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Non-compliance as a determinant of constitutional change? A comparative study

Tim Schnelle¹

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Abstract

It has often been claimed that if constitutions are not complied with, they will be changed. Because an ineffective constitutional contract is a bad contract, a lack of enforcement should induce constitutional reform. This paper empirically tests this conjecture based on a dataset of 170 countries from 1950 to 2018. The results indicate that the size of the *de jure/de facto* gap has no effect on the likelihood of constitutional change as such. However, after differentiating between amendments and replacements as distinct modes of constitutional reform, the results imply that non-compliance robustly increases the probability of constitutional replacement only. This relationship is primarily driven by an implementation gap regarding political and civil rights. Expected moderating effects of interpersonal trust and civil society organizations as catalysts for successful civil reform movements cannot be empirically supported. Overall, this has important consequences for the writers of future constitutions. If reformers desire longevity for their new constitutional framework, they must be aware that utopian promises may backfire by provoking a quick replacement of their rules.

Keywords Constitutional change · Constitutional compliance · De jure-de facto gap · Collective action

JEL classification H11 · H73 · K10 · K42 · O57 · P48 · P51

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1 Introduction

Durability is often considered to be a defining trait of constitutions (Raz, 1998). However, these documents are substantially shorter-lived than many would assume (Lorenz & Seemann, 2009). For instance, the Dominican Republic already lives under its 34th supreme law. In general, the average life expectancy of national constitutions is only 19 years (Elkins et al., 2009). Other constitutions – such as that of India, which is more than 70 years old – may exist for long periods of time but are amended so often that they basically establish a different legal system than that for which they initially laid the groundwork (Albert, 2019). But why do some constitutions remain substantially unchanged for decades while others are frequently amended or thrown out altogether? Few studies have quantitatively analyzed this question and investigated the determinants of constitutional change on a large scale (Hayo & Voigt, 2010). Moreover, the existing research primarily emphasizes the effects of specific institutions (e.g. judicial review) or external events (e.g. armed conflicts) on constitutional reform (Negretto, 2017). This paper addresses this shortcoming by investigating a further determinant that may serve to induce constitutional change – namely, that of non-compliance.¹

Constitutional compliance is itself a concept that only recently entered the scientific debate in comparative constitutional economics (Voigt, 2021). It is usually defined as the *de jure/de facto* gap between formal constitutional guarantees and their actual implementation (Gutmann et al., 2024; also see Law & Versteeg, 2013). Most of the existing empirical research on this topic analyzes factors conducive to compliance which is often justified in terms of economic prospects or human rights protection (Gutmann et al., 2021). However, non-compliance may also have significant political effects beyond that of poor rights enforcement. Most importantly, enforcement could be a necessary condition for – or at least a promotor of – constitutional stability (Ginsburg et al., 2009). As Dennis Mueller formulates it: “If it becomes apparent that it [the ideal of a self-enforcing contract] has not been achieved, [then] the citizens can exercise their ultimate sovereignty and rewrite the constitutional contract” (Mueller, 1996, p. 72–73). Similarly, Weingast (2006) states that if executives regularly transgress their legal boundaries, then constitutions will be changed. This paper aims to empirically test this established conjecture.

The paper is structured in six sections. Following the introduction, the second section reviews the existing literature on constitutional change and compliance. Section three establishes the paper’s theoretical foundations, from which the hypotheses to be tested are derived. Section four describes the data and estimation approach, while the results of this analysis are presented in section five. Finally, section six concludes and derives possible implications for future constitution-makers.

¹ The terms formal and written constitution are used interchangeably and define the *de jure* constitution of a country. Both constitutional change and compliance refer to the formal constitution only as this is the only reference point the two concepts can reasonably be applied to in an empirical analysis. Accordingly, throughout this paper “constitutional change” exclusively refers to changes made to the written text of a constitution.

2 Literature Review

2.1 Comparative constitutional change

As of now, there is no empirical research explicitly connecting constitutional compliance and change. Hence, this section is divided into two separate overviews of the existing literature. The first presents analyses of constitutional change, replacement, and amendment. The second part summarizes the empirical literature on constitutional compliance.

Arguably, the seminal contribution regarding the determinants of constitutional endurance is from Elkins et al. (2009). Distinguishing between design and environmental factors they find that inclusiveness, flexibility, and specificity lengthen constitutional life. External events only have a modest impact on the hazard of replacement. Some exceptions are neighboring constitutional events, regime transitions, and extra-constitutional leadership changes, all having a negative effect on a constitution's longevity. Clearly inspired by this study, Negretto (2012) follows a similar empirical approach and focuses on one of the global "hotspots" of constitutional change, i.e. Latin America. Moreover, he is the first to systematically differentiate between replacements and amendments in a large-N study. He finds that replacements are more likely in the case of constitutional crises, if the rigidity of the document prevents change through amendment, and if the political system concentrates power in a small number of positions. The probability that an amendment will be adopted increases along with the length and detail of the constitutional text. Moreover, amendments become more likely if a low rigidity of amendment rules is paired with a low degree of party fragmentation. Hence, the choice between amendment and replacement is mainly a function of formal (in-)flexibility and the type of shock. While certain events call for a constitutional re-start, pressures caused by internal shifts of power are usually solved through amendment.

In addition to Negretto's study, constitutional amendments have received attention by a host of other scholars (Jensen et al., 2022; Lutz, 1994; Lorenz, 2005; Tsebelis, 2021). Most prominently, a plethora of studies has sought to develop a single quantitative index of constitutional rigidity (Anckar & Karvonen, 2002; Lijphart, 2012; Lutz, 1994; Tsebelis, 2021). Unfortunately, their results are mixed, and the proposed indices are rarely applicable outside the context for which they were developed (Lorenz, 2005). The only robustly confirmed determinant of amendment frequency is the length of the document (Ferejohn, 1997; Lutz, 1994; Tsebelis & Nardi, 2016). The incapability to empirically test and confirm a more complex theory of amendment led Albert (2019) to the conclusion that any effort to quantify amendment ease must necessarily fail. Nevertheless, two recent studies adventured new attempts from different directions. On the one hand, Tsebelis (2021) increased complexity by constructing an index based on veto-player theory. Available for 49 countries, this index not only incorporates all tracks of amendment but also the configuration of political parties. On the other hand, Ginsburg and Melton (2015) abandon the institutional approach altogether and argue that it is simply the "amendment culture" which is the fundamental driver of the actual amendment rate. Both studies find empirical support for their respective arguments, which further muddies the water. Overall, this persis-

tent heterogeneity in results suggests that Rasch's (2003) twenty-year-old diagnosis is still correct – the empirical relationship between amendment ease and the actual rate of intra-constitutional change is indeed very tenuous.

