the United Kingdom, where no formal requirements for constitutional change exist, any such change is best to be explained in terms of partisan political power relations, or by reference to external developments such as European integration

⁶⁸ Kevin Boyle and Tom Hadden, "Northern Ireland," in *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, ed. Robert Blackburn and Raymond Plant (London / New York: Longman, 1999), 282-5.

⁶⁹ Ian Loveland, "Incorporating the European Convention of Human Rights into UK Law," *Parliamentary Affairs* 52 (January 1999): 115.

⁷⁰ John Wadham, "A British Bill of Rights," in *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, ed. Robert Blackburn and Raymond Plant (London / New York: Longman, 1999).

The apologetic role of the FCC during the process of German unification underscores the importance of interpretation and usage for constitutional change even in a country that has a formalized constitution such as the Basic Law. The same can be said about the role of the Constitutional Council in France with respect to the consolidation of presidentialism in France in 1962. Finally, none of the constitutional developments outlined above support Murphy's suggestion that the hurdles of procedural requirements increase with the substantive impact and range of the constitutional change. In sum, it can be said that, although constitutional provisions for amendment are not without effect, the study of constitutional change should concentrate mainly on the 'real-life' power relations among the actors involved in the struggle for or against constitutional change. Further research on the topic should focus on an aspect that lies somewhat beyond the dichotomy of the 'constitutional rules of the game' versus the 'political actors', namely the third-order political struggle over the nature of the rules about changing the rules.

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