Constitutions as non-tyrannical contracts between generations

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Abstract:

A “constitution” can be defined as a system of fundamental principles according to which a state is to be governed. With regard to generational change, how (in)flexible should a constitution be? It is argued that constitutions can be tyrannical if they place the will of deceased people – previous generations – above the will of the present population. In order to be non-tyrannical contracts between generations, constitutions must account for generational turning points (GTP) and they must allow each new generation the possibility to make substantial changes. Recurring constitutional reform commissions in fixed time intervals are the best way to give each generation of citizens a say. A numerical example of the calculation method of the GTP is given with regard to the constitutional reform proposed by the Joint Constitutional Commission of the Federation and the Länder 1994 in Germany, which was adopted, and the “Renzi reform” 2016 in Italy, that failed in a constitutional referendum. In the last section, the outlined model of non-tyrannical, equitable constitutions is defended against several counterarguments.

Methodologically, the theory that is laid out here combines philosophy, law and demography. It is applicable to all constitutions, or constitutionalising processes, in the world. Especially the peoples that live under the rule of constitutions that are very or extremely difficult to change would benefit from implementing the “generational turning points” theory.

1. Introduction: Constitutional rule and generational change

A “constitution” is usually[1] defined as a system of fundamental principles according to which a state is to be governed. Constitutions build a framework for a state’s public policy. Sometimes, they also enshrine the fundamental values of a people, often in their preambles or in their first part. Constitutions are distinguished from ordinary legislation by their rigidity. They enjoy normative priority over ordinary statutes and regulate the manner in which ordinary laws are made. Written constitutions usually require legislative supermajorities, concurrent majorities of different houses of the legislature, and/or popular referenda in order to be changed.[2] By their very nature, constitutions are intergenerational documents because they are intended to place certain questions beyond the reach of simple majorities, the components of which change frequently (Tremmel 2019).
The demos[3] is considered the only legitimate source of governmental power in democracies nowadays. As a matter of fact, the demos does not consist of the same people over time as generations[4] come and go when time passes. So, as constitutions are intergenerational contracts,

[1] Both “constitution” and “constitutionalism” are contested concepts. For an extended discussion, see e.g. Lutz 2006: 1-25. Grey opens his essay with: “Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse.” (Grey 1979: 189).

[2] In countries without written constitutions, such as the United Kingdom, Israel or Saudi-Arabia, constitutional provisions can, in principle, be changed by ordinary acts of the legislature.

[3] The Greek term “demos” *(*δῆμος) designates the citizenry within a people while the term *ethnos* (ἔθνος) refers to a nation as an ethnic group. Historically, the establishment of demes as fundamental units of the state by Cleisthenes in 508 BC was an important step in the evolution of political order out of kin structures.

[4] Two different meanings of the word “generation” can be distinguished: generations as age groups and generations as ensembles of all people living together at a given point in time. The former can be termed temporal and the latter intertemporal generations (see Tremmel 2009, ch. 2). Thus two kinds of intergenerational justice must be distinguished: “justice between young, middle-aged and old people alive

how much weight should the will of the "founding fathers" have? Is a contemporary young person bound by a constitution that came into being long before his or her birth?[5]

2. The beginning of the debate about perpetual constitutions[6]

The start of the debate on constitution-making and intergenerational justice has an exact date: in a letter to James Madison of 6 September 1789, Thomas Jefferson pondered the problem of intergenerational domination. Jefferson begins his letter with the words: "The question whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water" (Jefferson 1904, 3). As Jefferson states, the history of political thought until his time had been oblivious to generational change. The great theorists of early modern times laid the foundations for the first acts of constitution-making in France and the USA by devising the eminent thought experiment of the evolvement of state authority out of a state of nature by a social contract. This lead the way to a constitutionalized state in which every citizen is simultaneously ruler and ruled. Ruler, because he or she, at least in principle, participates in the legislation. Ruled one, because he or she must obey the law. But for Hobbes, Locke, Rousseau, Montesquieu and Kant the exit from the state of nature and the entry into a social contract was a singular act, not an act that each generation had to repeat.[7] Some accounts, such as Rousseau's *Contrat Social*, conceived of the demos as a homogenous entity both synchronically and diachronically. But even those that did not conceive of a people as a homogenous entity synchronically – for instance Hobbes, who acknowledges in the *Leviathan* that there are different factions at one point of time – conceived of a people as one homogenous entity diachronically. Therefore Jefferson's contribution to the history of political thought can hardly be overstated. From a discussion of public debt, he switched to laws and constitutions: "On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. [...] Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right" (Jefferson 1904, 8-9).

Jefferson proposes in this letter that constitutions should have a set expiration date. In his reply letter, of 4 February 1790, Madison dissented and pointed at the instability that would ensue. Madison's objections were mainly of a practical nature:[8] "Would not a Government ceasing of

today" (temporal intergenerational justice) and "justice between the present generation (i.e. all people alive today) and future generations" (intertemporal intergenerational justice). Constitutions that are perpetual or very difficult to change present a problem for both kinds of intergenerational justice.

[5] Michael Otsuka formulates a similar question: "[H]ow can one defend the claim that laws enacted by a deceased generation of citizens of country x have any authority over the present generation of citizens of country x?" (Otsuka 2003, 136).

[6] This section follows Tremmel 2019.

[7] In John Locke's *Second Treatise of Government,* generational change is discussed to some extent, but from a different angle. With regard to the family level, Locke writes: "[W]hatever engagements or promises any one made for himself, he is under the obligation of them, but cannot bind the children or posterity. For his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son than it can of anybody else" (Locke 1823, Essay Two, chap. VIII, § 116, p. 156).

[8] In one theoretical remark, Madison raises the "lost generation" objection. In short, this is the complaint that those adolescents lucky enough to become enfranchised immediately before the end of Jefferson's nineteen-year-long electoral cycle have almost nineteen more years of political participation than those who come of age immediately *after* the next electoral cycle has begun. The "lost generation" objection must be put in perspective: What is preferable: to have one lost generation, or to have many lost generations? Secondly, a

necessity at the end of a given term, unless prolonged by some Constitutional Act, previous to its expiration, be too subject to the casualty and consequences of an interregnum? [...] Would not such a periodical revision engender pernicious factions that might not otherwise come into existence; and agitate the public mind more frequently and more violently than might be expedient? [...] I can find no relief from such embarrassments but in the received doctrine that a *tacit* assent may be given to established Governments & laws, and that this assent is to be inferred from the omission of an express revocation" (Madison 1904, 438–40; italics in original).

The US constitution that came into force in 1789/1791 did not become a sunset constitution. On the contrary, it became a constitution that is notoriously difficult to change. Arguably, Jefferson's extreme proposal of a sunset constitution prompted this harsh counter-reaction. Jefferson was in Paris during the oftentimes bitter 1787–91 battle over ratification of the US Constitution (including the Bill of Rights), but Madison was very present in Philadelphia, masterminding quite the opposite of Jefferson's proposal.[9] An almost impermeable article 5 was included in the US constitution when it was drafted, and this article remains unchanged until the present day.

3. Clarification of the key concepts

3.1 "Perpetual" and "endurance-by-default" constitutions

Having an adequate terminology is essential, and not every account is helpful here. In his otherwise thoughtful paper *The Problem of a Perpetual Constitution*, Victor Muñiz-Fraticelli (2009, 377) writes: "A perpetual constitution has no 'sunset clause', no date of expiration; it *may* [my emphasis] contemplate for its amendment and even specify a procedure for its modification, but it does not consider its own abolition. When adopted, it is intended to govern a society for as long as that society exists, and to be accepted by the present and future members of that society as a valid charter of political association." The problem with this definition is that the modal verb "may" renders it inadequate. Its extension encompasses both constitutions that cannot be changed for an indefinite future *and* constitutions that can be amended by (super)majority vote at any time. Muñiz-Fraticelli's terminology forces him to speak of "a constitution sufficiently perpetual" (p. 390: fn. 26), which is a contradiction in terms since "perpetuity" is not a gradual concept. Muñiz-Fraticelli's terminology is inadequate because it implies that every constitution that is not a sunset constitution is by definition a perpetual constitution. But, as this paper will show, it is important to be able to distinguish terminologically a "perpetual constitution" from an "endurance-by-default constitution" that has cumbersome amendment procedures. In comparison to ordinary laws, all constitutions are

similar problem, albeit on a smaller scale, arises with a system of elections every four or five years, as is commonplace. And thirdly, the "disenfranchised youth objection" (as it should be called more precisely) is somewhat overstated because babies, little children and younger adolescents have no interest in political participation anyway. For those minors who do wish to participate, a remedy would be a flexible voting age as proposed by Tremmel and Wilhelm (2015).

