

# Constitutions as Chains?

## On the Intergenerational Challenges of Constitution-Making

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**A**bstract: In this essay, I explore the ambiguity of the competition's title "Constitutions as Chains", and distinguish between two intergenerational challenges in constitution-making: the challenge of intergenerationally just constitutional provisions, and the challenge of creating a stable institution which is accepted by successive generations. I prioritise the latter. After contrasting classic ideas of Burke and Paine, I discuss different ways of addressing the challenge, such as the amendability of a constitution, eternity clauses or recurring constitutional assemblies. A flexible approach towards existing constitutional provisions, which is open to future developments, gets the nod. However, a need for empirical research remains.

### Introduction<sup>1</sup>

"Constitutions as chains" is an ambiguous metaphor.<sup>2</sup> It allows for at least two interpretations to characterise constitution-making.

The first interpretation carries a negative connotation: it is the interpretation of constitutions as fetters.<sup>3</sup> Ideally, society commits itself in a "sober" state to certain rules. The aim is to prevent itself from carrying out actions in a "drunken" state that it will regret when "sober" again. Odysseus is seen as the archetype of such practice. He has his companions tie him to the ship's mast. Thus, he can listen to the sirens without falling for their call.<sup>4</sup> A problem arises if fetters are not self-imposed. This is a classic puzzle in constitutional theory: one generation claims a freedom for itself which it simultaneously denies a successive generation. We can call this the paradox of constitution-making.<sup>5</sup> If we now think of generations as different actors, autonomy can turn into heteronomy.<sup>6</sup>

The second interpretation carries a positive connotation, and can be understood as a response to the aforementioned paradox: recurring constitutional assemblies could renew a constitution's legitimacy, or decide on a new constitution. Constitutions would form a chain, connected through assemblies. This is not exactly the idea that underlies the legal concept of a "legitimation chain" (Legitimationskette) in representative democracy;<sup>7</sup> still, this interpretation points to the necessity of a constant renewal of a constitution's democratic foundation.

The metaphor of "constitutions as fetters" has rhetorical force, and the idea of "legitimation chains" offers an interesting response. In order to assess the fit of problem and proposed solution, we need to elaborate on both. I begin by distinguishing two intergenerational challenges in constitution-making. Building on classic texts by Burke and Paine, I turn to what characterises a constitution as a legal institution and how it exerts its influence. Against this background, I go on to discuss different possible reactions to the intergenerational challenge. I see the best possible reaction in a rational, not overly restrictive, approach to constitutional boundaries and change mechanisms. Still, which approach to constitution-making is most likely to be successful, remains an empirical question.

For legal examples, I rely on the German Constitution, the Basic Law (Grundgesetz), as this is the legal material I am most familiar with. However, I do believe – albeit cautiously – that the arguments put forth in this essay apply more generally. But there are at least two caveats. First, institutions arise and function under conditions specific to a certain society. There is no one-size-fits-all approach. Second, constitutions in authoritarian regimes do not bind power in the same way, and they pose challenges that I do not address in this essay.<sup>8</sup>

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### Two intergenerational challenges

The intergenerational challenge of constitution-making consists of at least two specific sub-challenges. Their common denominator is uncertainty on the part of the current, acting generation: knowledge about our successors is necessarily incomplete.

#### *Intergenerational justice*

The first intergenerational challenge concerns the question of intergenerational justice directly. If we assume an ethical obligation to preserve the action space of the following generations, how should we account for this obligation in material constitutional provisions? This question relates to the preservation (or augmentation) of resources, which can be natural resources, but also material wealth. Indeed, for Thomas Jefferson the rights of successive generations were closely related to the question of national debt.<sup>9</sup> And today, provisions requiring a balanced budget are discussed and employed as instruments of intergenerational justice.<sup>10</sup> In the German case, apart from budget provisions, article 20a Basic Law refers directly to successive generations. According to this provision, "the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."<sup>11</sup> A provision that addresses intergenerational justice generally and apart from matters of environmental protection does not exist, but has been discussed.<sup>12</sup> While there already are traces of intergenerational justice provisions, prominently Peter Häberle still sees a great – and global – potential in this regard.<sup>13</sup>

#### *Stability*

The other challenge concerns the stability of the constitution as an institution, meaning its enduring recognition and acceptance. From the perspective of generational ethics, institutions – including constitutions – are "cultural capital", but it is unclear whether such capital is a positive heritage or a negative burden.<sup>14</sup>

The success of a constitution, i.e. whether it creates a stable environment for civil<sup>15</sup> society, will ultimately depend on successive generations. From such an angle, the second challenge has priority over the first. Insofar as acceptance of a constitution depends on its contents, an interrelation exists. One could also argue that the obligation to endow them as far as possible with functioning institutions is also among the obligations towards successive generations, and that the functioning of an institution includes the option to adapt it to current circumstances.

