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Formal and Informal Constitutional Amendment

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Abstract

The constitutional search for greater justice is the animating principle that guides or should guide constitutional amendment and constitutional change whenever and wherever it occurs. Almost all states and governments formally declare their constitutional commitment to justice, liberty, and the rule of law. Yet reports on constitutional amendment from nations throughout the world remind us that we live at a moment of constitutional peril. The general trend of constitutional government in many states has been towards greater corruption, violence, and arbitrary action. This illustrates the dual and parallel importance of constitutional principles and constitutional structures in securing the rule of law. Constitutional principles animate the constitutional structures that apply our constitutional principles in practice. Constitutional amendment and constitutional change can be formal, informal, cultural, and even at times, illegal. Which techniques are appropriate will vary according to the circumstances. The failure of widely shared and well-developed formal or structural constitutional arrangements to prevent the decline of the rule of law in the early twenty-first century confirms the important role that informal and cultural constitutional change have always played in the development of constitutional justice. While constitutions can declare the importance of liberty, justice, and the public welfare, and establish constitutional checks and balances to protect them, they cannot guarantee good faith. That depends on the lawyers, judges, and scholars who make the constitution real.

Constitutional amendment is the process by which constitutions change. The use of "amendment" in this context signifies the expectation that change will be for the better, removing faults that mar the status quo.[1] Such amendment may be formal or informal, open or hidden, deeply considered or happened upon without much thought. What makes an amendment legitimate and justified (or not) is its actual effectiveness in making the constitution better, which is to say in securing liberty and justice through law. This Report reflects the insights of twenty authors from fourteen jurisdictions, who considered how their nations and constitutions use constitutional amendment to secure a more just society for all those subject to their government and laws—or fail to do so—by which methods, and with what consequences.[2]

Every legal system has a constitution, by which I mean an overall structure and guiding rules by which it operates. The concept and reality of any legal *system* entails the existence of such a governing *constitution*, and vice versa. Thus, when we study legal systems, we seek to describe their constitutions and when we seek to create or improve legal systems, we seek to develop or amend these constitutions. Constitutions may also change or evolve without the deliberate intervention of any particular actor, but when deliberately made or recognized we call the process of constitutional change "amendment." To "amend" a constitution is deliberately to change or recognize a change in the guiding rules or overall structure by which the legal system operates in practice.[3]

Constitutional amendment can be either *formal* or *informal*, just as constitutions themselves can be either formal or informal. Formal constitutional amendment is amendment according to the declared rules or announced structures of

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[1] From the Latin "emendare," "to remove a fault."

[2] On Constitutional change in general see recently, Albert et al. (2017); Contiades (2013).

[3] For the development of modern constitutionalism see Adams (1788); Cf. Montesquieu (1748).

K. Boele-Woelki et al. (eds.), *General Reports of the XXth General Congress of the International Academy of Comparative Law - Rapports généraux du XXème Congrès général de l'Académie internationale de droit comparé*,
Ius Comparatum - Global Studies in Comparative Law 50, https://doi.org/10.1007/978-3-030-48675-4_17

the system itself. Informal constitutional amendment is constitutional amendment by any other means, uncontemplated by, unstated by, or contrary to the declared rules or announced structures of the legal system being modified. Sometimes the legal system has very few declared rules or announced structure. Then constitutional amendment will mostly be informal. Sometimes the existence or nonexistence or the legitimacy or illegitimacy of declared rules and structures of amendment governing a legal system remains disputed. Then the formality or informality or existence or legitimacy of constitutional amendments will also be subject to dispute.

There may also be a gap between formally recognized and informally effective methods of constitutional amendment. The mere declaration or announcement of constitutional structures or rules does not necessarily make them effective in fact. Methods of amendment not declared or formally accepted by the legal system may be more effective than those that are formally announced. The nature of constitutional amendment and constitutional change, the methods by which change takes place, and the circumstances in which amendment or change is appropriate will all differ depending on the legitimacy, effectiveness, justice, history, and other contingencies of the existing constitution and institutions of the legal system in question. Yet there are some unifying themes, common aspirations, shared principles and vocabulary that emerge from the systematic study and comparison of constitutional amendment and constitutional change as it takes place in different jurisdictions. Comparisons also help clarify which techniques are most useful in what circumstances, and when they are not.

1 Constitutional Amendment

Identifying common themes and shared principles in the project of constitutional government and the science of constitutional law requires consideration of the nature of the enterprise. What is—or should be—the purpose of constitutional amendment? Explicit or implicit in all the national reports on constitutional amendment and constitutional change is the statement or assumption that the only legitimate purpose of constitutional amendment is to improve the constitution in question, by making it more effective in achieving its aims. Those proposing amendments or constitutional change always also advance the necessary justifying assertion that the proposed alteration will make the constitution better than it was before.

This makes the assumed purposes of constitutional amendment and formal and informal constitutional change dependent in turn on the purpose or purposes of constitutions and constitutionalism in general. If the purpose of constitutional amendment is or should be to make constitutions better, then there must be a standard against which constitutions may be judged to be good or bad—and therefore to be better or worse and in need of amendment, or not. Here too some shared basic assumptions pervade the reports: constitutions are better when they establish justice through the rule of law, and worse when they facilitate injustice or oppression.

Understanding the nature and purpose of a practice (or a document) makes the practice or institution easier to improve. The value of comparative constitutional law arises not only from the benefits of learning about the practices of others as a good in itself, but also from the insights such comparisons bring to our own particular institutions and laws. We see our own strengths and flaws more clearly in the light of comparison and receive guidance and inspiration for how we might legislate, govern, and adjudicate better in the future than we have in the past.

2 Constitutionalism

Constitutionalism is the desire to understand and deliberately to improve the overall structure and guiding rules by which a legal system operates. Every institution has a constitution, whether its structure has been considered or reflected upon or not. The constitution is simply those rules by which an institution predictably operates, at any particular time. Such rules need not be self-consciously maintained, or even understood to be a "constitution" in the most basic sense of that word. But constitutionalism as a discipline goes further. It subjects the existing form of government to scrutiny. "Constitutionalism" is the deliberate study of and search for improvement in the constitutional architecture of the State. The very term "amendment" implies ameliorisation. Formal and informal constitutional amendment are the tools of constitutionalism and reflect the constitutionalists' deliberate attempt to implement necessary constitutional improvements by design.

All human societies and institutions have constitutions, but as applied to "States", "Commonwealths", or "Republics" the process becomes more considered. Constitutionalism develops as we seek to perfect our legal and political institutions, through deliberate constitutional change or amendment. Since justice is the measure of political and constitutional legitimacy, the only legitimate purpose of constitutional amendment is to make the constitution more just, and all constitutional amendments implicitly claim to do so. Constitutions and other political institutions are justified only to the extent that are actually just, and therefore all political and legal institutions tacitly or explicitly claim to be just in reality.