[9] At „the other side of the water", the events evolved quite differently (cf. Condorcet 1847). The right of a people to reform their constitution was a key element in the Girondin constitutional project. Article 28 of the draft of the French Constitution of 1793 stated: "A people always has the right to review, reform, and change its constitution. One generation may not subject future generations to its laws." But this constitution was invalidated during the so-called "Reign of Terror" in the French Revolution. In the Thermidorian Reaction, it was discarded in favour of a more conservative document, the Constitution of 1795.

difficult to change, but this does not make them "perpetual" in the usual sense of the word ("eternal", "everlasting" or "perennial").

I define the concepts that are used in this article as follows:

a) **Perpetual constitution:** A constitution that does not allow for amendment, repeal or replacement. (The analogue of this on the level of a single clause would be an "irrevocable clause", i.e. a clause in a constitution that is not alterable by the constitutional amendment procedures enshrined within the constitutional text.)

b) **Sunset constitution:** A constitution that lapses automatically after a fixed time span. (The analogue of this on the level of a single clause would be a "sunset clause".)

c) **Endurance-by-default constitution:** A constitution that endures by default in the sense that unless objection to it receives a certain level of political support, the constitution will endure. (The analogue of this on the level of a single clause would be an "endurance-by-default clause".)

3.2 Irrevocable and entrenching clauses as the small brothers of perpetual constitutions

There is not (and never has been in the history of man-made constitutions) a perpetual constitution anywhere in the world. This is the upshot of a study of hundreds of historic and current constitutions by legal scholar Yaniv Roznai who summarizes: "Treating the *entire* [my emphasis] constitution as unamendable derives either from ascribing it to a superhuman source, or from the constitution-maker being afflicted with exceptional arrogance and belief that he has achieved the apex of perfection" (Roznai 2015, 3). However, there are unalterable provisions *within* endurance-by-default constitutions. While there is some ambiguity in the literature about the best nomenclature, in this article the provisions that are sheltered from alteration or repeal are termed "irrevocable provisions" [10] What makes them "irrevocable" is that no measure of legislative or popular approval – not even unanimity among all institutions of the state in concert with the freely expressed wishes of the citizenry – are sufficient to ever change them (cf. Albert 2000, 672). "Entrenching clauses", on the other hand, are those provisions that *guarantee* that some provisions or some principles of the constitution remain irrevocable.[11] In the 735 past and present constitutions that Roznai examined, 28% include or included entrenching clauses.[12] The system of government is more often the subject

[10] In his paper *Constitutional Handcuffs*, Richard Albert points to the ambiguity in the literature about irrevocable and entrenching clauses. Most scholars correctly distinguish between the two types of clauses but use a variety of names for both: eternity clauses, unamendable clauses (or nonamendable clauses), perpetuity clauses, prohibitory clauses, and so on. Albert cites 15 papers to show that there is no consensus in the scientific community of legal theorists yet on how these clauses should be best named (Albert 2010, 665).
I deem at least the term "unamendable provisions" inadequate as it ignores the difference between a change to and an amendment of a constitution. An "amendment" in the Anglo-Saxon tradition is subsidiary to the original text. Amendments can nullify provisions in the original text, but they do not change the text; they merely add to it. In the US constitution, even amendments such as the 18th (prohibition), which are repealed (by the 21st), remain in the text. In contrast, in those parts of the world where constitutions are "changed" and not "amended", the original text is reworked to incorporate the intended change of its content.

[11] It makes sense to distinguish between principles and provisions here. For instance, article 79 (3) in the German *Grundgesetz* (Basic Law) is an entrenching clause. It decrees in the very article 79 (3) that certain *content* of the constitution is irrevocable, such as the federalist structure of Germany. And it decrees that certain *clauses* are irrevocable, namely article 1 and 20.

[12] Roznai 2015: 8. These numbers include those multiple constitutions of the same state.

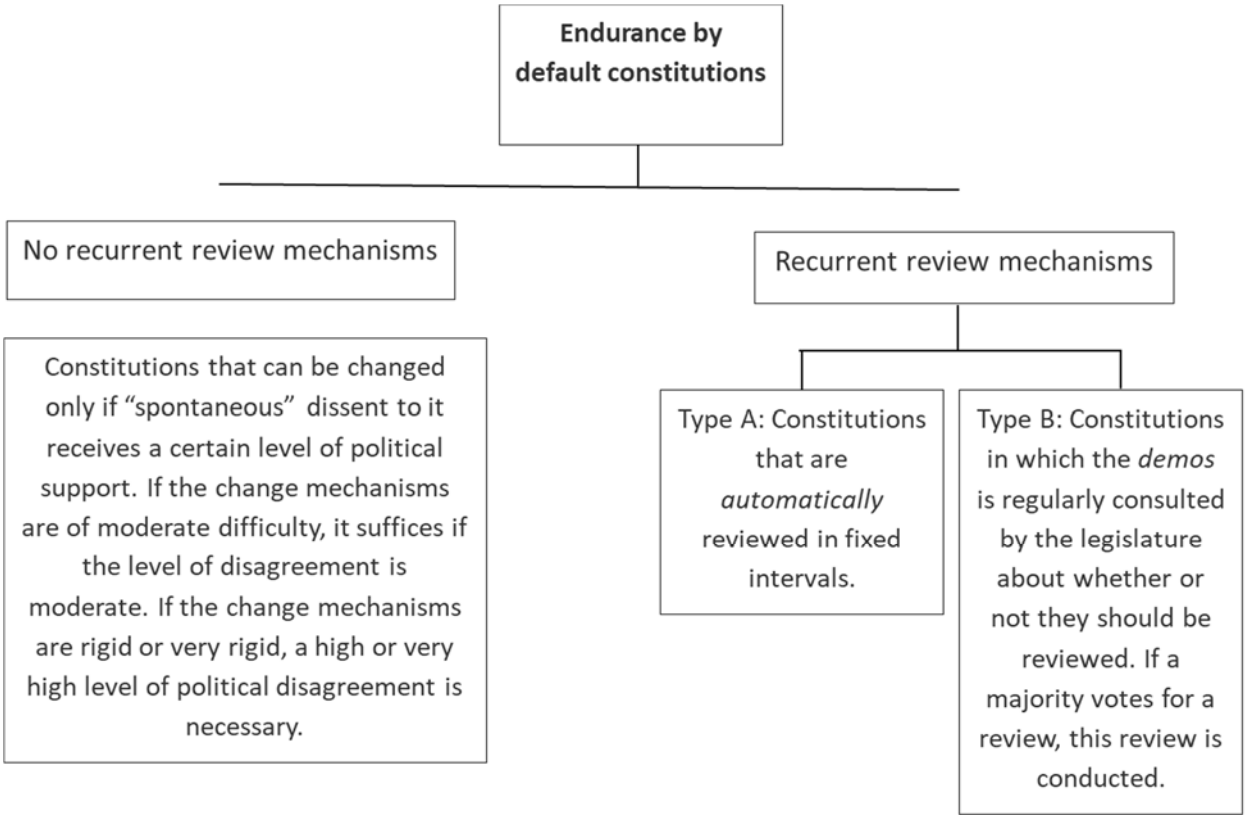
of irrevocable clauses than anything else. While more than 100 constitutions protect the republican form of a government, some protect a monarchy. This is especially the case in some of the Arab countries [13] but also for instance in the Grand Duchy of Luxembourg, a member state of the EU.[14] The second notable group is protecting the state's political or governmental structure, such as federal or unitary, for instance, or presidential or parliamentarian (Roznai 2015, 11).
Most of the world's entrenching clauses are not irrevocable provisions.[15] In theory, this would allow a two-step process by which, firstly, the entrenching clause could be abolished, and then, secondly, the previously entrenched content can be altered by normal constitutional change procedure. But some entrenching clauses are declared irrevocable themselves[16] – in this case of "second-order irrevocability", no legal recourse can be taken by successor generations to change the content that was entrenched by their predecessors.
Irrevocable and entrenching clauses are one (but by no means the only possible) way to make a constitution rigid. Other onerous change mechanisms are, for instance, three-quarter majorities in two different legislative chambers, or concurrent votes of two different legislatures with an intervening election between these votes.

