

**CONSTITUTIONAL CORE(S):**  
**AMENDMENTS, ENTRENCHMENTS, ETERNITIES AND BEYOND**  
**PROLEGOMENA TO A THEORY OF NORMATIVE VOLATILITY**

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*Preliminary Remarks*

This essay is not an exhaustive disquisition on the topic. It is not meant to be. It is an agglomeration of thoughts, raising questions rather than providing answers, a sketch rather than an elaborated concept; a possible starting point for a broader and more detailed discussion.

***I. Introduction: Constitutional Persistence – Constitutional Flux***

**A. Heraclitus and Plato (I)**

The concept of a constitution is inseparably connected with the idea of persistence. Constitutions are to provide a solid framework for political action:<sup>1</sup> While (the perception of) factual phenomena and accordingly their normative appreciation are constantly changing, constitutions are deemed to serve as foundation for the manner (as well as the extent to which) these phenomena are addressed. Thus, constitutions depend on inherent stability; an exclusively ‘Heraclitian’ conception of dynamic constitutions in constant normative flux

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<sup>1</sup> See Werner Kägi, *Die Verfassung als rechtliche Grundordnung des Staates* (Reprint 1971) 51.

would not meet these requirements: 'A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion'.<sup>2</sup>

Still the framework's design has to ensure a sufficient capacity to respond to social reality. As much as constitutions serve as normative foundations of political systems elevated from normal politics, they cannot elude completely from being reactive to a changing political environment.<sup>3</sup> Otherwise their requirements would turn out to become a normative corset too tight to regulate political practice reasonably any longer. Thus, also a 'Platonic' vision of a static constitution trying to establish normative truth, will not prove to be sufficiently workable:<sup>4</sup> 'A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution.'<sup>5</sup>

A balance has to be struck between dynamic elements providing for the system's flexibility and static elements providing for the system's persistence in order to safeguard its functionality. "That useful alterations will be suggested by experience, [can] not but be foreseen'.<sup>6</sup> A 'healing principle' is to be introduced;<sup>7</sup> as '[i]t is wise [...] in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy'.<sup>8</sup>

This essay is dedicated to the quest of this principle.

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<sup>2</sup> Joseph Story, *Commentaries on the Constitution of the United States* III (1833) Ch XLI § 1821.

<sup>3</sup> Cf Wahl, 'Verfassunggebung – Verfassungsänderung – Verfassungswandel' I in Wahl (ed), *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation* (2008) 29, 30.

<sup>4</sup> See e.g. Dreier, *Grundgesetz* (Second Edition 2004) Art 79 Abs 2 at 11; Grimm, 'Verfassungsfunktion und Grundgesetzreform' 97 *Archiv des öffentlichen Rechts* 489 (505).

<sup>5</sup> Story, above n 2, Ch XLI § 1821.

<sup>6</sup> James Madison, *Federalist* No 43 No. 43 (1788) – edited by Jacob E. Cooke (1961).

<sup>7</sup> Thomas Pownall quoted according to Wood, *The Creation of the American Republic 1776-1787* (Reprint 1998) 613.

<sup>8</sup> Story, above n 2 Ch XLI § 1821.

## B. Constitutive Laws – Constitutional Law

I will distinguish between a *dis*-positive and a *positive* approach to the conception of a constitution. This distinction is based on the question whether or not formal attributes grant additional stability to some legal norms while denying it to others:

A legal system may lack any formal distinction between its various legal provisions, leaving it to the *dis*-posal of a certain body (legislator in a broader sense) to alter them all likewise. This legal system does not grant any additional formal stability to norms considered to be of fundamental importance (*constitutive* laws), in comparison to ordinary legislation dealing with questions concerning normal politics. Due to this lack of distinction between ordinary legislation and *constitutive* laws, the latter remain open to alteration by regular means – an inherently dynamic conception.

Legal systems may, however, decrease this dynamic on a formal level by *positively* stating additional requirements to be met for the alteration of certain provisions; thus creating a sphere of *constitutional* law.

## C. Heraclitus and Plato (II)

A comparison between legal systems guided by a substantive concept of *constitutive* laws and legal systems structured according to formalized conceptions positively creating *constitutional* laws seems to be a reasonable starting point to walk along the path that leads from the ‘Heraclitian’ perception of normative flux to a ‘Platonic’ vision of normative truth referred to above.

Having sketched the difference between the two concepts, I will focus on various modes of normative stabilization legal systems provide by distinguishing *constitutional* laws from ordinary legislation by the means of specified requirements to be met to amend or revise *constitutional* law. I will then introduce a multi-tier structure distinguishing different degrees of *constitutional* amendment within legal systems, eventually outlining a model of positive stabilization. This model will draw our attention to doctrinal, sociological and theoretical questions.<sup>9</sup>

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<sup>9</sup> Intellectual honesty demands to add other aspects, in particular on a political and on an interpretative level (*Verfassungswandlung* – see, for example, Jellinek, *Verfassungsänderung und Verfassungswandlung* (Reprint 1996); Böckenförde, ‘Anmerkungen zum Begriff Verfassungswandel’ in *Festschrift Lerche* (1993) 3; Wahl, ‘Verfassungsgebung – Verfassungsänderung – Verfassungswandel II’ in Wahl (ed), *Verfassungsänderung*, (2011) J. JURIS 519

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## D. Beyond Dualism?

Finally I will address the question whether, and to what extent, boundaries are set to positive stabilization, finding a possible affirmative answer on a pre-positive level by introducing a structural principle based on social contract theory. This answer – while at first glance leading ‘Beyond Dualism’ – in essence, will turn out to stay attached to the participatory principle underlying a dualist model of constitutional law.

## II. *The dis-positive Perspective*

### A. A Substantive Perception

“With us,” Albert Venn Dicey stated in 1902 ‘laws [...] are called constitutional because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws’;<sup>10</sup> an astonishing statement when assessed from the point of view of contemporary continental European law: Dicey’s perspective refers to the constitution first and foremost by its claim to provide an answer to the fundamental questions of how the state is structured, of how community and individual define their relation to each other.

This approach is based on a substantive perception of legal provisions constitutive for the community (*constitutive* laws), a purely substantive perception, refraining from positively creating an elevated sphere of *constitutional* law beyond normal politics: ‘Parliament of today cannot fetter the Parliament of tomorrow with any sort of permanent restraints, so that entrenched

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*Verfassungswandel, Verfassungsinterpretation* (2008) 65; Voßkuhle, ‘Gibt es und Wozu nutzt eine Lehre vom Verfassungswandel?’ in Wahl (ed), *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation* (2008) 201; Schulze-Fielitz, ‘Verfassung als Prozess von Verfassungsänderungen ohne Verfassungstextänderungen’ in Wahl (Ed), *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation* (2008) 219; Barak, *The Judge in a Democracy* (2008) 130; Mc Ginnis/Rappaport, ‘Our Our Supermajoritarian Constitution’ (2002) 80 *Texas Law Review* 703, 802) but also with regard to the influence specific techniques or formal requirements (as, for example, Incorporation-Clauses – see, i.a., Wiederin, ‘Über Inkorporationsgebote und andere Strategien zur Sicherung der Einheit der Verfassung’ [2004] *Zeitschrift für öffentliches Recht* 175) may have on a constitution’s relative rigidity that are not covered by this essay.

The capacity of the model introduced below, however, will not be exhausted by the rather formal focus of the questions I try to address predominantly in this paper. For a recent enquiry of the topic based on a quite different approach – see the interesting study of Elkins et al, *The Endurance of National Constitutions* (2009).

<sup>10</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Reprint 2005) 123.

provisions are impossible. That, at any rate, appears to be the view of the legal establishment'.<sup>11</sup>

While certain norms define the state's very nature substantively they do not enjoy elevated normative authority in terms of procedural requirements; there is no constrain to 'the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London':<sup>12</sup> formally, *constitutive* laws remain at the legislator's *dis*-posal.