The search for justice and the claim of justice that are at the heart of the constitutional project need not be absolute or fully successful to justify constitutional change or

amendment. To be justified, the change must be at least a little bit for the better and must at least somewhat advance public institutions towards the ultimate and unachievable goal of establishing a perfectly just republic. Constitutional change can be legitimate or illegitimate, justified or unjustified, appropriate or not. The primary value and purpose of the study of comparative constitutional law through the gathering of scholarship from different jurisdictions, and the publication of the results, is to advance the shared enterprise of building more just States and societies through law.

3 The Rule of Law

Proponents of constitutionalism and better constitutional government and institutions generally assert one or the other or both of two fundamental values as the central principle of their pursuit of justice through constitutional law. These two basic principles—the frequently reiterated aspirations for "liberty" and the "rule of law"—are in many respects the same thing and have both been at the heart of the constitutional project since the writings of Aristotle[4] and Cicero.[5] In modern legal discourse they have come to represent the two main elements of well-constructed constitutions everywhere. "The rule of law" primarily arises from the procedural and structural elements of constitutions that seek to control and guide the deliberation and actions of public officials towards their proper end of justice through checks and balances, the separation of powers, federalism, and similar structural devices. "Liberty", in contrast, has come to stand for those substantive and fundamental human rights declared and protected by the constitution, without regard to structure or procedure. In fact, however, substantive liberty and the procedural rule of law are fully complementary and neither is possible without the other.

The rule of law bears further scrutiny because it is so often appropriated by autocrats or traduced by self-interested misconstruction. The "rule of law" should not be confused with "rule by law," to implement the will of corrupt factions and self-interested despots. The "rule of law" in its most useful sense is "the rule of law and not of men" ("*imperium legum*") promoted by republican Rome and the eighteenth-century Enlightenment that inaugurated the modern science of constitutional law.[6] The rule of law in this sense demands that the laws should rule and not the will or desires of powerful public officials. There is no rule of law when power can achieve its private aims through misappropriation of the public legal apparatus. The rule of law demands that officers of the state should themselves be constrained by law and prevented from arbitrary action. Students of constitutional science since Machiavelli and Adams have sought to discover "what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance."[7]

The rule of law in this sense requires the absence of arbitrary government, which is to say, the prevention of any exercise of governmental power that departs from government's only legitimate purpose, which is service to the welfare of all those subject to its rule. Many governments depart from this standard. Many constitutions, much constitutional change, and numerous constitutional amendments violate the rule of law by facilitating oppression, corruption, and the deliberate betrayal of justice and the public good by those who ought to keep them safe. But since doing so violates the justifying purpose of constitutional government, any governments that do so diminish their own legitimacy, and lay themselves open to criticism. Knowing this, corrupt and self-interested rulers dissimulate their actual purposes. All constitutions, all constitutional change, and all constitutional amendments claim to serve justice, even when they do not do so in fact.

4 Liberty

Liberty in its most basic sense is equal citizenship in a just community. To live under a just constitution is to enjoy liberty, and *vice versa*. In this sense liberty and the rule of law go hand in hand. Where there is the rule of law there is liberty, and otherwise not.[8] But liberty has a second, more specific connotation, as the enjoyment of fundamental "liberties," or human rights. Some rights are so basic that there is no justice without them, and therefore no liberty until they are restored. This *substantive* liberty supplements the *procedural* liberty associated with the rule of law. Good constitutions address both requirements: *first,* the procedural checks and balances that prevent arbitrary government; and *second*, the substantive protections that declare and protect fundamental human rights.[9]

The substantive liberty of fundamental human rights, like the procedural liberty of the rule of law, may differ in its requirements depending on the circumstances. Constitutionalism everywhere shares (or claims to share) the same basic goals of justice and the common good, but societies differ in their development, education, needs, and circumstances. The project of constitutional change is not and should not be

[4] Especially Aristoteles, *Politika*.

[5] Especially M. Tullius Cicero, *de republica, de legibus, de officiis*.

[6] Silkenat et al. (2014) and Sellers and Tomaszewski (2010).

[7] Adams (1787).

[8] Titus Livius. 2.1.

[9] See e.g. Reidy and Sellers (2005).

simply to discover the best institutions of the most free societies and to implement them everywhere, but rather to move each State forward towards greater liberty and justice, as circumstances require or permit.

Aristotle, Cicero, Machiavelli, and Montesquieu all engaged in the science of constitutionalism, seeking to make forms of government better and more just. But the real birth of deliberate constitutional amendment and constitutional change came only with the republican revolutions of the late eighteenth century, through their declared commitment to liberty and the fundamental rights of all human beings, everywhere. Constitutions became written documents, expressly dedicated to liberty and justice, with specific procedures for amendment, and carefully drafted bills of rights. This is the project of *constitutionalism*, in which all governments should be engaged, and to which the contributors to this volume have dedicated their careers.[10]

5 Amendment

The project of constitutionalism is also the purpose of constitutional amendment, which moves the constitution forward towards greater effectiveness and justice. In the new world of written constitutions, we generally think of constitutional change as taking place in or through four broad forms or techniques: *formal* constitutional amendment; *informal* constitutional amendment; *customary* constitutional amendment; and *illegal* constitutional amendment. All four of these techniques have the effect of implementing constitutional change. All four techniques have the same declared purpose of creating a more just society. And all four can be legitimate or illegitimate or justified or unjustified, depending on the circumstances in which they take place.

Formal constitutional amendment takes place with the introduction of *written* changes into the text of the constitution itself. *Informal* constitutional amendment is also a deliberate change, not to the written text, but to the *interpretation* or *application* of the written constitution in practice. *Customary* constitutional amendment is the non-deliberate alteration of the constitution through the *evolution* of the culture and understanding of the constitution and constitutional interpretation. *Illegal* constitutional amendment is the deliberate *disregard* of the constitution and its requirements, sometimes behind the veil or some scant pretense of interpretation, by simply violating the constitution's actual provisions, and doing something contrary to what the constitution would have required, if understood sincerely.[11]

Notwithstanding their starkly contrasting modes of operation, all four of these well-known methods of constitutional amendment or constitutional change share the same underlying putative purpose and two fundamental underlying principles. Whether we seek to change the written constitution, the interpretation of the constitution, the culture of constitutional legality, or the effectiveness of its operation, we claim to do so in pursuit of justice. We claim to amend constitutions in order to secure just laws, to maintain just institutions, to interpret the laws justly, or to develop a culture that supports justice and a just society for all. We claim this—with varying degrees of sincerity—because to admit otherwise would vitiate the enterprise.

