Formal Stabilization of Constitutional Law: Degrees, Techniques and Minority-Protective Effects

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Introduction: Constitutional persistence: constitutional flux

(a) Dynamic and static

While the concept of law in general is based on a certain degree of perpetuity, the idea of a constitution is inseparably connected with the idea of persistence. Constitutions are to provide a solid framework for political action thus granting stability to a political system. While factual phenomena and accordingly its perception or appreciation are constantly changing, constitutions are deemed to serve as foundation for the manner these phenomena are addressed. In order to grant stability, constitutions themselves depend on their inherent stability; a conception of dynamic constitutions in constant normative flux would not meet the requirements associated with constitutions as regulative ideas governing a political system: A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. The counter-factual character that is consequently attributed to constitutions necessarily creates tension between a system's steady framework and diverging demands based on fluctuating social phenomena.

This tension is an inherent consequence of the constitution’s function to draw a line political action must not cross; a function that may, however, only be sustained as long as the constitution still corresponds to social reality sufficiently. Just 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 reality, should their function to control political action be

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2 Still one of the most impressive discussions on how to preserve political regimes – Aristotle, Politics V.
3 See Kägi, Rechtliche Grundordnung 51.
4 Story, Commentaries II Ch XLI § 1821.
adequately adhered to.\textsuperscript{4} Otherwise constitutional requirements would turn out to become a normative corset too tight to regulate political practice reasonably any longer. Thus also a vision of a static constitution establishing normative truth may not prove to be sufficiently workable.\textsuperscript{5} 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.\textsuperscript{6}

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.\textsuperscript{7} This essay is dedicated to the quest of this principle. The way constitutions provide for these useful alterations shall be the subject of this short disquisition.

(b) Constitutive laws—constitutional law

I will start to develop my argument by distinguishing 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-posa of a certain body to alter them all likewise. If so, 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 may only be induced out of the whole corpus juris by the means of interpretation.

On the contrary legal systems can decrease the dynamic of certain provisions granting them additional stability in comparison to ordinary legislation by positively stating additional requirements to be met for their alteration. In this case a sphere of constitutional law is created by the means of formalization; the way this stabilization is achieved and the effects it yields shall be discussed below. First, however, I would like to give a basic idea of what I would like to call a "dis-positive" approach to a constitution.

The dis-positive perspective

(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\textsuperscript{9}—a remarkable statement in the view of the continental European lawyer at first glance; still comprehensible at a second: From Dicey's perspective the constitution first and foremost is characterized 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, as I may add, refraining from positively creating an elevated sphere of constitutional law beyond ordinary legislation by entrenching certain provisions considered fundamental: Parliament of today cannot fetter the Parliament of tomorrow with any sort of permanent restraints, so that entrenched provisions are impossible. That, at any rate, appears to be the view of the legal establishment.\textsuperscript{9}

The fact that some statutes define the state's very nature substantively therefore does not self-evidently entail a claim to their elevated normative authority in terms of procedural requirements; it does not constrain 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;\textsuperscript{10} formally, constitutive laws remain at the legislator's dis-posa.

(b) Flexible constitutions—normative dynamic

This lack of formal restrain, the fact that Parliament without special procedure, and by simple Act, [can alter any law at any time, however fundamental it may seem to be\textsuperscript{11} 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.\textsuperscript{12}

Following the distinction introduced above we may assess that from the perspective of formal stabilization a dis-positive approach to constitutions displays 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: Still, also a substantive perception implicates some degree of increased stability when compared to ordinary legislation dealing with normal politics simply by introducing such a

\textsuperscript{4} QWahl, Verfassungsgebung 130.
\textsuperscript{5} See, e.g., Driener, Art 79 Abs 2 Rn 11: Grimm, Verfassungsfunktion und Grundgesetzerform, 505.
\textsuperscript{6} Story, Commentaries II Cap. XLI § 1821.
\textsuperscript{7} Madison, Federalist 43.
\textsuperscript{8} See HWR Wade, Constitutional Fundamentals 24 ff. It has to be highlighted, however, that this view is not undisputed - cf e.g. for the "new approach" to Supremacy Jennings, The Law and the Constitution' 152 ff and Gordon, Foundations, 519 supporting Jennings' position as well as, for possible further developments, Ackerman, At the Crossroads.
\textsuperscript{9} Dicey, Constitution 122 ff.
\textsuperscript{10} James, Introduction to English Law\textsuperscript{2} (1889) 118.
\textsuperscript{11} Bryce, Studies in History and Jurisprudence Volume I (1901 [Reprint 2005]) 154.
distinction to the relevant discourse;\textsuperscript{13} thereby granting special status to the laws that may be considered being part of a community's foundation.\textsuperscript{14, 15} However, such an approach inherently remains political and does not provide for a formal guideline that would help us to exactly define of what laws a country's constitution is composed.\textsuperscript{16}