Focusing on changes to one specific formal institution, Hayo and Voigt (2010) study the form of government. Drawing from cross-sectional data of 169 countries they find that geographical factors and colonial history are central predictors for changes in the form of government. Moreover, they identify several variables including party competition, knowledge diffusion, armed conflicts, and the extent of democratization, that explain such shifts. In a follow-up paper the same authors find that the likelihood of a switch towards presidentialism is especially high when a leader dies of natural causes while in office or retires due to illness (Hayo & Voigt, 2013).

2.2 Constitutional compliance

While the field of comparative constitutional change has received sizable attention over the last 20 years, systematic research on compliance with constitutional rules is still in its infancy (Voigt, 2021). This is surprising because few countries actually meet the high standards promised in their constitution while it is also known that *de facto* institutions matter more for the actual effects on e.g. economic output than the *de jure* text (Feld & Voigt, 2003; Voigt et al., 2015).

The first paper thoroughly describing the gap between constitutional text and reality is from Law and Versteeg (2013), who cluster countries according to their constitutional comprehensiveness and rights implementation. While there are some democratic overperformers like Australia that effectively deliver more rights than they formally promise, the group of underperformers or “sham constitutions” exclusively counts non-democratic regimes.

Since then, most of the literature has treated constitutional compliance as a dependent variable. Ginsburg et al. (2011) study the observance of constitutional term limits. They expect these rules to be more strenuously complied with than other provisions, because they define clear focal points which should be simple for the citizens to identify and therefore make public coordination against renegeing political authorities easier. They find some evidence that term limits are indeed complied with more reliably than other procedural rules, at least in consolidated democracies. Yet, they also show that among those leaders reaching their formally defined term limit, more than 20% overstay. Following a similar rationale, a paper on constitutional budget constraints shows that transparency and monitoring increase their effectiveness (Blume & Voigt, 2013). Furthermore, several studies indicate that shock events like armed conflicts and successful coups decrease compliance (Choutagunta et al., 2024; Gutmann & Voigt, 2023; Metelska-Szaniawska, 2021). Yet another potential determinant of compliance studied by Gutmann et al. (2023) are the individual characteristics of political leaders. According to their analysis of 943 political leaders between 1950 and 2010, education, political experience, military background, the way of entry into office and membership in extreme left-wing parties all affect the *de jure/de facto* gap observed in their sample. In an attempt to identify possible safeguards against constitutional backsliding and protect countries from poor leadership,

Gutmann and Voigt (2023) find that only few provisions can effectively deter leaders from renegeing. According to their main model including 157 countries, the degree of respect for the constitution is largely determined by the regularity of entrance into government and the previous level of compliance. In another study, Gutmann et al. (2021) show that deeply entrenched cultural aspects correlate with the size of the constitutional implementation gap. In particular, more individualistic and less hierarchical societies tend to experience significantly higher levels of compliance.

While it remains contested which specific institutions are most salient for facilitating compliance, two descriptive patterns seem to be well established. Firstly, democracy clearly has a positive effect on the overall level of compliance (e.g. Gutmann & Voigt, 2023; Metelska-Szaniawska, 2021). These findings square with the descriptive clustering by Law and Versteeg into overperforming democratic and sham authoritarian constitutions. Similarly, nation-statehood is positively related to constitutional compliance (Grajzl et al., 2024). Secondly, Chilton and Versteeg (2015) find that group rights are more likely to be implemented than individual rights. Their proposed explanation holds that in the case of constitutional violation, barriers for collective action are lower among already organized interest groups, thereby increasing the expected costs of non-compliance for executives.

Given the diversity of studies mentioned above, it seems that we already have a rather sophisticated understanding of the determinants of the *de jure/de facto* gap with regard to constitutional rights (Voigt, 2021). However, little is known about the effects of constitutional compliance. While there are arguments connecting compliance with lower uncertainty regarding the expected behavior of political authorities which should lead to higher investment and better economic development (Gutmann et al., 2021; Voigt, 2021), the political effects of a widening *de jure/de facto* gap have not garnered significant attention. This paper attempts to shed some light on this empirical blind spot.

3 Theory

3.1 Non-compliance and reform

Constitutional non-compliance is usually understood as the gap between text and reality (Voigt, 2021). Note, that compliance is thus not synonymous to the rule of law. Broadly understood, the latter principle demands that the same rules apply to all members of society. If, however, a constitution allows for unequal treatment of different genders, compliance can still be high, but rule of law would clearly be violated (Gutmann et al., 2021). Hence, compliance is a purely descriptive concept capturing the *de jure/de facto* gap at the constitutional level.

The idea of linking compliance to constitutional stability (as opposed to constitutional change) is not novel but has been an implicit assumption in many theoretical debates. For instance, Weingast (2005) notes that constitutions fail where politicians fall short of the promises made in the constitution and violate citizens' rights. Consequently, constitutions are likely to be changed unless they effectively deter the executive from transgressing the law. Similarly, it has been argued that some constitutions

live longer than others because they are self-stabilizing in that they “create incentives for all relevant actors to abide by the rules” (Jacobi et al., 2015, p. 601).