4. Two kinds of endurance-by-default constitutions

Now, as we have the relevant vocabulary, we can focus on "endurance-by-default constitutions"
Most of the 935 constitutions in the world, past and present, can be changed only if "spontaneous" dissent to them receives a certain level of political support. If these "endurance-by-default constitutions" are rigid constitutions, reforms are rare. But a few constitutions have a recurring review mechanism, as figure 1 shows.

[13] See for instance the constitutions of Bahrain (1973), art. 120(c); Jordan (1952), art. 126(2); Libya (1951), art. 197; Qatar (2004), art. 145; Kuwait (1962), part V, art. 175; and Morocco (1992), art. 100.
[14] Luxembourg Const. (1868, rev. 2009), art. 115: "During a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well as the order of succession" (quoted from the translation available in the Constitute Project database at constituteproject.org; subsequent constitutional provisions will also be quoted from the same source).
[15] This is, for example, the situation with regard to the Bulgarian Const. (1991), art. 57; the Romanian Const. (1991), art. 14; the German Basic Law (1949), art. 79 (3). In Germany, the Federal Constitutional Court has ruled that this entrenching article is revocable, see BVerfGE, 30,1.
[16] See, for example, Armenia Const. (1995), art. 114 which declares that articles 1, 2 *and 114* are irrevocable. See also Bosnia and Herzegovina Const. (1995), art. X2; Honduras Const. (1982), art. 374; Niger Const. (2010), Art. 177; Rwanda Const. (2003), art. 193.

Figure 1: Typology of constitutions with regard to their reformability



In constitutions with recurrent review mechanisms, an opportunity for reflection about the constitution is incorporated in the text of the constitution. At fixed intervals, a review has to be conducted either automatically (type A), or the demos has to be asked if such a review should be taking place (type B). There is only a small number of constitutional clauses that prescribe a predetermined, *automatic* review (type A).[17] Type B is more frequent. Fourteen American states, possibly inspired by Jefferson, require the legislature to regularly consult the people about whether to call a constitutional convention (Martineau 1970). Eight states consult the people every 20 years; one state holds a vote every sixteen years; four states vote every ten years; and one state votes every nine years (Elkins/Ginsburg/Melton 2009, 13).

The idea behind recurrent reform commissions is in line with the principles of intergenerational justice. Constitutions should prescribe a time for their own revision. This would make the voices of succeeding generations heard from time to time by opening a window of opportunity. If a constitution is too difficult to change, the dead wield power over the living, and the past rules over the present.[18] Elkins, Ginsburg and Melton draw an interesting analogy: "The return to the well of contemporary popular sovereignty is mirrored in the periodic ritual of elections. The critical difference is that elections renew the personnel that fill government posts, not their powers or even

[17] Actual examples on a national level are Micronesia's constitution (art. 12, 2) or Papua New Guinea's (art. 260). Iraq's 2005 constitution calls in art. 137 for a one-time special committee to propose amendments, a feature designed to correct errors in the initial bargaining process.

[18] More precisely, those who were of voting age at the time the constitution was adopted bind those who were not of voting age then because they were too young, and those not even born, at that point in time.

the existence of the post themselves. Many states have adopted limits on the number of terms that a representative can serve, responding to popular frustration with the advantages of the incumbency. Like expiration dates for laws, limits on terms strike a difficult balance between two threats of representation: the inertial power of the status quo and the illiberalism of forbidding the continuation of the status quo. [...] Presumably, Jefferson contemplated only a new round of deliberation, not one that would have prevented the electorate or their delegates from sustaining the old constitution by popular acclaim" Elkins/Ginsburg/Melton 2009, 14). No matter which interpretation of Jefferson's writings is correct, sunset constitutions would indeed be indefensible, but "endurance-by-default" constitutions with recurring reform commissions are a different matter altogether.

5. Generational turning points

How long should the fixed time intervals between two succeeding commissions be? The general principle is: The reform commission should be convened as soon as the point is reached at which the citizens of a country are subjected to a constitution in which the majority of them could not participate because they were not yet born or eligible for voting at the time of its adoption. This date can be dubbed "generational turning point". One can calculate the point in time if the following demographic data is known for a specific country:

1. The number of citizens eligible to vote in the base year x of the constitutional adoption (=constituent generation).
2. the number of citizens who reached voting age in the years x+1, x+2, ..., x+n and thus became a new part of the demos.[19]
3. the number of members of the constituent generation who died in the years x+1, x+2, ..., x+n

5.1 Germany

For each country, one arrives at different time periods until the next GTP depending on its population structure and the minimum voting age. Applied to Germany, it is assumed below that the Joint Constitutional Commission of the Federation and the Länder carried out the last major reform of the Basic Law in 1994. This commission was established soon after German unification and it subjected the Basic Law to the greatest revision since its adoption. Accordingly, 1994 is the base year x and at that time there were 60,452,009 eligible voters in Germany (75 percent of the total population at that time).

This "constituent demos" figure is now being changed from two sides: first, its members are dying off; second, members of the succeeding cohorts are reaching the age of majority and thus becoming citizens.

[19] If migration is factored in, the variable "*naturalised immigrants (above the voting age) in the years x+1, x+2, ..., x+n*" adds to the part of the population who are citizens of a country without having had the chance to consent to the constitution. But one can argue that by applying for naturalisation, these people have consented to the constitution of their new home country.

Table 1: Generational Turning Point for Germany

Year	Survivers of the constituent demos (on 1 Jan of each year)	New citizens (newly eligible people)	Deaths in the demos of 1994	Share of new citizens in the demos of the current year	Cumulated	Years passed since last constitutional convention or reform commission
1994	60.452.009	798.334	663.496	1,32	1,32	1
1995	59.788.513	805.496	663.496	1,35	2,67	2
1996	59.125.017	808.619	663.496	1,37	4,04	3
1997	58.461.521	817.217	663.496	1,40	5,43	4
1998	57.798.025	865.789	663.496	1,50	6,93	5
1999	57.134.529	862.100	663.496	1,51	8,44	6
2000	56.471.033	861.275	663.496	1,53	9,97	7
2001	55.807.537	827.933	663.496	1,48	11,45	8
2002	55.144.041	812.292	663.496	1,47	12,92	9
2003	54.480.545	813.803	663.496	1,49	14,42	10
2004	53.817.049	848.232	663.496	1,58	15,99	11
2005	53.153.553	867.969	663.496	1,63	17,62	12
2006	52.490.057	892.993	663.496	1,70	19,33	13
2007	51.826.561	880.459	663.496	1,70	21,02	14
2008	51.163.065	905.675	663.496	1,77	22,80	15
2009	50.499.569	830.019	663.496	1,64	24,44	16
2010	49.836.073	809.114	663.496	1,62	26,06	17
2011	49.172.577	798.447	663.496	1,62	27,69	18
2012	48.509.081	769.603	663.496	1,59	29,27	19
2013	47.845.585	765.221	663.496	1,60	30,87	20
2014	47.182.089	796.013	663.496	1,69	32,56	21
2015	46.518.593	812.173	663.496	1,75	34,30	22
2016	45.855.097	785.034	663.496	1,71	36,02	23
2017	45.191.601	770.744	663.496	1,71	37,72	24
2018	44.528.105	766.999	663.496	1,72	39,44	25
2019	43.864.609	734.475	663.496	1,67	41,12	26
2020	43.201.113	719.250	663.496	1,66	42,78	27
2021	42.537.617	706.721	663.496	1,66	44,45	28
…	…	…	…	…	…	…
2025	…	…	…	…	**50**	**32**

A reform commission should be convened once the generational turning point is reached. Given the current demographics in Germany, this will be every 32 years or so, next time in 2025. It can be significantly shorter in other countries depending on their demographic structure. The GTP is independent from the outcome of an attempted constitutional reform. It the Bundestag and the Bundesrat had not approved the changes to the constitution that were proposed 1994, the principle of generational sovereignty would have nevertheless been recognised. The next GTP with regard to the German constitution would still be around 2025.