## B. Flexible Constitutions – Normative Dynamic

This lack of formal restraint, Parliament's capacity to alter any law 'without special procedure, and by simple Act, [...] however fundamental it may seem to be',<sup>13</sup> prompted Dicey's contemporary James Bryce to define constitutions as the English as flexible 'because they have elasticity, because they can be bent and altered in form'.<sup>14</sup>

Assessed from the perspective of formal stabilization such *flexible constitutions* allow for a great extent of normative dynamic.

This is, of course, not to say that the constitution lacks normative relevance in legal systems following a *dis*-positive approach: Also a substantive perception implicates increased stability when compared to ordinary legislation dealing with normal politics simply by introducing such a distinction to the relevant discourse;<sup>15</sup> thereby granting special status to the laws that may be considered being part of a community's foundation.<sup>16,17</sup>

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<sup>11</sup> See HWR Wade, *Constitutional Fundamentals*, 32<sup>nd</sup> Hamlyn Lectures (1980). It has to be highlighted, however, that this view is not undisputed – cf. e.g. for the 'new approach' to Supremacy Ivor Jennings, *The Law and the Constitution*, (5<sup>th</sup> ed 1959) 152 and Michael Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' (2009) Public Law 519 supporting Jennings' position.

<sup>12</sup> Dicey, above n 10, 122-123.

<sup>13</sup> Philip Seaforth James, *Introduction to English Law* (12<sup>th</sup> ed 1989) 118.

<sup>14</sup> James Bryce, *Studies in History and Jurisprudence* Vol I (Reprint 2005) 154.

<sup>15</sup> Setting aside Parliament's Sovereignty itself as link to an assumption of a hierarchical and thus comparatively static (cf Christian Starck, *Verfassungen* [2009] 385) structure of the United Kingdom's legal system – see e.g. Jeffrey Goldsworthy, 'Abdicating and limiting Parliament's Sovereignty' (2006) 17 *KC LJ* 255, 261.

<sup>16</sup> For further developments in the relationship between parliament and the judiciary cf CJS Knight, 'Bi-Polar Sovereignty restated' (2009) *Cambridge Law Journal* 361.

The *dis*-positive approach, however, grants such additional stability on a political level only and does not provide for an exact guideline that would help us to define how (i.e. by which specific acts and provisions) a country's constitution is composed.<sup>18</sup>

Consequently substance precedes form when following the *dis*-positive approach;<sup>19</sup> substance exclusively defines the status a legal provision qualifies to claim.

### III. *The positive perspective*

#### A. Stabilization by Formalization

Retaining Bryce's classification, 'rigid' constitutions mark the counterpart to the flexible structures based on the *dis*-positive concept I referred to above. Far from easily being 'bent and altered', rigid constitutions are 'hard and fixed'.<sup>20</sup>

What Marshall stated famously in *Marbury v. Madison* is overall true for the structure of 'rigid' constitutions according to Bryce: They have to be regarded as a 'superior, paramount law, unchangeable by ordinary means'.<sup>21</sup> By drawing 'formal and technical distinctions between laws of different kinds',<sup>22</sup> this conception by its very nature positively shifts the constitution's structure towards an increasingly static design: Irrespective of the techniques used,<sup>23</sup> the

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<sup>17</sup> This question has become even more important, when the Human Rights Act 1998 was introduced providing for a special procedure with regard to the compliance of a proposed statute with human rights. See, e.g., KD Ewing, 'The Human Rights Act and Parliamentary Democracy' 62 *Mod. L. Rev.* 79 or Julian Rivers, 'Menschenrechtsschutz im Vereinigten Königreich' (2001) *Juristenzeitung* 127, 130.

For the relation between Acts of Parliament and European Union Law cf. *R v Secretary of State for Transport ex p. Factortame* (no. 1) [1990] 2 AC 85; *R v Secretary of State for Transport ex p. Factortame* (no. 2) [1991] 1 AC 603.

<sup>18</sup> See Dicey, above n 10, cxlv-cxlvii. For the continental-european perspective see Hans Kelsen, *Die Verfassungsgesetze der Republik Deutsch-Österreich* Vol III (1919) 112. For the problems arising in this context see Christoph Bezemek, 'Die Rolle des Bundespräsidenten im Gesetzgebungsverfahren' in Georg Lienbacher, Gerhard Wielinger (eds), *Jahrbuch öffentliches Recht* (2009) 89, 94-95. See also Georg Jellinek's critical assessment: *Allgemeine Staatslehre* (3<sup>rd</sup> ed Reprint 1960) 533.

<sup>19</sup> *L'essence précède l'existence* one may add – cf. Jean Paul Sartre, *L'Existentialisme est un Humanisme* (Gallimard 1996) 27.

<sup>20</sup> Bryce, above n 14, 154.

<sup>21</sup> *Marbury v. Madison* 5 U.S. 177 (1803).

<sup>22</sup> Bryce, above n 14 155.

<sup>23</sup> I will distinguish ordinary legislation and *constitutional* amendment with regard to their comparatively dynamic or comparatively static character notwithstanding the fact that, of course, there are differences between the paths chosen for *constitutional* amendment in particular with regard to the question whether *constitutional* amendment basically originates in- or outside

positive elevation of certain laws compared to the normal politics passed into law by ordinary legislation provides additional stability for laws enjoying *constitutional* status.

## B. Creating *constitutional* law

But form not only precedes substance in the positive approach to constitutions;<sup>24</sup> form not only *defines* the normative status a legal provision qualifies to claim:<sup>25</sup> As a constitution's amendment procedure states the requirements to alter certain legal provisions it serves not only as yardstick whether or not requirements have been met, providing an additional rule of change.<sup>26</sup> Additionally, it is the formalized procedure that introduces the distinction between ordinary (future) legislation and *constitutional* law in the first place.<sup>27</sup> The introduction of a (second) rule of change, asking for elevated requirements to be met for the enactment and alteration of provisions vested with elevated formal authority not only upholds but also recognizes and thus creates *constitutional* laws; a quite remarkable fact...

## C. *Constitutive vs constitutional* laws

### 1) Foundations

But which laws should enter this newly established sphere?<sup>28</sup> At first glance the answer is obvious: the *constitutive* laws referred to above, in order to grant additional formal stability to these fundamental provisions;<sup>29</sup> comforting the demand for stability when it comes to the state's foundation.<sup>30</sup> With this approach of granting additional stability to certain legal provisions by the means of formal requirements the constitution seems secured from a random

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the legislative power. See drastically for first instance Article 76 of the Weimar Constitution and compare for example the mechanism for *constitutional* amendment according to Article V of the US Constitution.

<sup>24</sup> Again: Sartre, above n 19, 26: *l'existence précède l'essence*.

<sup>25</sup> With similar conclusions Friedrich Müller, *Fragment (über) die verfassungsgebende Gewalt des Volkes* (1995) 37.

<sup>26</sup> Cf. H.L.A. Hart, *The Concept of Law* (1972) 93.

<sup>27</sup> For the transition from a dispositive perception to a positive conception exemplified by the Austrian Constitution see Hans Kelsen, *Die Verfassungsgesetze der Republik Deutsch-Österreich* Vol I (1919) 90 and Kelsen, above n 18, 112.

<sup>28</sup> For a functional approach to this question in more recent scholarship see, for example, Ruth Gavison, 'What belongs in a Constitution?' (2002) 13 *Constitutional Political Economy* 89, 91-94.

<sup>29</sup> See i.a. Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (Reprint) in Kojan (Ed), *Hans Kelsen oder die Reine Rechtslehre* (1988) 113.

<sup>30</sup> Hans Kelsen, *Allgemeine Staatslehre* (1925) 252.

majority's volition.<sup>31</sup> Formally recognized *constitutional* laws in this regard may thus be described as minority-protective,<sup>32</sup> evening out the problem that has been referred to by de Tocqueville as 'Tyranny of the Majority';<sup>33</sup> insulating *constitutional* law 'from the absolutism of majority will' by protecting it against acts that do not enjoy the same enlarged extent of political legitimacy as *constitutional* provisions.<sup>34</sup>

Many questions may be raised against the backdrop of these observations:

- Do these characteristics stand in tension with the idea of liberty or rather promote it?<sup>35</sup>
- To what extent does such formal normative stability actually aim to be an approximation to 'truth' on a normative level?<sup>36</sup>
- Whether and to what extent may such a 'minority-protective' effect,<sup>37</sup> turn into a 'tyranny of the minority'?<sup>38</sup>

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<sup>31</sup> Jellinek, above n 18, 534.