One way to rationalize these conjectures is to apply the compliance framework developed by Voigt (2021). In this cost-benefit model, compliance is a function of the incentives faced by an executive. The incentive structure is determined by the presence of veto players (legislature, courts etc.), the national public and foreign actors. When making decisions, executives weigh the benefits and costs of non-compliance – considerations that are shaped by contextual factors and, critically, by constitutional design. Hence, a large gap between constitutional text and de facto implementation indicates that the current provisions impose insufficient costs on a reneging government. The intuitive response to this issue would be to sharpen those provisions by rewriting the constitution (see Mueller, 1996; Weingast, 2006).²

Conversely, one might argue that non-compliance as such need not induce constitutional change. First, constitutional reform can be a very difficult task. The recent history of Chile shows that even when there is widespread agreement on the need for change, dispute over its substance can still prevent success. While in a plebiscite in October 2020 a vast majority (78%) of Chilean voters agreed to replace the 1980 Pinochet constitution, the first draft was rejected by 62% of the people in a referendum in 2022 (Larrain et al., 2023). Second, if the relevant actors are able to agree on a different implicit set of rules or a critical group benefits from a reneging government, there is room for an “equilibrium” with low compliance and no constitutional change. This argument may be explicitly relevant for authoritarian regimes, where constitutions are primarily used as tools of “window-dressing” vis-à-vis the international community while the actual rules of the political game are implicit (Ginsburg, 2020a; Ginsburg & Simpser, 2014). Third, compliance is only partially a consequence of “bad government”. The previously cited literature suggests that many contextual factors like colonial origin, conflicts, and culture affect the compliance level. Moreover, constitutions may simply become outdated due to social changes within society. In these cases, non-compliance could be a popularly supported alternative for constitutional change. If amendment rules are too rigid and replacement is no feasible option for symbolic reasons, non-compliance may be a substitute for constitutional change rather than a determinant thereof (Huq & Ginsburg, 2018).

Despite these concerns, there is something to the idea of connecting formal constitutional change with a lack of law enforcement – even if the link between non-compliance and reform may not be as direct as suggested and involve multiple mechanisms. Additionally, Congleton (2011) already found some qualitative evidence among Western democracies for an evolutionary tendency toward efficient Constitutionalism where poor design choices of the past have subsequently been replaced. There

² To reach a higher level of compliance, reformers could also simply remove those constitutional promises that are not complied with. Obviously, this is not the intention behind the argument. Citizens have a substantive interest in rights protection. They will therefore not simply give up on formalized rights for the sake of a better compliance score. To alleviate concerns that it is actually the removal of rights from the constitution that narrows the *de jure/de facto* gap, I checked how constitutional changes affected 14 basic rights potentially covered by a constitution. Of the 2056 changes (amendments and replacements) in the sample, only 2.3% reduced the number of formalized rights.

seems to be no *prima facie* reason why this finding should not extend to other countries as well. Hence, the first hypothesis states:

H1 Non-compliance increases the probability of constitutional change.

3.2 Replacements versus amendments

Replacements and amendments have often been understood as substitutes for each other (Burgess, 1890; Ginsburg, 2020b). In line with this tradition, the first hypothesis treats any form of constitutional change alike. However, this simplification may be inappropriate in the given context. Instead, predictions should distinguish between the two standard modes of constitutional reform – amendment and replacement.

Albert (2019) highlights three ways to differentiate the two: a proceduralist, a textual and a content-based approach. According to the first definition, changes are called amendments if the actors claim to have followed the formal amendment rules, and replacements otherwise. The textual approach understands any change *within the same codified document* as an amendment, while all other changes are replacements. Finally, the content-based definition considers whether a formal change preserved legal continuity. If the new provisions run counter to the ideas and spirit of the former constitution, this counts as a discontinuity in a country's legal history and should therefore be considered as a replacement even if reformers have followed the official amendment rules (Albert, 2019). The latter approach might theoretically be the most precise one, but is impractical for large-N analyses. The textual approach, however, has been rejected for being overly simplistic (Levinson, 1995, p. 25). Therefore, I follow the standard literature and opt for the procedural definition of amendments and replacements (see Elkins et al., 2009).

The idea to distinguish between amendments and replacements is based on two arguments. First, they send different signals and differ in scope. Amendments try to preserve continuity and usually only make fine adjustments, while replacements highlight the beginning of something new and signal a political re-start (Negretto, 2012). Non-compliance means that a constitution fails to deliver on what has been promised to the people. Symbolically stressing continuity under the impression of failure and making minor adaptations only is unlikely to calm the public. Moreover, as the most basic law, constitutions lack any external mechanisms for their implementation – a problem Ordeshook (1992, p.137) coined as the “mystery of enforcement”. Hence, every constitution at least partially relies on its perceived legitimacy to exert influence on the behavior of actors. Replacement appears to be a more suitable tool to reestablish these values, as it allows political decision-makers to leave the ignominious past behind. Second, the actors involved in amendment procedures are usually not the ones suffering most from non-compliance, i.e. the citizens.³ According to data from the Comparative Constitutions Project led by Elkins and Ginsburg

³ Citizens will especially suffer from non-compliance where constitutional rights are considered. Therefore, the discussion is mostly concerned with “substantive compliance” with the rights section as opposed to “procedural compliance” with the rules of decision-making.

(2022), only about 10% of constitutions allow citizens themselves to propose amendments.⁴ At the same time, those capable of amending the constitution (especially the executive) benefit from the currently loose incentive structure. In sum, those objecting to substantive non-compliance lack the tools for amendment, while those capable of internal reform lack the interest to pursue it. Institutional optimization aiming at better rights enforcement from within a constitutional system thus seems unlikely. Instead, the people must exercise their constituent power as the ultimate sovereign to get rid of their “sham constitution” (Law & Versteeg, 2013).⁵ The following hypotheses take up on these points:

H2 Non-compliance increases the probability of replacement.

H3 Non-compliance has no effect of the probability of amendment.⁶

3.3 Constitutional change and collective action

Starting with H2, this holds that replacements should only happen if citizens can credibly threaten to exercise their revolutionary power. This will only be the case where they can overcome the collective action problem (Olson, 1965; Weingast, 1997). Since nobody can be excluded from the benefits of an improved constitution, citizens have little reason to join costly protests or contribute to the drafting process if others are willing to do so on their behalf (see Goldstone, 1994). Moreover, citizens will only participate and invest in opposition if they expect many others to do the same because otherwise the success probability and expected returns are insufficiently high. Thus, a second problem is the uncertainty about the actions of fellow citizens (Hadfield & Weingast, 2014). Incorporating collective action into the theory therefore implies that the link between non-compliance and replacement should be moderated by factors which help to reduce uncertainty between citizens and mitigate the temptation of free-riding.