5.2 Italy

The Italian constitution seems to be the only one in Europe, or maybe worldwide, which has a bicameral system with the absolute equality of the two chambers of parliament. All other countries have opted for different systems, namely a unicameral system or a bicameral system in which the two chambers have different tasks which do not fully overlap. So maybe some reform will be attempted again sooner or later here, which might make my theory more topical for Italy than for other countries.

The generational turning point and thus the time frame when a constitution becomes tyrannical is independent from the outcome of the previous attempted constitutional reform. The Italian example is a case in point. In December 2016, the people was asked whether or not to approve the "Renzi reform" constitutional law, it would have achieved the most extensive constitutional reform in Italy since the end of the monarchy, substantially influencing the organisation of the Parliament. The "people of 2016" have had their say. 50,773,284 Italians (at home and abroad) were eligible for voting, almost 80% of the total population at that time.[20] This generation had the choice of voting either "yes" or a "no" and in 2016 it was a "no". The next generational turning point – the point at which the citizens of Italy are subjected to a constitution in which the majority of them could not participate – is reached around 32 years later if Italy's current demographic development continues. Put differently: The vote of 2016 makes the current Italian constitution a non-tyrannical constitution until around 2048 from a generational point of view.[21]

A recurrent review mechanism, which is in fact not inscribed into the Italian constitution, would put constitutional review on the agenda from time to time and thereby open up a window of opportunity. Of course, windows of opportunity may also be opened up by other developments. *Spontaneous* dissent may always lead to constitutional change. My proposal would bring constitutional reform back on the Italian agenda around 2048 *at the latest*. But it does not foreclose the possibility that a constitutional reform is discussed earlier, say 2025, 2029, 2035 or 2040. There is a continuum with "normal" constitutional changes (mostly only one article) which happen every year, and the "greater" constitutional changes that a reform commission at a generational turning point could propose. The Italian constitutional reform project of 2016 was a about a *package* of constitutional changes, and it failed. But nevertheless "normal" improvements of the constitution went on since then. For instance, in February 2022 a reformed article 9 of the Italian constitution came into forth. It added the protection of the environment, biodiversity and ecosystems to the already existing promotion of the development of culture and scientific and technical research and the conservation of the historical and artistic heritage of Italy (Menga 2022).

[20] https://elezionistorico.interno.gov.it; https://www.istat.it/it/archivio/197435. I am grateful to Ferdinando Menga for pointing me at these figures.

[21] Imagine that ten reform commissions were installed in 300 years, each one presenting a proposal to the contemporary people. If this would be regarded as a normal course of events, then no one would call it a failure if some of these ten reform commissions presented only minor proposals, or if one citizenry would not adopt the proposals of "their" generation's reform commission. Each time the citizenry would still have had their say. Each generation could be called sovereign as it would have a realistic chance to live under constitutional provisions of their own choosing.

Conversely, we should be aware of the fact that "Institutions are sticky, and constitutions are the stickiest of them" (Elkins/Ginsburg/Melton 2009, 3). Without any self-revisionary clause, the next improvement debate might be put off too long.

5.2 Some more thoughts on regular reform commissions

Many legal scholars cherish the idea that democratic and liberal states should have an explicit constitutional supremacy, which serves the goal of limiting the rule of the (temporary) majority and protecting and protect minorities by establishing binding procedures and an institutional system of an institutional system of co-decision-makers and control bodies, as well as protected individual rights (Heber 2017).To be very clear: A constitutional reform commission is not a constitutional convention. The mandate of the latter would be to draft a new constitution of a piece, a monolithic and integral new document. In a way, constitutional conventions found a country anew. A reform commission, on the contrary, has the task of making proposals for the adoption/change/abolition of single clauses. This excludes the danger that a generation could end up without any constitution at all.

It is very likely that such a flexible mechanism for constitutional change would increase the endurance of the very constitution. One of Elkins et al.'s key findings is that flexibility (defined as the constitution's ability to adjust to changing circumstances captured in the empirical analysis by the ease of formal and informal amendment, either informally via constitutional construction by the courts or via formal amendment procedures by the legislature) is positively correlated with the endurance of a constitution (Elkins/Ginsburg/Melton 2009, 76). Likewise, the inclusiveness of a constitution (defined as the degree to which the constitution includes relevant social and political actors taking into account that time will change which societal groups will have a stake in the endurance of the constitution) is positively correlated with its stability over time. The life expectancy of the least inclusive constitution is a full 55 years less than the most inclusive constitution (14 years v. 69 years).

7. Pros and cons of "(very) difficult to change" constitutions

There can be no doubt: constitutions are great inventions in the history of humankind. But this in itself does not defend "very difficult to change" constitutions. Are they defendable at all? Here are some arguments that have been brought forward on their behalf:

7.1) It is a good thing that constitutions shield certain matters from capricious everyday politics. Contentious issues must be silenced at some point in order to secure peaceful co-operation and fellowship among all citizens.[22]

Usually, democratic societies do not shy away from debate and deliberation.[23] Participatory democracy even aims at involving people actively in politics. Therefore, the burden of proof lies with those who argue in favour of the avoidance of open debates.

[22] Madison elaborated on this point in the *Federalist Papers*, No. 49. We should "recollect," he says, "that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord."

[23] According to Roznai (2015, 22) it is a risky strategy to use constitutions as "gag devices" since "whatever is silenced might explode in the future." See also Holmes 1993, 19.

I concede that the "silencing argument" is convincing enough to counsel against constitutional reform commissions that are established at very short intervals, e.g. every five years or so, but not against recurring commissions every 25-35 years. Once within a whole generational cycle, the "risk" of high public engagement and fierce debates seems bearable. Moreover, as long as the debated question is it not "this constitution, or an alternative" but just single provisions of the constitution in place, the conflict will be manageable.

Veneration for constitutions (and constitution-making events) should not obscure the fact that each constitution is man-made. Drawing on the common division between polity, policy and politics, constitutions are usually regarded as part of *polity*. This view neglects that constitutions (like all other political institutions) are "clotted" *politics*. Before they came into existence, politicking happened. As Pitkin (1987, 168) writes: "[C]onstitutions are *made*, not found. They do not fall miraculously from the sky or grow naturally on the vine; they are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose."

The concern with the silencing argument is that onerous amendment procedures undermine the participatory values that give constitution-making its meaning. Highly-esteemed values such as "the rule of the people" or "popular sovereignty" become meaningless if the present demos cannot change certain constitutional clauses for the simple reason that their forefathers wanted to leave an immovable imprint in history. Arguably, the Second Amendment to the United States constitution is a case in point. It protects the right of citizens to keep and bear arms ("a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.") Comparative studies have shown that the percentage of people killed in gun incidents is much higher in the US than in culturally similar countries where citizens do not have a constitutional right to bear arms, such as Canada. Arguably, if the Second Amendment were abolished, the death toll of the present and all succeeding generations of US citizens could be reduced.

7.2) As constitutions entrench democratic rules and fundamental rights against their abolition, they make it more likely for succeeding generations to live under those rules and to enjoy these rights and liberties. Constitutions are thus devices to ensure intergenerational justice.