6 Constitutional Duties

The duties of those who interpret, explain, enforce, study, teach, and amend the constitution arise directly from the constitution's only proper purpose and justification, which is justice. This means that the nature of the constitution and the nature of constitutional interpretation should vary according to the social and historical realities of the societies and institutions in which the proposed constitutional change takes place. The constitutional changes or amendments that will be appropriate at different times and in different places will depend on the nature of the existing constitution, the nature of the society it governs, and the circumstances in which it operates.

Suppose that a constitution is substantially just, in the sense that it establishes institutions that facilitate worthwhile and fulfilling lives for all those subject to its rule. If the governing institutions are just, then we share in a duty to protect and defend them. But when the existing constitution has established or maintains an unjust society we have a duty to establish *more just* institutions, ideally by formal constitutional amendment. So, for example, after fighting a Civil War over the institution of slavery, the United States amended its constitution to abolish slavery, and establish the principle that all persons should enjoy due process of law and the equal protection of the laws. This was an improvement, which made the constitution better.[12]

Had there been no formal amendment, however, as before the War, when the text of the constitution seemed to require the return to slavery of those who managed to escape, then conscientious judges should have *interpreted* the Constitution to make it more just. Good judges would have done so in the face of a difficult text and perhaps even in violation of the text, because slavery is such a fundamental injustice that it requires amendment. Teachers of constitutional law, professors and other commentators and publicists, should have guided the constitutional culture in such a way as to

[10] Cf. Sellers (2003).

[11] Cf. Roznai (2017).

[12] See, *Constitution of the United States* Amendment XIII (December 6, 1865) and Amendment XIV (July 9, 1869).

protect the fugitive slaves, because slavery is so clearly antithetical to justice.[13]

7 Constitutional Justice

The example of the great injustice of slavery in the United States before the Civil War, and the further injustice of racial discrimination and racial oppression afterwards, illustrate the methods and necessity of constitutional change, and the inescapable standard of justice against which to measure every aspect of the constitutional project. Similar, if perhaps smaller, injustices exist in every political community, and need to be rectified. Formal and informal constitutional amendments and constitutional changes always take place in the light of justice and have no use or justification unless they take justice into account. At the same time, justice is impossible without constitutionalism. Constitutional obscurity conceals and facilitates injustice, and only the clear-sighted examination and open discussion of scientific constitutionalism can overcome the concealed manipulations of unjustified authority.

Constitutional justice is the only legitimate aim of constitutional amendment, and should give continuous guidance to all students of constitutional law. Constitutions play not only a procedural and substantive role in the search for the common good and the protection of fundamental liberties, but also an educative role in improving the civic and constitutional cultures of the societies they regulate and protect. Simply by declaring fundamental rights, constitutions make these rights more real. By announcing commitments to justice, liberty, and the common good, constitutions make citizens and public officials more likely to respect their duties. Not that we will always fulfill all the constitutional duties that we know to exist, but knowledge of justice is the first step towards respect for justice, and its eventual realization. Even hypocrisy is better than ignorance.

Hypocrisy is the tribute that vice pays to virtue,[14] which is why even the worst regimes declare noble constitutional aims. They do this to claim a legitimacy they do not deserve. Yet even hypocritical declarations of rights and duties have the virtue of reminding us that such constitutional rights and duties exist, and noble sentiments once embedded in constitutions may bloom years later to move the law towards greater justice. This gives formal constitutional amendment a value that transcends its actual effectiveness. Formal, informal, cultural, and even illegal constitutional change are useful and justified only when they make the world more just, but they often do so over time, with considerable opposition and delay.

8 Argentina

Actual constitutions and experiences of constitutional amendment in various nations illustrate both the general principles and some differing realities of constitutional change. For example, the Argentine Constitution contemplates a very formal process of constitutional amendment, beginning with a special act of Congress summoning a constitutional convention. Nevertheless, a constitutional amendment of 1994 made it possible for treaties to achieve constitutional status, bypassing the need for a constitutional convention. This facilitated Argentina's conformation to global standards of justice, without facing the procedural limitations of ordinary constitutional politics. The 1994 amendment itself respected formal procedures, so constitutional propriety was maintained, but it changed the nature of the Constitution, making formal constitutional change much easier than it had been before.

The stricter the formal process of amendment, as in Argentina, the more likely there will be informal "amendments" made to the constitutional regime through judicial interpretation. Estela Sacristan, in report on constitutional amendment in Argentina, notes many emergency measures eroding property rights that were tolerated by the Argentine Supreme Court under the guise of "regulation." A series of cases beginning with a decision concerning rent control in *Ercolano c/ Lanteri de Renshaw* showed great caution in protecting property rights. The court's motivation reflected crisis conditions and economic necessity in the wake of the First World War, but the rationale offered by the Court to justify such decisions relied on the pretense that such regulations were "temporary." This was disingenuous, but effective.

The Argentine example illustrates the symbiotic relationship between formal and informal constitutional change. The great difficulty of achieving formal amendment in Argentina encouraged informal amendment through the non-enforcement of formal constitutional requirements. This was particularly striking in the case of the right to a jury trial, formally incorporated into the Constitution of 1853–1860 in Section 24. This right has never been fully implemented by law and remains a nullity in practice.

9 Australia

Australia's written Constitution was passed as a statute by the Imperial Parliament in the United Kingdom in 1900. Australians were consulted, but as a formal matter the

[13] See e.g. Dyer (2012).

[14] François, Duc de la Rochefoucauld, *Réflections: ou sentences et maximes morales* (1664) #218: "L'hypocrisie est un homage que le vice rend à la vertu."

constitution was imposed by the imperial power. To make formal changes in the constitution, the Australian Parliament must propose changes for approval by a majority of electors in a majority of the Australian States (and a majority of electors overall). As in Argentina, this difficult process has made formal amendments rare, and encouraged informal constitutional changes, mostly through judicial interpretation. The High Court of Australia is the ultimate arbiter of constitutional meaning in Australia, and has not been shy in exercising its power.

The British background of the Australian constitutional tradition left most human and civil rights with very little formal constitutional protection, but the High Court has stepped in to remedy the deficiency by construction. The Court has found the *implication* of freedom of political communication (for example) in the necessities of representative democracy, as established by the Constitution as a whole. Elisa Arcioni observes in her report on constitutional amendment in Australia that Commonwealth and State legislation can and has been struck down as invalid when it conflicts with fundamental human rights, including the right to political participation, or any of the other rights necessary for political participation to be effective, and well-informed.