Consequently substance precedes form in the dis-positive approach,\textsuperscript{17} substance exclusively defines the (political and thus the normative) status a legal provision qualifies to claim.

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 harsh and fixed.\textsuperscript{18}

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.\textsuperscript{19} By drawing formal and technical distinctions between laws of different kinds,\textsuperscript{20} this conception by its very nature positively shifts the character of constitutional laws toward an increasingly static design: Irrespective of the techniques used,\textsuperscript{21} the positive elevation of certain laws compared to ordinary legislation by the means of additional requirements to be met according to a specific amendment procedure provides additional stability for laws enjoying constitutional status.

(b) Creating constitutional law

But form not only precedes substance in the positive approach to constitutional law,\textsuperscript{22} form not only defines the normative status a legal provision qualifies to claim.\textsuperscript{23} 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.\textsuperscript{24} Additionally, it is the formalized procedure that introduces the distinction between ordinary (future) legislation and constitutional law in the first place.\textsuperscript{25} The introduction of this (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 realizes and thus creates constitutional laws; a quite remarkable fact.

(c) Constitutive vs constitutional laws

(i) A "minority-protective" function. But which laws should enter this newly created sphere?\textsuperscript{26} At first glance the answer is obvious: the constitutional laws I referred to above in order to grant additional formal stability to these fundamental provisions; comforting the demand for stability when it comes to the state's foundations.\textsuperscript{27} With this approach of granting additional stability to certain legal provisions by the means of formal requirements the constitution seems secured from a random majorities' volition.\textsuperscript{28} Formally recognized constitutional laws in this regard may thus be described as minority-protective,\textsuperscript{29} evening out the problem that has been referred to by de Toqueville as "Tyranny of the Majority."\textsuperscript{30} Insulating constitutional law "from the absolutism of majority..."\textsuperscript{31}
will” by protecting it against acts that do not enjoy the same enlarged extent of political legitimacy as constitutional provisions.32

(ii) Detachment. This ideal-type description 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 these 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.33

(d) Different tiers—different weight?

The structure of amendment provisions, 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. Such systems provide 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 constitutional provisions asking for additional requirements to be met in comparison with “ordinary” constitutional legislation to be lawfully altered.34

Let me refer to some examples, in order to give an idea about the structural differences between different mechanisms for constitutional amendment.

(e) 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

32 Ackerman, Foundations 264.
33 Cf Buzek, Materiele Perspektiven 443 f.
34 See for a discussion of this phenomenon Ackerman, Foundations 15; for the continental European perspective see, for example, Pirmann, Verfassungskern 46 II, 80 f. For Austria see VStU (Collection of the Austrian Constitutional Court’s Case Law) 16,327; for Germany see BVerfGE (Collection of the German Constitutional Court’s Case Law) 109, 279.

(f) 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,35 in three different kinds:

- Amendment
- Entrenchment
- Eternity

(i) Amendment. When speaking about “Amendments” I mean to use this term in a quite narrow sense. As Amendment I understand the basic form of constitutional revision a legal system provides on a formal level. Using the term “amendment” as the basic form of altering constitutional laws, amendments feature the specific characteristic compared to entrenchments and techniques of normative eternization that they are to be defined as form-related stabilization only. This is due to the fact that these mechanisms common to all “rigid” constitutions serve as essential differentiators to the merely substantive conceptions of constitutional law, concerned with creating a sphere of constitutional law in the first place.36

(ii) 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.

(iii) Eternity. “Eternity” finally, or better: “eternization” wants to describe provisions that go beyond Entrenchment by divesting (certain aspects 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.

(g) Amendment

To perceive amendments as basic legal technique of constitutional revision 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.