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Constitutional designers are well aware of these challenges. They want to take precautionary measures to make a constitution's endurance more likely. To this end, they need a workable descriptive conception of how a constitution functions.

### What characterises a constitution?

A constitution functions in multiple ways. Emphasising one almost necessarily means neglecting another. Still, in the following I will focus on some of the aspects I deem essential.

#### *Creating identity*

A prominent function of a constitution can be to create a collective identity. A group might constitute itself as such through a constitution. The constitution offers a common point of reference. Such a legal constituting process might be preceded by a prelegal conception. Examples are ethnicities or nations.<sup>16</sup> However, such a prelegal conception is not a necessary condition. The sober idea of “constitutional patriotism” (Verfassungspatriotismus)<sup>17</sup> does not presuppose a narrow conception of a nation.

If the identity of a group is created, or reinforced, by a constitution, the relationship to the constitution is a peculiar one. A problem might arise when reverence turns into sacralisation.<sup>18</sup> This obscures the view on the possible need for reform. Horst Dreier gives an impressive account of this danger, and names examples where normative “petrification” may occur. In the German context, this is the role of the states on the federal level, certain aspects of the rule of law, and the reluctance to make use of direct-democratic instruments.<sup>19</sup> Risks of petrification give cause for concern.

#### *Generational imprint*

Constitutions have a practical everyday function: they create boundaries for government and shield matters from politics. They state what can be determined politically and what cannot. Thus, minorities are protected from majorities, and “fragile democracies” protect themselves against the reopening of particularly sensitive chapters of political bargaining.<sup>20</sup> Traumatic experiences can play a strong role in drawing these boundaries. In this sense, the description of a constitution as an intergenerational document must be qualified. A constitution might matter for several generations; however, it bears a decisive imprint from the generation that enacted it. The constitutional moment thus might not be a sober one.<sup>21</sup> Such a moment is often connected to an intensive experience. Prudent and far-sighted constitution-making in such a situation is nothing less than “audacious practice”.<sup>22</sup>

#### *Experimental character*

Every democratic constitution is a big experiment. Pratap Bhanu Mehta discusses the biggest experiment of this kind: the democratic constitution of India.<sup>23</sup> He describes the manifold challenges involved as “manifestations of one single challenge: how to create citizens bound by a sense of reciprocity”.<sup>24</sup> In the moment of constitution-making, it is unclear whether a sense of common civility will arise. Constitution-makers can only hope so and try their best to create institutions that make this possible. This implies potential fallacies and mistakes. Necessarily, the knowledge with which constitution-makers operate is incomplete.<sup>25</sup> A “sacralisation” is not compatible with this perspective. The possibility of being wrong about a choice of constitutional design rather leads to a respectful, but rational approach to constitutional documents.

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Further, if we account for the experimental character of constitution-making, it does not come as a surprise that most constitutions do not endure. Although created for “eternity”, only half of them last more than 19 years.<sup>26</sup> Areas of law with a much more modest claim to longevity seem to endure much longer. In the German context, this is captured in the classic statement by the leading figure of German administrative law, Otto Mayer. The new edition of his German textbook came out just after a world war, a revolution and the enactment of a new constitution. Still, the preface stated that there was not much new to report: “Constitutional law passes, administrative law remains”; this has already been observed elsewhere.<sup>27</sup> In the following, I contrast (mainly) two classic positions on constitution-making.

#### *Edmund Burke's eternal society*

Edmund Burke understood the constitution as an intergenerational contract.<sup>28</sup> In itself this conception is not helpful. A contract has at least two parties. In case of a breach, a party can sue. This means that one party can turn to a third party that will facilitate enforcement. However, generations do not come together as parties; there is no reciprocal relationship.<sup>29</sup> And more importantly, a constitution lacks an external authority that guarantees enforcement.<sup>30</sup> One might think of a constitutional court, but a constitutional court also depends on the acceptance and recognition of its judgements and has — apart from its slowly built legitimacy<sup>31</sup> — no mechanism to enforce its decisions. Burke's conception turns comprehensible if a higher — or natural — order beyond positive law is invoked. In his pamphlet<sup>32</sup> against the French Revolution, Burke elaborates on his position:

*Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure — but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, [...] and to be dissolved by the fancy of the parties. [...] because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science;*

*a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles. It is the first and supreme necessity only, a necessity that is not chosen, but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy.*<sup>33</sup>

In this longer quote, Burke speaks of the state as an all-encompassing “partnership” in an “eternal society”, in which “visible and invisible world” are connected. These principles are violated by revolution. As a politician Burke even argued for a military intervention in France.<sup>34</sup> One might disagree about whether Burke is a natural law theorist, a reactionary or a conservative.<sup>35</sup> In any case, his actual conception is in many aspects not compatible with our contemporary idea of a rational constitutionalised state. It can hardly be deemed liberal. The possibility of thinking and acting freely has not much space in a “partnership in all virtue”. Burke describes the state as divine order. Such a state is not ours. The liberal constitutionalised state guarantees its citizens the freedom to act and think; it has to function without divine legitimation.<sup>36</sup> In short, Burke’s conception does not share the presumptions of modern constitution-making.<sup>37</sup>

This does not mean that Burke’s conception cannot spark an interesting debate. A normative reinterpretation of Burke could lead to an as-if-benchmark useful for evaluating how well a constitution fares in the first intergenerational challenge: could the constitution – if thought of as an intergenerational contract – be the result of negotiations, in which successive generations took part? The particular difficulty of this thought experiment lies in anticipating the preferences of successive generations. A meaningful – and need-based<sup>38</sup> – minimal consensus could be thought of, e.g., regarding “natural foundations of life”.<sup>39</sup> Beyond such minimal consensus, we can only speculate which values matter to successive generations. We do not know. The accusation of a pretence of knowledge is easily raised.<sup>40</sup>

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We still do not need to give up the contract metaphor completely. The idea of an offer has merit: The constitution-making generation offers a constitution to its successors. This constitution has to prove itself constantly and has to be recognised in practice. This bears a resemblance to Ernst-Wolfgang Böckenförde’s description of the

deep problem of the constitutionalised state: it depends on conditions that it cannot guarantee.<sup>41</sup> Still constitutional designers can ask themselves the meaningful question: which design<sup>42</sup> will make it more likely for successive generations to accept the offer?

#### Thomas Paine’s objection

A far more liberal (and, for our question, more constructive) perspective is taken by Thomas Paine, who fiercely contradicts Burke in a direct reply:

*There never did, there never will, and there never can exist a parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controuling posterity to the “end of time,” or of commanding for ever how the world shall be governed, or who shall govern it; and therefore, all such clauses, acts or declarations, by which the makers of them attempt to do what they have neither the right nor the power to do, nor the power to execute, are in themselves null and void.—Every age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. The parliament or the people of 1688, or of any other period, had no more right to dispose of the people of the present day, or to bind or to controul them in any shape whatever, than the parliament or the people of the present day have to dispose of, bind or controul those who are to live a hundred or a thousand years hence. Every generation is, and must be, competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its government shall be organized, or how administered.*<sup>43</sup>

Paine emphasises the role of the living and denies the legitimacy of eternal legislation. In a letter to James Madison, Thomas Jefferson makes a similar statement: “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”<sup>44</sup>

The statements by Paine and Jefferson have a strong normative, but also a descriptive content. On the normative side, they propose that each generation has certain rights, in particular regarding political self-determination.<sup>45</sup> According to Paine, “every age and generation must be as free to act for itself.” On the descriptive side, they acknowledge that the influence of each generation is limited, as Paine speaks of the “right or the power [my emphasis] of binding and controuling [sic] posterity to the ‘end of time.’” This is where the interpretation of “constitutions as fetters” is not consistent:<sup>46</sup> One cannot loosen one’s fetters. Odysseus needed his companions to do it. But to be effective a constitution depends on the recognition by its addressees, the People. From a factual viewpoint, the People can always exercise their constituent power and give themselves a new constitution,<sup>47</sup> or just ignore the present one. A liberal constitution is not eternal.<sup>48</sup> Whether it will prove itself is an open question.

#### Countermeasures

The measures taken on the level of constitutional design to

enhance the likelihood of a constitution's acceptance need to strike a balance between substantive and procedural elements.

