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Political Practice and Comparative Constitutional Change: Legal, Political, and Material Perspectives

Marco Goldoni and Tarik Olcay

Abstract. The chapter focuses on the methodologies used in constitutional studies for understanding the role of political practices in effecting constitutional change. Three sections are devoted to the main models for the constitutional study of political practices: legal constitutionalism, political constitutionalism and the material study of constitutional orders. After having criticised the limits of the first two approaches, the chapter provides the main methodological tenets of the material approach and put forward the case for its stronger capacity to grasp the role of political practices and their impact on constitutional change. The last section takes up three case studies (Saudi Arabia, Switzerland and Turkey) with a view to illustrate how to identify and assess the impact of political practices on constitutional changes from the material perspective.

1. Introduction

How does political practice impact on constitutional change? Unsurprisingly, while being very much at the forefront of political-science oriented research, the question has often been neglected by constitutional lawyers for at least two reasons. First of all, a legal and normative conception of the constitutional order has dominated constitutional studies for a long time. The background condition which made this dominance possible is the separation between the two systems (law and politics) or their coupling. If understood in formal terms, such a view implies that the normativity of the constitutional order has to be seen in fundamental legal terms. The second reason is the obsession and the relative narrow focus (visible at least in certain jurisdictions) on the activities of supreme or constitutional courts.¹ Indeed, constitutional studies have focussed for the most on higher courts and their decisions. As we shall see, this focus has limited the capacity of constitutional lawyers and practitioners to grasp fundamental changes of the constitutional order. As a reaction to this type of constitutional analysis, in the last two decades a return to the analysis of the political constitution has been advocated (mostly in Commonwealth countries: see Waldron 1999; Tomkins 2005; Bellamy 2007; Ewing 2013). For this stream of constitutional analysis, political practice is the backbone of the constitutional order and, as a consequence, it is more prone to look into the political system for effectuating constitutional change.

This brief sketch of the state of art in constitutional studies provides the frame for the main models of understanding constitutional change: legal or political. The chapter first unpacks these two models (respectively, in sections 1 and 2) and their roots in different constitutional experiences. It then suggests, in section 3, an integrated view on constitutional change which is defined as ‘material’ and it relates constitutional change to the formation and development of the undergirding social order. In the last two sections, the chapter introduces three case studies for illustrating the point of a material analysis. In this way, it will be possible to show the limits of an analysis of political practices which collapses it either blurs the impact of political practice into a formalism of constitutional change or into a complete overlapping between political practice and constitutional transformation. The case studies discussed in the last section prove that adopting the two classic perspectives, partially blind the constitutional observer from noticing the effectiveness of certain constitutional changes while overstating it in other cases.

¹ For a denunciation of this narrow view see, classically, Hirschl 2004.

2. Constitutional Change and Legal Constitutionalism

The main epistemic problem when addressing the role of political practice in constitutional change concerns the mediation of the legal system. In other words, the issue of the impact of political practice on constitutional change always conjures up an understanding of the relation between law and politics. The risk of a legal colonisation of political practice is concrete, as the dominant model of constitutional ordering is grounded on the premise that the main channel for constitutional change is legal and, in certain contexts, simply judicial. In other words, according to this model of constitutional ordering, constitutional change is not only certified by legal actors (and in particular by courts); it can also be brought about through judicial (or other legally-centred) intervention.

First of all, according to the legal constitutionalist model, the law is constitutive of the space and possibilities of politics. Its role is at its most visible when it regulates the political system (e.g., by limiting the political parties, or regulating campaigning). In a sense, this is an intuitive idea as most parts of modern political systems are regulated by law, leaving the impression that without those legal rules, political action would simply be reduced to a series of irrational and unproductive moves. Obviously, constitutional law plays the key role in this narrative. Accordingly, the proponents of this view postulate that it is necessary to tie political practice to fundamental laws (Alexy 2002; Kumm 2004; Sager 1998), usually represented by constitutional rights (as classically advocated, for example, by Dworkin 1977). Often, this view of the constitutive status of law produces the idea that political power shall always be also constrained by law (see the description of the attitude defined as ‘legalism’ by Shklar 1964). Once located within this framework, political practice might be simply reduced to policy making and, therefore, undignified when confronted with constitutional practices because the latter would assume that form only when constituted by law. In this way, ordinary politics is not only fully institutionalised, but it is also harnessed to the aim of protecting and/or expanding existing constitutional guarantees.

