Democratic Flexibility and Constitutional Stability

*Matthias Rossi**

Abstract: *Constitutional democracies are characterised by the tension between political freedom of scope and the constitutional order. Democracy means change – or at least changeability – while constitutions, firm as a rock, guarantee reliability with stability. These poles, however, are not in rigid contrast to each other. Constitutions have not only limiting but also enabling functions. And for reasons of self-preservation they must themselves be changeable and convertible. On the other hand, democratic legislation is rigid not only for constitutional reasons. Against this background, this paper sets out the multi-dimensional relations between democratic legislation and the binding nature of a constitution.*

---

* Matthias Rossi, *Dr. iur.*; Professor, University of Augsburg, Faculty of Law. Chair for Constitutional Law, Administrative Law, European Union Law and Theory of Legislation.
I would like to thank my colleague, Aqilah Sandhu, and Gill Mertens for their assistance in translating this paper.

I. Introduction

The model of constitutional democracy has prevailed in many countries across the world. Especially from the perspective of the 'western world' – if this rather undefined, yet comprehensive, concept may be used – it is considered to be the only political system that fully respects the principle of liberal self-determination.

Nevertheless, the fundamental tension between democracy as governance by the people and the legally binding force of the constitutional order frequently suffers ruptures.

Young democracies in Central and Eastern Europe often find it difficult to exercise their right to self-determination within the boundaries set by their constitution and by the legal order of the European Union. Even old democracies like Switzerland find it difficult to accept that referendums on banning the construction of minarets are incompatible with fundamental rights and human rights provisions.

In Germany, it also took the young Weimar Republic a long time to accept that the fundamental rights as guaranteed in the constitution have a binding force upon Parliament as an expression of institutionalised democracy. This only became a matter of fact after the experience of National Socialism.

Despite this fundamental tension, it would be wrong to consider democracy and the binding force of the constitution to be antipodes. The interplay between constitutional stability and democratic flexibility enables societies to develop a self-determined life, while at the same time sticking to their historical origins and preserving, and further enhancing their cultural identity.

In this respect, constitutions have the dual task of simultaneously ensuring stability and acting as an open proposal for change in the future.[1] This dual function of constitutions – ensuring stability on the one hand, facilitating development on the other – has been described often.[2] In the following, we will therefore focus solely on liberating stability and flexibility from their supposed antagonism, making it clear that both must be brought into balance and can be brought into balance.

II. Constitutional stability

1. Stability by liability

Constitutions serve as "anchors of stability". From a legal point of view, this is – or should be – nothing new.

Without doubt, all state authority is bound by the constitution. The differentiation between the '*pouvoir constituant'* that creates this basic order (not in the sense of *Kelsen*) or these 'rules of play' and the '*pouvoir constitué*' – which is created (and at the same time limited) by this constituent power – is compatible with the idea of democracy. However, this is only the case if an assembly representing the people has exercised the constituent power, or if it was at least adopted or even later accepted by the majority of the people. Even Germany suffers from a birth defect in this respect, because such a popular vote on the Basic Law for the Federal Republic of Germany (GG) – which was initially conceived merely as a provisional arrangement – has never taken place. Instead, the parliaments of the German *Länder* (Federal states), which have only indirect democratic legitimacy, ratified the Basic Law. In political reality, there are no doubts as to the democratic foundation of the Basic Law.

---

1 See *Gunnar Folke Schuppert*, 120 (1995) *Archiv für öffentliches Recht (AöR)*, 32 (35).

2 See *Gunnar Folke Schuppert*, 120 (1995) *Archiv für öffentliches Recht (AöR)*, 32 et seqq., with much further evidence.

2. Stability by historical experiences

The Basic law probably derives its stability from its content, as constitutions are the product of a specific historical experience.The power of constitutions to give a sense of identity and legitimacy to the people derives largely from central and shared moral values resulting from injustice suffered. We will give just a few examples. The struggle for religious freedom is the reason why the fundamental right to freedom of religion is of particular significance. The inviolability of human dignity is a reaction to its complete denial in history. The lack of the right to self-dissolution of the *Bundestag* under the Basic Law is explained by the instability of the Parliament under the Weimar Constitution. The list of examples could be continued – especially in countries such as South Africa.

The fact that to a certain extent constitutions relate to the past does not confer a backwards character upon them. Rather, constitutions refer to collective experiences and thereby form the basis of what we today call a narrative. Insofar, they are a point of focus (or of reference, at least) which the development of statehood takes as its starting point and on which it may fall back once again – especially in times of crisis.

3. Stability by sticking to a framework regime

Aside from this rather cultural relevance, constitutions have a primarily legal significance. The constitution is the founding, organising and limiting source for the exercise of state power. Its limiting function is certainly the focus of every legal analysis. However, in most cases, the question of whether or not certain acts are constitutional, does not only prevent an impartial and objective debate. It also obscures the perspective of the many opportunities that are available within that framework. At the same time, the question paves the way for a constructive approach – by defining the space, actors and instruments. The constitution insofar creates the institutional infrastructure, without which the peaceful resolution of disputes would be as much impossible as the problem analysis itself.