The dubious legitimacy of an Australian constitution imposed by the fiat of a foreign parliament, and with very few embedded substantive and procedural rights, has therefore been much enhanced by an Australian judicial culture that values democracy, the rule of law, and fundamental human rights. The ostensibly Federal nature of the Australian constitution has similarly given way in the face of the needs of the Commonwealth as a whole. The formal text of the Australian constitution today is almost unchanged since its enactment in 1900, yet it governs a democratic and substantially just legal system, with the widespread support of all elements of Australian society.

10 Belgium

The Belgian Constitution has been evolving since the 1970s from a unitary state into a more federal form of government. This was done through a series of six amendments strengthening the role of linguistic groups in all aspects of the Belgian legal system. This included the establishment of a Belgian Constitutional Court, to review the constitutionality of legislation and its compliance with the division of powers between the linguistic groups. The Constitutional Court is the ultimate arbiter of the Belgian Constitution and therefore the primary engine of informal constitutional change in Belgium. The Legislative Division of the Council of State also has significant influence, since it advises the legislators on proposed legislation. Belgian constitutional lawyers refer to this process as "latent state reform," unacknowledged constitutional change that nevertheless has a profound effect on the actual system of government in Belgium.

Jurgen Goosens, in his report on constitutional amendment and constitutional change in Belgium, explains the highly complicated nature of Belgian federalism, which divides Belgium not only into linguistic communities, but also into geographic regions. This deliberate structure of checks and balances assures that nothing substantial can be accomplished without broad communal as well as regional consensus. Consensus in reality depends upon the secret negotiations of party leaders and high public officials, with no input from the people and very little from Parliament or any other organs of the State. This small elite often succeeds in effective compromise, which the rest of society accepts, but the process can be difficult. In 2010 and 2011 it took Belgian politicians 541 days to agree on a new state reform and to form a new government. Thus, constitutional reform and ordinary politics were unavoidably linked.

In fact, the constitutional amendment or "Sixth State Reform" implementing the compromise of 2011 by substantially altering the structure of the Senate, took place outside the existing procedures for constitutional amendment, adding (and then relying upon) a new "transitional provision" in the clause regulating constitutional change. This sleight-of-hand made compromise possible, and received the imprimatur of the Venice Commission of the Council of Europe, but illustrates the extent to which the legitimacy of constitutional change in Belgium relies on the substantive necessity of satisfying the communities, rather than the procedures through which constitutional alterations take place. Each change has been incremental towards greater communal federalism and it is this value, rather than formal procedures, which has been decisive.

11 China

Chinese judicial culture is dramatically different from that of Belgium. Where Belgian judges act with self-confident independence, Chinese judges demonstrate no independence at either the formal or the practical level. The rule of law, democracy, and fundamental human rights have no real influence on judicial behavior in China. Thus, judges in China have neither the constitutional power of judicial review nor any inclination to restrain or correct the formally illegal actions of public officials. Since 1949, China has adopted five different formal constitutions, none of which had made a substantial difference on the actual behavior of public officials, or underlying realities of party rule in an autocratic and undemocratic State.

The most significant element in actual Chinese legal and political practice since 1949 has been the policy guidelines of the Communist party, such as the "Two Whatevers"

guideline of the 1970s: "Whatever policy decision was made by Chairman Mao we must resolutely maintain; whatever instruction was made by Chairman Mao, we must unswervingly abide by." Chengdong Jin in his report on constitutional change in China notes that the seventh paragraph of the Preamble on guidelines is the most frequently amended part of the Chinese Constitution. Recent significant amendment made in this paragraph added "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era" to Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the Thought of Three Represents and the Scientific Outlook on Development as "Guiding Ideologies of the State."

Thus, although the Chinese Constitution now declares a commitment to improve "the socialist rule of law," it reiterates that "the leadership of the Communist Party of China is the most essential feature of socialism with Chinese characteristics." The new constitution also removes the two-term limit that had been placed on the Chinese president, eliminating what had been the most significant restriction on presidential power. Formal constitutional amendment in China is approved by the National People's Congress at the proposal of the Communist Party of China, but in reality such formal procedures simply ratify and make public decisions already taken and implemented by the President and his coterie. The Chinese Constitution is operative in reality only insofar as it reveals the attitudes of those who are actually in charge. The real constitution follows the vagaries of the President's will.

12 Cyprus

Cyprus is a former British colony and received its independence and constitution, like Australia, through an Act of the British Parliament. Cyprus was unusual in being a bi-communal State, with guarantees and protections for both the Greek Cypriot and the Turkish Cypriot communities. For this reason, 48 out of the 199 Articles of the 1960 Constitution are basic and unamendable, whereas non-basic articles may be amended by a law passed by separate special majorities comprising at least two-thirds of the Greek-Cypriot representatives and at least two-thirds of the Turkish-Cypriot representatives. This structure sought to maintain communal solidarity by respecting all elements of Cypriot society.

This noble intention met practical frustration when Greek and Turkish Cypriots failed to develop the culture of cooperation necessary to support their shared political institutions. Greek Cypriots took charge of the government, Turkish Cypriots withdrew their participation, and political control and the island was divided between the two communities in a manner wholly inconsistent with the formal constitutional order. The only conceivable justification for such actions was the doctrine of necessity. The formal constitution became a nullity, the Turkish half of the island disregarded the Constitution and the Greek half of the island implemented constitutional amendments without reference to the formal provisions of the Constitution itself. Konstantinos Kombos and Athena Herodotou explain in their report on constitutional change in Cyprus that no other option was available, given the irreconcilable breach between the two communities on the island.

The Cypriot experience illustrate the complicated relationship between substantive justice, procedural justice, legitimacy, and effectiveness in constitutional amendment and constitutional law. The structure of the formal Cypriot constitution was dictated by a political compromise between Greece, Turkey, and the United Kingdom, never fully accepted by the citizens of Cyprus. The substantive justice of the compromises embodied in the document could not overcome the mutual hostility of the Cypriots, undermining the effectiveness of the formal document in practice. Necessity therefore required unconstitutional constitutional amendments—amendments which could be justified, if at all, only by their substantive justice and utility. Thus, constitutional amendment like constitution-drafting and constitutional interpretation ultimately derives its legitimacy and validity from the substantive requirements of justice.

13 The Czech Republic

The process of formal constitutional amendment in the Czech Republic takes place by three-fifths vote of each of the two houses of the legislature, with the restriction that "Any changes in the essential requirements for a democratic law-based state are impermissible."[15] The Constitution does not specify what these are, giving considerable latitude to the constitutional authorities and especially to the Constitutional Court. The Constitutional Court has stated that "the guiding principle is undoubtedly the principle of inherent inalienable, non-prescriptable, and non-repealable fundamental rights and freedoms of individuals equal in dignity and rights; a system based on principles of democracy, the sovereignty of the people, and separation of powers, respecting the cited material concept of a law-based state."[16]

The relatively recent date (1993) and favorable circumstances of the Constitution of the Czech Republic help to explain its clear commitment to the democratic rule of law, and the principles this entails. Miluše Kindlová, points out in reporting on constitutional amendment in the

[15] Art. 9(2) of the Constitution of the Czech Republic.