It is certainly true that fundamental rights and liberties are a boon for present and future individuals. Fundamental rights are not only enshrined in international documents such as the *United Nations Declaration of Human Rights* or the *European Convention for the Protection of Human Rights and Fundamental Freedoms* but, selectively, also in national constitutions.[24] One of these fundamental rights in a number of constitutions is the right to freely exercise one's religion. Freedom of religion implies that there is no state religion, since a religion imposed by a government would discriminate against both citizens of a different faith and citizens who are agnostics or atheists. According to the devotees of very rigid constitutions, the fact that freedom of religion is enshrined "in constitutions" seems to support the conjecture that national constitutions are defenders of human rights. But the debate is usually led with a parochial bias: the constitutions of some Western states feature very prominently in it, but then the derived conclusion (namely, that only cumbersome procedures of constitution-amending are intergenerationally just) is more or less generalized to *all* constitutions of the world. Based on some single-case studies of Western constitutions, it is concluded that rigid

[24] Historically, the first guarantors of human rights were states (guaranteeing rights for their respective citizens), but international treaties today play an equal, if not more important role in protecting human rights.

constitutions per se are beneficial. It should not go unnoticed that 96% of national states today have a constitution (Rasch/Congleton 2006, 340). But of all states, only 12.6% (home to only 6.4% of the world population) can be classified as "full democracies".[25] Taking a global view, one cannot ignore the fact that almost all semi-democratic and authoritarian states are constitutionalised states. Ignore the West, and the relation between constitutionalism, liberal values and democracy is quite different from that depicted in textbooks, which usually state that constitutions are a tool to limit governmental power. The doctrine of supremacy of the constitutional principles postulates that "there is a constitutional core of consolidated principles, which cannot be changed, not even through the formal process of constitutional amendment" (Chiassoni 2011: 329). This might be a blessing or a curse, depending on context. When constitutional provisions protect the rights of a monarch, the principle of inherited rules and succession to the throne, they serve as a mechanism to preserve the existing power of the rulers rather than to limit it (cf. Roznai 2015, 15).

In many authoritarian settings, constitutions protect the political order without protecting human rights and liberties. Some constitutional clauses are directly disjunctive to fundamental human rights. For instance: several constitutions in Islamic countries enshrine the primacy of Islam, sometimes even with entrenching provisions.[26] By fusing religion into the branches of government, these constitutional clauses defy the principle of religious freedom and thus contradict that particular basic human right. Yet these examples are often ignored when legal scholars assert that constitutions are defenders of human rights and liberties. With regard to international comparisons, it is high time that the mainstream focused more on constitutionalism in authoritarian settings (notable exceptions are Dowdle/Willkinson 2017; Ginsburg/Simpser 2014; Svolik 2012; Brown 2001).

7.3) No long-term private investment of time and capital will occur if there is no reasonable certainty of reaping its reward. Constitutions may reduce uncertainty – assuring for instance, the performance of contracts and securing the rights to property. A system in which the constitution and the laws are self-expiring or too easy to change will increase uncertainty about the future and undercut most long-term private investments.

The endurance of a constitution must not be equated with the endurance of ordinary laws. Even though laws have a more modest claim than constitutions, their longevity (at least in some areas) is often greater. France, for instance, has seen no less than 15 constitutions come and go, yet the French Code Civil of 1805 has endured unaltered "[w]hether the French government has been imperial, republican, or fascist" (Elkins/Ginsburg/Melton 2009, 76). The same is true, by analogy, of the *Bürgerliches Gesetzbuch* in Germany, which came into effect on 1 January 1900.

7.4) No difficult-to-change constitution, however constructed, can survive revolution. Even a constitution full of irrevocable clauses will be swept away if a new generation wants to replace it.

In parts of the literature, it is sometimes light-heartedly asserted that succeeding generations are always free to abandon the constitutional order they inherited – by means of a revolution. From this, the conclusion is drawn that there is no intergenerational injustice in including irrevocable (or very difficult to change) content in constitutions. But this is a cynical argument, since it devalues human

[25] According to the "Democracy Index" 12.6% of all countries are "full democracies" and another 31.7% are "flawed democracies"; see Economist Intelligence Unit 2021. Of course, "democracy" is a highly contested concept. For a different definition of the term, and thus a different count, see Bertelsmann Stiftung 2016.
[26] Iran, Algeria and Afghanistan use irrevocable provisions to make it impossible for all succeeding generations to disestablish Islam as a state religion.

lives. Historically, revolutions were often followed by periods of unrest and civil war, and they usually brought about a lot of casualties and massive suffering for a large share of the population. There should be easier ways for succeeding generations to get rid of an outdated constitutional legacy.

Iran might be a modern case in point. The irrevocability of some key provisions[27] makes it very difficult for the succeeding generations in Iran to get rid of any of the illiberal provisions of their constitution of 1979. When "their" constitution was enacted almost 40 years ago, the majority of the people living in this country today were not even born. Now the youth has the choice between the devil and the deep blue sea. A revolution would give them the opportunity to replace the Iranian constitution, but during a revolution many Iranians could lose their lives in prisons and be tortured and killed. In fact, starting in 2009, Iran was repeatedly the scene of vigorous youth revolts. Millions of young people took to the streets when waging the so-called Green Revolution against the rigged election of Ahmadinejad and soon against the whole illiberal theocratic political system that is protected by the present constitution. And the outcome? The subsequent youth revolutions were repressed with sheer brutality, and failed to change the political system.

7.5) There are more checks and balances against short-term passions in older constitutions.

Since Madison, the defenders of very rigid constitutions have been arguing that their content must be protected against changes by successive generations that are motived by irrationality and presentism. The resounding assertion that later generations will pander to their "passions" and short-term interests can be countered by pointing at an interesting development in constitution-amending worldwide. The growing sense of a responsibility for succeeding generations, arguably a moral progress, has materialised in constitutional clauses, especially when constitutions were not too difficult to change. Many constitutions which have been adopted or amended in the last few decades address the aim of long-term thinking by referring specifically to the rights of future people or the duties of today's citizenry towards posterity. These newly inserted clauses may be termed "posterity protection provisions" (PPP).[28] Thematically, most of these clauses fall into one of the following three categories: general PPPs, ecological PPPs and financial PPPs (Tremmel 2006, 190; 2009, 57). Examples for financial PPPs are the "debt brakes" recently adopted by several European countries. The constitution of Poland, for instance, limits the level of national public debt to three-fifths of GDP.[29] Even more frequently, environmental PPPs have seen the light of day. Using the Constitute Project's database, Dirth (2018) has scrutinized environmental posterity protection provisions and more general provisions about sustainable development in all the constitutions of the world. She found that 120 countries' constitutions make some reference to this. She categorized these provisions into a) individual rights to a healthy environment (74 cases), b) non-binding environmental clauses (58), c) explicit mention of future generations (37), d) explicit mention of the *right* of future generations to

[27] Article 177 (of the revised constitution) states: "The contents of the Articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the wilayat al-'mr; the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran [Islam] and the school [Twelver Ja'fari] are unalterable."

[28] Clauses that are designed only for the purpose of protecting future generations and their respective interests are termed "intergenerational constitutional provisions" by González-Ricoy (2016b) and "posterity provisions" by Ekeli (2007). But I think these two terms are ambiguous, since basically *all* clauses of a constitution reach into the future and are thus in a certain way "intergenerational" or "related to posterity". Therefore, I deem "posterity protection provisions" a clearer term for this very special kind of clause.

[29] Constitution of Poland (1997), art. 216 IV.

the environment (7)[30], e) more elaborate legal provisions (33), f) clauses enabling further legal or policy frameworks to develop (46), and finally g) citizens' responsibility clauses (59). Most of the environmental PPPs are enshrined as individual rights; this follows the rationale that protecting the environment for today's generations is also good for future generations. Some others are enshrined as statements of public policy, often in preambles, and hence function as a guide for public policy-making. These environmental PPPs formulate an obligation of the state, as they are based on the assumption that there is a potential conflict of interests between present and future generations because of the fact that today's generations can benefit by burdening future generations. These provisions usually mention future generations explicitly and underline the state's responsibility to them.