<sup>32</sup> Kelsen, above n 30, 252. Similarly Bryce, above 14, 201 distinguishes four different motives for establishing constitutions guided by the idea of formal distinction to ordinary legislation:

'(1) The desire of the citizens, that is to say, of the part of the population which enjoys political rights, to secure their own rights when threatened, and to restrain the action of their ruler or rulers.

(2) The desire of the citizens, or of a ruler who wishes to please the citizens, to set out the form of the preexisting system of government in definite and positive terms precluding further controversy regarding it.

(3) The desire of those who are erecting a new political community to embody the scheme of polity under which they propose to be governed, in an instrument which shall secure its permanence and make it comprehensible by the people.

(4) The desire of separate communities, or of distinct groups or sections within a large (and probably loosely united) community, to settle and set forth the terms under which their respective rights and interests are to be safe-guarded, and effective joint action in common matters secured, through one government.'

One may have to discuss to what extent these categories still prove to be valid today.

<sup>33</sup> Alexis de Tocqueville, *Demokratie in Amerika* (Reprint 1950) 39. Cf also and in particular John Stuart Mill, *On Liberty* Ch I and James Madison, *Federalist* No 51 edited by Jacob E. Cooke (1961).

<sup>34</sup> Bruce Ackerman, *We the People: Foundations* (1993) 264.

<sup>35</sup> Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Reprint 1963) 8-9.

<sup>36</sup> See, for example, Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (3<sup>rd</sup> ed 1926) 36-7 referring to the problem of defining a people's true will irrespective of the majority's volition; granting additional stability to certain legal provisions by the means of formal requirements addresses this problem by fortifying the provision's *Geltungsanspruch* (see Jürgen Habermas, 'Wahrheitstheorien' in Fahrenbach (ed), *Wirklichkeit und Reflexion* [1973] 211, 218) in a formal manner.

<sup>37</sup> The effects, of course, vary depending on the specific design; cf, in particular, Ackerman's model of a 'supermajoritarian-escalator' increasingly strengthening the minority's position – Bruce Ackerman, *Before the next Attack*: (2006) 80 and, most recently, *Decline and Fall of the American Republic* (2010) 168.

– Does it rather preserve the *status quo* or prevent an undesirable subjection under a random majority's volition?<sup>39</sup>

## 2) Detachment

This ideal-type description, however, is just one side of what may come along with the formal creation of a sphere of *constitutional* law. Giving it closer scrutiny this approach consequently also causes detachment of the formally elevated laws from the idea inherent to a substantive conception of *constitutive* laws as described above, subsequently creating the fundamental character attributed to a legal provision by granting it elevated status.<sup>40</sup> From this perspective, any content may become *constitutional* law. And many examples show that the creation of *constitutional* law does not have to be in pursuance of a noble goal or guided by the intention of regulating the community's fundamental concerns.<sup>41</sup> Form and function fall apart.

On the one hand this formal creation of a *constitutional* sphere provides a much greater extent of clarity when it comes to define what a community's constitution *is* when compared to the inductive approach deriving from the substantive conception of *constitutive* laws. However, the positive approach does not provide us with immanent criteria to assess what these *constitutional* laws *ought* to be. *Constitutional* laws may lawfully be enacted in order to avoid judicial review of laws which, if regularly enacted, would be considered *unconstitutional*,

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<sup>38</sup> See, for the American Constitution, Sanford Levinson, *Our undemocratic Constitution* (2006) 204. For the minority-protective effect the amendment procedure of the Articles of the Confederation yielded see James Madison, *Federalist* No 40, (1788) – edited by Jacob E. Cooke (1961) 263. Also see the way Hamilton perceives the minority-protective effect of supermajorities – *Federalist* 58, (1788) – edited by Jacob E. Cooke (1961) 396.

<sup>39</sup> See, for example, Schaller, Consent for Change: Article V and the Constitutional Amendment Process (1997) 8 *Constitutional Political Economy* 195; Anthony McGinnis, *The Tyranny of the Super-Majority: How Majority Rule protects Minorities* 10 Center for the Study of Democracy, Irvine <<http://escholarship.org/uc/item/18b448r6>>; McGinnis/Rappaport, 'Majority and Supermajority Rules: Three Views of the Capitol' (2007) 85 *Texas Law Review* 1115; Masing, 'Zwischen Kontinuität und Diskontinuität: Die Verfassungsänderung' in Wahl (ed) *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation* (2008) 131, 134; for the preservationist function discharged by select institutions see Bruce Ackerman, Lost Opportunity?, (1990) 10 *Tel Aviv U. Stud. L.* 53, 58.

<sup>40</sup> Cf Christoph Bezemek, 'Materielle Perspektiven eines formellen Verfassungsverständnisses' in Holoubek et al (eds), *Die Zukunft der Verfassung – Verfassung der Zukunft* (2010) 437, 443-4.

<sup>41</sup> The possible disruption between *constitutional* laws as norms usually considered as fundamental for a community in a substantive perception and the lack of such an attribution per se in the formal conception may be exemplified quite drastically by § 10 para 2 Austrian non-scheduled services act (*Federal Gazette* 125/1987) which contained provisions for the granting of taxi-cab licenses on a *constitutional* level.

they may provide the degrading treatment of individuals with the blessing of higher lawmaking or even help the political elites in charge not to be prosecuted for crimes we do not even wish to think about; all this may be regarded as *constitutional* law whether or not to be considered as *constitutive* laws – all this enjoys the same degree of formally increased legal stability.

#### D. Different tiers – different weight?

The structure of the amendment provisions that serve as gatekeepers to the *constitutional* sphere, of course, differs largely. Some ask for exceptionally high requirements to be met, while others are being content with prerequisites of rather low-threshold character. Some legal systems may know only a single way of amending *constitutional* laws while others follow a tiered approach of different requirements to be met also within the *constitutional* level. The latter provide for different degrees of normative volatility approximating relative normative static within the *constitutional* sphere. This consequently entails different tiers of *constitutional* provisions causing the phenomenon that also duly enacted *constitutional* law may turn out to be *unconstitutional* in case it does not comply with other *constitutional* provisions asking for additional requirements to be met in comparison with first-tier *constitutional* legislation to be lawfully altered.<sup>42</sup>

#### E. Pick and Choose

Even though many of these problems have to be reserved for deeper assessment it will be useful to keep these remarks in mind before turning to some examples of how *constitutional* amendment provisions are designed in various legal systems. It has to be noted that the examples below were chosen solely with regard to the revision mechanisms they provide for and select techniques they make use of but not with any regard to matters of substance.

In addition to that I want to emphasize that the examples below, of course, only serve to give an idea about the structural differences between different mechanisms for *constitutional* amendment. For the purpose of this essay it will not be necessary to cite any more examples, which should, of course, be part of a larger discussion of the topic. However, intellectual honesty demands to admit that also the rather superficial discussion of the examples used below is largely determined by the author's limited knowledge of the various legal systems. Thus in particular the Austrian or the US legal system will be covered

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<sup>42</sup> See for a discussion of this phenomenon Ackerman, above n 34, 15; for the continental European perspective see, for example, Peter Perenthaler, *Der Verfassungskern* (1998) 46, 80-1. For the Austrian Constitutional Court's case law see VfSlg (Collection of the Austrian Constitutional Court's Case Law) 16.327

quite broadly, whereas China, Honduras, and others will only be mentioned briefly. Due to the formal character of the model I would like to describe this should not affect the argument presented: Of course doctrinal questions (as the few discussed in this essay show) will arise against the thoughts presented below; they will, however, not determine the model's validity.