[16] Ruling of the Constitutional Court of 26-11-2008. File No. 19108 (No. 446/2008 Coll.) par. 93.

Czech republic that many of its drafters and interpreters believed such principles to be binding and unamendable in their own right, being principles required of any legitimate constitution, and therefore beyond the competence of any constitution-maker to limit or diminish their peremptory effect. This would make the principles of the democratic rule of law unamendable limitations on constitutional amendment, even when the constitution makes no such express prohibition in the body of its own written text.

The Czech Constitutional Court relied on Art. 9(2) of the constitution, protecting the "democratic law-based state" to impose a ratchet on constitutional amendment, so that "no amendment of the Constitution may be construed in a way which would lead to a limitation of the already attained level of procedural protection of fundamental rights and freedoms."[17] This extends to the delegation of powers of the Czech Republic to the European Union, which "must not go so far as to impair the very essence of the republic as a sovereign and democratic state governed by the rule of law and based on the respect for rights and freedoms of man and citizen or establish a change in the essential requirements of the democratic state based on the rule of law."[18]

14 Denmark

Denmark's constitutional rules are essentially entrenched in one single act, the "*Grundloven*," or "Fundamental Law," consisting of 89 sections. Formal amendment of the *Grundloven* requires a positive vote by two consecutive Parliaments (with an intervening election) followed by a direct vote of the electors, and royal approval. Thus, formal constitutional amendment requires not only concurrence of the government and two Parliaments, but also the electorate, requiring both a majority of those voting and positive vote by at least 40% of the electorate as a whole. This very democratic, but also quite restrictive procedure has rendered formal constitutional amendment rather rare in Denmark.

The logic of this strict rule of formal constitutional amendment implies that treaties and the case law of bodies established by treaties cannot be read into the rules of the Fundamental Act. Jens Hartig Danielsen in his report on constitutional amendment in Denmark points out the Danish treaties only require a simple majority of votes to take effect, a much less stringent standard than the formal procedures required to amend the basic law. The strictness of the formal standard encourages in Denmark the same creativity in informal procedures that arises whenever formal amendment is hard to achieve. In this case, Denmark has developed certain "constitutional customs" that modify the *Grundloven*. For example, the Parliament's Finance Committee is entitled to authorize ministers to incur expenses, in clear contravention of Section 46(2) of the Fundamental Act.

The Danish Constitution illustrates the flexibility possible in a very small and culturally homogenous nation, with a high level of education and general consensus in favor of the rule of law, social solidarity, and fundamental human rights. Somewhat archaic and under-elaborated constitutional structures operate well through the good will of governments, legislators, and other public officials. Formal constitutional change takes place only with very broad social support and generally ratifies informal changes that have already occurred in the society at large. Formal constitutional details become less important when the society itself is operating well.

15 Hungary

Hungary illustrates the threats to constitutional government that arise when the government itself sets out to undermine the rule of law. Formal amendment has been comparatively easy in Hungary since the 1949 Soviet era constitution, which established amendment by two-thirds majority in Parliament. This became significant in 1989, when the Hungarian Republic used formal constitutional amendment to establish a democratic rule of law state. After 2010, with the rise of illiberal and authoritarian parties in Hungary, these same procedures made it easier to constitutionalize provisions that violated the liberal rule of law reforms of 1989.

The possibility that the Hungarian Constitutional Court might review illiberal or anti-democratic constitutional amendments for their compatibility with the fundamental principles of the Constitution as a whole was directly attacked by a formal amendment in 2013, which stated that "[t]he Constitutional Court may only review the Fundamental Law and amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation."[19] Tímea Drinóczi, Fruszina Gárdos-Orosz, and Zoltan Pozsár-Szentmiklósy, in their Hungarian Report point out that vague constitutional provisions concerning fundamental rights invite broad judicial discretion, verging on informal constitutional amendment, that may be challenged by political actors, when they believe that judges have gone too far.

When the strength of the governing party in Parliament exceeds two-thirds, as has been the case in Hungary for much of the past decade, the government may be tempted to amend the constitution whenever constitutional protections thwart

[17] Ruling of the Constitutional court of 25.6.2002 File No. Pl. US 36/01 (No. 403/2022 Coll.).

[18] Ruling of the Constitutional Court of 26.11.2008 File No. 19/08 (No. 446/2008 Coll.), par. 93.

[19] Article 24(5) of the Fundamental Law adopted by the Fourth Amendment of the Fundamental law in 2013.

the government's will. The Constitutional Court of Hungary affirmed in response that the *jus cogens* of international law and common principles of the constitutional heritage limit the powers of the constituent power, even when this follows the Constitution's formal procedures.[20] Therefore, although the Fundamental Law does not contain unamendable clauses and the Fundamental Law limits the right of the Constitutional Court to review the amendment of the Constitution, the Constitutional Court, by way of interpretation, discovered its inherent power to make substantive review of amendments to the Fundamental Law in certain cases. Whether in practice this will restrain the government in any way, remains to be determined.

16 Italy

The Italian constitution of 1948 was implemented after a period of fascist rule under a flexible and easily amended constitution, leading to many of the same abuses currently evident in Hungary. The post-war Constitution therefore made amendment more difficult in order to entrench fundamental constitutional values against transient majorities. The new rules required the concurrence of both legislative houses for amendment in two successive debates, and approval by popular referendum (Article 138)—unless both chambers achieve a 2/3 majority at their second reading. The Constitution also stipulated that, "the republican form of the State shall not be a matter for constitutional amendment" (Art. 139).

Recent constitutional amendments have limited the death penalty (Art. 27), regulated the vote of Italian citizens living abroad (Art. 48), strengthened the equal opportunities of men and woman (Art. 51) and brought Italy into closer conformity with the institutions of the European Union (Art. 111). Tania Groppi, in her report on constitutional amendment in Italy, observes that the formal amendment procedures set out in Article 138 of the Italian Constitution have implemented reforms very effectively when the political will is present, even in times of considerable opposition and controversy. There have also been many informal amendments, made possible by the generality of most constitutional prescriptions. Electoral Laws or Standing Orders of the Chambers fill in and clarify when the Constitution is vague. The broad capacity of Electoral Laws allow broad changes in the form of government to take place without formal constitutional amendment.