One such catalyst for collective action are civil society organizations (CSO), which reduce incentives for free-riding by splitting the decision-making process of joining the reform movement into two stages. In the first stage, citizens decide to join a CSO. In the second stage, CSOs must coordinate to organize joint protests. As the number of actors at both stages is relatively small, free-riders can be punished more easily. As a consequence, the threat of revolution is more credible the more CSOs exist in a country (Goldstone, 1994).

⁴ On the other hand, since 1950 citizens have been directly involved in constitutional replacement through popular referendum in about 35% of the cases considered (Ginsburg et al., 2009).

⁵ Since the people draw their power as ultimate sovereign from the threat of revolution which is common to both autocracies and democracies, it is not necessary to distinguish between regime types in the analysis.

⁶ The statement of H3 follows from the theoretical argument. As one of the anonymous reviewers pointed out correctly, this is econometrically not correct and should read “non-compliance has a positive effect on amendments” to be testable by standard statistical significance tests. However, this would confuse the reader because it states the contrary of the theory. I thank the reviewer for pointing this out.

Another well-established promoter of collective action is social trust (Putnam, 1993). The less people are expected to become part of a protest, individual costs for participants increase, thereby leading fewer citizens to join. Thus, positive expectations are central to make collective action possible in the first place (Hadfield & Weingast, 2014). Sønderskov (2009) empirically shows that social trust is an important moderator in large-N collective coordination problems. He argues that agents will be more willing to join collective action if they believe and trust others to also join. On the other hand, if citizens distrust the promises made by their peers, they will not be willing to accept the risk of potentially high participation costs, resulting in no collective action taking place. Moreover, social trust is closely associated with dependability which can be interpreted as a norm against free-riding.

These considerations lead to the following conjectures:

H4 The effect of non-compliance on the replacement probability is stronger the higher the number of CSOs.

H5 The effect of non-compliance on the replacement probability is stronger the higher the level of interpersonal trust.

4 Data and empirical approach

4.1 Main variables

4.1.1 Constitutional change

The variables for constitutional change and the design of constitutions are based on the Comparative Constitutions Project (CCP) lead by Elkins and Ginsburg (2022). This dataset covers all constitutions since 1789, their content, and the changes made to these documents.

The regression models distinguish three different forms of constitutional change. Firstly, the dummy variable *conchange* is a cumulative measure of replacements and amendments. This pooling approach is also followed by Versteeg and Zackin (2014). Its major advantage is that it avoids the difficult task of adequately categorizing amendments and replacements (Law & Whalen, 2020). However, their underlying mechanisms may be too different to be analyzed in the same model (Negretto, 2012). Thus, models 2 and 3 differentiate between the two forms of formal change. Following the procedural definition cited in Sect. 3, changes are considered as an amendment if the reformers claim to follow the amendment rules of the codified constitution (see Elkins et al., 2009). If reformers promulgate a new or interim constitution, this is coded as a replacement. I consider both “proper” and interim constitutions

as replacements because both cases signal a usurpation of the previous constitutional framework (whereas amendments preserve and signal legal continuity).⁷

4.1.2 Compliance

Constitutional compliance is quantified using the recently published Comparative Constitutional Compliance Dataset developed by Gutmann et al. (2024). Their main indicator (*cc_total*) identifies the size of a *de jure/de facto* gap by matching data from the CCP on the formal presence of a right with an indicator for the implementation of this right from the Varieties of Democracy Project (V-Dem) run by Coppedge et al. (2023). The *cc_total* score covers 14 rights and is constructed from four sub-variables independently quantifying compliance in the area of property rights and the rule of law (*cc_prop*), civil rights (*cc_civil*), political rights (*cc_polit*), and basic human rights (*cc_basic*). For each separate right, the specific indicator is coded as 0 if the right is mentioned but not enforced and coded 1 if a right is both mentioned and implemented. If a right does not appear in the constitution, the sub-component is assigned a baseline value of 0.5 to not reward countries for making no commitments. The individual rights within each category are aggregated using factor analysis and then averaged to generate the total compliance indicator (Gutmann et al., 2024).

Additionally, all models are re-run using two alternative compliance indicators as robustness checks. The first one is an alternative construction of the *cc_total* index that replicates the compliance index of Law and Versteeg 2017. This measure (*cc_total_lv*) does not account for those rights which are not mentioned in the constitution by coding them as missing but is otherwise identical to *cc_total* (Gutmann et al., 2024). The second indicator is structurally different from the first two and is taken from the V-Dem dataset (*v2exrescon*). This score is an ordinal variable ranging from 0 to 4 and is based on an expert survey asking whether “members of the executive (the head of state, the head of government, and cabinet ministers) respect the Constitution” (Coppedge et al., 2023, p. 115). Although the V-Dem indicator has greater coverage, it lacks transparency in what is precisely measured. Most importantly, it is unclear how the question is interpreted by different country experts, undermining its cross-coder reliability and potentially introducing severe perception bias (see Gutmann et al., 2020). This is also the reason why it is not used as the primary compliance indicator. The correlation between the three indices ranges from 0.70 to 0.93 which suggests they are measuring a similar latent variable. To ease interpretation, all three variables are multiplied with -1 to convert them into measures of non-compliance rather than compliance. The corresponding variable names are *non-compliance*, *non-compliance L&V*, and *non-compliance V-Dem*.

4.1.3 Social trust and CSOs

Data on the presence and power of CSOs is taken from the “core civil society index” (*v2xcs_ccsi*; re-labelled as *CSO*) of the V-Dem Project (Coppedge et al., 2023). This

⁷ A robustness check which only considers replacements by “proper” constitutions indicates that it makes no substantial difference whether replacements by interim constitutions are included or not.

measure ranges from 0 to 1 and considers both the level of participation in them and the degree of government control or repression of these organizations.

Sociological constructs like trust are inherently hard to quantify. The standard way has become using data from the World Value Survey (WVS) run by Haerpfer et al. (2022). One of their instruments asks: “Generally speaking, would you say that most people can be trusted?” (Inglehart et al., 2004, p. 415). The share of people answering “yes” to this question can be interpreted as the general level of trust (Bjørnskov, 2008). However, what respondents understand as “most people” may vary from country to country. Therefore, the radius of trust for each respondent is estimated from six WVS-subitems of the trust questionnaire using the formula developed by Delhey et al. (2011). The final *trust* index is calculated as the product of *trustlevel* and *trustradius*. To maximize the coverage of countries, observations from all seven waves of the WVS (1981–2022) enter the variable.

