

CONSTITUTIONALISM IN ACTION: RULES AND CONSTITUTIONAL POLITICS

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LONG ABSTRACT

A legal maxim, inspired by Aristotle's *Nicomachean Ethics*, states, "Ubi homo, ibi societas. Ubi societas, ibi ius. Ergo: ubi homo, ibi ius." ("Where there are people, there is society. Where there is society, there is law. Therefore: where there are people, there is law.") (Heath-Stade, 2012).² Building upon this maxim, which depicts the dependent link between people in a politically organized community and the legal order created in it, this paper examines rules and constitutional politics determining constitutionalism in action.

Decisions and actions of individuals within a polity shape constitutionalism and preserve it by reinforcement. In doing so, they are expected to act in accordance with the rules established by the institutions. Otherwise, the institutions are abandoned. Crucially, these rules are put in place to create a political order that will facilitate coordination and, as such, decrease uncertainty and structure expectations on recurrent relations of political actors in society (North, 1990; Ordeshook, 1992; Hardin, 1999; Weingast, 2005). When they facilitate equilibrium, the individuals see an incentive to adhere to the established rules and not subvert the institutions (Schotter 1981; Calvert 1998; Aoki 2001; Binmore 2010; Hédoin 2017). Thus, these incentives affect whether the political actors sustain the rules that define constitutionalism by reinforcing them.

The paper asks two questions: What legal or extra-legal rules define the institutional framework of constitutionalism in constitutional states? What incentives to the political actors determine whether the rules that define constitutionalism are sustained or folding within a political process?

Addressing the first question, the paper uses an institutional perspective of constitutionalism to study rules constraining the state's power and state officials' discretion. This paper argues that the political order of a country establishes and reinvigorates the institutions of constitutionalism by adhering not only to

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² The second part of this maxim, *Ubi societas, ibi ius.* (Where there is society, there is law.), is variously attributed to Cicero, Ulpian, Hugo Grotius, or Baron Heinrich von Cocceji.

constitutional principles but also to constitutional norms (conventions, codes of conduct, and customs). I identify and discuss eight rules or bundles of rules (popular sovereignty, limited government, civilian control and oversight of the military and state security, independence of the judiciary, separation of church and state, no one is exempt from the law, faithful execution of laws, and due process) that establish and strengthen the institutions of constitutionalism. The article classifies these rules or bundles of rules, both legal or extra-legal, into four dimensions: structural, substantive, procedural, and popular.

Addressing the second question, the starting point of the analysis is that constitutionalism is a means for rulers and ruled to ensure not only through the formation but also through legal enforcement and political invocation of institutions that their idea of a politically organized society is politically implemented. The mere 'on paper' existence of institutions is not a guarantee of constitutionalism, as the latter depends on the willingness of political actors to utilize these legal and extra-legal rules through political procedures. These established rules tend to be relatively stable and self-enforcing. The reason is that it is assumed that the costs of renegeing upon them are significant for the political actors and in the long run the costs of doing it are predicted to be higher than the benefits. Yet, having the prerogative and opportunity to change the institutions within the political system, some political actors subvert the rules that define these institutions, especially since they develop an interest in short-term benefits or are confident the benefits will outweigh the costs in their case. Friedrich (1974, 13) postulates that studying constitutionalism requires exploration of "the methods and techniques by which such restraints are established and maintained". Further, Hardin (1999, 87) advocates that "[c]oordination theory is primarily a theory of workability, not of normativity or obligation." Hence, utilizing a positive approach, the paper applies the concepts and insights of the constitutional political economy to analyze five paths for political actors in reassessing and changing the constitutional text: i) rules are underpinned by fundamental values; ii) rules reflect the citizenry's view of the role of the state in society; iii) alignment of legal and extra-legal rules; iv) utilization of rules; and v) rules for political gains. With a game theory model the paper determines the incentives under which changes in constitutional texts lead to the 'thickening' of constitutionalism or its 'thinning'.

Keywords: constitutionalism, institutions, constitution, Political Economy, Game Theory.

JEL classification: C70, D02, D72, D90, K10, P00

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