Furthermore, for countries where constitutionality review is centralised, *ex post* and the supreme or constitutional court has the last word on these questions, constitutional change might actually happen directly via litigation in courts. Interestingly, this type of narrative has often found recognition in jurisdictions where constitutional review is strong and coupled with powerful and generally respected highest levels of judicial power. The USA, Germany, Israel and, perhaps only until recent times, Spain, provide important examples of this approach to constitutional change.² In these constitutional experiences, it is especially revealing to see how assertive the highest judicial bodies have been even on questions concerning the organisations of the political process. The most important example is given by the case law of the US Supreme Court on electoral funding. In *Buckley v Valeo* (1976), the US Supreme Court upheld the constitutionality of a limit over campaign expenditures which also strengthened a two-party political system. In the more recent and seminal *Citizens United v Federal Electoral Commission* (2010), the Supreme Court partially reversed its previous stance and modified its interpretation of the First Amendment by extending the right to free speech to corporations. The Court stated that any limitation on financial support for campaigning is equivalent to an unconstitutional interference with free speech. The Supreme Court has come to “reject [...] the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’” (Roberts concurring, at 8). The decision

² For the US, a direct statement of judicial constitutional transformation is represented by Rubenfeld 2005. As for Israel, see Hirschl 2004, chapter 2; cf Lerner 2011; on German constitutionalism see Haillbronner 2015; cf Murkens 2013; For Spain, see Ferreres Comella 2013.

contains not only a change in the classic anti-corruption rationale of previous case-law, but it also dismisses political practice as cynical representative politics (Teechout 2014, p.267). This last intervention has the potential of reshaping the form of the political process and the relation between political parties and lobbies. In brief, this type of judgments epitomizes all the virtues and vices of a legalised understanding of the political process and it actually directs the impact of politics on constitutional dynamics.

Another seminal decision which confirms the strictly constitutionalised nature of the political process is given by the famous *Lüth* decision of the German Constitutional Court.³ The highest German judicial body excluded the reformed neo-Nazi party from the political process by banning it. The same court has also been a decisive protagonist when it comes to the shape of the German electoral law. Until the fall of the wall, the German Constitutional Court would uphold the 5% threshold for accessing proportional representation in the lower house and it has recently decided on the unconstitutionality of the same threshold for the European Parliament elections.

The crux of the relation between legal constitutionalism and political practice shall be seen in the thorny issue represented by the question of the judicial reviewability of constitutional amendments, both in *ex ante* modality (as it happens in Brazil) and in *ex post* (as it happens in a number of jurisdictions such as India and Colombia). Under this approach, constitutional change is always registered as already under the law; in other words, it gets closer to constituted than constituent power. In fact, legal constitutionalists aim to contain the creativity of constitutional amendments both by textual reference to constitutional norms and, most crucially, through judicial review by making reference either to constitutional principles or basic structures. As we shall see below, this viewpoint faces a stark alternative: either it concedes that the law is an objective value whose existence grounds political practice (and, in this way, it legalises constitutional change) or leaves to judges and judicial rationality the task of protecting the legal constitution from potential change. The problem that is highlighted is not much a question of political or democratic deficit (although this is an important one), but it is rather epistemic. By postulating that law constitutes and constrains political power, legal constitutionalism does not provide enough resources for understanding when a constitutional change is taking place in a substantial manner, not to mention its different scale or impact upon the existing constitutional order. Therefore, from the perspective of legal constitutionalism only formal legal rules, not political practice, can recognise the existence and the magnitude of the constitutional change. Consequently, without accurate legal specifications, there is no criterion for drawing a distinction between constitutional transformation and amendment.

In brief, constitutional change is registered only when it takes a pre-defined legal form. Yet, in the end what we see is a confusion between a change according to a defined legal form and a substantial change. Accordingly, the creativity of political practice (as portrayed by, e.g., Crick 1962) is hugely underestimated while the formal aspect of constitutional law is overestimated.

3. Constitutional Change and Political Constitutionalism

Another important constitutional tradition and stream of thought shall be recognised and studied for the understanding of how political practice acts in and upon the constitutional system. This tradition has developed around the legacy of Commonwealth constitutionalism. In principle, this is a privileged observation point as this constitutional model understands the formation and development of an order as the direct outcome of the political process. Clearly, the basis for this model is provided by the British constitution and the constitutions of some of

³ BVerfGE 2:1 (1952).