4.2 Controls

When grouping the control variables, I follow the proposal by Elkins et al. (2009) and distinguish between design or environmental factors. Design factors are those given by the content of the constitution while environmental factors capture external events like regime changes.

The first design factor considered in the control vector is flexibility. Unfortunately, none of the attempts to directly measure constitutional rigidity has been fully successful (see Lorenz, 2005). Hence, I follow Marshfield (2018) who argues that the actual amendment rate is the best available measure of flexibility as it directly incorporates formal as well as external determinants (also see Versteeg & Zackin, 2016). The rationale behind this control is the following: If a constitution has been frequently updated, the demand for replacement due to outdated provisions decreases (Barroso, 2020; Dicey, 1982). At the same time, high amendment rates indicate low rigidity, which should increase the probability of further amendments. The control variable *flexibility* is thus proxied by the amendment rate of the current constitutional system lagged by one year. The second design factor controlled for is the logged age of the document, as the demand for reform either through amendment or replacement may increase as a constitution grows older, and potentially outdated (Lutz, 1994; Sartori, 1962).

Additionally, I control for three environmental factors that are often associated with constitutional reform. First, regime transitions imply institutional and, hence, constitutional change (Elkins et al., 2009). Thus, two dummies are added which control for transitions towards democracy (*dtrans*) or autocracy (*atrans*). The data on regime types is taken from Bjørnskov and Rode (2020). Second, constitutions are often changed during or in response to domestic conflicts (Ginsburg et al., 2009; McWhinney, 1981). The control dummy *conflict* indicates those country-years where at least 25 victims died in an armed conflict as reported by the UCDP/PRIO Armed Conflict Dataset (originally introduced by Gleditsch et al., 2002). Finally, Elkins et al. (2009) find that constitutional replacements have a contagion effect on neighboring countries. The corresponding variable *contagion* is calculated as the share of countries in the same geographical region which

replaced their constitution within the last three years.⁸ Sources and coding rules for all variables are reported in Table A3. Descriptive statistics are displayed in Table 1.

4.3 Empirical approach

The empirical analysis is based on unbalanced panel data for 170 countries. It spans the period from 1950 to 2018 which is largely dictated by the coverage of the compliance index. All models only consider “proper” constitutions, as interim constitutions can be assumed to follow their own logic. Most importantly, interims are designed to be replaced, while proper constitutions “are designed to last” (Kontiadēs & Phōtiadou, 2020, p. 8). Hence, their susceptibility to change cannot be analyzed using the same assumptions and interim constitutions are dropped from the sample.

Previous studies often used Cox proportional hazard models to determine the survival factors of specific institutions or constitutions in general (see Hayo & Voigt, 2010; Negretto, 2012; Elkins et al., 2009). This would have also been the estimation approach of choice for this study. However, the compliance data did not meet the assumption of proportional hazards. Thus, I alternatively employ fixed-effects OLS with country-clustered standard errors.⁹

I use the following regression model specification:

Table 1 Descriptive statistics

	Obs.	Mean	Std. Dev.	Min	Max
conchange	8,106	0.249	0.432	0	1
replace	8,106	0.024	0.152	0	1
amend	8,106	0.225	0.418	0	1
non-compliance	8,106	-0.078	1.061	-1.972	1.862
non-compliance L&V	8,106	-0.078	1.013	-1.410	1.269
non-compliance V-Dem	8,106	-0.455	1.379	-3.406	3.168
flexibility	8,106	0.209	0.234	0	1
age_log	8,106	2.715	1.184	0	5.438
atrans	8,106	0.008	0.089	0	1
dtrans	8,106	0.011	0.104	0	1
conflict	8,106	0.151	0.358	0	1
contagion	8,106	0.089	0.097	0	0.571
CSO	8,106	0.586	0.321	0.008	0.983
trust	4,353	0.136	0.104	0.019	0.457
non-compliance basic	8,106	-0.074	1.042	-1.588	1.989
non-compliance civil	8,106	-0.064	1.051	-1.399	1.167
non-compliance polit	7,932	-0.076	1.056	-1.812	1.407
non-compliance prop	8,074	-0.047	1.058	-2.013	1.410

⁸ Each country is assigned to one of ten geographical regions as defined by Teorell and Hadenius (2005).

⁹ Although the dependent variable is dichotomous, I could not use logistic fixed-effects regressions since standard statistical packages do not allow to estimate country-clustered standard errors for non-linear models. Therefore, the coefficients will be relatively small in absolute terms.

$$change_{it} = \beta * noncompliance_{it-1} + \rho * X_{it} + \mu_i + \lambda_t + \epsilon_{it} \quad (1)$$

In this expression the subscript c denotes country and t year. $change_{it}$ represents the dependent variable which is either *conchange*, *replace*, or *amend*, depending on the model. The variable $noncompliance_{it-1}$ is the constitutional compliance index. X_{it} represents the control vector which was discussed in detail in the previous chapter. Country- and year-fixed effects like culture or global recessions are absorbed by μ_i and λ_t , respectively. Finally, the error term ϵ_{it} captures all remaining time-varying unobservable shocks that impact a country's constitutional stability in year t .

The literature review indicated that many factors impacting compliance also increase the probability of replacement. For instance, conflicts and low compliance levels often go hand in hand (Choutagunta et al., 2024; Gutmann & Voigt, 2023). By including these confounders in the model, multicollinearity may become an issue. However, the mean variance inflation factor (VIF) is only 1.26 and the correlation between the independent variables ranges from -0.25 to 0.38 , which indicates that collinearity poses no severe problem for the estimations.