#### *Substantive elements*

First, there is a substantive side to meeting the intergenerational challenge. The offer made to successive generations must have suitable legal substance.<sup>49</sup> A constitution that is grossly unjust programmes social conflict and is not a suitable intergenerational offer. What rather is needed is a material legal solution that protects fundamental rights and creates the basis for functioning statehood. Formulating a minimal content is a difficult task, but not unthinkable. Arguably, the basic characteristics of a minimal constitution consist in a limitation of state power, protection of the citizen's rights, and practicable rules for democratic institutions. One might also think of safeguarding democracy and the rule of law.<sup>50</sup> Many designs are possible in the case of democratic institutions and government.<sup>51</sup>

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But as uncertainty persists regarding future challenges and future generations' preferences, this material side needs to be complemented with procedural elements. These imply that the constitution-makers themselves do not know which substantive solutions will be realised by such means.<sup>52</sup>

#### *Procedural elements*

Notwithstanding a recently identified trend towards more specificity in constitutional documents,<sup>53</sup> we can assume that constitutions are rather general documents, with provisions that need to be interpreted. Thus, the "open texture of law"<sup>54</sup> provides successive generations with some flexibility. This way, situations that were not foreseeable at the time of constitution-making can be covered. The need for interpretation creates a new problem: Which interpretation shall be decisive? Commonly, this dilemma is solved by entrusting a constitutional court with the task of interpreting the law in light of current developments.<sup>55</sup>

Going one step further, one can allow for a constitution to be amendable.<sup>56</sup> If mere interpretation does not suffice to keep the constitution up-to-date, the text can be adjusted to changed circumstance. The German Basic Law regulates its amendment procedure in Article 79. Amendment is tied to high thresholds: the two-thirds majority required by Article 79 (2) Basic Law in both parliament (Bundestag) and the representation of the federal states (Bundesrat) is not easily achieved. But there is more. In Article 79 (3) the Basic Law shields certain contents from being amended: "the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20".<sup>57</sup> This is the so-called eternity clause which has particular importance from an intergenerational perspective.

#### *Eternity clause and constitutional assemblies*

On the textual level, such an eternity clause conserves a specific constitutional content and shields it from amendment. The clause creates the seemingly paradoxical category of unconstitutional constitutional law. The clause aims at marking hidden breaches

of the constitution. If the constitution is undermined, this can be made visible and described as such. The power to distinguish makes eternity clauses attractive. They are used more and more in constitutions around the globe.<sup>58</sup> More often than not, they are shaped by painful experiences that have marked a societal transition.<sup>59</sup> The later practical use of an eternity clause does not necessarily fall within the scope of what the constitution-maker had foreseen. The experience that led to Article 79 (3) Basic Law was the undermining of the Weimar constitution by Nazism. Today, Article 79 (3) Basic Law is used by the Federal Constitutional Court to mark the limits of European integration by way of so-called "identity control".<sup>60</sup> One may argue about the persuasiveness of this – potentially self-serving and political<sup>61</sup> – jurisprudence.<sup>62</sup> In any case, European integration was not the object of the founders' concerns when drafting the Basic Law. This illustrates a possible functional change of constitutional guarantees.

From the perspective of generational ethics, the use of eternity clauses seems like an appropriation: with which right does one generation deprive another from an option to act? From such a perspective, the solution of a "permanent constitutional assembly" seems appropriate.<sup>63</sup> Recurring conventions would counterweigh the eternity clause and renew the constitution's legitimacy. This is the idea of the connected "constitutional chains" mentioned at the beginning. This idea has the merit that it recognises the need for a democratic foundation of a constitution. However, it overestimates the force of eternity clauses and at the same time underestimates the risks of an institution rivalling the written constitution.

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Eternity clauses express the idea that certain values were of paramount importance to the founders. But the word "eternity" should not fool us. With good cause the Federal Constitutional Court of Germany speaks of the "so-called eternity guarantee".<sup>64</sup> The normative force of such an eternity clause cannot exceed the normative force that a constitution generally has due to the recognition by its addressees. This does not mean that a constitutional amendment contrary to Article 79 (3) Basic Law would be simple to realise. It means that the actual opposition to such an endeavour depends on how the eternity clause is perceived and valued in practice. In fact, at least in Germany, the clause is valued highly. For the idea of an eternal constitutional core this is essential. As already mentioned, Dreier recognises a concerning trend of "petrifications". Dreier speaks of a "sacralisation" and emphasises the need for a rational approach to the constitution that limits power, but does not contain eternal truth.<sup>65</sup> A constitutional assembly that expresses that a constitution is not set in stone could be a remedy to such tendencies.