the countries previously belonging to the British Empire. In a nutshell, the main constitutional tenets of this model are two: parliamentary sovereignty and a flexible constitution (e.g., Loughlin 2011). Of course, there are other important aspects as well (the centrality of the rule of law and a peculiar version of separation of powers which makes the executive an emanation of Parliament), but said two tenets are the most important in order to understand constitutional change from the perspective of what could be called the ‘Commonwealth model’. In fact, in this model the constitutional order is conceived as the structure of the political process itself. Most famously, John Griffith (1979, 17) defined the constitution as ‘what happens’ and, accordingly, ‘if nothing happens, that is constitutional as well’. In a sense, this is a pre-revolutionary model as it postulates that ordinary politics exhausts the possibilities of political practice. Therefore, within this constitutional scheme there is no difference between higher and ordinary forms of politics. Bringing Griffith’s most famous dictum to its logical consequences, one might state that anything that happens is constitutional change or transformation. It is worth pausing and unpacking further what brings political constitutionalists to a reductionist view of constitutional change. Parliamentary sovereignty is indeed conceived in terms of party politics played out in parliament and this is where (in an exclusive manner) political practice happens and unfolds. However, in this way political practice is understood as electoral practice and parliamentary accountability in a way that abstracts it from the undergirding social relations.⁴

Moreover, given the centrality of the political process, this constitutional model has often conceived rights as political elements of the legal order and elevated political structures as the core content of the constitution. Of course, this means that the basic tenets of the political process – meaning, the primacy of parliament and the relevance of the electoral process – constitute the identity of the constitution, but these are rarely described as constitutional essentials. As recently illustrated by Stephen Gardbaum (2012), even this model might have undergone a constitutional transformation because of the rise of a rights-based legal and political culture, which has partially eroded the purely political nature of this constitutional model. It is worth pausing and unpacking Gardbaum’s argument, as it illustrates the dynamics of the constitutional change of the political process in some Commonwealth countries and the impossibility of formalising the change as constitutional. Gardbaum maintains that the constitutional change affected Canada, the UK, New Zealand, and Australian provinces (Victoria), though these jurisdictions were all affected in different degrees. In the last 30 years, a constitutional transformation might have affected these countries but the political process that has brought about it does not seem to have peculiar traits. Gardbaum notes that these countries now represent a third way between political and legal models of constitutionalism. Canada is the country where the transformation is most visible, and this is because of the relative judicial activism of its Supreme Court. The interpretation of the Canadian Charter has given enough room to the Supreme Court to introduce and develop new rights previously not recognised, and such a change had not been initiated by the political branches. The UK Supreme Court and the New Zealand High Court have been more cautious, exhibiting clear signs of self-restraint. Concretely, the new model translates into the introduction of two peculiar institutions: a bill of rights (note that all these countries did not use to have one) and a legislative review of rights-compliance centrally organised as a parliamentary committee (Gardbaum 2012; Hiebert and Kelly 2015). Is this a constitutional transformation or just an evolution of the previous model?

Ultimately, political constitutionalism lacks any plausible criteria for understanding the status and nature of constitutional change. Anything can be constitutional change because any political practice, in its unfolding, produces some form of constitutional transformation of the

⁴ An exception is Bellamy (2007), according to whom the political constitution of the Commonwealth model is a mixed constitution.

content of the constitution. In a nutshell, the risk for political constitutionalism is that it understands constitutional change in terms of a flat living constitution (Strauss 2010) and in this way does not provide any distinctive analysis of the contribution of political practice to the formation of the constitutional order. The meaning of the living constitution changes according to the changes of political practice. The shortcoming of such a view is most visible in the absence of any reflexivity about the assumptions undergirding the political process and the deeper constitutional change that the transformation of one of them would bring about.

Perhaps, within the constellation of political constitutionalism, one might think of an exception which does not come from the Commonwealth context. At the theoretical and historical level of analysis, the most encompassing attempt to capture the dynamic between the political process and the legal system in a balanced way has been provided by Bruce Ackerman, in a series of volumes on the constitutional history of the US (Ackerman 1991; Ackerman 1998; Ackerman 2013). Ackerman's effort represents the most encompassing account of constitutional change from a relative political constitutionalist perspective because, unlike classic political constitutionalism, it recognises (1) the difference between higher and ordinary forms of lawmaking, linked to the constitutional recognition of popular sovereignty⁵ and (2) that the initiating moment of a constitutional transformation comes from a political impulse in the form of a movement taking over the driver's seat of a political party (Ackerman 2013, ch 2). Ackerman has tried to understand the development of the American constitutional model by pointing to cycles that unfold by confrontation and/or collaboration among different branches of government. This logic unfolds both at the horizontal level (where the three classic governmental functions interact and conflict) and at the vertical level, between states and central government. In this way, his account actually tries to strike a synthesis between the political and the legal level. The compromise between the two systems is achieved by recognising to the political side the initiative of constitutional change, and to the legal side the recognition and formalisation of the constitutional transformation. In his scheme, this process unfolds in different stages, but what is key is that the final translation of the impulses coming from the political system happens through judicial means, that is, when the Supreme Court ratifies the transformation and grafts it on to the current constitutional regime. In the case of the New Deal, for example, the 'switch in time' becomes the moment of formalisation that a deep constitutional transformation has occurred. Ultimately, Ackerman's is the most sophisticated and balanced version of a political perspective over constitutional change. However, despite the fact that his theory allows to see the New Deal and the Civil Rights movement as constitutional moments, other potential changes are reduced to ordinary politics and remain invisible to his scheme.⁶

