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Changing Constitutions

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INTRODUCTION

THIS BOOK IS about how constitutions change in 15 different jurisdictions, 14 states (all liberal democracies) and the European Union. We shall seek to draw some lessons about the workings of constitutions, their amendment, and organic or evolutionary change within constitutional systems.

We need to explain what we mean by 'constitution' and by 'change'. The word 'constitution' can refer to the fundamental document that sets out the rules regulating the government of a state and which has a specially protected legal status: all states except Israel, New Zealand and the United Kingdom have such documents. Most such documents also contain a Bill or Charter of Rights. It is convenient to refer to such instruments as 'Constitutions' with a capital C. Most of the countries which are members of the United Nations have such a document, and most are 'entrenched' in some way. But 'constitution' can cover something wider, 'constitutional law', and can thus embrace not only the rules set out in a country's fundamental document but also other rules, whether found in laws passed by the legislator or in decisions of the courts. In most countries there are many such laws, it being considered impossible or inappropriate to include all of the laws about the system of government in a single foundational document. Thirdly, 'constitution' can refer to the de facto system of government in a country. This will include the Constitution if there is one. Constitution in this 'system of government' sense includes case law and legislation of a 'constitutional' nature, and what in the United Kingdom are known as 'constitutional conventions', codes, guidance, concordats and memorandums of understanding which set out how certain aspects of government are or should be conducted. Not all of these documents or rules are 'laws' in the sense of being enforceable in the courts. Of course it is possible that these rules do not actually represent the de facto system of government in a country. All they do is set out the rules. They do not tell us whether those rules are in fact obeyed or enforced. If they are not obeyed then the de facto constitution is what happens rather than what the rules require.

The rules regulating how a country—or the EU—is governed and the ways in which they operate or are applied or interpreted change from time to time. Constitutions are commonly characterised by continuous structural development and in this respect they resemble living organisms—they are organic or evolutionary. They are a product of society; they reflect or respond to changes in society. Thus constitutions both change continuously, and may be changed continuously.

Constitutional change takes place in a variety of different ways. Change takes place, for instance, when the courts decide on a new interpretation of the Constitution or of other foundational or constitutional documents. The case of *Marbury v Madison* (1813) where the US Supreme Court decided that it had a judicial review jurisdiction over the acts of Congress is the classic example of such constitutional change. The European Court of Justice (ECJ) jurisprudence on the primacy of European law and its direct effect provides another more recent example of organic change, both in a body once thought to be international but, by virtue of that jurisprudence, in reality supranational, and in the constitutions of member states which have subsequently accepted the doctrines of primacy and direct effect as developed by the ECJ and altered their constitutional arrangements and the theories underlying them (for example sovereignty) as a result.

Much constitutional change, however, is *formal* in the sense that it is produced by amendments to the text of the entrenched written Constitution, often by a special procedure which may include qualified majorities in the legislature or a referendum, or of other Acts which can be regarded as of fundamental nature: the addition of the Bill of Rights to the US Constitution by the adoption of its first 10 Amendments was one of the first examples (1791), followed by countless others. Formal changes to constitutional arrangements may also be effected by the passing of laws of a constitutional nature rather than by changes to an entrenched Constitution: this is the case with the Basic Laws of Israel and the unentrenched Constitution Act 1986 of New Zealand. The possibility of Acts of Exception in Finland provides another exception of formal constitutional change.

Even in countries which, unlike Israel and New Zealand, do have an entrenched Constitution, changes of a constitutional nature may be effected by ordinary Acts of Parliament: that is to say by Acts which are not strictly 'constitutional' in their legal nature according to the hierarchy of the sources of law developed by Hans Kelsen but which nevertheless change the operation of the system of government.

Many Constitutions lay down formal requirements as to participation in the process of constitutional change. The involvement of the electorate via a referendum as in Switzerland is an example. But apart from such formal requirements there may be political or public traditions or expectations in a country to the effect, for instance, that amendment should only be by consensus between political parties, or that reform should be non-partisan—neutral between

parties—or that there should be wide consultation before reforms are introduced, or that the Cabinet should, or should not, participate in reform proposals, or that reform should follow on from recommendations by a body of non-political experts.

The subject of constitutional change is topical, since the constitutions and systems of government of many democracies are responding to a range of pressures, internal and external, and in the process their de facto operation is changing, or they are undergoing processes of formal constitutional amendment or reform. The pressures for change include: the internationalisation and Europeanisation of countries' obligations; the international and supranational economy and politics (globalisation); the terrorist threat; religious fundamentalism; migration; and citizen demands, whether for enhanced protection of human rights of various kinds, or for greater transparency, or for a more responsive governmental arrangement. Such demands may crystallise in pressures for devolution, federalisation or even secession or independence, and in many instances for a more efficient and open system of government and for better representative democratic institutions.

Our project, then, is to identify (a) the factors which influence changes to constitutions, and (b) the processes and procedures by which change takes place, and to obtain insights into these issues by making comparisons between a range of differing countries and constitutional arrangements. These matters will be influenced by factors such as the existence or absence of an entrenched Constitution, the legitimating constitutional justifications that are current in a particular country, the question whether constitutional laws are directly or indirectly effective and the role of 'soft law' in the system.

THE ANALYTICAL FRAMEWORK

The chapters in the next Part of this book will cover a range of democratic countries and the EU. We have deliberately selected countries whose arrangements seem to us to reflect the basic requirements of modern constitutionalism from which comparative analysis is possible.

Each of the chapters in this collection will stand on its own as an account of the jurisdiction and how it changes and is changed. Each author has been asked to deal with a number of issues:

— the basic features of the constitutional arrangements in their jurisdiction;
— a brief summary of the changes in those arrangements since a Constitution first came into effect or, if no such document exists, changes of significance over, say, the last 100 years;
— what is embraced in the category of 'constitutional' rules and what is not;
— what is included in a country's current 'Constitution' and what is not, and why;

— how constitutional provisions are implemented—whether they have 'direct effect' or are self-executing or whether they require implementing legislation to be passed;
— the formal and de facto procedures for constitutional amendment or change—to what extent the Cabinet, Parliament, other bodies and the electorate participate in the process;
— the influence on a system of government of changing social norms and culture, demographic influences, economic pressures, political culture or electoral behaviour, internationalisation and Europeanisation;
— formal and informal or evolutionary changes that have taken place or are under consideration;
— the extent to which conventions, cultural expectations and traditions affect the working of formal constitutional laws and are recognised; and
— what, if any, legitimating constitutional values, theories or ideologies underlie Constitutions and the de facto system of government.

The authors of the country-based chapters and the EU chapter will focus on the issues in this framework that are most relevant to their own jurisdiction, and adopt the concepts as understood in their own country (or the EU) and explain them.

This approach will enable us to conduct a joint comparative analysis and to try to develop a theory of constitutional change in the final chapters.

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