Another general problem common to all large-N analyses is endogeneity. First, compliance is a function of crises and regime transitions – both of which are part of the controls (see Choutagunta et al., 2024; Gutmann & Voigt, 2023). This issue is addressed by lagging the compliance indices by one period. Second, compliance presumably depends on constitutional stability itself. For instance, Ginsburg et al. (2009) note that the interpretation of constitutional provisions by potential enforcers will only align over time. Since compliance is determined by a constitution's ability to serve as a focal point for coordination, this suggests that the *de jure/de facto* gap should narrow over time (Voigt, 2021). Consequently, the age of the constitution will have competing effects on the risk of reform. The first effect is a direct one where reform becomes necessary because the constitution must adapt to a changing environment. The second one is an indirect one through increased compliance which is expected to make changes less likely. While this interdependency undermines causal inference, the results will still be indicative of whether the negative effect of compliance on reform outweighs the positive one through age.

5 Results and discussion

5.1 Main model

The output of the main model is displayed in Table 2. All results are based on fixed-effects OLS estimation with country-clustered standard errors. The column headers indicate the dependent variable of the respective regression. Columns (1), (3) and (5) use the standard indicator *non-compliance* as the main independent variable. Columns (2), (4) and (6) can be considered as a first robustness check. In these models, the same control vector is entered but they utilize the alternative Law and Versteeg construction of the compliance index (*non-compliance L&V*) as an independent variable. Evidently, the results of the robustness checks are structurally identical to the standard specification.

Table 2 Non-compliance and constitutional change

	(1) conchange	(2) conchange	(3) replace	(4) replace	(5) amend	(6) amend
non-compliance	0.001 (0.012)		0.008** (0.004)		-0.007 (0.011)	
non-compliance L&V		0.009 (0.013)		0.012*** (0.005)		-0.003 (0.013)
flexibility	0.207*** (0.056)	0.207*** (0.056)	-0.008 (0.015)	-0.008 (0.015)	0.215*** (0.051)	0.215*** (0.051)
age_log	0.019** (0.009)	0.018** (0.009)	0.019*** (0.003)	0.019*** (0.003)	-0.000 (0.008)	-0.000 (0.008)
dtrans	0.054 (0.051)	0.053 (0.051)	0.060* (0.031)	0.060* (0.031)	-0.006 (0.043)	-0.007 (0.043)
atrans	0.073 (0.074)	0.074 (0.074)	0.099** (0.048)	0.100** (0.048)	-0.026 (0.047)	-0.026 (0.047)
conflict	-0.003 (0.019)	-0.004 (0.018)	0.011 (0.008)	0.011 (0.008)	-0.014 (0.019)	-0.015 (0.019)
contagion	0.071 (0.070)	0.072 (0.070)	0.052 (0.031)	0.052 (0.032)	0.019 (0.070)	0.020 (0.070)
Observations	8106	8106	8106	8106	8106	8106
No. of Countries	170	170	170	170	170	170
Within R ²	0.021	0.021	0.031	0.031	0.018	0.018

Fixed-effects OLS regression coefficients with country-clustered standard errors in parentheses; dependent variable as indicated by column header; variables *noncompliance*, *noncompliance L&V*, *flexibility*, and *age_log* are lagged by one period; observations are country-years; *: 0.1, **: 0.05, ***: 0.01

The results presented below reject H1 but support H2 and H3. The first hypothesis posited a negative effect of compliance on the probability of constitutional change. However, the compliance variable is insignificant in both model specifications. The controls suggest that a high degree of flexibility increases the probability of constitutional change. Moreover, older constitutions are more susceptible to reform. Since this is the first cross-country study that uses a cumulative measure of replacements and amendments there is no literature to compare these findings with. Still, both results sound intuitive.

Furthermore, the outcomes confirm the conjecture that non-compliance increases the likelihood of replacement. In Columns (3) and (4) of Table 2, as well as in the second robustness check using the V-Dem compliance index, the respective coefficient is highly significant (see Table A1). Additionally, replacements are more likely the older a constitution is and if a regime transitions from democracy to autocracy or vice versa. The latter finding is in line with an argument from Elkins et al. (2009), who contend that regime transitions in both directions might have a positive effect on the risk of replacement. While democratic revolutionaries are eager to make a clear cut with the inglorious dictatorial past, freshly installed authoritarians may have the urge to immortalize themselves and leave their imprimatur on the political system.

Finally, the probability of amendment does not seem to be a function of compliance as suggested by H3. The only significant explanatory variable in Columns (5) and (6) is *flexibility*. This catch-all measure already takes the institutional and

contextual factors of a polity into account, so its strong positive effect is no surprise. The absence of significant main effects in Columns (5) and (6) also explain why H1 had to be rejected: As around 90% of all constitutional changes in the sample are amendments, the regression results in Columns (1) and (2) are largely driven by these intra-constitutional changes. Thus, distinguishing between amendments and replacements was indeed necessary to disentangle the different implications of compliance on types of constitutional change.

5.2 Replacement and collective action

Hypotheses H4 and H5 are tested by adding interaction terms of non-compliance and the respective moderators to the model as specified in Eq. (1). For marginal effects to be estimable for the time-invariant *trust* index, the second model uses random-effects (RE) rather than fixed-effects (FE). Notably, the coefficients are structurally similar in the RE- and the FE-model, so resorting to RE does not systematically affect the estimation. The estimation results are displayed in Fig. 1 as plotted marginal effects of *non-compliance* at given levels of *CSO* and *trust*, respectively.

As indicated by Fig. 1(a) and the corresponding regression Table A2 (in the [appendix](#)), the marginal effect of non-compliance on the replacement probability slightly decreases with the CSO index. Nevertheless, the interaction effect is not significantly different from zero and H4 must be rejected. Almost identical results are observed with respect to the moderating influence of trust. Initially, the negative slope in Fig. 1(b) seems to suggest that non-compliance may in fact matter more in low trust societies. This would contradict the theory which posited that replacement risk will be higher under a non-compliant government in high-trust countries. However, the interaction term in column (3) of Table A2 is again insignificant. Hence, the graphical evidence of non-compliance being more effective in low trust countries is only tentative and should not be overstated. Consequently, H5 is also rejected.