Finally, one can find traces of a certain kind of political constitutionalism in those countries where formal constitutional change has to be ratified not by supreme or constitutional courts, but by the political process itself. More specifically, in certain countries referendums can be held in order to instigate or confirm a constitutional change (for an overview, see Tierney 2012). This enlargement of the scope of analysis beyond the political system of parties has to be welcomed. Political parties might have the upper hand on referendums, but there is a number of sufficient cases that prove they are also open to the intervention of other social sectors. The study of referendum (and of popular lawmaking initiatives, for example) is a clear indicator

⁵ In the US context, a similar sensitivity is shared by popular constitutionalism. As shown by Kramer (2004), according to the doctrine of popular constitutionalism political practice becomes constitutionally salient when it instantiates acts of 'the people'.

⁶ The point is that Ackerman's reconstruction is heavily normative as only those changes that expand the constitution are deemed to be constitutional moments, while other political practices potentially reductive of the constitutional order are excluded. This difference might find a normative justification, but in terms of the analysis of constitutional change, it is ineffective.

that political practice relevant to constitutional change cannot be limited to party-based political system, but has to be extended to the wider public and often has to be related to either forms of authoritarianism (the confirmation of the political decisions of an autocrat) or, to the contrary, of social and political movements.

4. The Material Study of Constitutional Change

The juxtaposition between legal and political constitutionalism is based around ideal-types and should not be taken too strictly. As it has often been remarked, these two models, though rooted in two different constitutional traditions, help in framing the discourse on comparative constitutional change. They both thematise constitutional change as the outcome of a process which is ultimately sanctioned either politically or legally. The advantages of thinking about constitutional change according to the model of the political constitution are its flexibility, its capacity to adapt to changing circumstances, and the avoidance of an ossified and impoverished political process. The advantages of thinking about constitutional change according to the model of the legal constitution are to be seen in its capacity to control and steer constitutional change and in putting the emphasis on legal and constitutional certainty. The idea of a higher law presiding over political practices is also supposed to deliver a more robust version of the rule of law. Obviously, both models exist ideally only in abstract, while in all constitutional experiences one can find a different mix of both.

However, both approaches are missing an essential aspect of modern constitutional orders when it comes to understanding constitutional change. The model of the political constitution basically portrays the role of the political process as the engine of a living constitution, constantly morphing into an evolving constitutional order. According to this perspective, the law will have then to register what happens in the political sphere, but the constitution is reduced to a thin procedural fact. The model of the legal constitution, on the other hand, entails that law is constitutive of politics and by changing law one can change politics as well (or at least, tame it and make it more rational and less interest-based). When, according to legal constitutionalists, political practice is constrained by constitutional law, then arbitrary political change can be severely curbed. Be that as it may, in the case of political constitutionalism, political practice and constitutional order are fundamentally the same. Therefore, any change in political practice entails a change in the constitutional order, no matter the size or the depth of change. The model of the legal constitution suffers from a similar problem. Any change of the constitution is valid and effective as long as (1) it is registered by a certain form and/or procedure of the law and (2) it is adopted according to the proper procedure, be it a constitutional amendment or a decision of the constitutional court, and all of this independently from the magnitude and the substance of the change in society.

In this section, it is assumed that it is possible to avoid the Scylla of legal constitutionalism and the Charybdis of political constitutionalism by adopting a material understanding of the formation and development of the constitutional order. Such an approach has an important and rather dated pedigree (see Heller 1996; Schmitt 2008; Romano 2017; Mortati 2019) which finds its intellectual roots in the first wave of classic legal institutionalism.⁷ A key tenet of this theoretical approach is the connection between the development of institutions and the social order. Legal institutionalists emphasised the social origins of the legal order, a link captured by the famous dictum *ubi societas, ibi ius* (Romano 2017, 32). Unsurprisingly, they interpreted the constitutional order as deeply intertwined with the political and social nature of the community.