With this classification comes a large difference with regard to the prerequisites necessary to conduct a constitutional amendment: just as in life

35 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.
36 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.
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.

Article 44 para 1 of the Austrian Constitution may serve as an example for the
first instance: "Constitutional laws or contained in simple laws constitutional
provisions may be by the National Council only in the presence of at least half of
the members and by a majority of two thirds of the votes cast, and are as such
("constitutional law," constitutional provision") refer to explicitly."37

These amendment requirements are rather low-threshold by their very nature.38
The dynamic inherent to the amendment procedure of Austrian constitutional law
exposes especially against the backdrop of the Austrian "Reallvassung" 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 B-
VG as the main constitutional document alone and countless other constitutional
provisions;39 The fragmentation caused by this practice has led to the metaphor
of the Austrian Constitution as "Ruini."40

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 as constitutional provision.41 Bearing this in mind the
safeguard-function of formal stabilization of constitutional law was gradually
amplified as the difference between a solely substantive conception of constitutive
laws and a formal conception of constitutional law was obliterated.42

Assessing only the relevant amendment provisions, without including specific
political constellations abetting normative dynamic, we may add, 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

37"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 44 para 2 B-VG the consent of the Federal Council (Bundesrat) is
required. Article 44 para 1 of the Austrian Constitution: "Verfassungsveränderungen oder in einfachen
Gesetzen enthaltene Verfassungsbestimmungen können vom Nationalrat mit einer 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."
38See, for example, Eberhard/Lachmayer, Constitutional Reform 112.
39See Kleindorfer, Bundesverfassungsrecht 62 and the critical account of Wiederin, Über Ruini 102.
40For the problems connected with such broad parliamentary majorities in the Austrian system see,
Kobzina, Flucht aus dem Verfassungsstaat 259 and Koenig, Verfassungsbewusstsein.
41For the gradual invalidation of the basic amendment procedure in tiered systems of constitutional
alteration infra.
42See, for example, Eberhard/Lachmayer, Constitutional Reform 112.
43See, for example, Levenson, Our Democratic Constitution 159 ff. For an alternative approach to the
amendment of the US Constitution see Amar, The Constitution of the Constitution outside Article V: For Ackerman's approach to alternative Higher Lawmaking and the
tests that have to be met in this conception see Foundations 290 ff. Transformations 15 ff; Revolution on a Human Scale 2340 ff Living Constitution 1804. For a discussion of both accounts see Torke, Extrastaat Constitution Change, 229. For one among many reform proposals see, for example,
Rappaport, Reforming Article V.
44See for the provision's relative rigidity, for example, Ackerman, Discovering the Constitution 107 note 6.
45See infra 44.
46Jellinek, Allgemeine Staatslehre 511 ff; also see Dicey, Law of the Constitution 419.
President be submitted 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.\textsuperscript{40}

When putting aside the problem of "Teiländerung" (partial revision) which is comparable to the mechanism depicted above for the Grundgesetz of Liechtenstein, for the Austrian Constitution the question of "Gesamtänderung" (total revision) remains. What we do learn from the provision cited above is that there obviously exists something called "total revision" requiring additional steps to be taken. Yet what we do not know by looking at the text is what a total revision is or better: what it is meant to be.

Two schools have evolved around that question; the first which is the minority opinion among constitutional scholars wants to perceive the question of total revision (also) as a matter that would be form-related according to the classification developed above.\textsuperscript{41} Total revision according to this interpretation would mean the replacement of one constitutional document by another, thus dealing with the question of total revision as detached from substance-related questions.\textsuperscript{42}

The majority of constitutional scholars in Austria as well as the Austrian Constitutional Court,\textsuperscript{43} however, attribute substance-related character to the term "total revision" used in Article 44 para 3 of the Austrian Constitution.

Substance-related entrenchment

- 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 Austrian constitution rests upon.\textsuperscript{44} 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

\textsuperscript{39} "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 (consulta of the Federal Council), jedoch vor der Beantragung durch den Bundespräsidenten, einer Abstimmung des gesamten Bundesvolkes zu unterziehen."

\textsuperscript{40} See i.a. Wiederin, Gesamtänderung, Totalrevision und Verfassungsgebung 980.

\textsuperscript{41} See for this problem Amur, Consent of the Governed 300 f.