## **F. Form and Substance**

Given that many 'rigid' constitutions not only know one single way of *constitutional* amendment but often follow a tiered approach, asking for additional requirements to be met compared to the regular form of *constitutional* amendment I want to distinguish two different techniques of such additional formal stabilization:

- A purely formal technique, focused only on procedural and institutional prerequisites – form-related stabilization
- A technique combining formal and substantive aspects by imposing additional procedural and institutional requirements if a proposed amendment is regarded to affect specific elements of the constitution – substance-related stabilization

## **G. A Matter of Degree**

Both of these approaches anew allow for immanent gradations; thereby creating a structure within the level of *constitutional* law itself moving successively from comparatively dynamic to comparatively static *constitutional* law. These immanent gradations may be classified, essentially,<sup>43</sup> in three different kinds:

- Amendment
- Entrenchment
- Eternity

### **1) Amendment**

When speaking about 'amendments' in the context of this essay I intend to use this term in a quite narrow sense. As amendment I understand the basic form of *constitutional* revision a legal system provides. Based on this understanding, amendments feature the specific characteristic that they are, when compared to

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<sup>43</sup> Each of these classifications may anew be subdivided; most importantly a distinction can be made between implicit and explicit modes of *constitutional* revision. I will only touch on these further subdivisions for the purposes of this essay parenthetically as it will add another level of complexity to the basic model which is not necessary to explain exhaustively in order to make the main argument.

the superior modes of *constitutional* alteration, to be defined as form-related only. This is due to the fact that these mechanisms common to all ‘rigid’ constitutions serve as essential differentiator to the merely substantive conceptions of *constitutive* laws, concerned with creating the sphere of *constitutional* law in the first place.<sup>44</sup>

## 2) Entrenchment

The term ‘entrenchment’ on the other hand refers to provisions stating additional prerequisites that have to be met for the alteration of *constitutional* laws compared to the basic conception of *constitutional* amendment.

## 3) Eternity

‘Eternity’ finally, or perhaps even better: ‘eternization’ wants to describe provisions that go beyond entrenchment by divesting (certain parts of) the constitution of any form of revision.

Unlike amendments, entrenchment and eternization occur both on a form-related and on a substance-related level.

## H. Amendment

### 1) Scope

To perceive amendments as basic technique of *constitutional* alteration a legal system provides, is a relational approach, comparing several mechanisms within specific legal systems; thus if a legal system should provide solely one mechanism of *constitutional* revision this would qualify as well for the purpose at hand as an amendment provision in a legal system distinguishing several kinds of differently tiered procedures of *constitutional* revision.

### 2) Methodical Remarks

This may seem to be a sledge-hammer-method, disregarding not only the historical and social background against which the various legal systems referred to would have to be assessed in an adequate manner but also the vast difference of the prerequisites to be met for *constitutional* amendment. However: As true as these allegations may prove to be – on a structural level they lack importance. Structurally a low threshold-character amendment provision,

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<sup>44</sup> One may regard of course all amendment procedures as all substance-related, which is just a matter of viewpoint; a viewpoint, however, that does not prove to be very practical.

asking for any random additional requirement to be met compared to regular legislation is equivalent to an amendment provision asking for a unanimous vote in both houses of a bi-cameral system.

Still, this is not to say that the relative rigidity of amendment requirements does not matter when it comes to the question to which extent positive stabilization is permissible. Therefore a larger variety of specific examples shall be presented below in order to show that just as in life there are easy and hard cases it is the same with regard to constitutions. There are some truly amenable for amendment and there are some which are not.

**a) AUSTRIA**

Article 44 para 1 of the Austrian Constitution may serve as an example for the first instance:

‘Verfassungsgesetze oder in einfachen Gesetzen enthaltene Verfassungsbestimmungen können vom Nationalrat nur in Anwesenheit von mindestens der Hälfte der Mitglieder und mit einer Mehrheit von zwei Dritteln der abgegebenen Stimmen beschlossen werden; sie sind als solche ("Verfassungsgesetz", "Verfassungsbestimmung") ausdrücklich zu bezeichnen.’<sup>45</sup>

These amendment requirements are rather low-threshold by their very nature.<sup>46</sup> The dynamic inherent to the amendment procedure of Austrian *constitutional* law evolves in particular against the backdrop of the Austrian ‘Realverfassung’ which largely is based on the historical bi-partisan division of the country and the mode of consensus among the conservative and the social-democratic party that culminated in longish periods when Austria was governed by a grand coalition equipped with the majorities necessary to amend the constitution anytime according to their will resulting in more than one hundred amendments to the main *constitutional* document and countless other *constitutional*

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<sup>45</sup> ‘Constitutional laws or constitutional provisions contained in simple laws can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast; they shall be explicitly specified as such (‘constitutional law’, ‘constitutional provision’).’ Additionally according to Article 42 para 2 B-VG the consent of the Federal Council (Bundesrat) is required.

<sup>46</sup> See, for example, Eberhard/Lachmayer, ‘Constitutional Reform 2008 in Austria’ (2008) Vienna Journal on International Constitutional Law 112 <icl-journal.com>.

provisions.<sup>47</sup> The fragmentation caused by this practice has led to the metaphor of the Austrian Constitution as a *ruin*.<sup>48</sup>

Back in the time of the grand-coalition the only difference between a statutory act and a *constitutional* provision was to be found in whether or not the norm has been explicitly specified to be *constitutional* provision.<sup>49</sup> Bearing this in mind the safeguard-function of formal stabilization of *constitutional* law was, of course, gradually annulled as the difference between a solely substantive conception of *constitutive* laws and a formal conception of *constitutional* law was obliterated.<sup>50</sup>

## b) CHINA

Assessing the relevant amendment provisions, without including specific political constellations abetting normative dynamic, we may add, however, that the Austrian Constitution technically states the same prerequisites for amendment as, for example, Article 64 of the Chinese constitution:

‘Amendments to the Constitution are to be proposed by the Standing Committee of the National People’s Congress or by more than one-fifth of the deputies to the National People’s Congress and adopted by a vote of more than two-thirds of all the deputies to the Congress’

## c) GERMANY

The requirements stated in Article 79 para 2 of the German Basic Law are quite similar to those described above for an amendment of the Austrian Constitution even though the consent requirement in the Federal Council is elevated up to two thirds.<sup>51</sup>

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<sup>47</sup> A partial revision of the Austrian Constitution in 2008 deprived overall more than one thousand provisions of their status as constitution law.

<sup>48</sup> See Hans Klecatsky, ‘Bundes-Verfassungsgesetz und Bundesverfassungsrecht’ in Schambeck (ed), *Das österreichische Bundes-Verfassungsgesetz und seine Entwicklung* (1980) 83 and the critical account of Ewals Wiederin, ‘Über Ruinen und Verfassungen’ (2003) *juridikum* 192.

<sup>49</sup> For the problems connected with such broad parliamentary majorities in the Austrian system see, Alfred Kobzina, ‘Die Flucht aus dem Verfassungsstaat’ in *Festschrift Schambeck* (1994) 259 and Karl Korinek, *Verfassungsbewusstsein in Österreich* (1980).

<sup>50</sup> For the gradual invalidation of the basic amendment procedure in tiered systems of *constitutional* alteration below IV.A.

<sup>51</sup> Overall the German constitution had to experience less battery than its Austrian counterpart lacking overlong periods of grand coalitions governing the country and in absence of means to create *constitutional* law outside of the main *constitutional* document itself (‘Incorporation’-Clause).

‘Ein solches Gesetz bedarf der Zustimmung von zwei Dritteln der Mitglieder des Bundestages und zwei Dritteln der Stimmen des Bundesrates’<sup>52</sup>

**d) LIECHTENSTEIN**

Article 112 of the Basic Law of Liechtenstein, on the other hand, states comparatively altered prerequisites for *constitutional* amendment by stating:

‘Abänderungen oder allgemein verbindliche Erläuterungen dieses Grundgesetzes können sowohl von der Regierung als auch vom Landtage oder im Wege der Initiative (Art. 64) beantragt werden. Sie erfordern auf Seite des Landtages Stimmeneinhelligkeit seiner anwesenden Mitglieder oder eine auf zwei nacheinander folgenden Landtagssitzungen sich aussprechende Stimmenmehrheit von drei Vierteln derselben [...] und jedenfalls die nachfolgende Zustimmung des Landesfürsten’<sup>53</sup>

**e) UNITED STATES**

Still also the latter provision falls short of requiring high standards when compared to the regime as stated in Article V of the US constitution:<sup>54</sup>

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<sup>52</sup> ‘Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.’