⁷ For a recent reconstruction see Loughlin 2017.

The key constitutional intuition is that there is a crucial distinction between the constitutional order and constitutional law (Schmitt 2008, p. 70-75; Schupmann 2017, ch. 3). Therefore, a lot of their concerns were directed at the maintenance of homogeneity (Heller and Schmitt) or the integration of social relations and factions into the constitutional order (Romano and Mortati). Be that as it may,⁸ the relevant intuition shared by these authors revolve around the juristic idea that social practices have to be selected and harmonised in order to be jurisgenerative. For this reason, the material study reconnects political practice and constitutional change to the underlying social structure and its substantial formation and reproduction. In a nutshell, the material level of constitutional analysis observes and studies the internal connection between societal formation and constitutional ordering. This approach is the opposite of the standard conceptions of how political and legal constitutionalism see the relation between society, political practice and constitutional law. According to the material analysis, political practice is not an instantiation of the autonomy of the political (as celebrated by political constitutionalists). It is rather a way of organising and holding together a certain configuration of social relations and this assemblage contains seeds of constitutional normativity.

Crucial for the material analysis of constitutional development is to take into account the essential tenets which make up for the identity of the constitutional order. First, there must be subjects or bearers capable of imposing and sustaining the order. These subjects are often political parties, but they are not the only ones. Other subjects can also become bearers of the constitutional order. A classic example is represented by the military or, usually in smaller states, by royal families. Moreover, a plurality of subjects (an alliance) can also become the subjective bearer of the material constitutional order. Organisational capacities are a key requirement for these types of subjects as they have to be able to order important sectors of society. Second, a set of concrete social relations and institutions represent another essential tenet. These are marks of the identity of the constitutional order and are embedded in its materiality. Examples can be provided by the type of property that is regulated and protected, the relation between Church and State, or by the organisation of labour relations. A third core aspect is given by the fundamental political goals that all constitutional orders strive to achieve. Not only is there a teleological element entailed by this assumption, but it is possible to observe a strict continuity between social relations, subjects and fundamental goals. The latter cannot last without the support of subjects and the undergirding base of certain social relations. Once this constellation and its intimate unity are accepted, it is also necessary to recognise that other subjects, other social relations and other political goals are excluded from the constitutional order. Decisively, the consequences of this approach on constitutional knowledge are quite important ones. The material analysis is, at its core, a different way to observe and appreciate constitutional reality. Like legal constitutionalism, the material approach maintains that there is a rigid core at the basis of every constitutional order, but this core is grounded in the material organisation of the social setting. Like political constitutionalism, the material study privileges political subjects as the main bearers of the constitutional orders, but it also includes less formal political actors, institutions, and fundamental political aims. When a change in one of the mentioned tenets has a remarkable impact on social relations, then politically-driven constitutional transformation has to be recognised.

Finally, all the preceding observations do not drive toward the marginalisation of the formal constitution. To the contrary: the formal constitution represents another important aspect for the material study of the constitutional order. In fact, in the vast majority of cases, the formal constitution is a good indicator of the most important features of a specific constitutional order. However, this is not always the case and one of the epistemic added values of the material study is that it provides a methodology for ascertaining whether changes in the formal

⁸ This is not the space for a reconstruction of this stream of constitutional thought.

constitution do have a substantial impact or are just cosmetic interventions over the material level. The opposite case can be true as well: despite the lack of formal constitutional change, a transformation has occurred at the material level which amounts to a fundamental alteration.

5. The Materiality of Constitutional Change in Practice

Looking at the formal constitutional arrangements and their formal change does not always give the full picture with regard to constitutional change in a given state. There are instances where major constitutional changes occur without any changes to the formal constitution. Likewise, formally major constitutional changes can result in little or no real change to the political system of a state.

In order to demonstrate the merit of adopting a material perspective in making sense of constitutional change, we examine cases in three countries in two groups, where legal and political constitutionalism fail to satisfactorily identify and explain constitutional change. First, we look at the adoption of the 1992 Basic Law of Governance in Saudi Arabia, which is the first comprehensive written constitutional document adopted in the country, and at the adoption of the 1999 Constitution in Switzerland, which replaced the 1874 Swiss Constitution. These two cases are examples where major formal constitutional change did not bring about change to the political system. In those cases, it is necessary to find the proper resources for understanding the constitutional role of political practice. Second, we look at the difficult process through which the ban on wearing religious headscarves by female students on university campuses was lifted in Turkey. The Turkish case demonstrates that it is possible to effect constitutional change without formal constitutional procedures when changes in political arrangements result in changes in political practice, in particular when they have an impact on fundamental social relations. In opposing ways, these two groups of cases show that it is crucial to look at whether there is a major change in political practice or political system in order to identify and understand constitutional change. Only the material study of these experiences can avoid false positives (formal constitutional change without substantial transformation) and negatives (substantial transformation without formal constitutional change).