The literature on PPPs, especially those that constitutionalise "green rights", is abundant.[31] The important point for our context is that most of these clauses have been adopted just recently. Cho and Pedersen mention a time span of 25 to 30 years,[32] which is roughly equivalent to the time span in which the vulnerability of the environment came to the fore in public and scientific debate. Dirth (2018, 49) also mentions this time-related point: "Firstly, there are more examples of constitutions from newer states, and these examples tend to include greater levels of detail and more legally enforceable rights and language." This contradicts the hypothesis that there is more rationality and more foresight in older constitutions. It refutes the claim of the proponents of perpetual or "difficult-to-change" constitutions that the succeeding generations will give more leeway to passion than to wisdom in "their" rounds of constitutionalism.

Paternalistic constitution-making rests on the assumption that the framers of a constitution are in a position to identify and represent the general interest – forever. It was shown in the section above that this assumption does not hold, either theoretically or empirically. It is extremely unlikely that the interests and preferences of a group of contemporary adults[33] can be better identified by their forefathers than by the affected group itself. The paternalistic conception that men understand women's needs better than women themselves was successfully rejected by women during their long battle for the right to vote. Unlike the founding fathers of the American constitution, we reject the idea that the interests of Afro-American slaves could be adequately represented by their white masters. That citizens themselves best understand their own interests is a generally accepted principle in contemporary political theory for sound reasons.

A framers' generation should be aware of their own fallibility. It is nothing less than hubris for a generation to pretend to be able to determine which institutions will be the most appropriate for a

[30] Art. L 110 b Const. of Norway, of 1992; art. 7 Bolivian Const., of 2002; art. 35 Const. of Morocco, of 2011; art. 39 Const. of Angola, of 2010; art. 32 of the Const. of Egypt, of 2014; art. 13 Const. of Malawi, of 1994 and art. 50 Const. of Iran, of 1979.

[31] Brandl and Bungert 1992; Cho and Pedersen 2013; Dirth 2018; Ekeli 2007; Gonzalez-Ricoy 2016a and 2016b; Hayward 2005; Hiskes 2009; MacKenzie 2016; May and Daly 2014; Tremmel 2006.

[32] Cho/Pedersen 2013: 435. Some dates for the insertion of such provisions: Estonia 1992 (preamble); Czech Republic 1992 (preamble and art. 7); Poland 1997 (preamble and art. 74); Switzerland (preamble and art. 73) 1999/2002; Ukraine 1996 (preamble); Argentina 1994 (art. 41); Brazil 1988 (art. 225); Finland 1999 (art. 20); Germany 1994 (art. 20a); France 2004 (Charter for the environment); Hungary 1989 (art. 15); Netherlands 1987 (art. 21); Latvia 1998 (art. 115); Lithuania 1992 (art. 54); Portugal 1976 (art. 66); Slovakia 1992 (art. 44); Slovenia 1991 (art. 72); South Africa 1994 (art. 24); Spain 1978 (art. 45); Sweden 1976 (art. 1); Uruguay 2004 (art. 47); Bolivia 2002 (art. 7); Norway 1992 (L 110 b) etc. One hardly finds any PPPs in constitutions that were adopted before the Second World War.

[33] Paternalism with regard to children is a different issue that is not discussed here.

future they cannot know.[34] The future is unknown to every present generation. New worldwide trends that give rise to the need for reform of the constitutional state can come to the fore anytime (cf. Häberle 2000, 84-6). Take for instance the ecological crisis. Prompted by humanity's unprecedented ability to influence its geophysical surroundings, scientists have recently begun to speak of the beginning of a new geological period, the Anthropocene.[35] The conditions in which people live now in the Anthropocene are, in fact, very different to those of the Holocene.

If one generation entrenches irrevocably rules and systems of government, they mistrust the sense of judgement of their successors. But why should a father mistrust his adult son? Why a mother her adult daughter? Under the shared premise of all generations that the future is insecure, every framers' generation should *offer* a constitutional content to its successors, not try to force it upon its children and grandchildren.

Similar to changing circumstances, a change in the values of a people can justify a revision of a constitution. What can be said about value change generally – that is, not with regard to a specific people, but about all peoples? If all men were angels, then maybe constitutions would be unnecessary at all.[36] Men are no angels and will never be. While there is no consensus as to whether or not humankind has progressed morally since ancient times, some theorists do see some kind of moral progress at work (e.g. Singer 2011; Pinker 2018). If they are right, the argument of justified paternalism loses further ground. Jefferson himself expressed his belief in the progress of the human mind in a letter to Samuel Kercheval dated 12 July 1816:

"I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand *with the progress of the human mind* [my emphasis]. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times" (Jefferson 1905, 11–2; emphasis mine).

Moral progress might be expected to materialise in constitutional evolvement, unless stunted by onerous constitution-amending mechanisms. The insertion of PPPs in constitutions can be regarded

[34] The Second amendment of the US Constitution is a case in point: With changing circumstances and technological advances the impact of the Second Amendment has altered dramatically over time: a muzzle-loading musket is not the same as an AK-47 assault rifle, after all. The Second Amendment is also a case in point against the hope that the doctrine of a "living constitution" as proclaimed by scholars like David Strauss (2010) will soon materialise in the USA. The US Supreme Court has *not* taken into account changing values and circumstances when interpreting key constitutional phrases. In *District of Columbia v. Heller* (2008), the Supreme Court handed down a landmark decision holding that the Second Amendment protects an *individual right* to possess and carry firearms. In *McDonald v. Chicago* (2010), the court clarified its earlier decisions that limited the amendment's impact to a restriction on the federal government. In *Caetano v. Massachusetts* (2016), the court reiterated its earlier rulings that the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding, and that its protection is not limited to only those weapons useful in warfare.

[35] The term 'anthropocene' was coined by the ecologist Eugene F. Stoermer and effectively elaborated on by the climate researcher and Nobel Prize winner Paul Crutzen. At the 35th International Geological Congress in Cape Town (September 2016), the members of the subcommission voted almost unanimously in favor of changing the classification of geological epochs and of declaring a new world age – the Anthropocene.

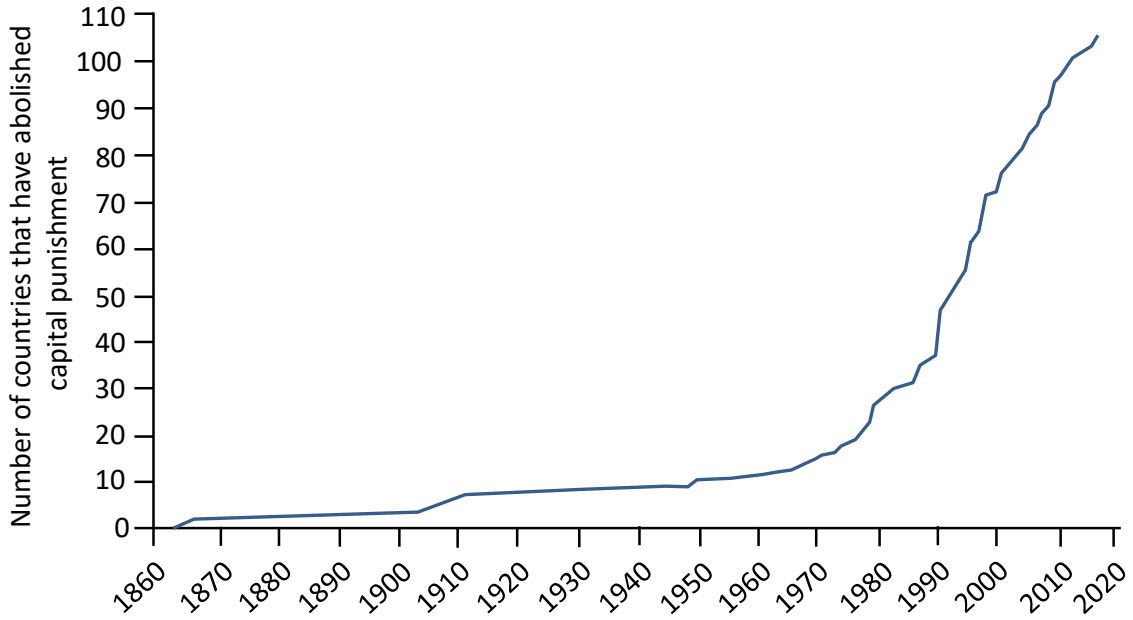
[36] Cf. Federalist Paper no. 51: "If men were angels, no government would be necessary."

as a sign of moral progress, since these provisions are guided by an impartial concern for the common good in the long term.