<sup>53</sup> ‘Any amendments to or universally binding interpretations of this fundamental law may be proposed either by the Government or by the Diet or through the initiative procedure (Art. 64). These shall require the approval of the Diet, either by the unanimous vote of the members present or by a majority of three-quarters of the members present [...] and in any event the subsequent assent of the Prince Regnant.’

<sup>54</sup> Even though not in the center of the (formal) argument presented here, it shall not be remain mentioned, however, that these demanding standards set by Art V are subject to criticism – see, for example, Levinson, above 38, 159-162. For an alternative approach to the amendment of the US Constitution see Akhil Amar, ‘Philadelphia Revisited: Amending the Constitution Outside Article V’ (1988) 55 *University of Chicago Law Review* 1043. For Ackerman’s approach to alternative Higher Lawmaking and the tests that have to be met in this conception see above n 34, 290-4; *We the People: Transformations* (1998) 15-8; ‘Revolution on a Human Scale’ (1998-1999) 108 *Yale Law Journal* 2279, 2340-43; ‘2006 Oliver Wendell Holmes Lectures – The Living Constitution’ (2006-2007) 120 *Harvard Law Review* 1737, 1804. For a discussion of both accounts see Torke, ‘Extratextual Constitutional Change’, 229. For one of the more recent reform proposals see Michael Rappaport, ‘Reforming Article V: The Problems Created by the National Convention Amendment Method and how to fix them’ (2010) 96 *Virginia Law Review* 1509.

‘The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress’

**f) INSTRUMENT OF GOVERNMENT**

Art V of the US Constitution may with regard to its rigidity may perhaps only be challenged by Article XIII of the Articles of the Confederation,<sup>55</sup> and, much earlier (and even more intensely), by Article VI of Cromwell’s ‘Instrument of Government’ of 1653 stating – guided by the perception of the constitution as a treaty,<sup>56</sup> that could only be entered and thus only altered or dissolved unanimously<sup>57</sup>

‘[t]hat the laws shall not be altered, suspended, abrogated, or repealed, nor any new law made, nor any tax, charge, or imposition laid upon the people, but by common consent in Parliament [...]’

**I. Entrenchment**

**1) Form-related Entrenchment**

Entrenchment clauses typically refer to certain substantive aspects within the *constitutional* system, as civil rights, or the federal structure of the state, to give just a few examples. Some constitutions, however, also apply entrenchment mechanisms on a merely form-related level; asking for additional requirements to be met upon request *ad hoc* without specifying its object in advance.

**a) LIECHTENSTEIN**

In Liechtenstein, for example, according to Article 66 upon the request of the Diet (Landtag), the eligible voters or the municipalities a referendum to be held as

‘[j]edes vom Landtag beschlossene, von ihm nicht als dringlich erklärte Gesetz [...], unterliegt der Volksabstimmung, wenn der Landtag eine

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<sup>55</sup> See for the provision’s relative rigidity, for example, Bruce Ackerman, ‘Storr Lectures: Discovering the Constitution’, (1984) 93 *Yale Law Journal* 1013, 1017 note 6.

<sup>56</sup> See below V.D.2.

<sup>57</sup> Jellinek, above n 18 511-2; also see Dicey, above n 10, 419.

solche beschliesst oder wenn innerhalb von 30 Tagen nach amtlicher Verlautbarung des Landtagsbeschlusses wenigstens 1000 wahlberechtigte Landesbürger oder wenigstens drei Gemeinden [...] ein darauf gerichtetes Begehren stellen.’<sup>58</sup>

**b) ALBANIA**

Article 177 para 4 of the Albanian Constitution refers the question whether a referendum has to be held over a draft for *constitutional* amendment to a rather high quorum among the delegates to the assembly which

‘may decide, with two-thirds of all its members that the draft constitutional amendments are to be voted in a referendum. The draft law for the revision of the Constitution enters into force after ratification by referendum, which takes place not later than 60 days after its approval in the Assembly’

while granting strong minority rights in article 177 para 5 in case the draft for a *constitutional* amendment has been approved in the assembly:

‘The approved constitutional amendment has to be put to a referendum when this is required by one-fifth of the members of the Assembly’

**c) AUSTRIA**

In Austria according to Article 44 para 3 of the constitution a referendum either has to be held upon request of a third of the members of the National Council or the Federal Council or in case of a ‘total revision’ of the constitution:

‘Jede Gesamtänderung der Bundesverfassung, eine Teiländerung aber nur, wenn dies von einem Drittel der Mitglieder des Nationalrates oder des Bundesrates verlangt wird, ist nach Beendigung des Verfahrens gemäß Art. 42 [consent of the Federal Council], jedoch vor der Beurkundung durch den Bundespräsidenten, einer Abstimmung des gesamten Bundesvolkes zu unterziehen.’<sup>59</sup>

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<sup>58</sup> ‘Every law passed by the Diet which it does not declare to be urgent [...] shall be submitted to a referendum if the Diet so decides or if not less than 1,000 citizens with the right to vote or not less than three communes submit a petition to that effect [...].’

<sup>59</sup> ‘Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Art. 42 above but before its authentication by the Federal President be submitted

## 2) Substance-related Entrenchment

### a) IMPLICIT SUBSTANCE-RELATED ENTRENCHMENT

The substance-related perception of the Austrian constitution's 'total-revision'-clause, mentioned before, is understood as grave alteration of the basic principles the legal system rests upon.<sup>60</sup> These basic principles

- Democracy
- Republicanism
- Federalism
- Rule of Law
- Separation of Powers
- Liberty

provide an additional limitation on what may be enacted by meeting solely the requirements stated for 'ordinary' *constitutional* amendments as described above. They are not explicitly mentioned in the Austrian Constitution but have to be induced from the corpus of *constitutional law*.<sup>61</sup>

Such an inductive approach imposes on the interpreter to deal with rather loosely definable principles. Implicit substance-related entrenchment thus raises the same methodical problems as purely substance based perceptions of *constitutional laws*;<sup>62</sup> asking for an induction of *constitutive* elements from a homogenous body of *constitutional law*,<sup>63</sup> thereby granting immense powers to the judiciary in legal systems allowing for *constitutional adjudication*.<sup>64</sup>

### b) EXPLICIT SUBSTANCE-RELATED ENTRENCHMENT

Unlike the Austrian constitution most constitutions using means of substance-related entrenchment do not rely on a method of inductive identification of the core aspects asking for additional procedural requirements to be met but rather explicitly define the elements in question.

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to a referendum by the entire nation, whereas any partial revision requires this only if one third of the members of the National Council or the Federal Council so demands.'

<sup>60</sup> Theo Öhlinger, *Verfassungsrecht* (8<sup>th</sup> ed 2009) para 64.

<sup>61</sup> See Andreas Janko, *Gesamtänderung der Bundesverfassung* (2004) 82.

<sup>62</sup> Above II.

<sup>63</sup> See Bezemek, above n 40, 452.

<sup>64</sup> A power even greater, of course, with regard to eternized *constitutional* Elements – see Thomas Würtenberger, 'Verfassungsänderung und Verfassungswandel' in Wahl (ed) *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation* (2008) 49, 57; for the implicit entrenchment mechanism of the Indian Constitution according to the Supreme court's case law see His Holiness Kesavananda Bharati v The State of Kerala and Others, AIR 1973 SC 146.