5.1. Formal-immaterial Constitutional Change

5.1.1. Saudi Arabia

The Kingdom of Saudi Arabia presents a good example to demonstrate the value of the materialist study of the constitution in explaining constitutional change. The adoption of the Basic Law of Governance in 1992 was the first constitutional codification in the country, yet, it introduced virtually no change to the political system of Saudi Arabia. This therefore is a good example of a significant formal constitutional change without a material constitutional change.

Until 1992, Saudi Arabia did not have a codified modern constitution or a constitutional document. The Qur'an was regarded as the constitution of the state, and sovereignty belonged to the monarch, who also acted as the religious leader (Al-Marayati 1968, p.293). The teachings of the prophet Muhammad formed the basis of the Saudi jurisprudence and the interpretation of these teachings and the Qur'an were made by qualified Islamic scholars (Al-Marayati 1968, p.293). However, with the king as the ultimate political and religious authority, the Saudi political system operated within a framework of absolute monarchy.

A promise of making a constitution for Saudi Arabia was made by King Abd-al Aziz as early as in 1932 (Al-Fahad 2005, pp.376-77), after the unification of various areas ruled by the

Saudis (Brown 2002, p.59). However, this promise was fulfilled only in the aftermath of the Gulf War with the enactment of the Basic Law of Governance. In the meantime, there have been minor modernisations of the political system, such as the formation of the Council of Ministers in 1953 and a further royal decree in 1958 that formalised the duties and functions of the Council of Ministers and gave it legislative and executive functions, although the ultimate authority remained to rest with the King (Al-Marayati 1968, pp.294-95). Still, until 1992, the political system of Saudi Arabia operated within an informal constitutional framework. The institutional set-up was a derivative of the Qur'an and no separation of powers existed until 1992 (Mallat 2007, p.160).

The Basic Law of 1992 was drafted in secrecy and with no public debate, and did not have a *constitutive* claim, as it was “derived from the goodwill of the sovereign” (Al-Fahad 2005, pp.384-85). The Basic Law explicitly states in its first article that the Qur'an and the Sunna (words and acts) of Muhammad are the constitution of Saudi Arabia.⁹ It makes no reference to popular sovereignty and provides for no separation of powers in the constitutionalist sense (Al-Fahad 2005, p.385). For these reasons, the adoption of a formal constitutional document in Saudi Arabia has been labelled by an observer as an example of ‘ornamental constitutionalism’ and the whole project as “the codification of the status quo” (Al-Fahad 2005, p.385). As it introduces no change to the political system of Saudi Arabia and does not even claim to introduce constitutionalist elements to the Saudi political order, unlike many constitutions in the region, it is not regarded as a façade constitution and it is largely followed (Brown 2002, p.7).

One of the peculiarities of the Saudi Basic Law, therefore, is that its adoption formalised the (already existing) material constitution of Saudi Arabia. In this sense, there is a close overlap between the formal constitution and the material constitution, i.e. the Basic Law is far from being a sham constitution. This is because it is an honest constitution (Al-Fahad 2005, p.389), it is different from façade constitutions (like post-2017 Turkey's, USSR's or Saddam's constitutions) in that it does not claim to introduce a constitutionalist government. The adoption of the Basic Law in 1992, therefore, is not a constitutional change, but rather the formalisation of the material constitution.

From the perspective of legal constitutionalism, this constitutional change would be said to be a major constitutional change and to have created a new constitutional order for Saudi Arabia. This is due to legal constitutionalism's focus on pre-defined domestic or universal forms as to identify constitutional change. From this perspective, the adoption of a new basic law that institutionalises the political practice in a country previously without a codified constitution is a major constitutional change. However, this approach does not take into account that this is not a change to the constitutional organisation of the state—it is merely a rebranding of it. Legal constitutionalism, therefore, has a limited capacity to identify constitutional change, as it largely ignores the material change to political practice.

A purely political analysis of the Saudi Arabia case would not provide the wrong outcome, as it would be able to detect that it was not a substantial constitutional change. However, one might question whether a purely political analysis would grasp the right reasons behind it, as the inquiry would be limited to the formal political system, which in this case did not change at all.