Recently, Steven Pinker (2018) has compiled remarkable data on the thesis of moral progress. One of his examples is the abolition of state death penalty.[37] Capital punishment was once applied to hundreds of misdemeanours in gruesome, public spectacles of torture and humiliation. After the Enlightenment, this extreme form of violence by the state against its citizens was abolished for all but the most serious crimes in European countries. When the Universal Declaration of Human Rights inaugurated a second humanitarian revolution 70 years ago, capital punishment was abolished in several countries altogether, especially after the 1970ies, as figure 2 shows. Moreover, while many countries retain capital punishment in their law books, less than a fifth of all nations actually continue to execute people.

[37] Pinker 2018, part II (progress), chapter 14 (democracy).

Figure 2: Death penalty abolitions, 1863–2016 (number of countries).



Source: Pinker 2018, figure 14-3.

What's the upshot of this section? The arguments discussed above are not entirely wrong, but not as convincing as their rejoinders. As often, the truth lies somewhere in the middle. Constitutions may aggregate and cyrstallise the disparate needs, demands and aspirations of citizens at a certain point of their shared history. This is most obvious if constitutions are enacted in the rush that follows a revolution (cf. Albert 2010, 673). But decisions for rigid constitutional change mechanisms made in such constitutional moments may undermine democracy in the long run as it is the *repeated* act of deliberation, reflection and ultimately choosing that gives democracy its meaning.

6. Flexibility might increase endurance

6.1 A thought experiment

What decides the endurance of a constitution: its internal design or the course of a country's history that might be more or less tumultuous? For a long time, and maybe still today, the prevailing view is that external historical "shocks", such as crises, wars, disasters and the like, are the main explanatory factors for the birth of new constitutions and the death of their predecessors. In this view, their internal design – whether they have many entrenching clauses or none, or whether a four-fifths supermajority is needed for constitutional change or a two-thirds supermajority – is merely epiphenomenal. Having analyzed each and every constitution written since 1789,[38] Elkins et al

[38] Their dataset from the Comparative Constitutions Project covered the constitutional history of every independent state from 1789 to 2005, altogether 935 constitutions for more than 200 different states – the complete universe of cases, not just a sample.

concluded that the social histories of countries are less significant than previously thought. Their central point is: design choices matter.[39]

The intuition that flexibility increases endurance can be made plausible by two thought experiments.

> As a first thought experiment, let us imagine that in a newly formed nation a constitutional convention adopts a constitution. In this constitution, the very last provision stipulates that no single clause of the constitution be changed or abolished for a time period of 300 years. After that time period, constitutional changes are possible by a supermajority of 75% of the members of parliament.

In this scenario, the framers of a constitution impose their will on subsequent generations and leave an immovable imprint for a limited, but quite long time period. Those born in the next three centuries are expected to acquiesce to the norms of this constitution without their consent.
Here is a second, slightly changed version of the thought experiment.

> In another nation, the framers of a newly-formed constitution install a review provision which stipulates that, instead of leaving all constitutional clauses unchanged for 300 years, each generation can have a reform commission and revise the constitution, albeit without changing its general spirit. It further stipulates that after 300 years the whole constitution can be replaced by a completely new document if the then-demos decides to do so.

Which constitution is more likely to be repealed entirely after 300 years: the one with the 300 year-old content due to the entrenched embargo by the framers' generation, or the one that has been updated by each generation (who wanted to do this) in the last 300 years? In the first scenario, the citizens have been hindered from exercising the *pouvoir constituant* for a long time, whereas in the second scenario no generation was shut out of *their* project of constitutionalism. Even if not all installed review commissions actually did lead to constitutional changes or amendments, all generations have had their say. In this second version of the thought experiment, 300 years after the initial formulation of the constitution a revolution will be unnecessary, given that an evolutionary process (in the form of amendments) has taken place.
In the influential constitution-making account of the US legal scholar Bruce Ackerman, constitutional amendment is the upshot of a slow-motion and spontaneous process whereby activists manage to place certain requests on the constitutional agenda, which results in increasingly intense popular engagement and deliberation and, if successful, in a change of the constitution (Ackerman 1991). Presumably, the worry is that, if this incremental process is omitted by externally mandating that a constitutional commission with the ability to set the agenda for reform be regularly set up, the upshot of the amendment process, even if supported by majority vote, might lack the deliberative and participatory pedigree that renders democratic constitutions particularly legitimate.
The difficulty of constitutional amendments is in line with Ackerman's (1991, 6) concept of a dualist democracy: "Decisions by the People occur rarely, and under special constitutional decisions. Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed

[39] Elkins/Ginsburg/Melton 2009, 10.

initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for 'higher lawmaking' [...]. Decisions made by the government occur daily, and also under special conditions. [...] Even when this system of 'normal lawmaking' is operating well, however, the dualist Constitution prevents elected politicians from exaggerating their authority. They are not to assert that a normal electoral victory has given them a mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People. If they wish to claim this higher form of democratic legitimacy, they must take to the specially onerous obstacle course provided by the dualist Constitution for purposes of higher lawmaking."

While I do not dissent from the idea that constitutions should be more difficult to change than ordinary laws, I do not take this premise to imply that the bar should be raised extremely high for reformers. How homogenous is the "We" in "We the People", after all? If it is usually quite inhomogeneous, then what is the best way to deal with this inhomogeneity? With regard the US constitution, Ackerman acknowledges the selectivity of the activists in 1787/1789.[40] Why should the vote of the now-deceased activists that managed to frame a constitution count way more than the vote of the activists of today? And can we simply presume that earlier generations' views still find support among the contemporary "We the People"? At this point of the discussion, it is time to take a closer look at a key concept here that has been ignored so far: tacit consent.

6.2 What kind of consent is "tacit consent"?

The "tacit consent" concept implies that as long as there is no voiced and open opposition by a majority against a constitution (or some of its clauses), it enjoys the support of the demos. Those who don't articulate their dissent are counted as supporters for the status quo.[41] John Locke was one of the classical proponents of the idea that individuals as free agents enter into consensual relationships with other free agents, and that this becomes the basis for political governance. As approval to this contract is not voiced explicitly, Locke adds the notion of tacit consent.[42] Otsuka (2003, 95-105) specifies the Lockean argument for tacit consent by adding that tacit consent can be presumed only when an individual has a realistic opportunity to exit the political society in which he is currently residing.

[40] "When Madison and the rest drafted the Constitution in the name of the people, they spoke for a million white male planters and merchants, farmers and mechanics, who were just beginning to assert the independence of the Eastern Seaboard." (Ackerman 1991,35).

[41] For a comprehensive account of different kinds of consent, see Simmons 1979, 75-100.

[42] "There is a common distinction of an express and a tacit consent, which will concern our present case. Nobody doubts but an express consent of any man, entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds—i.e., how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it, whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and, in effect, it reaches as far as very being of any one within the territories of that government" (Locke 1823, "Essay Two," chap. VIII, § 119, p. 157).

In the history of legal thought, the argument of tacit consent has often been invoked. It seems to provide a splendid justification for leaving constitutions unchanged for very long periods of time. However, tacit consent as an argument might not reach all that far.