\textsuperscript{42} VBlg 16:327/2001.

\textsuperscript{43} Öhinger, Verfassungsrecht (2009) para 64.
be induced from the corpus of constitutional law.\textsuperscript{54} Such an inductive approach leaves room for doubt and imposes on the interpreter to deal with rather loosely definable principles. Implicit substance-related entrenchment thus basically raises the same methodological problems as purely substance-based perceptions of constitutional laws;\textsuperscript{55} asking for an induction of constitutive elements from a homogenous body of constitutional law;\textsuperscript{56} thereby of course granting immense powers to the judiciary in legal systems allowing for constitutional adjudication.\textsuperscript{57}

- 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.

Again Liechtenstein for example states a separate procedure in case the monopolical structure of the state shall be abolished in Article 113 of the Grundgesetz 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:

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.\textsuperscript{58}

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:

Article 142 para 1A of the Constitution of Bangladesh may serve as an example for this approach entrenching the fundamental principles underlying the constitution\textsuperscript{59} that are— unlike demonstrated above with the help of Article 44 para 3 of the Austrian Constitution— explicitly referred to as well as the provisions dealing with the status of the president and the ministers and the entrenchment clause itself:

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.

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 three 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.

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:

Constitutional laws or constitutional provisions contained in simple laws restricting the competence of the Landtag in legislation or execution require furthermore the approval of the Federal Council which must be impartial in the presence of at least half the members and by a two thirds majority of the votes cast.\textsuperscript{60}

Just as the Indian Constitution states additional requirements for the enactment of a constitutional law affecting select parts of the constitution:

Provided that if such amendment seeks to make any change in (a) article 54, article 55, article 73, article 162 or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

The Austrian and the Indian Constitution referred to above, again, share 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.

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 regions.

\textsuperscript{54} See Junko, "Gesamtänderung der Bundesverfassung 82 ff.

\textsuperscript{55} Supra 326.

\textsuperscript{56} See Bozem, Makelare Perspektiven 452.

\textsuperscript{57} A power even greater, of course, with regard to enshrined constitutional Elements – see Württemberg, Verfassungsumwandlung und Verfassungswandel 57; for the implicit entrenchment mechanism of the Indian Constitution according to the Supreme court’s case law see His Holiness Rezvananda Bhattacharya, "The State of Kerala and Others AIR 1973 SC 146.

\textsuperscript{58} "Weinstein 1350 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 und spätestens nach zwei Jahren einer Volksabstimmung zu unterziehen. Der Landesfürsten steht das Recht zu, für die gleiche Volksabstimmung eine neue Verfassung vorzulegen."\textsuperscript{60}

\textsuperscript{59} 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."

\textsuperscript{60} "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 drei Viertel der Mitglieder und mit einer Mehrheit von zwei Dritteln der abgegebenen Stimmen zu erteilenden Zustimmung des Bundesrates."
concerned region and the approval of the majority of its citizens in a general referendum.

Article 34 para 4 of the Austrian Constitution however clearly shows similarities to the explicit substance-related provision the US Constitution knows when 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, causing Bryce to call it in this respect “virtually, if not technically, unchangeable.”

(i) Eternity

Apart from such “virtually” unchangeable constitutional provisions we may encounter Constitutions which actually are defined as—at least partially—unalterable and thus the phenomenon of “eternization”.

(i) Form-related eternity. Applying the model of form- and substance-related stabilization as introduced above we have to reach the result that the only opportunity of creating purely form-related eternization may be to declare the Constitution unalterable as a whole.

Examples for unalterable constitutions are rare of course. Complete petrifaction 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 adopted eventually. Obviously this approach was carried into effect by the Chartier constitutionelle francaise of 1814 granted by Louis XVIII which did not provide for the case of amendment.

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.”

(ii) Substance-related eternity. It seems though that modern “constitution makers” 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.