A constitutional assembly can be organised in many different ways.<sup>66</sup> If it is planned and designed from scratch, however, it will always lack the special historic moment that has helped most constitutions achieve legitimacy. One might consider whether a constitutional assembly was necessary after German reunification. The Basic Law was designed as a provisional solution. In this sense, it was designed to trigger a debate about its very self

in the moment of reunification. For reasons of feasibility, mixed with political prejudice, unified Germany did not enact a new constitution. Still, the historic moment was there. Without such a moment, constitution-making can be difficult.<sup>67</sup>

There is a stronger argument against permanent, or regularly recurring, constitutional assemblies. It builds on the aforementioned description of how a constitution functions, and where its limitations lie. As an institution, a constitution depends on its broad acceptance by its addressees. Enforcement is decentralised. Society must – at least with a critical majority – enforce the constitution collectively against a transgressor. Which rules and values should be upheld, though? If society wants stability, it has to agree on a body of such rules and values. The constitution in the form of a respected document gives the necessary reference point.<sup>68</sup> Legitimacy and dignity of the institution “Constitution” underline it.<sup>69</sup> To say it with Thomas Schelling: They add salience.<sup>70</sup> This is where the force of a constitution lies. It provides a strong reference point for what the values of a society are. From the perspective of positive political theory, it solves a coordination problem.<sup>71</sup> This function becomes paramount in moments of crisis. In such unforeseeable situations, the force of the constitution should not be weakened. A constituent assembly that is active in parallel, and potentially strongly legitimised, might create a competing institution that may undermine this force. On the other hand, in times of (relative) political calm, a constituent assembly might again bring about the societal divisions that the constitution tried to overcome.<sup>72</sup>

A constitution is so important that it seems ill-advised to weaken its force just as a matter of principle by creating a competing

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institution. In a constituent assembly, the constituent power is activated. This raises the question how a formally valid constitution will be perceived, if a parallel constituent assembly is in process. It cannot be safely assumed that politics would continue to respect the formally valid document. If the assembly discusses a change of competences between government bodies, this would cast a shadow on how these competences are exercised under the valid constitution. And political forces could use the opportunity of a majority in a constitutional assembly to entrench their interests. Constitutional assemblies typically mark transitions. Taking the aforementioned risks into account, the wiser choice suggests avoiding permanent constitutional assemblies.

Against the background of the dangers that are associated with such a concept, we can think about less severe means to check whether a constitution is in need of reform. Commissions that check for this need without employing constituent power are one example. Such commissions, and a scientific discourse on the shape of the constitution, are well underway.<sup>73</sup>

#### *Open and flexible interpretation*

This does not mean that legitimacy and its renewal should not concern us. A means less severe than permanent constitutional assemblies can be found in an open, flexible and, most importantly, rational approach to existing constitutional provisions. It seems that constitutions are well aware of their limitations. The

(extended) Call for Papers for the 8<sup>th</sup> Intergenerational Justice Prize points to a historic example, the French Constitution of 24 June 1793, which never entered into force.<sup>74</sup> There, the “right to revolution” was explicitly acknowledged. Article 28 read: “Un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut pas assujettir à ses lois les générations futures.”

The statement that a generation always has the right to “revise, reform, and change” its constitution seems paradoxical in a constitution that aims at endurance. But this is not a singular historic oddity. We find similar clauses even today in constitutions. The last provision of the German Basic Law, Article 146, reads:

*This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.<sup>75</sup>*

The relevance of Article 146 Basic Law is a fiercely debated issue in German constitutional scholarship.<sup>76</sup> The history of the preceding provision,<sup>77</sup> which naturally lacked the reference to reunification, was influenced by the division of Germany and Allied occupation. It was supposed to open the door to a constitution-making process free of such constraints. As reunification was realised by the new federal states of former Eastern Germany acceding to Western Germany,<sup>78</sup> a significant part of German constitutional scholars treats it as obsolete, if not dangerous.<sup>79</sup> This view is not uncontested. Dreier recognises the potential of Article 146 Basic Law. He speaks of the “normative bridge” that Article 146 Basic Law can provide and of how Article 146 Basic Law dispenses with the need for revolution.<sup>80</sup> Accordingly, Article 146 Basic Law allows for a transition to a constitution that is designed differently than the eternity clause would allow.<sup>81</sup> This is particularly relevant for a constitutional development that may want to continue the tradition of the Basic Law, while at the same time doing specific things differently. Such a development need not take place in the near future. But the possibility of such development should not be excluded.