In a pluralistic society, you never have unanimous support for a constitution. There are always some dissenters who want to change this or that constitutional provision. In practice, tacit consent is a *gradual* concept. Leaving aside those who flee the country, because they don't want to live under certain constitutional provisions any longer, and leaving aside those who express open dissent with some constitutional provisions, you have a lot of people who are silent. Whether this is a majority or a minority is not revealed as long as there is no decision-making on the agenda. It is thereby important to understand that the failure of *success* of the open dissenters is not a criterion of the legitimacy of certain constitutional provisions. Let's imagine a constitution to be changeable by direct rule of the people, that is: referenda without parliamentarian intervention, by a supermajority of 75%. Assume, for the sake of argument, that a lot of citizens are unhappy with one clause in the constitution, the right to bear arms in public. Let's assume the dissent varied in the past one hundred years, ranging from 67% to 74%. The dissenters in this scenario would in all these years be unsuccessful in abolishing this clause; but it would be false to say that the clause enjoyed "the tacit consent of the people". But to claim that constitutions generally do not enjoy the support of the citizenship would also be inaccurate. What is correct is that there is constant call for reform which sometimes becomes louder, sometimes less loud, but never ceases. And even if the government tries to silence it, as is often the case in authoritarian regimes, it is still there. The desire of a part of a nation's citizenry to modify their constitution as they learn about unintended, unexpected and unwanted consequences is ubiquitous in a globalised and interconnected world.

Let's apply Ackerman's argument to two peoples and their constitutions: the US Americans and the Norwegians. In the US, only a very low number, 27 proposals, have been ratified and became part of the Constitution. The first ten amendments were adopted and ratified simultaneously and are known collectively as the Bill of Rights. Counting the Bill of Rights as *one* change, the US Constitution has experienced only 18 changes in 230 years. In comparison, the Norwegian constitution, also one of the oldest in the world, has been changed 200 times since it came into existence on 17 May, 1814.

As mentioned, article 5 of the US constitution sets a very strict change mechanism for the rest of the US constitution's provisions. In comparison, Norway's constitution has only moderately strict amendment procedures. And, for good reasons, the amendment clause of Norway's constitution[43] brings "experience" into play ("If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended,...").

There is no evidence that succeeding generations of the American people may be less inclined to change the constitution than succeeding generations of Norwegians. In the US, individual members

[43] Article 121 (Constitution amendment procedure): "If experience shows that any part of this Constitution of the Kingdom of Norway ought to be amended, the proposal to this effect shall be submitted to the first, second or third Storting after a new General Election and be publicly announced in print. But it shall be left to the first, second or third Storting after the following General Election to decide whether or not the proposed amendment shall be adopted. Such 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."

of the House and Senate *propose* around 90 amendments each year.[44] The reason outdated provisions in the US constitution[45] are not changed is not that the contemporary American people still supports them, but that reformers lack windows of opportunity to mobilise the silent (super)majority against them. The activists and pressure groups arguably act quite alike in the US and in Norway, but the variable "constitutional design" makes the difference.

Many scholars have pointed to the cognitive phenomenon called the status quo bias (Samuelson/Zeckhauser 1988; Sunstein 2000). Political institutions are sticky because human-beings are rule-following animals by nature. They are biased in favour of the social norms that already exist. This gives an anthropological explanation for the odd fact that constitutional clauses survive even when the conditions for which they were once created have obviously disappeared long ago. Ackerman's account of constitution-making does not give enough weight to the difficulties of re-deliberation. In fact, "we are endowed with a status quo bias that causes us to stick with earlier choices, often without conducting a full evaluation of the merits" (Elkins/Ginsburg/Melton 2009, 14). There is thus no even playing field for those who want to abolish outdated and problematic constitutional provisions and those who want to keep them, even if the former group is a (super)majority. Inertia plays into the hands of the existing system despite the fact that time goes on and the world changes constantly. This is why recurring review mechanisms are needed. They are a flexible and inclusive tool that can be employed to keep old constitutions young.

Provided the reform commission, as described above, makes a proposal for a more or less extensive revision of the constitution, how should it be ratified? I see no reason to stray away from the usual amendment procedure laid out in the constitution. The way a constitutional provision can be "challenged" in normal times (outside the window of opportunity of a reform commission) varies significantly from state to state. Supermajorities in parliament, referenda and intervening elections (confirmation by a double vote) are the most common amendment rules. In some countries, a minimum number of MPs is needed to trigger the procedure of constitution-amending. In some countries such as Switzerland, it can be triggered by popular initiative (for classification schemes of constitutional change procedures, see Rasch/Congleton 2006, 328-30; Elster 2000, 101; Lane 1996, 144). The proposal of the reform commission should be covered by the normal amendment rules. In fact, if an extra amendment procedure for the proposals of the reform commission would be established, the key idea would get lost. The reform commission should overview the reform requests that have been voiced by experts and citizens alike. It should crystallise popular engagement and deliberation.

[44] 11,699 measures have been proposed to amend the Constitution since 1789 (counted up to 3 January 2017). See https://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm

[45] One example for an outdated provision in the US constitution is the process for electing the US president commonly known as the Electoral College. The 12th amendment is seen by many scholars as an institution that should be reformed or abolished, see e.g. Levinson 2006. Already in 2000, the candidate with the plurality of votes, Al Gore, was prevented from becoming president by this constitutional provision. The 2016 presidential election again pointed to the problems of this institution. It allowed Donald Trump to become president without the support of the plurality of the voters, as Hillary Clinton had received 48 % of the vote, Donald Trump 46 % and others around 6%. Clinton received almost three million votes more than Trump, which is a substantial margin. The Electoral College currently employed in the USA is an institution that might have had some credibility in 1787, before most people became literate, and before the formation of modern political parties, but circumstances have changed since then.

7. Defusing the debate on the role of constitutional courts

The debate on the role of the judiciary in models of separation of powers and on the legitimacy of decisions by constitutional courts that overrule decisions by the legislative is extremely wide-ranging and cannot be addressed here in its entirety. Nevertheless, it is worthwile to briefly point out that the proposal propagated here would defuse this debate. “Whoever gave Nine Old Layers authority to overrule the judgements of democratically elected politicians?” asks Ackerman (1991, 8) rhetorically.[46] However, there is also much to be said for the position that a nation does not necessarily benefit when constitutional judges impose judicial self-restraint on themselves. It may make sense from an overarching perspective for proven legal experts with the possibility of quiet, confidential deliberation to see it as their role to question all decisions of the legislature that might violate any single clause of the constitution. Rosanvallon (2011) calls it a misunderstanding when constitutional courts are accused of being directly responsible to no one and their existence undermines the principle of popular sovereignty. In his historical analysis, he emphasizes that independent institutions must be regarded as a fundamental part of democracy as a form of government. Even in classical Athens they were regarded as a necessary correction of the majority principle. Only if a democracy recognizes the risk of its own dysfunctionality and establishes appropriate counterweights can it function in the long term (Rosanvallon 2011, 74). With regard to constitutional courts, it can be inferred from this that they are an indispensable part of a more complex understanding of democracy.

The case of judicial restraint (or the opposite, judicial activism) cannot be decided here. Rather, it should only be pointed out here that the model of “constitutional reform commissions in the generation cycle” would defuse this bitter debate. Those who call themselves representatives of people's sovereignty could rely on each newly composed demos having a realistic chance to sufficiently systematically redefine the constitutional norms under which they live. Those who call themselves constitutionalists can rely on the fact that the times at which the demos takes the constitution and thus the formation of the rules of the game into its own hands are rare and far apart.

8. Conclusion

So far, this essay has hopefully convincingly made the following points: A constitution is not a sacrosanct holy scripture. All generations should grant their successors the basic sovereign right of continuing self-definition. Every constitution-maker, our generation as much as previous and future generations, should conceive of a constitution not only as a segment of being, but also as a process of becoming. The initiation of recurrent review mechanisms is the touch-stone if we, the people wielding power today, are willing to be non-tyrannical ancestors.

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[46] Explicit criticisms of the power of the Supreme Court or of constitutional courts as a whole can be found in Hirschl 2004; Kramer 2004; Tushnet 1999 or Waldron 2001.

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