The Constitutional Court of Italy has used constitutional interpretation to protect universal human rights not expressly mentioned in the constitutional text. The Court has also discovered unstated constitutional principles, such as the secular nature of the State, and an "undeniable core" of fundamental rights connected to human dignity, despite the absence of any express reference to such matters in the Constitutional text. Many of these developments correspond to broader trends in the European culture of constitutional law, sometimes justified by reference to the "open clause' of article 11, which allows the ratification of European Treaties through ordinary legislation, without the need to modify the text of the Italian Constitution.[21] At the same time, the Court has identified in the "supreme principles of the constitutional system" a limit to the primacy of European law.[22] Due to the lack of consensus and the difficulty of amendment, most of the constitutional change since the Second World War in Italy has been informal, made by courts and governments in response to the exigencies of the moment.

17 Japan

The Constitution of Japan was issued on November 3, 1946, shortly after the end of the Second World War, and came into effect on May 3 of the following year. This made it the basis of the post-war settlement, introducing a rigidity even greater than that of Italy, which came into existence in similar circumstances. There has never been a formal amendment of the Japanese Constitution. This makes informal constitutional changes more significant made mainly through a strategy known as "Kaishaku Kaiken," accomplishing *de facto* constitutional change by reinterpreting the constitution. The foreign origin and rigidity of their constitution has led many Japanese to view the existing form of government as an alien imposition, and politicians frequently call for more formal amendments, particularly in Article 9, which strictly limits Japan's recourse to military power.

The Japanese experience raises fundamental questions about constitutional legitimacy. Does legitimacy depend on the excellence of the constitution or the procedure which created it? Japan's constitution as it exists today substantially incorporates a draft constitution prepared by the General Headquarters of Gen. Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan after the Second World War. This implemented democracy and respect for human rights, fundamentally replacing the autocratic institutions of the Meiji imperial regime. Keigo Komamura explains in reporting on constitutional amendment in Japan that some view this American constitution as having inaugurated an "August Revolution," bringing new authority and self-rule to the Japanese people, while reducing the emperor to a ceremonial role. Others object to what they

[20] Decision 12/2013 (V.24) of the Constitutional Court, Reasoning, [30], [36]–[37], [43].

[21] Since Decision No. 14/1964.

[22] Since Decision No. 183/1973, and especially in Decision No. 170/1984.

characterize as an "imposed constitution," importing Western values to Japan.

The formal procedures of constitutional amendment in Article 96 of the Japanese Constitution require two-thirds majorities in both houses of the Nation Diet, followed by a majority of votes in a subsequent national referendum. When a constitutional amendment is approved in accordance with these procedures, the Emperor immediately announces its official promulgation in the name of the people. This procedure combines popular sovereignty with the authority of the Emperor as the basis of constitutional change, but does not entirely avoid the underlying reality that the Constitution itself arose by imposition, after military defeat. The Constitution of Japan begins in its Preamble declaring constitutional democracy, liberty, and the abhorrence of war as "universal principles of humanity," and it is on these principles, rather than popular sovereignty, that the legitimacy of the Japanese Constitution must ultimately rest.

18 The Netherlands

In the Netherlands, as in all the nations reporting on their constitutions at the World Congress of Comparative Law in Fukuoka, informal constitutional change has taken place much more frequently than formal amendment. That should not be surprising given the deliberately general and open texture of most well-drafted constitutions, and the unavoidable alterations required by changing circumstances in evolving societies. The current Constitution of the Netherlands first came into existence in 1814, and therefore represents one of the world's most stable constitutional polities. This happened in part with the aid of gradual constitutional change, both formal and informal, over many years.

Reijer Passchier in his report on the Constitution of the Netherlands stresses that informal processes of constitutional change have been much more important than formal constitutional revision and that therefore informal change should be the central concern of anyone who seeks to understand Dutch constitutional development. This arises in part from the relative difficulty of formal constitutional changes in the Netherlands, which requires two legislative stages, with general elections for the lower house in between. The first reading requires a simple majority of both houses of parliament. The second reading requires a qualified two-thirds majority in both houses and the assent of the government. This does not frequently occur.

Passchier advocates what he calls an "historical-institutionalist" view of constitutional change, accepting the authority of formal constitutional norms, while recognizing that institutional practices and understandings of these norms may evolve over time. Thus, the master constitutional text retains its authority, but the institutional context in which the constitution is embedded can adjust to changing circumstances. This can lead to reinterpretation or to the development of new conventions to govern the application of constitutional principles in practice. The text does not change, but its meaning changes, or actors come to feel bound by standards that are not explicit in the text.

19 Poland

Poland offers another example of a constitutional state in which the rule of the law and the stability of constitutional rights has been challenged by the forces of populism. Poland has relatively rigid formal procedures of constitutional amendment, designed to protect the rights of the people and the humanistic orientation of the state. The introduction to the Constitution of Poland refers to the "inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland."

Janusz Trzinski and Michal Szwast in their report on the Constitution of Poland identify the development of a new mechanism of extra-constitutional change of the constitutional order. Thwarted by courts and other institutions in the pursuit of unconstitutional political aims, but without sufficient numbers to effectuate formal amendment, the dominant party in the legislature has used ordinary legislation to alter the laws governing the *operation* of key state bodies, in order to render them ineffectual in fulfilling their duty of protecting constitutional norms. For example, numerous amendments of the Constitutional Tribunal Act have made it impossible for the Court to function or to exercise its powers normally, and prevented the review of unconstitutional legislation.

Such interventions by the legislature may be seen as simple violations of the rule of law, contrary to formal constitutional norms. The innovation of the Polish technique arises from its oblique effect. By incapacitating public authorities, legislation on capacity and procedure renders the formal constitution inoperative, and substitutes a new legislative constitution, superseding the formal institutions of the state. This challenge to the rule of law is more subtle than the open subversion of the rule of law in Hungary, or the constitutionally entrenched extra-legal role of the party in China, but it has a similar effect. By removing the possibility of constitutional review and enforcement, the government renders the existing constitution inoperable and opens the door to less restrictive informal constitutional norms.

20 Romania

The 1989 Constitution of Romania has a comparatively rigid structure of formal constitutional amendment, requiring two-thirds majorities in both houses of parliament, followed

by a referendum. There is also a secure and assertive Constitutional Court. Thus, most constitutional change has been informal and has taken place with the acceptance of even at the initiative of the Constitutional Court. The Constitutional Court is also the first and last authority to give an opinion on formal constitutional changes. This power, conveyed in Article 146 of the Constitution, provides that the popular referendum required for constitutional amendment may not take place until the Court has given its approval.