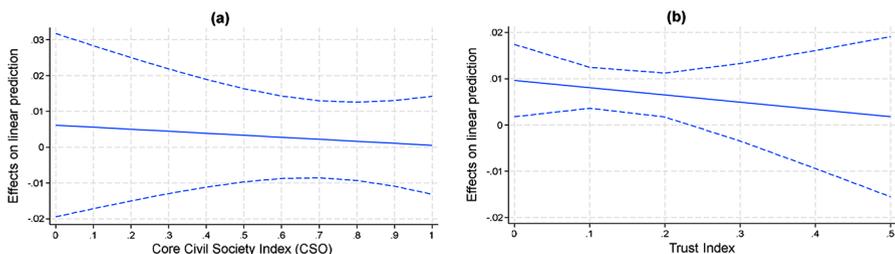


Fig. 1 Marginal effects of compliance on replacement for given levels of the CSO and trust index *Note* Graphs plot the estimated margins with 75% confidence intervals for *non-compliance* at given levels of *CSO* and *trust*. Estimations based OLS regression with country-clustered standard errors; estimation results of the regressions are displayed in columns (2) and (3) of Table A2. All figures were created using STATA

5.3 Model extension – disaggregating compliance

The main model's non-compliance index is a catch-all measure which does not differentiate between the affected rights areas. However, there are reasons to believe that certain rights violations are considered to be a more severe breach of the rules than others. For instance, the enforcement of property rights might be crucial for a stable constitutional system as property owners tend to be more politically active and influential (Echeverria, 1997; Yoder, 2020). If these powerful actors are affected by a *de jure/de facto* gap, this may pose a greater risk of instability than the political suppression of a weak or poorly organized marginalized group. Alternatively, non-compliance might be more difficult to agree on in some areas because the precise meaning of certain rights is more contested and less transparent. This in turn should contribute to the collective action problem and reduce the likelihood of successful reform movements (see Ginsburg et al., 2011; Hadfield & Weingast, 2014).

To shed some light on these conjectures, I re-ran the regressions using the four sub-indices of the main compliance index provided by Gutmann et al. (2024). The political rights sub-index (*cc_polit*) quantifies compliance with the freedom of association, assembly and the right to form parties. Basic freedoms such as the right to life and the prohibition of slavery and torture are considered by *cc_basic*. The property rights and rule of law score (*cc_prop*) reflects private property rights, judicial independence, equality before the law and the rule of law itself. Finally, the civil rights measure (*cc_civil*) covers free media, speech and movement, as well as religious freedom (Gutmann et al., 2024). The correlation between the four indices lies between 0.6 and 0.8. The estimation approach is identical to the main model. Compliance variables are again recoded into a measure of non-compliance (i.e. multiplied with -1) to ease interpretation. Results are reported in Table 3.

The coefficients reported in Table 3 suggest that the link between non-compliance and replacements found in the main model is primarily driven by a *de jure/de facto* gap in terms of political and civil rights. Both results are remarkable, as the two sub-indices cover exactly those rights that seem to be preconditions for successful popular reform movements. If the freedom of association (political liberty) and media freedom (civil liberty) are suppressed, coordination among citizens to pressure for institutional change should be especially difficult. Still, these are the factors which make extra-constitutional reform through replacement more rather than less likely.

6 Conclusion

Many authors have claimed that constitutions will be changed if they are ineffective (Jacobi et al., 2015; Mueller, 1996; Weingast, 2005, 2006). This paper tests this claim on a large sample of 170 countries over almost 70 years. Although the empirical strategy does not allow for making strong causal claims, it does shed some light on the validity of the hypotheses. Constitutional change as such is not more likely if the gap between *de jure* and *de facto* is large. However, a lack of rights enforcement robustly increases the probability of constitutional replacement. This effect is moderated by social trust which enables citizens to coordinate better and pressure for reform. More-

Table 3 Disaggregated non-compliance and constitutional replacement

	(1) replace	(2) replace	(3) replace	(4) replace	(5) replace
non-compliance polit	0.007*				0.004
	(0.004)				(0.005)
non-compliance basic		0.005			0.001
		(0.003)			(0.004)
non-compliance prop			0.002		-0.004
			(0.003)		(0.004)
non-compliance civil				0.009**	0.007
				(0.004)	(0.006)
flexibility	-0.009	-0.008	-0.008	-0.008	-0.009
	(0.015)	(0.015)	(0.015)	(0.015)	(0.015)
age_log	0.019***	0.019***	0.019***	0.019***	0.019***
	(0.003)	(0.003)	(0.003)	(0.003)	(0.003)
dtrans	0.059*	0.060*	0.060*	0.059*	0.059*
	(0.031)	(0.031)	(0.031)	(0.031)	(0.031)
atrans	0.099**	0.099**	0.099**	0.100**	0.100**
	(0.048)	(0.048)	(0.048)	(0.048)	(0.048)
conflict	0.012	0.011	0.012	0.011	0.011
	(0.008)	(0.008)	(0.008)	(0.008)	(0.008)
contagion	0.041	0.041	0.042	0.045	0.043
	(0.031)	(0.031)	(0.031)	(0.031)	(0.031)
<i>Observations</i>	7927	7927	7927	7927	7927
<i>No. of Countries</i>	167	167	167	167	167
<i>R</i> ²	0.031	0.031	0.031	0.032	0.032

Fixed-effects OLS regression coefficients with country-clustered standard errors in parentheses; dependent variable as indicated in column header; all *non-compliance* variables, *flexibility*, and *age_log* are lagged by one period; observations are country-years; *: 0.1, **: 0.05, ***: 0.01

over, by disaggregating the compliance measure it is possible to identify implementation gaps regarding political and civil rights as the most important drivers of the effect. Therefore, the results overall support the hypothesis that a lack of compliance with constitutional rights has the potential to destabilize constitutional systems and increase the risk of their replacement.

Given the increasing value attributed to constitutional continuity this has important implications for constitution-writers (see Oliver & Fusaro, 2011). If they assign an inherent value to constitutional stability and want their institutional framework to remain durable, reformers should be careful with granting rights that cannot be enforced or implemented. This especially concerns positive rights such as the right to receive an education, which many countries in the developing world simply cannot provide due to limited financial resources. This study shows that such implementation gaps increase the risk of replacement, which is often a fraught affair with unpre-

dictable outcomes (Elster, 1995, 2000, 2018). Still, one might argue that reformers should favor making changes to their constitutions if doing so is likely to improve the quality of their implementation. However, one of the defining traits of replacements is that they place everything back on the table while amendments only question and change single provisions (Albert, 2019). Reformers could thus favor optimizing amendments but may not want to push their luck and risk a wholesale rework of their institutional design. Constitution-writers should thus be aware that making many utopian promises may backfire by provoking a quick replacement.