The point of the material analysis of the constitution is seen here in its capability to explain the merits of what is formally presented as a constitutional change. The material study of the

⁹ Article 1 of the Basic Law of Governance (Saudi Arabia).

constitution calls the observer to analyse the previous and subsequent political systems in a given constitutional order in order to identify and explain constitutional change. In this example from Saudi Arabia, it identifies no constitutional change, despite the fact that the Basic Law had been presented as a formal constitutional change. Rather, the new constitution is a rationalisation of the undergirding material constitution and it preserves the same bearers of the constitution, its essential institutions, and the fundamental political aims.

5.2. *Switzerland*

Switzerland's total revision of its federal constitution in 1999 is another example of *formal* constitutional change without material constitutional change. Although the 1999 Constitution replaced the previous 1874 Constitution with a complete repackaging, it did not change any of the fundamental underpinnings of the Swiss political system.

The foundations of the Swiss federal political arrangement set by the first federal constitution of 1848 are still in place today even after two total revisions of the constitution (Biaggini 2011, p.303). Rather than focusing solely on the latest total revision in 1999 itself, in order to understand constitutional change in Switzerland, it is more pertinent to pay attention to what happened between the two constitutional replacements, i.e. between 1874 and 1999 (Biaggini 2011, p.314). The main constitutional developments in this period are identified as the "expansion of the instruments of direct democracy, progressive centralisation—still with considerable cantonal autonomy, and the strengthening of *Rechtsstaatlichkeit* (Rule of Law)" (Biaggini 2011, p.317). The 1999 Constitution represented the consolidation of these developments (Biaggini 2011, pp.317-24), rather than effecting such changes to the Swiss political system. The total revision in 1999 also served to *codify* the previously unwritten constitutional principles such as the principle of legality, proportionality, good faith (Biaggini 2011, p.325).

This constitutional reform for total revision was first proposed by the Federal Council and the Parliament with the aim of editing the wording of the Swiss federal constitution (Fleiner 2013, p.344). Among the goals of adopting a 'new' constitution was to "ensure that all fundamental rights would be clearly stipulated in an up-to-date text corresponding to the latest jurisprudence of the Supreme Court and to international standards" (Haller 2002, p.261). It was therefore not presented as a major change to the constitutional system but rather a modernisation of the existing constitutional arrangement of Switzerland.

The 1999 Constitution consequently built upon the reforms made under the 1874 Constitution and limited itself to the reorganisation of the structure of the constitutional text and introduced no major constitutional change (see Grote 2013; Barbera 2016, pp.10-11). However, as this is a new formal constitution, from the perspective of legal constitutionalism, its adoption created a brand new constitutional order for Switzerland, with a break in the constitutional history of Switzerland.

Given that the 1999 Constitution was also adopted through political means and by respecting the rule of law, it is fair to assume that political constitutionalism would still interpret the change as a fundamental one because it is the outcome of a super-majoritarian political consensus and it produced a whole new constitutional text. However, this would fail to examine that constitutional change from a more reflexive perspective and this is not possible if the political system is taken as a given (as it usually is with political constitutionalism) and its fundamental aims are not at the centre of the analysis.

The point of the material study of the constitution is seen here in its ability to identify where real change to political practice took place. In the Swiss case, it is not the 1999 Constitution that brought about constitutional change. This total revision merely modernised the structure and content of the constitutional text but introduced no significant change to the political system. Therefore, while the adoption of the 1999 Constitution is presented as an important formal constitutional change, it is of little consequence with regard to its effect on the political system of Switzerland. In fact, Switzerland's democratic principles, federalism, and main political subjects were not substantially transformed by the 1999 Constitution.

5.2. Informal-material constitutional change

5.2.1 Turkey

A relatively more recent example of constitutional change drawn from Turkey demonstrates the relevance and significance of the material study of constitutional change from the opposite perspective. While in Saudi Arabia the adoption of the Basic Law was a major *formal* constitutional change with little material constitutional consequence, Turkey went through a *material* constitutional change despite the failure of a formal constitutional change attempt. In this instance, a constitutional change that could not be achieved through formal constitutional amendment was achieved through a series of ordinary administrative decisions. Consequently, we are faced with a *material* constitutional change by means of legal change at the formally sub-constitutional (even sub-legislation) level. What makes this case peculiar (in contrast with other informal constitutional changes) is that the very same change had been attempted to be made by a formal constitutional amendment and it had caused a major constitutional crisis.