*i. Liechtenstein*

Again Liechtenstein for example states a separate procedure in case the monarchical structure of the state shall be abolished in Article 113 of the Basic Law that has to be initiated by the voters and after a positive referendum orders the Diet to draft a republican constitution that is subject to another referendum while the Monarch is being granted the opportunity to draft a new constitution himself to be voted on at this referendum:

„Wenigstens 1500 Landesbürgern steht das Recht zu, eine Initiative auf Abschaffung der Monarchie einzubringen. Im Falle der Annahme der Initiative durch das Volk hat der Landtag eine neue Verfassung auf republikanischer Grundlage auszuarbeiten und diese frühestens nach einem Jahr und spätestens nach zwei Jahren einer Volksabstimmung zu unterziehen. Dem Landesfürsten steht das Recht zu, für die gleiche Volksabstimmung eine neue Verfassung vorzulegen.“<sup>65</sup>

Entrenching only a single aspect of the constitution on a substance-related level however is comparatively rare. Mostly constitutions that operate with these mechanisms safeguard a multitude of core-principles by using this technique:

*ii. Bangladesh*

Article 142 para 1A of the Constitution of Bangladesh may serve as an example for this approach entrenching the fundamental principles underlying the constitution<sup>66</sup> that are – unlike demonstrated above with the help of Article 44 para 3 of the Austrian constitution – explicitly referred to as well (including the provisions dealing with the status of the president and the ministers and the entrenchment clause itself):

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<sup>65</sup> ‘Not less than 1,500 citizens as a minimum requirement have the right to introduce an initiative to abolish the Monarchy. In the event of this proposal being accepted by the People, the Diet shall draw up a new, republican Constitution and submit it to a referendum after one year at the earliest and two years at the latest. The Prince Regnant has the right to submit a new Constitution for the same referendum.’

<sup>66</sup> See Article 8 para 1 of the Constitution of Bangladesh: ‘The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.’

‘when a Bill [is] passed [...] which provides for the amendment of the Preamble or any provisions of articles 8, 48 [or] 56 or this article, is presented to the President for assent, the President, shall within the period of seven days, after the Bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to.’

*iii. Iraq*

The path chosen in Article 122 para 2 of the Iraqi constitution is comparable even though it sets standards that are more demanding than the requirements stated by its Bangladeshi counterpart:

‘The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the Council of Representatives members, and the approval of the people in a general referendum and the ratification of the President of the Republic within seven days.’

*iv. Austria*

Also the Austrian constitution, however, is not being exclusively content with the inductive approach and does contain instances of *explicit* substance-related entrenchment safeguarding the states’ powers by stating in Article 44 para 2

,Verfassungsgesetze oder in einfachen Gesetzen enthaltene Verfassungsbestimmungen, durch die die Zuständigkeit der Länder in Gesetzgebung oder Vollziehung eingeschränkt wird, bedürfen überdies der in Anwesenheit von mindestens der Hälfte der Mitglieder und mit einer Mehrheit von zwei Dritteln der abgegebenen Stimmen zu erteilenden Zustimmung des Bundesrates.’<sup>67</sup>

and stating in Article 34 para 4 additional requirements for the enactment of a *constitutional* provision affecting the Federal Council’s composition:

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<sup>67</sup> ‘Constitutional laws or constitutional provisions contained in simple laws restricting the competence of the Laender in legislation or execution require furthermore the approval of the Federal Council which must be imparted in the presence of at least half the members and by a two thirds majority of the votes cast’.

'Die Bestimmungen der Art 34 und 35 können nur abgeändert werden, wenn im Bundesrat - abgesehen von der für seine Beschlussfassung überhaupt erforderlichen Stimmenmehrheit - die Mehrheit der Vertreter von wenigstens vier Ländern die Änderung angenommen hat.'<sup>68</sup>

Article 44 para 2 of the Austrian Constitution again, shares similarities to Article 122 para 4 of the Iraqi Constitution even though with regard to the Republic of Iraq there are higher requirements to be met in case the powers of the regions are affected.

*v. Iraq*

'Articles of the constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities except by the consent of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum.'

*vi. United States*

Article 34 para 4 of the Austrian Constitution, however, clearly shows similarities to the explicit substance-related provision in the US Constitution, stating at the end of Article V

'that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.'

which of course sets standards that go far beyond the Austrian constitution's four-states rule as described above;<sup>69</sup> causing Bryce to call it in this respect 'virtually, if not technically, unchangeable'.<sup>70</sup>

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<sup>68</sup> 'Article 34 and 35 can only be altered if – in addition to the majority required for constitutional amendment – a majority of the representatives of at least four of the Laender in the Federal Council has consented to the amendment'.

<sup>69</sup> For the history of this part of the provision *see*, for example, Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment' (1990) 21 *Tex. Techb. L. Rev.* 2443 246-7.

<sup>70</sup> Bryce, above n 14, 209.

## J. Eternity

Apart from such ‘virtually unchangeable constitutional’ provisions we may encounter constitutions which actually are defined as – at least partially – unalterable: the phenomenon of *eternization*.

### 1) Form-related Eternity

Applying the model of form- and substance-related stabilization as introduced above the conclusion may be obvious that the only opportunity of creating purely form-related eternization<sup>71</sup> may be to declare the constitution unalterable as a whole.<sup>72</sup>

Examples for unalterable constitutions are rare, of course. Complete petrification has been considered in France 1789, when the question of whether or not a constitution should be an amendable document or rather a secluded system was discussed controversially; however, this approach has not been adapted eventually.<sup>73</sup> Obviously this approach was carried into effect by the *Charte constitutionnelle française* of 1814 granted by Louis XVIII which did not provide for the case of amendment.<sup>74</sup> Evidently this approach was unsuccessful. Bryce commented on this with the words: ‘Nothing human is immortal; and constitutionmakers do well to remember that the less they presume on the long life of their work the longer it is likely to live’.<sup>75</sup>

### 2) Substance-related Eternity

It seems though that modern *constitutionmakers* did not heed Bryce’s advice. Or at least that they did not heed his advice fully. An immense number of modern Constitutions avail themselves of eternity clauses explicitly specifying unalterable aspects.

#### a) IMPLICIT SUBSTANCE-RELATED ETERNITY

The first eternity clause in the sense it is understood nowadays is found in Article 112 of the Norwegian Constitution of 1814.

#### *Norway*

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<sup>71</sup> However intellectual honesty demands to state that the classification of Constitutions which are *a priori* unalterable as form-related may eventually turn out to be a question of viewpoint. Thought out one may as well reach the result that eternization of a whole constitution is nothing but the substance-related stabilization referring not only to single aspects but to *each* aspect of the constitution.

<sup>72</sup> See for a discussion of this phenomenon Kelsen, above n 30, 253-4.

<sup>73</sup> See Carl Schmitt, *Verfassungslehre* (9<sup>th</sup> ed Reprint 2003) 10.

<sup>74</sup> *Cf* Jellinek, above n 18, 527.

<sup>75</sup> Bryce, above n 14, 208.

'[An] amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two thirds of the Storting agree thereto.'

**b) EXPLICIT SUBSTANCE-RELATED ETERNITY**

*i. France 3<sup>rd</sup> Republic*

The French *constitutional* laws of 1875 establishing the Third Republic as amended by the *constitutional* law of August 14<sup>th</sup> 1884 explicitly prohibited a change into a form of *constitutional* monarchy by stating:

'La forme républicaine du gouvernement ne peut faire l'objet d'une proposition de revision'

*ii. Tonga*

Article 79 of the constitution of Tonga, also dating back to 1875, again, quite on the opposite, preserved (among other central concepts) the monarchical structure of the state by stating

'amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles'

*iii. Germany*

The most prominent example of such an eternity clause is, of course, to be found in Article 79 paragraph 3 of the German Basic Law stating:

„Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig“<sup>76</sup>

*iv. Italy*

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<sup>76</sup> 'Amendments to this Basic Law affecting the division of the Federation into *Laender*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

Also, Article 139 of the Italian Constitution contains an eternity-clause even though its textual scope is limited in comparison with its German counterpart:

‘La forma repubblicana non può essere oggetto di revisione costituzionale’

v. *Democratic Republic of the Congo*

Eternity-Clauses like those mentioned above, however, are not elements predominantly peculiar to Western European constitutions. Quite the contrary we find impressive examples for most elegantly elaborated versions of *constitutional* Eternity-clauses in *constitutional* provisions like Article 220 of the Constitution of the Democratic Republic of the Congo

‘La forme républicaine de l’État, le principe du suffrage universel, la forme représentative du Gouvernement, le nombre et la durée des mandats du Président de la République, l’indépendance du Pouvoir judiciaire, le pluralisme politique et syndical, ne peuvent faire l’objet d’aucune révision constitutionnelle’

vi. *Honduras*

We find similar approaches in Article 374 of the constitution of Honduras,

‘No podrán reformarse, en ningún caso, el artículo anterior [constitutional amendment provision], el presente artículo, los artículos constitucionales que se refieren a la forma de gobierno, al territorio nacional, al período presidencial, a la prohibición para ser nuevamente Presidente de la República, el ciudadano que lo haya desempeñado bajo cualquier título y el referente a quienes no pueden ser Presidentes de la República por el período subsiguiente’

or in Article 225 of the constitution of Chad

vii. *Chad*

‘No procedure of revision may be started or pursued if it interferes with:

- the integrity of the territory, independence or national unity;
- the republican form of the state, the principle of the division of powers and secularity;

- the freedoms and fundamental rights of the citizen;
- political pluralism.'