Elena-Simina Tănăsescu and Bianca Selejan-Guțan in their report on constitutional amendment in Romania note that the most striking examples of informal constitutional revision by the Romanian Constitutional Court have been the Court's efforts to constitutionalise its own new competences, introduced by law. The powers in question were introduced by the organic law of the Court in 2010 concerning review of Acts of Parliament. In a decision made in 2012, the court concluded that Parliament's legislative power concerning the Court's powers only extended to *increasing* the Court's powers but not to *removing* powers already conferred by law. These now had a "constitutional rank," despite the silence of the constitution on such matters.

The experience of Romania illustrates the general proposition that the mere existence of a Constitutional Court does not guarantee protection against unconstitutional revisions. Most informal revisions of the Romanian constitution have taken place with the blessing of the Constitutional Court. In addition to the question of extending its own jurisdiction, the Court has been remarkably complacent in the face of legislative incursions against fundamental rights, such as the legislative ban on same-sex marriage, and popular initiatives to entrench the marriage ban in the Constitution. These may to some extent reflect a desire to avoid defying public opinion in emotive cases, even to protect fundamental human rights.

21 Singapore

Singapore has been ruled by one party with an overwhelming majority in Parliament since its independence in 1965. This majority has never fallen below the two-thirds threshold required for constitutional amendment, making the Constitution, for the most part, an instrument, rather than a limitation, on the ruling party. The primary aim and main source of legitimacy of the Singapore government since its inception has been economic growth, not democratic or constitutional guarantees, and the government has altered the constitution whenever the court has exhibited a desire to constrain it, as in the *Chng Suan Tze* decision in 1989, concerning the detention of suspected dissidents.

Constitutional change in Singapore has generally been formal, in light of the dominance of a single political party. Swati Jhaveri in her report on the Constitution of Singapore observes that this has given rise to an instrumental rather than a normative view of the Constitution and constitutional amendment, as a tool for political consolidation and change, rather than a limit on government power. The aim has been to achieve a sense of stability in politics, which is heavily managed, rather than seeking to protect fundamental rights, or limit the powers of the government. The executive power in Singapore has guided the process from the beginning, and never shared its primacy with other organs of the State.

This executive-led process prevented the constitution itself from playing a significant role in conferring legitimacy on government. *De facto* change in the actual constitution of Singapore always precedes alterations in the *de jure* constitution, which simply reflects political realities that develop outside the formal constitutional framework. Singapore's relative stability and financial success under the more-or-less untrammeled rule of a single powerful man and his family has avoided too much scrutiny of the largely irrelevant formal constitution. This well illustrates Pope's dictum that good administration can overcome poor *forms* of government, more often than good constitutional structures can overcome the corruption of rulers or—what is worse—the corruption of the people themselves.[23]

22 Slovak Republic

The Slovak Constitution shares with many other constitutions and particularly with post-Soviet and post-imperial constitutions, the imbedded desire to overcome and prevent the worst offenses of a preceding regime. More specifically, the Constitution seeks self-consciously to entrench and perpetuate fundamental liberal values, including universal human rights, the rule of law, and democratic participation of citizens in their national government and politics. At the same time, the National Council of the Slovak Republic (the parliament) has the power to approve the Constitution and constitutional laws, as well as their amendment. The task of the constitution and the Constitutional Court is to reconcile this constituent power of the National Council with the values and purposes it exists to serve.

Ján Svák and Boris Balog observe in their report on the Slovak Republic that when the current Constitution was adopted by the Slovak National Council in 1992, the measure was not formally described as a constitutional law. Nevertheless, it has been universally accepted as such. Moreover, although the constitution contains no explicit derogatory clause, the National Council of the Slovak Republic has approved constitutional amendments since 1998, in the

[23] "For forms of government let fools contest. Whate'er is best administer'd is best" Alexander Pope, *Essay on Man*, *Epistle* 3.1.303-4 (1733).

form of constitutional laws—or "amending constitutional laws"—when they directly amend the Constitution. None of this is formally contemplated by the constitutional text, but it fits the over-all scheme well, reflects Slovak constitutional tradition, and is necessary for the smooth execution of the constitutional structure as a whole.

This relationship between formal and informal constitutional institutions reflects the importance of underlying constitutional *values* in any successful constitutional regime, and the necessary constitutional *principles* that support these values and give the constitution the coherence and legitimacy that make it effective in practice. Fundamental constitutional values may be explicit or merely implied in the constitutional text, but they animate the whole and constitute the ultimate constitution of the state. To disregard or change these underlying values and principles to overturn the Constitution *in toto*. The Slovak Constitutional Court has been quite deferential in policing these boundaries, which has weakened the liberal and democratic vitality of the State.

23 Switzerland

Switzerland is, with the Netherlands and the United States, one of the world's oldest federal, liberal, and democratic republics, and provided an inspiration for the development of more scientific constitutional government throughout the world. Paradoxically, the very antiquity and self-confidence of these ancient republics also makes their written constitutions more quirky and antiquated than more recently drafted forms of government. But their supporting constitutional culture is correspondingly deeper, and therefore more able to transcend any weaknesses and infelicities in the formal constitutional order.

Luc Gonin, in his report on constitutional amendment in Switzerland, points out that Switzerland's constitution provides two primary routes towards formal constitutional revision, through popular initiative or representative democracy. Popular initiatives have always played a large part in all aspects of Swiss political life, and in this case require 100,000 signatures within 18 months to raise a question for approval by the people and Cantons of Switzerland. The two Councils and the Federal Assembly may also propose revisions (Art. 193§1) or decree them in the case of partial revisions by the Federal Assembly (Art. 194§1). The requirement of majority approval both by a majority of the people and by a majority of the Cantons combines the democratic and the federal principles, without erecting too significant a barrier to constitutional change.

Switzerland's ancient and very democratic constitutional order also illustrates the growing power of international law and international institutions in constitutional law and constitutional interpretation. Art. 190 of the Constitution of Switzerland explicitly requires the Federal Court to apply national laws and international treaties without review, but does not specify which should prevail in case of a conflict between the two. The Court now firmly asserts the primacy of international law over federal laws.[24] The same applies to the Constitution. The Supreme Court's role in reconciling national law with international law may constitute a form of informal amendment, particularly where international and constitutional context is used to redefine the constitutional norm.[25]

24 United States of America

The United States Constitution became effective in 1789, opening the modern era of written constitutions and setting a very high bar for formal amendment: two-thirds vote in both houses of the legislature, followed by a three-quarters vote of the States.[26] This corresponds closely to the standard set for ratification of the original Constitution, and pays due respect both to Federal and to State power, but is a very strict standard making formal amendment an exceptionally rare occurrence in the history of the United States. As in the approval of the original federal constitution of 1787, there is no recourse to a referendum or plebiscite, procedures strongly disapproved by the founders of the American republic.