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64 For the history of this part of the provision see, for example, Levinson, Constitutional Amendment 246 f.
65 Bryce, Jurisprudence 209.
66 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.
67 See for a discussion of this phenomenon Kelsen, Allgemeine Staatslehre 253 f.
68 See Schmidt, Verfassungslehre 10.
69 Cf Jellinek, Allgemeine Staatslehre 527.
70 Bryce, Jurisprudence 208.
71 “La forme républicaine du gouvernement ne peut faire l’objet d’une proposition de révision.”
72 “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 2 niedergelegten Grundsätze berührt werden, ist unzulässig.”
73 “La forma repubblicana non può essere oggetto di revisione costituzionale.”
74 “La forme républicaine de l’Etat, le principe du suffrage universel, la forme représentative du Gouvernement, le nombre et la durée des mandats du President de la République, l’indépendance du Pouvoir judiciaire, le pluralisme politique et synodal, ne peuvent faire l’objet d’aucune révision constitutionnelle.”
We find similar approaches in Article 374 of the constitution of Honduras:

No reform can, in any case, the previous article [Amendment constitutional provision], the present article, the constitutional articles referring to the form of government, the country, the presidential period, the prohibition to be President again Republic, the citizen who has performed under any title and respect those who cannot be President of the Republic for the aftermath.

or in Article 225 of the Constitution of 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.

Finally Article 149 of the Islamic Republic of Afghanistan’s Constitution shall not remain unmentioned; 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.

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

Any constitutional amendment having as its objective or consequence the reduction of individuals rights and liberties or the reductions of the prerogatives of the provinces and decentralized territorial entities is formally prohibited.12

Protecting minorities—Preserving the status quo?

Of course many more interesting 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 5th 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 point seems to be clear as well as the various techniques and their respective consequences demonstrated sufficiently:

Given the various rules of constitutional alteration provided by the systems analysed, it has been shown that, perceiving constitutional volatility from the perspective of positive constitutional law guided by the question whether and to what extent formal stability is being granted, a mere substantive approach to what a constitution is maximizes its dynamic.24 What remains then is not a clea conception of a constitutional sphere governing ordinary legislation by authority deriving from the compliance with elevated prerequisites but rather a necessarily unclear perception of laws considered fundamental. On a formal level there is no difference between the succession to the Crown and the Oxford Railway Act only substantively the difference remains.25

As soon as a line is drawn between constitutional laws and ordinary legislation “made in pursuance thereof” two shifts are to be observed; first and foremost a shift from dynamic to static intrinsically tied to the introduction of a formally elevated sphere of constitutional law; yielding effects we may describe as “minority protective” — as I did above. Such a distinction between ordinary legislation and constitutional law, however, turns out not to be a line of demarcation but rather a border region where more than one checkpoint may have to be passed, while granting even more power against minorities, the highest requirements of safeguards shall have to be met. Along with this shift from a rather dynamic to a comparatively static structure comes a shift from substance to form — causing detachment of rank from content.26 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; anything may dress up as constitutional law. 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.27

Constitutional laws may lawfully be enacted in order to avoid judicial review of laws which, if regularly enacted, would be considered unconstitutional, they may provide the degradating treatment of individuals with the blessing of higher lawmaking or even help usurpers not to be prosecuted for having committed crimes we do not even want 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.

On a theoretical level we may, of course, continue to perceive that these elements may be regarded as minority-protective. This is, however, a euphemist description. Structurally we must realize, that what formalizes constitutional provisions abet is rather the preservation of the status quo.28 Current sever-majorities thus create protected spheres for future minorities on all various levels of the constitution permitting not only protection against the tyranny of the majority but also allowing for a future tyranny of certain minorities within a political entity; the phenomenon of eternization serving as terminal point of the

12. "Est formellement interdit 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."
24. Supra 328 ff.
26. Supra 5 ff.
28. Supra 330.
25. 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 constitution 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.
27. See, for example, Schaller, Consent for Change 208; McGinn, Tyranny of the Super-Majority 10; McGinnis/Rappaport, Majority and Supermajority Rules, 1155; Maiting, Die Verfassungseränderung 134.
vector leading to normative static and thus the rule of a past minority; or to put it more declamatory: the reign of the dead over the living in opposition to Jefferson’s famous dictum whereas “the earth belongs to the living generation.”

To conciliate the need to provide for a stable foundation a state may rest on and the necessary flexibility to comfort the needs of those that have to actually have to arrange their lives according to those guidelines a constitution gives is a highly demanding task, of course; “it 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.”