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In regard to our question of intergenerational constitutional stability, Article 146 Basic Law bears an intriguing potential. The constitution leaves the possibility open to be developed further, thus leaving more choices to successive generations. This could indeed mitigate “reactance”.<sup>82</sup> In accordance to the old Article 146 Basic Law, the Basic Law put its own abolishment on the table in the process of German reunification. The possibility of abolishment could have benefited its endurance, as after an intense debate the result was in fact the affirmation of the existing Basic Law.<sup>83</sup> However, a challenge to this reasoning can be found in the United Kingdom’s “Brexit” vote, where the vulnerability of the Union – expressed in the option to leave it in accordance with Article 50 of the Treaty of the European Union – worked to its detriment. This case cannot be covered here,<sup>84</sup> but it should motivate us to taken an even closer look at the conditions of institutional stability.<sup>85</sup>

## Conclusion and outlook

I have argued that a flexible and rational approach to a constitution's limitations can benefit a constitution's success. This is an argument for treating such a provision as Article 146 Basic Law as a counterweight to the eternity clause. The possibility of adapting the constitution to new challenges remains open to successive generations that want to continue, and build on, a constitutional tradition. This might already have a stabilising effect today. However, there are limits to this argument. Indeed, the question of how a flexible approach that is open to future development affects the acceptance and thus the stability of a constitution cannot be answered with legal methodology alone.<sup>86</sup>

Empirical research can put our intuitions to the test. Quantitative studies suggest that inclusiveness as well as a certain level of flexibility predict a constitution's endurance.<sup>87</sup> This literature is already rich and still growing. But causal inference is particularly difficult in the constitutional setting.<sup>88</sup> This calls for complementary perspectives. Typically, such a perspective can come from case studies. A more daring approach that is worth exploring can be found in laboratory decision experiments, that are designed to tackle the identification problem.<sup>89</sup> The behavioural mechanisms identified in experimental studies could be contrasted with the insights from field data studies.<sup>90</sup> New experiments could be designed to model the problems faced by constitution-makers. This exercise could further inspire the noblest task of constitutional designers: creating institutions that help bring about a civic sense of solidarity.<sup>91</sup>

## Notes

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2 The theme for the Intergenerational Justice Prize 2015/16 was expressed in German as "Verfassungen als Ketten" ("Constitutions as Chains"). For the English version this was rendered as "Constitutions as Millstones".

3 Albert 2010 explores a similar metaphor: "constitutional handcuffs".

4 Homer, *Odyssey*, 12th Book, 192 et seq. (translated by A. T. Murray): "So they spoke, sending forth their beautiful voice, and my heart was fain to listen, and I bade my comrades loose me, nodding to them with my brows; but they fell to their oars and rowed on."

5 More generally, Elster 1984: 93: "paradox of democracy".

6 See Dreier 2009b: 29, who refers to the passage of time ("Der Zeitfaktor macht aus Selbstbindung Fremdbindung, aus Autonomie Heteronomie.").

7 See the settled case law of Germany's Federal Constitutional Court (Bundesverfassungsgericht), demanding a "legitimation chain" between the People and public authority; e.g., BVerfGE 77, 1 = NJW 1988, 890, 891.

8 See also Tsebelis/Nardi 2016, who include only OECD countries in their sample. For a treatment of constitutions in authoritarian regimes, see the edited volume by Ginsburg/Simpser 2012: 15, who map the functions of such constitutions as "operating manuals, billboards, blueprints, and window dressing".

9 See Thomas Jefferson, letter to James Madison, Paris Sep. 6, 1789.

10 See, e.g., Article 109 (3) Basic Law; critical but balanced appraisal of this mechanism by Burret 2013: 62.

11 Translation by Christian Tomuschat and David P. Currie ([http://www.gesetze-im-internet.de/englisch\\_gg](http://www.gesetze-im-internet.de/englisch_gg); last retrieved October 19, 2016).

12 On intergenerational justice provisions in national constitutions, see Tremmel 2009: 57-59.

13 See Häberle 2006: 226.

14 On these classifications, see Tremmel 2009: 68-69.

15 Note that if a society is governed by an authoritarian regime, the pure longevity of a constitution cannot be seen as an indicator of success.

16 Classic analysis by Anderson 2006: 6, who sees a nation as "an imagined political community – and imagined as both inherently limited and sovereign" and deems the invention of the printing press as critical for the emergence of nationalism (*ibid.*, Chapter 3).