In 2008, the AKP government decided to put an end to the headscarf ban for female students on university campuses. As they did not have the qualified majority required to pass a constitutional amendment, with the support of the ultra-nationalist MHP, the AKP passed an amendment to Articles 10 and 42 of the Constitution, which provide for, respectively, the principle of equality before the law and the right to education.¹⁰ Although the proposed textual changes to the Constitution did not mention anything specific to headscarves or Islamic attire in general, the official justifications in the amendment bill stated that the amendment aimed to do away with the headscarf ban.¹¹ As this was a contentious issue between the religious conservatives and secularists at the time, the ultra-secularist CHP took the amendment to the Constitutional Court for annulment. The Turkish Constitutional Court struck down the amendment on the grounds that it had violated the unamendable principle of secularism.¹² Moreover, this attempt at constitutional change formed the basis of the party closure case against the AKP which resulted in partial cut to state funding to the party (Bâli 2013, p.689). This represented the tipping point for the headscarf saga in Turkey. These judgments by the Constitutional Court were preceded by numerous judgments upholding the ban by the administrative judiciary over the past two decades, one of which was unsuccessfully challenged before the European Court of Human Rights.¹³

As a response to this, among other judicial activist challenges to its authority such as the 2007 presidential election crisis and the party closure case, the AKP decided to make major judicial reforms and put these reforms to a referendum in 2010 (Bâli 2013, p.691). This was a critical turning point in Turkish constitutional history as 58% of the electorate voted in favour of the

¹⁰ Law No. 5735, 9 February 2018.

¹¹ General Reasons for this amendment can be reached at <www2.tbmm.gov.tr/d23/2/2-0141.pdf> accessed 6 February 2019.

¹² Turkish Constitutional Court, E. 2008/16, K. 2008/116, 5 June 2008, 45/2 AYMKD 1195.

¹³ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI.

reforms that allowed a major overhaul of the judicial system especially by reforming the appointments to the Constitutional Court and the High Council of Judges and Prosecutors, which made it possible for the AKP to pack and unpack the apex courts (Bâli 2013, pp.691-92). As a result of these reforms, the power balance in the high judiciary shifted towards more liberal or conservative judges as opposed to the earlier secularist hold in the judiciary. After the 2010 reforms, it became inconceivable for the judiciary to stand in the way of lifting the headscarf ban.

Indeed, the ban was lifted virtually effortlessly, given the magnitude of the 2008 constitutional crisis over the issue. The chairman of the Higher Education Board (YÖK), which oversees universities in Turkey, sent a formal letter to Istanbul University on 27 July 2010 stating that a lecturer could not remove a student from a lecture hall for covering her hair. Although the execution of a similar letter by the YÖK chairman had been suspended in March 2008 by the Council of State,¹⁴ this time the letter stood, and the ban was lifted incrementally across universities in Turkey.

Consequently, what could not be achieved through formal constitutional change has been achieved through an ordinary administrative act. This example from Turkey shows the merit of the material study of constitutional change. A formal constitutional amendment failed to bring about the intended outcome of lifting the headscarf ban. This outcome, however, was achieved by a simple administrative act *after* a major overhaul of the political system. The significance of the arrangement of the political system in effecting constitutional change is clear in this example. The lifting was obtained, in the end, by a re-organisation of the political system and the main bearers of the Turkish constitution.

From the perspective of legal constitutionalism, the lifting of the headscarf ban is not a *constitutional* change as the 2008 constitutional amendment failed and the formal constitution stayed the same. However, this perspective does not account for the change in the political system—the system which did not allow the lifting of the headscarf ban in 2008 with the great resistance yet came to smoothly allow it after 2010.

From the perspective of political constitutionalism, it is difficult to understand the relevance of the headscarf case. In the end, the outcome of that conflict is simply seen as the end result of ordinary politics. The fact that administrative law was the legal tool mobilised to achieve that end strengthens the idea that the whole saga was about ordinary politics. Therefore, political constitutionalism would see in that conflict not a constitutional conflict, but an evolution of the living constitution.

The main takeaway of our study of the Turkish case on the headscarf ban is that in order to understand the dynamics of *constitutional* change, at times it can be futile to look at the formal constitution and the formal amendments to it. As an alternative perspective, the material study of the constitution calls to look at where the political power forms and develops—in this case, not only the change in the composition of the Turkish Constitutional Court and the Council of State, but the new political forces rising within the Turkish political system that effected such change—to make sense of whether a constitutional transformation took place.

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¹⁴ Danıştay 8. Daire (8th Chamber of the Council of State of Turkey), E. 2008/1501, 10 March 2008.

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