*viii. Afghanistan*

In Article 149 of the Islamic Republic of Afghanistan's Constitution; a clause that provides an interesting example not only because of the safeguard-provision with respect to Islam but in particular because of its 'Favorability-Clause' with regard to the fundamental rights granted by the constitution's second chapter

'The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them.'

*ix. Democratic Republic of the Congo*

which again may be compared to the quite similar Article 220 of the Democratic Republic of the Congo safeguarding fundamental rights:

'Est formellement interdite toute révision constitutionnelle ayant pour objet ou pour effet de réduire les droits et libertés de la personne, ou de réduire les prérogatives des provinces et des entités territoriales décentralisées.'

Of course many more examples could be added to those cited above. One could point at the eternization of the amnesty granted to those involved in various coups d'état by Article 141 of the Constitution of Niger's 5<sup>th</sup> Republic or to the positive presupposition of the Holy Qur'an as the Constitution's foundation in Article 7 of the Basic Law of the Kingdom of Saudi Arabia. However, the various techniques have been demonstrated sufficiently.

**K. Lessons**

**1) Dynamic – Static**

At the beginning of this essay I admitted its task would rather be to ask questions than to provide answers. However, looking back at what has been

said, there are also some lessons to be learned; lessons, of course, that may raise another plurality of questions.

The most obvious conclusion is that when assessed from the positive perspective ‘flexible’ systems, like the UK constitution, are at the same time (to translate it to the terms used in this essay) inherently ‘dynamic’, whereas ‘rigid’ constitutions overall reduce this dynamic, shifting the legal system towards a ‘static’ design.<sup>77</sup>

However, it would not have taken dozens of pages to reach this result. Perhaps of greater interest is the observation that the *constitutional* sphere created by the means of formal stabilization is not a monolithic block. The distinction between ordinary legislation and *constitutional* law turns out not to be a line of demarcation but a border region where more than one checkpoint has to be passed: Rather the term *constitutional* laws refers to different layers that grant a greater extent of dynamic to some *constitutional* provisions while specifically denying it to others. Based on the model introduced above also within the *constitutional* sphere of a legal system elements of rather dynamic or rather static character can be distinguished: Already when analyzing purely form-related techniques of stabilization we often witness a tiered system: additional requirements may have to be met compared to those stated in the constitution’s basic amendment provision (form-related Entrenchment) or the constitution as such may be unalterable as a whole (form-related Eternization) – resulting in a formally static constitution.<sup>78</sup>

A multitude of formal *constitutional* systems, however, partially turn to a substantive conception,<sup>79</sup> positively defining certain aspects that are considered fundamental and stating elevated prerequisites for their alteration (substance-related Entrenchment) or prohibit their alteration overall (substance-related Eternization).<sup>80</sup>

The phenomenon analyzed may thus be described as a movement from normative dynamic towards normative static due to the introduction of the (fragmented) sphere of *constitutional* laws: The formal distinction between ordinary legislation and *constitutional* law entails the stabilization of the latter, a stabilization that keeps progressing positively up to the point of the constitution’s (partial) eternization – creating normative static; a

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<sup>77</sup> Above III.

<sup>78</sup> Above III.G.2.

<sup>79</sup> Above III.I.2.

<sup>80</sup> Above III.J.2.

'Foundationalist' system.<sup>81</sup> I hope the examples I referred to, gave a basic idea of how the various techniques of positive stabilization are actually applied.

## 2) Is - Ought

Compared to legal systems guided by a substantive perception of *constitutive* laws, legal systems introducing *constitutional* laws rather clearly state which laws are to be considered of particular gravity; which is, as we have seen, a rather arbitrary choice: Anything – non-scheduled services, prohibition, slavery as well as civil rights – may have its share of *constitutional* authority as long as specified requirements are met. The model sketched above provides us with a tool for the analysis of a given legal system with regard to its comparatively dynamic and static components which allows us to assess legal systems according to the questions which key features they are trying to safeguard and to what extent they do so, within a certain legal system as well as in comparison with other legal systems. It does not, however, provide us with any criteria to answer the question what ought (or ought not) to be positively stabilized.

### IV. *The pre-positive perspective*

#### A. The Earth and the Living Generation

But may the question, which normative content ought or ought not to be *constitutionally* protected, entrenched, or eternized legitimately answered anyway? Rousseau's answer, for example, that the more important the question discussed the higher the requirements to be met,<sup>82</sup> does not prove to be helpful: In a positive perspective the system offers a great extent of permeability; it is form that counts, not substance. Positively, the phenomenon of eternization has to be seen as terminal point of the vector leading from normative dynamic to normative static. Still, this leaves many questions unanswered:

- May eternity clauses be created within systems yet unfamiliar with this instrument?
- May revision clauses be lawfully amended (in case they do not state otherwise)?
- ...

#### B. Grundnorm vs Principle-Guided Norm Presupposition

A general answer addressing these questions, whatever it may be, will not be found when approaching the question from a doctrinal perspective; it must not be phrased on a *positive*, but on a *pre-positive* level.

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<sup>81</sup> Ackerman, above n 34, 15.

<sup>82</sup> Rousseau, *Du contract Social* IV Ch II.

On this *pre*-positive level, of course, many different anchor points may be distinguished. Still, I would like to focus on only two of them, assuming, without oversimplifying excessively, that both conceptions eventually do cover a quite broad range of the most significant theoretical approaches.<sup>83</sup> A Kelsenian ‘Grundnorm’ conception and a Conception based on a ‘natural law’ approach.

Both approaches are designed to provide a theoretical foundation for legal systems thereby granting legitimacy to (decide on the validity of) positive law. Both struggle with (different) problems I need not to address in this essay. The assumption of a ‘Grundnorm’<sup>84</sup> as a necessary theoretical precondition of any legal system<sup>85</sup> proves to be particularly unsatisfactory, however, for the task at hand; not (only) with regard to the frequent objections this theory had (has) to face<sup>86</sup> but (also) because in Kelsen’s own understanding of ‘the content of the positive legal order [as] completely independent of the basic norm from which only the objective validity of the norms of the positive legal order, not the content of this order, can be derived’.<sup>87</sup> Grundnorm-doctrine *per se* will not provide us with criteria for the *Ought* or the *Ought Not* of formally elevated, entrenched, and eternized normative content.

Therefore one may consider to turn towards the definition of a pre-positive structure that allows for the analysis of a legal order’s content presupposing a principle deriving from the idea of a social compact;<sup>88</sup> a compact idea as underlying,<sup>89</sup> for example, in the US Constitution.<sup>90</sup>

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<sup>83</sup> Cf, for example, Alfred Verdross, *Abendländische Rechtsphilosophie* (2<sup>nd</sup> ed 1963) 192.

<sup>84</sup> For Kelsen’s own account *see*, in particular, above n 30, 250-3 and *Reine Rechtslehre* (2<sup>nd</sup> ed 1960) 196-199 and, of course, ‘On the Basic Norm’ (1959) 47 *California Law Review* 107, 109-10.