17 As represented in Germany by Sternberger 1990.

18 Warning by Dreier 2009a.

19 Dreier 2009b: 69-71.

20 In his work on "fragile democracies", Issacharoff 2015: 10 emphasises the role of constitutional courts as "primary means of managing conflict in the difficult national settings of so many of the world's democracies [...] in the service of state building"; in regard to prior traumatic experiences, Albert 2010: 693 makes a more narrow categorisation of "reconciliatory entrenchment" clauses, referring to amnesty provisions for previous enemies.

21 On "interest, reason and passion" in constitution-making, see Elster 2012; further, Issacharoff 2015: 217.

22 Ginsburg 2012: 1.

23 Mehta 2003.

24 Mehta 2003: 35.

25 See on this problem also Engel 2001; Gärditz 2016.

26 Elkins/Ginsburg/Melton 2009: 129.

27 Mayer 1924.

28 See the (extended) Call for Papers for the 8<sup>th</sup> Intergenerational Justice Prize 2015/16.

29 On the "problem of reciprocity", see Tremmel 2009: 183, who hints at the key function of indirect reciprocity in intergenerational justice.

30 See, e.g., Elkins/Ginsburg/Melton 2009: 7.

31 More by Petersen 2015: 144.

32 See the characterisation by Paine 1998: 89: "There is scarcely an epithet of abuse to be found in the English language, with which Mr. Burke has not loaded the French Nation and the National Assembly. Every thing which rancour, prejudice, ignorance, or knowledge could suggest, are poured forth in the copious fury of near four hundred pages."