Appendix

See Tables A1, A2 and A3.

Table A1 Main model using the V-Dem compliance index

	(1) conchange	(2) replace	(3) amend
non-compliance V-Dem	0.004 (0.008)	0.013*** (0.004)	-0.008 (0.008)
flexibility	0.207*** (0.056)	-0.008 (0.015)	0.215*** (0.052)
age_log	0.018** (0.009)	0.018*** (0.003)	0.000 (0.008)
dtrans	0.053 (0.051)	0.058* (0.031)	-0.005 (0.043)
atrans	0.074 (0.074)	0.100** (0.048)	-0.026 (0.047)
conflict	-0.003 (0.018)	0.011 (0.008)	-0.015 (0.019)
contagion	0.073 (0.070)	0.056* (0.032)	0.017 (0.070)
<i>Observations</i>	8106	8106	8106
<i>No. of Countries</i>	170	170	170
<i>Within R²</i>	0.021	0.032	0.018

Fixed-effects OLS regression coefficients with country-clustered standard errors in parentheses; models (1) uses *conchange*, model (3) uses *replace* and model (5) uses *amend* as the dependent variable; variables *non-compliance V-Dem*, *flexibility*, and *age_log* are lagged by one period; observations are country-years; *, 0.1, **, 0.05, ***, 0.01

Table A2 CSOs and trust as potential moderators

	(1) replace	(2) replace	(3) replace
non-compliance	0.008** (0.004)	0.006 (0.013)	0.010** (0.004)
CSO		-0.024 (0.022)	
non-compliance*CSO		-0.006 (0.016)	
trust			-0.043 (0.029)
non-compliance*trust			-0.016 (0.024)
flexibility	-0.008 (0.015)	-0.008 (0.016)	-0.001 (0.009)
age_log	0.019*** (0.003)	0.019*** (0.003)	-0.000 (0.002)
dtrans	0.060* (0.031)	0.059* (0.031)	0.080* (0.044)
atrans	0.099** (0.048)	0.102** (0.048)	0.176** (0.076)
conflict	0.011 (0.008)	0.012 (0.008)	-0.003 (0.005)
contagion	0.052 (0.031)	0.053* (0.032)	0.041 (0.034)
<i>Observations</i>	8106	8100	4353
<i>No. of Countries</i>	170	170	87
<i>R</i> ²	0.031	0.031	0.046

OLS regression coefficients with country-clustered standard errors in parentheses; model (1) and (2) use fixed-effects, model (3) uses random-effects; the dependent variable in all models is *replace*; model (1) is the baseline model as in Eq. (1); model (2) additionally interacts *non-compliance* with *CSO*; model (3) additionally interacts *non-compliance* with *trust*; variables *non-compliance*, *CSO*, *flexibility*, and *age_log* are lagged by one period; observations are country-years; *: 0.1, **: 0.05, ***: 0.01

Table A3 Variables, coding and sources

Variable	Coding	Source
<i>age_log</i>	Logarithm of the number of years a constitutional system has been in place	Elkins and Ginsburg (2022)
<i>amend</i>	Dummy variable coded 1 if there was an amendment in that year, 0 otherwise	Elkins and Ginsburg (2022)
<i>atrans</i>	Dummy variable coded 1 if there was a switch to autocracy; 0 otherwise	Bjørnskov and Rode (2020)
<i>conchange</i>	Dummy variable coded 1 if a new or interim constitution is promulgated, 0 otherwise	Elkins and Ginsburg (2022)
<i>conflict</i>	Dummy variable coded 1 if there was an armed conflict involving the government of the respective country with more than 25 battle-related deaths in a given year; generated from variables “intensity_level”, “year” and “location” in UCDP/PRIO Armed Conflict Dataset 22.1	UCDP/PRIO Armed Conflict Dataset 22.1; Gleditsch et al. (2002)
<i>contagion</i>	Share of countries within the same region which experienced constitutional failure in that year (the observed country itself excluded)	Elkins and Ginsburg (2022) and regional classification by Teorell and Had-enius (2005)
<i>CSO</i>	Core civil society index from the Varieties of Democracy Project (<i>v2xcs_ccsi</i>)	V-Dem Dataset Version 13; Coppedge et al. (2023)
<i>dtrans</i>	Dummy variable coded 1 if there was a switch to democracy; 0 otherwise	Bjørnskov and Rode (2020)
<i>flexibility</i>	Number of amendments divided by the number of years a constitutional system has been in place	Elkins and Ginsburg (2022)
<i>non-compliance</i>	Total compliance score from the Comparative Constitutional Compliance Database <i>cc_total</i> * -1	Gutmann et al. (2024)
<i>non-compliance basic</i>	Compliance sub-index in the area of basic rights <i>cc_basic</i> * -1	Gutmann et al. (2024)
<i>non-compliance civil</i>	Compliance sub-index in the area of civil rights <i>cc_civil</i> * -1	Gutmann et al. (2024)
<i>non-compliance L&V</i>	Alternative compliance score from the CCCP using the aggregation formula from Law and Versteeg (2013) <i>cc_total_lv</i> * -1	Gutmann et al. (2024)
<i>non-compliance polit</i>	Compliance sub-index in the area of political rights <i>cc_polit</i> * -1	Gutmann et al. (2024)
<i>non-compliance prop</i>	Compliance sub-index in the area of property rights and the rule of law <i>cc_prop</i> * -1	Gutmann et al. (2024)
<i>non-compliance V-Dem</i>	Compliance index from the Varieties of Democracy Project <i>v2exrescon</i> * -1	V-Dem Dataset Version 10; Coppedge et al. (2023)
<i>trust</i>	Product of <i>trustlevel</i> (respondents answering “Most people can be trusted”) and <i>trustradius</i> (as estimated in Delhey et al. (2011))	World Values Survey Waves 1–7; Haerperfer et al. (2022)

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