Richard Kay, in his report on formal and informal amendment in the Constitution of the United States, observes that the very difficult procedure for amendment of the United States Constitution has been offset by the broad and general terms of the document itself. The Fourteenth Amendment in particular, passed after the American Civil War in the mid-nineteenth century, provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws" and that Congress shall have the power to enforce this article "by appropriate legislation." This very broad standard establishes basic constitutional values and principles, with an exceptionally wide range of possible legislative and judicial applications.

Very significantly, at the outset of constitutional government in the United States, Chief Justice John Marshall noted on behalf of the Supreme Court in the famous case of *Marbury v. Madison*[27] that "it is emphatically the province and duty of the judicial department to say what the law is."

[24] In its decision 139 I. 16.

[25] *See*, Decision 142 II 35, dated November 26, 2015, in which the Supreme Court clarified how it would resolve a normative conflict between national and international law.

[26] *Constitution of the United States*, Article V.

[27] *Marbury v. Madison*, 5 U.S. 137 (2003).

This established the principle of judicial review by which American courts and particularly the United States Supreme Court must disallow laws repugnant to the Constitution of the United States. This decision and its understanding of the Constitution identifies a formal and definitive authority for certifying "informal" constitutional changes, giving them a formal warrant in the Constitution itself, without requiring any modification of the text, Such changes present themselves as no more than a better understanding of the existing document, superseding erroneous readings of the past. Quite often this assertion is actually true—or at least accepted as true by the government and people of the United States of America.

25 Challenges

Accounts of constitutional amendment and constitutional change gathered from many different nations as they exist today remind us that we live at a moment of constitutional peril. The general trend of constitutional government in many states for the past decade has been away from constitutional justice, liberty, and the rule of law towards greater oppression, corruption, violence, and arbitrary action. Russia, Turkey, China, Egypt, Hungary, Poland, the United Kingdom and the United States are among the most celebrated examples of nations that beginning from completely different histories and stages of constitutional development have all in recent years seen a steep degradation of their constitutional cultures.

Lawyers and scholars everywhere have considered whether some specific constitutional infirmity has contributed to this decline, and which amendments or other constitutional changes might do the most to protect liberty and justice against the inroads of corruption and creeping autocracy. The fault, however, seems to lie less in the structures of the constitutions themselves than in changes of public culture, education, and the formation of public opinion. Television, the internet, and the dissemination of information on-line make public opinion highly manipulable by self-interested governments, oligarchs, and wealthy corporations, to the detriment of the public good. This undermines the democratic elements of modern constitutional governance.

The absence of an obvious formal or structural remedy to the decline of constitutional democracy in the early twenty-first century reminds us of the important role that informal and cultural constitutional change have always played in the development of constitutional justice. If the origin of all law and justice is, as Cicero long ago observed, the love and care we owe our fellow human beings, then the purity of this source of law and justice depends on good faith, the *bona fides* that we owe to the republic in fulfilling our civic and constitutional duties. While constitutions can declare the importance of liberty, justice, and good faith, they cannot instill these virtues directly in the people. To do so is the duty of real human beings—and above all the scholars and practitioners of constitutional law, who teach the public how to understand and venerate their constitutions, governments, and duties to each other, and to the laws.

26 Principles and Techniques

Giuseppe Franco Ferrari has usefully observed that constitutionalism as we know it is the product of the liberal tradition, establishing the government of laws, founded on the consent of the people, through such basic principles as the protection of the rights of man and citizen, the separation of powers, the rule of law, and the constitutional review of statutes codified in a higher law. These fundamental constitutional principles and techniques are necessary and fundamental because government without them is invariably unjust and therefore at odds with the first purpose of the constitutional project.

Constitutionalism begins by establishing provisions binding both on citizens and on public authorities. Constitutions establish the aims of the State and the principles and techniques necessary to accomplish these aims. Formally confirming this social framework in written form gives the political community the basis to advance the public good. The benefits conveyed by deliberately designed and written constitutions are considerable, but this raises the problem of formal and informal amendment. Societies and nations cannot and should not be static in all aspects of their fundamental laws and institutions. They should aspire to improve, and most in any case respond to changing circumstances and ideas. Amendment is therefore a necessary and inevitable aspect of every constitution whether this is openly acknowledged or not.

The principles and techniques of constitutional government are two aspects of the same project. Constitutional principles declare the aims, values, and core ideology that the constitution seeks to serve. Constitutional techniques establish social and political structures that can accomplish and advance these aims. Both are necessary. Neither can be effective without the other. Constitutional principles maintain the purposive element in the enterprise. Constitutional techniques guide deliberation and establish the institutions that implement the policies of the State. The applicable principles and techniques are embodied in the Constitution itself, but must also reflect the inherent requirements of the constitutional project. Many constitutional principles and constitutional techniques are shared by all well-ordered constitutions, regulating the resort to constitutional change—by formal, informal, customary, or even by unconstitutional amendment, when circumstances require it.

27 Conclusion

Reports from constitutional law scholars gathered from many jurisdictions throughout the world remind us that constitutional amendment and constitutional change take place in many ways. These can be formal, informal, cultural, and even at times illegal, in violation of the established constitution itself. The unifying force in all such forms of constitutional change or amendment is their claim to advance justice. No constitutional amendment or constitutional change takes place without its proponents claiming that the change will advance justice. They do so because constitutional amendment is not legitimate or justified unless it makes the constitution better, and the sole standard of constitutional value is the constitution's effectiveness in realizing justice in fact.

Constitutionalism is the project of creating or improving the constitutions of the world so that they serve their declared purpose better. Constitutional amendment and constitutional change are the processes by which constitutionalists attempt to do so in practice. The first commitment of constitutionalism is to establish the rule of law, minimizing the arbitrary power of public officials, to guide them towards the public good. Citizens protected in this way enjoy "liberty", which is to say protection against the domination or arbitrary power of those who would oppress them. The procedural checks and balances of constitutions everywhere exist to restrain arbitrary power in all forms of public and private authority.

The constitutional search for greater justice is the animating principle that guides or should guide constitutional amendment and constitutional change whenever and wherever it occurs. We all share a primary duty to implement, interpret, enforce, and amend our constitutions in the light of justice, liberty, and the rule of law, whatever our other affinities may be. The fundamental principles of justice, once expressed, are hard to forget. Plant the seeds of justice in the constitution if you can, or in the legal or national culture, and eventually they will grow. Seek to establish justice, which is the purpose of constitutional law, or at least amend and interpret the constitution in the direction of greater justice, whenever you can. Scholars of law in every jurisdiction share or should share these same noble purposes. *Ita ius esto.*

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