33 Burke 1909-14: 165.

34 Jörke/Selk 2016: 153.

35 Jörke/Selk 2016 take the latter view.

36 For a classic description of this problem, see Böckenförde 2006: 92-114 and later Böckenförde 2015; also Dreier 2010.

37 Similar conclusion by Jörke/Selk 2016: 155.

38 On need-based approaches, see Tremmel 2009: 98-100.

39 See Article 20a Basic Law.

40 See also the critique by Gärditz 2016.

- 41 Böckenförde 2006: 112.
- 42 Ginsburg 2012: 1-2 pleads for a cautious use of the term.
- 43 Paine 1998: 91-92.
- 44 See Thomas Jefferson, Letter to James Madison, Paris, Sep. 6, 1789, proposing a life span of 19 years for constitutions and laws. Interestingly, this is exactly the median life span of all constitutions coded by Elkins/Ginsburg/Melton 2009.
- 45 Tremmel 2009: 84 categorises the debate on a right to political self-determination as a question of the inheritance of cultural capital.
- 46 At least from the perspective of the People.
- 47 This process, of course, can be costly.
- 48 Dreier 2010: 17, pointing to the possibility that the constitution is overcome by revolution or further developed through evolution.
- 49 See also Isensee 1995: 85.
- 50 Issacharoff 2007.
- 51 McAdams 2015: 71: “Those creating a constitution are likely to disagree about which constitutional version is best, even though they may agree that quite a few versions are better than the failure to create a constitution.”
- 52 See also Engel 2001; Gärditz 2016.
- 53 Versteeg/Zackin 2016: 4: “constitutional micromanagement”.
- 54 Hart 2012: 124.
- 55 Voßkuhle 2010 draws an analogy to programming and speaks of maintaining the constitution’s “source code”; Strauss 2010 argues that the – notoriously difficult to amend – U.S. constitution evolves as a “common law system”, in which judges rely less on text, but more on precedent and common sense.
- 56 Note that a constitutional change might also take place without an explicit change of text or jurisprudence; see Ackerman 2014.
- 57 As translated by Christian Tomuschat and David P. Currie ([http://www.gesetze-im-internet.de/englisch\\_gg](http://www.gesetze-im-internet.de/englisch_gg); last retrieved October 19, 2016).
- 58 Roznai 2015: 3, examining clauses in 735 - partly historic, partly current - constitutional documents: “in recent decades unamendable provisions have expanded in terms of their detail, currently covering a wide range of topics.”
- 59 Issacharoff 2015: 47-52.
- 60 Polzin 2016 gives an account of the development of constitutional identity and identity control in Germany.
- 61 On the political dimension, see Lepsius 2015.
- 62 Critique by Halberstam/Möllers 2009.
- 63 See the (extended) Call for Papers for the 8th Intergenerational Justice Prize 2015/16.
- 64 BVerfGE 123, 267 (343) (“sogenannte Ewigkeitsgarantie”).
- 65 Dreier 2009a.
- 66 More on this by Elster 2012.
- 67 The Swiss case should not be overlooked. In Switzerland, “total revision” is a separate category of constitutional change. Interestingly, it is undertaken without a strong external reason. Altogether, the Swiss case appears as rather special, but with immense innovative potential for the interpretation of German norms; see the commentary of Article 146 Basic Law by Michael 2013, who heavily draws from comparative materials and especially the Swiss model.
- 68 On “self-enforcing” democracy, see Weingast 1997; Mittal/Weingast 2010.
- 69 We need to differentiate here; see McAdams 2015: 49:
- “Legitimacy might strengthen the focal point effect, but is separate from it.”
- 70 For the role of “focal points” in (political) coordination problems, see the seminal work by Schelling 1960.
- 71 Building on Schelling 1980 and in regard to constitutions: Hardin 1989; Strauss 1996; Weingast 1997; Hadfield/Weingast 2013; McAdams 2015.
- 72 On the fragility of many democracies, see again Issacharoff 2015.
- 73 See, e.g., the work of Germany’s Commission on Federalism (“Föderalismuskommission”). The Joint Constitutional Commission (“Gemeinsame Verfassungskommission”) after the German Reunification is a different case however: it is not marked by ongoing practical concerns, but by a special historic moment, in which constituent power might have been activated; on this possibility, critically, Isensee 1993.
- 74 On its fate, see Kley 2013: 172-173.
- 75 As translated by Christian Tomuschat and David P. Currie ([http://www.gesetze-im-internet.de/englisch\\_gg](http://www.gesetze-im-internet.de/englisch_gg); last retrieved October 19, 2016).
- 76 This debate cannot be covered in this essay.
- 77 So-called “Artikel 146 GG alte Fassung” (old version).
- 78 The Beitrittslösung according to Article 23 GG in its old version.
- 79 Leading voice is Isensee 1992b: Rn. 61; see also Isensee 1992a; Herdegen 2013; critique by Dreier 2009b: 82.
- 80 Dreier 2009b: 93.
- 81 Same view taken by Blasche 2006 and Cramer 2014.
- 82 On the psychological concept, see Brehm 1966; for a political context, see Elster 2000: 95-96: “By lowering the drawbridge and offering them the opportunity to leave, the ruler might reduce their desire to use it.”; Elster points to de Tocqueville 1995: 181, who in the context of his recollections of his participation in the constitutional commission of 1848 writes: “I have long thought that, instead of trying to make our forms of government eternal, we should pay attention to making methodical change an easy matter. All things considered, I find that less dangerous than the opposite alternative. I thought one should treat the French people like those lunatics whom one is careful not to bind lest they become infuriated by the constraint.”; for the original French version, see de Tocqueville 1893: 282.
- 83 The discussion is documented in Guggenberger/Stein 1991.
- 84 For a broad coverage, see the “Brexit Supplement” to vol. 17 of the German Law Journal.
- 85 See, e.g., the challenge of the “cosmopolitan/nationalist cleavage” as described by Dawson 2016.
- 86 See also, albeit with different consequences, Isensee 1995: 14.
- 87 Elkins/Ginsburg/Melton 2009: 139: “constitutions that are subject to public ratification are eight percent more likely to survive than those that are not”.
- 88 Law 2010 argues for methodological pluralism in the empirical study of constitutional law; Elkins/Ginsburg/Melton 2009: 33, 89, especially in reference to the problem of endogeneity in the data.
- 89 Arguing for such an approach in the social sciences generally, Falk/Heckman 2009; from a legal perspective, Engel 2013; from a political science perspective, e.g., Kubbe 2016.
- 90 See, e.g., the experimental literatures on status quo bias in human decision-making (Kahneman/Knetsch/Thaler 1991; Arlen/Tontrup 2015), positive effects of democratic choice

(Tyran/Feld 2006; Dal Bó/Foster/Putterman 2010; Sutter/Haigner/Kocher 2010), intergenerational common resources (Hauser/Rand/Peysakhovich/Nowak 2014; Putterman 2014), or trust creating mechanisms (Kopányi-Peuker/Offerman/Sloof 2015).

91 See again Mehta 2003: 35; on “indirect reciprocity”, see Nowak/Sigmund 2005: 1291: “likely to be connected with the origins of moral norms”.

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