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Autonomy as Means to Accommodate Cultural Diversity? The Case of Indigenous Peoples

Christina Binder

1. Introduction

The challenges posed by majority–minority constellations in states are as old as the very concept of nation states. Even today, a uniform national structure, based on one homogenous culture and people is among the defining characteristics of nation states. Ethnic, linguistic or cultural diversity is thus still viewed as danger for the state and successful nation-building processes.

Minorities, who ethnically, culturally, linguistically or religiously distinguish themselves from the majority population, face according difficulties. The range of possible violations of their rights seems endless. Genocide—as the Turkish genocide of Armenians in 1915 or the Jewish Holocaust in Nazi Germany during World War II—and ethnic cleansing—as during the conflicts on the Balkans in the 1990s—are the worst examples; discrimination and assimilation attempts by the majority population are others. Already the functioning of the very democratic system where decisions are taken by majority vote may entail disrespect for or negligence of minority concerns.

This contribution will deal with relevant constitutional arrangements—more specifically autonomous regimes—to safeguard the cultural identity of minorities and indigenous peoples. The comprehensiveness and breadth of the term “culture”—according to one definition “the cumulative deposit of knowledge, experience, beliefs, values, attitudes, meanings, hierarchies, religion, notions of time, roles, spatial relations, concepts of the universe, and material objects and possessions acquired by a group of people in the course of generations through individual and group striving”—makes it necessary to focus on those areas in which the minority distinguishes itself from the majority and is particularly vulnerable.

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2 P. Hilpold, Modernes Minderheitenrecht (2001) 2.
Constitutionalism
and
Constitutional Pluralism
ONE SUPREME LAW MANY COMMUNITIES
Contemporary Issues in India, South-East Asia, China & Europe

Edited by
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Foreword

The genesis of this book lies in the Dr Durga Das Basu Endowment instituted at the then recently established West Bengal National University of Juridical Sciences, Kolkata, by his son, Dr Saradindu Basu and other family members, initially for holding an annual public lecture by any legal luminary on any aspect of law in commemoration and promotion of the legacy contribution of Dr Basu to law and legal scholarship. Accordingly, year after year, the University organises lectures from legal luminaries from India and abroad. Since Dr Basu’s predominant engagement was public law, especially constitutional law, all these lectures so far have been on different aspects of constitutional law. Close to the time when Dr Basu would have completed one hundred years of his creative life on 2 February 2010, the University decided to celebrate 2010-11 as his centenary year, during which besides the annual lecture it also planned to host an international conference on any aspect of constitutional law of contemporary importance with the goal of publishing and dedicating the papers presented in it to Dr Basu, and getting the publication released at his next birthday on 2 February 2011. As the endowment funds were limited and could not be utilised for holding a conference, the University approached Dr Saradindu Basu with its proposal, who readily and graciously agreed to support the proposal with funds. Fortuitously, a year or two before the event was planned, the University had become a member of the Eurasia-Pacific UNINET based in Vienna which, among others, facilitated year after year—the organisation of international conferences in different member countries through substantial funding and participation of international scholars, a few amongst them from Austria. As the organisation had not held any conference in India until then, it was keen to make a beginning. Therefore, the University’s proposal to hold the conference as part of Dr Durga Das Basu Centenary celebrations was readily accepted. In accordance with the wish of the University, “Constitutional Pluralism: New Challenges for Constitutional Theory” was chosen as the theme of the conference which was successfully held on 11 and 12 November 2010 at the University, with the participation of constitutional scholars from North America, Europe and Asia including China, Hong Kong and Japan.

The University had expected the revised papers to be back from the participants by the end of the year, leaving some time for their editing and printing by the beginning of February next year. But as the papers did not arrive until a few months into 2011, whatever human resource the University had was occupied by the Common Law Admission Test (CLAT), which the University was required to do for all the national law universities in that year. By the time the CLAT work was wound up sometime in October, the time came for change of the Vice Chancellor at the end of November. The new Vice Chancellor, Professor Dr Ishwara Bhat, eminent for his scholarship and learning, took the leadership of the University in the right earnest with promptitude, efficiency and imagination. Through his effective and efficient style of functioning and commitment to scholarship and promotion of legal education and research, besides ensuring smooth operation and execution of routine matters at the University, he also ensured timely holding of annual convocation, endowment lectures and similar other programmes and activities, and also organised and directed an interdisciplinary conference on the crucial and perennially contentious issue of inter-state