<sup>85</sup> *See*, for example Robert Walter, *Wirksamkeit und Geltung* (1961) 11 *Zeitschrift für öffentliches Recht* 531, 537.

<sup>86</sup> Just *see* Julius Stone, ‘Mystery and Mystique in the Basic Norm’ (1983) 26 *Modern Law Rev* 34.

<sup>87</sup> Hans Kelsen, Professor Stone and the Pure Theory of Law (1964-65) 17 *Stanford Law Review* 1128, 1141-2.

<sup>88</sup> I do realize, of course, that these approaches – at least when coming from a Kelsenian perspective – do not match one another. A conception of a *Grundnorm* which is deemed to be void will not allow for any substantive attribution from the very outset, rendering the following thoughts useless.

<sup>89</sup> I am, of course, not assuming a contract determined by a specific context out of which a genesis of normative legitimacy shall be developed as Kelsen obviously does – *see* *Allgemeine Staatslehre* 251.

<sup>90</sup> Cf James Madison, *Federalist* No. 44 (1788) – edited by Jacob E. Cooke (1961) referring to Bills of attainder, ex post facto laws and laws impairing the obligation of contracts as ‘contrary to the first principles of the social compact.’

### C. Christianity as State Religion

Let us take an example provided by Bruce Ackerman to sketch the basic idea by assuming a successful campaign for partial repeal of the first amendment introducing a *constitutional* provision whereas:

‘Christianity is established as the state religion of the American people and the public worship of other gods is hereby forbidden.’

Against the backdrop of this example Ackerman argues vividly that if he was a member of the Supreme Court in those days he would either reject a petition to declare the amendment *unconstitutional* or ‘resign [...] office and join in a campaign to convince the American people to change their mind.’<sup>91</sup> In this scenario Ackerman’s Dualist Theory trumps Rights Foundationalism. This is a fair point. But will this perception of strict Dualism prove to be successful as the constitution’s last frontier?

What if the amendment in question was designed in a way that would not allow any advocacy in opposition to its content or more radically: What if ‘the American People’ decide to introduce a *constitutional* principle abolishing freedom of speech overall? What if ‘The People’, by vast majority decide to introduce an eternity clause to the constitution abandoning any popular political participation, be it on the present level of normal politics, be it with regard to any future revision of the *constitutional* structure? To put it bluntly:

Is it open to ‘The People’ to abolish a constitution’s democratic structure, just like Mo the bartender once famously suggested?<sup>92</sup>

### D. Beyond Dualism (II)?

#### 1) Dark Days

Ackerman of course sees the point even though referring to the main problem only in a footnote, summing it up by stating that ‘[s]uch questions are best left to the dark day they arise’<sup>93</sup> – an approach that may be considered to be pragmatic. However, it is an approach accepting that there is an answer to be found, be it today or Ackerman’s dark day. Interestingly, once we accept this possibility we also have to accept that this answer has to be true for today as

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<sup>91</sup> Ackerman, above n 34, 14.

<sup>92</sup> ‘Who wants to abolish democracy forever? Show of Hands!’, The Simpsons, Season 19 Episode 10 – E. Pluribus Wiggum.

<sup>93</sup> Ackerman, above n 34, 16.

well as for future days to come as it has to lead 'Beyond Dualism', beyond a *specific* legal system.

## 2) A participatory Grundnorm?

### a) 'CONSENT OF THE GOVERNED'

One thought that may be developed derives from the popular consent *in abstracto* as precondition underlying these conceptions, forming the foundation of the *pre-constitutional pouvoir constituant originaire*<sup>94</sup> which consequently can be altered only by such consent. When Rousseau, for example, assumes that the collective henceforth decides to accept the majority's decision in her place,<sup>95</sup> this assumption is based on the fact that as a matter of principle the possibility of a change of majority and by that the individual's opportunity to participate in public decision-making is being preserved. It is this opportunity to participation that serves as pre-supposed structural principle.<sup>96</sup> Indeed, '[t]he Constitution presupposes a citizenry with a sound grasp of the distinctive ideals that inspire its political practice'.<sup>97</sup>

### b) SNAPSHOTS AND STRUCTURAL PRINCIPLES

A possible argument would have to originate from the abstract (and thus, to put it in the terms used in this essay, static) idea of common consent to delegate decisions to a majority, a delegation that may again only be invalidated by such common consent *in abstracto*. To sacrifice this holistic approach for a snapshot of a momentary decision to abolish the state's democratic structure is not an option under this concept as the snapshot would only show a volition within the limits of the *pouvoir constituant institué*. If perceived in a different way an arbitrary cross-section of specific subjects would be entrusted to abolish what has not been transferred to its discretion but has rather been entrusted to be preserved for all future subjects.

Following this argument not even the consent of an entire people to establish a dictatorship would change this assessment: A principle of participation

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<sup>94</sup> For the origin of the distinction between *pouvoir constituant originaire* and *pouvoir constituant institué*, see Sieyès classical work, *Qu'est-ce que le tiers-état?*.

<sup>95</sup> Rousseau, above n 82, I Ch V.

<sup>96</sup> See for various conceptions and the idea of participation in the social compact model: Immanuel Kant, *Allgemeine Geschichte in Weltbürgerlicher Absicht* (Akademie Edition VIII) 23; Thomas Paine, *Common Sense and the Rights of Men* (Signet 2003) 6-7; Thomas Hobbes, *Leviathan* (Yale 2010) XVIII; Locke, *Second Treatise of Government* (Edition Millar 1764) § 95; Rousseau above n 82, I Ch. V; Nozick, *Anarchy, State, and Utopia* (1974) 113-120.

<sup>97</sup> Ackerman, above n 34, 3.

underlying the *pouvoir constituant originaire*, may not be abolished by the means of momentarily democratic decision making which is nothing but the basic structure's single manifestation. A snapshot of a volition within the limits of the *pouvoir constituant institué* does not dispose of the conditions necessary for such a structural change; these are different levels – a *positive* on the one and a *pre-positive* on the other hand. Again (but in a different relation than introduced before) this snapshot may be perceived as 'Normal (*constitutional*) Politics' concerned with decisions immanent to the system but not about transcending the system's preconditions. What this approach does reflect clearly is the spirit of Article 28 of the *Declaration des droits de l'homme et du citoyen of 1793*:

'Un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. *Une génération ne peut assujettir à ses lois les générations futures*'<sup>98</sup>

But does it relate to the question of dynamic and static analysis? The answer would be in the affirmative: If it proves to be valid, the argument teaches us that beyond all possible *positively* created normative static, participation as a principle deriving from the legal system's static *precondition* of common consent has to be presupposed; a presupposition that cannot be overcome by the positive means of normative stabilization.

#### **E. And back?**

By means of this pre-positive principle of participation the apparent antagonism of normative dynamic and normative static may be dissolved: What the principle would vouch for would be nothing but to grant dynamic; ultimately then change is what remains as a legal system's unalterable foundation: the people's chance to change their mind.

Coming from this perspective the doctrinal structure elaborated above has to be reevaluated. It will take careful analysis to define the permissible range of positively abetted normative static against the backdrop of this pre-positive principle and to see whether and to what extent positive stabilization has to be considered to be legitimate options of positive stabilization. However, we may state already at this point that the amendment provision prohibiting any advocacy against the 'Christianity-Amendment' may prove to be incompatible with the theory introduced above. Not because the approach introduced is foundationalist in character but on the contrary because it is committed essentially to a dualist (or perhaps: trialist) conception; 'it is democratic first,

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<sup>98</sup> Emphasis added by author.

rights protecting second<sup>99</sup> as rights, according to this theory, derive from the structural principle of participation – committed to prevent the ‘repeal of [Dualist] Democracy itself’;<sup>100</sup> ensuring the earth would still belong ‘to the living generation’.<sup>101</sup>

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<sup>99</sup> Ackerman, above n 39, 62.

<sup>100</sup> Ackerman, above n 34, 16.

<sup>101</sup> Discussing the way Jefferson’s approached this demand Robert McDonald, ‘Thomas Jefferson and Historical Self-Construction: The Earth Belongs to the Living?’ (1999) 61 *The Historian* 289.