4. Stability through resilience

In the sense of such an institutional infrastructure, the main purpose of a constitution is certainly "to be at its core a fundamental, systematic, consequently permanent, independent order of state life, which is therefore emphasised and shaped in a law".[3]

The comparison with an 'infrastructure' shows that constitutions regularly provide only instruments, but do not specify how these are supposed to be used. Such a rather formalised role of a constitution is perfect to guarantee its function of ensuring stability and also enables the necessary balance with the flexibility that is primarily founded in democracy. Paradoxically, however, an overly formal understanding can also jeopardise the very stability intended by a constitution. The problems that can result from an overly narrow understanding of bindingness and from a rigidity of constitutions are indeed history in Germany. But they are still present – the seizure of power by the National Socialists was formally compatible with the *Weimar Reichsverfassung* (WRV). A historian analyses aptly: "In order to preserve the rule of law, its defenders would have had to violate the letter of a constitution that was neutral against their own validity during the final crisis in Weimar. But this was opposed by an attitude that Ernst Fraenkel denounced at the end of 1932 as 'constitutional patriotism'. The relinquishment of governmental power to Hitler was not brought about by this failure, but was made possible by it."[4]

The elimination of democracy through the abuse of democracy was the beginning of the end of the most liberal German constitution, the Weimar Reichsverfassung, and ended in the demise of the Third Reich. Knowing full well that every monocausal attempt to explain these events allows only a partial and necessarily incomplete analysis, there is undoubtedly an essential (contributory) cause for this in the limitless liberality and value neutrality of the WRV: It was liberal to the point of self-abasement, because it contained no effective safeguards against its opponents.[5]

---

3 Translated from the original German. Hasso Hofmann, *Recht – Politik – Verfassung. Studien zur Geschichte der politischen Philosophie* (1986), 261 et seqq.

4 Translated from the original German. Heinrich August Winkler, *Weimar 1918–1933. Die Geschichte der ersten deutschen Demokratie*, (1993), 594.

5 Günter Dürig, in: Theodor Maunz and Günter Dürig (eds), *Grundgesetzkommentar* (83rd Edition, 2018), Art. 18 mn. 7.

The WRV did not have the manifold safeguards against internal erosion as provided for today in the GG. It could therefore be effectively repealed without violating the Constitution. To prevent this from happening again, the GG has devoted special attention to the protection of the Constitution[6] and for good reason opted for a 'fortified, 'resilient or 'defensive' democracy – the terminology varies. From the pluralism of goals and values, certain absolute values are excluded and resolutely defended against all attacks.[7]

5. Stability by changeability

Beyond the special instruments of resilience, which intend "to guarantee that enemies of the Constitution cannot invoke the freedoms guaranteed by the Basic Law and their protection to endanger, undermine or destroy the constitutional order or the existence of the state",[8] the task of the constitution to "bring the state into form" and to preserve it requires a degree of flexibility and adaptability of constitutional law.[9]

The framework itself, however, is not rigid and unchangeable. It is in many ways flexible and amendable. Depending on their respective content, constitutional provisions are subject to transformation, capable of interpretation and some depend on statutory definition even from the very outset. The constitutional jurisdiction, which is responsible for the interpretation of the Constitution, turns out to be remarkably future-oriented and progressive in many cases (at least in Germany), and it is quite obvious that its perspective is not merely to be the keeper of the Grail. Above all, the Constitution itself may be amended. The Amendment is subject to special procedures and formal requirements, because it is the *pouvoir constituent constitué* that is acting. After all, the Constitution itself provides for an amendment procedure that respects the principle of democracy, and also secures its own preservation. A constitution that is not amendable will – once it is incapable of solving the problems of its time convincingly – first lose its acceptance and then lose its validity, before it is replaced by a new one. It is the specific

6 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th Edition, 1999), mn. 695.

7 BVerfG, 17.08.1956 – 1 BvB 2/51 – BVerfGE 5, 85, para. 138 et seq.

8 BVerfG 17.01.2017 – 2 BvB 1/13 – BVerfGE 144, 20, para. 418 (prohibition of the NPD).

9 Gunnar Folke Schuppert, 120 (1995) *Archiv für öffentliches Recht (AöR),* 32 (37).

claim of its binding force that makes the changeability of a constitution necessary. Therefore, for the sake of their self-preservation, constitutions are intelligently designed if they provide for flexibility clauses and the possibility of amendment. (Considering its binding nature, it is rather questionable when a constitution provides for its own abrogation if the constituent power decides to adopt a new constitution. Such a provision, as is included in Article 146 of the Basic Law, may be explained by the provisional character of the Basic Law of 1949 and the lack of foresight in 1990).

From a political or social science perspective, two types of constitutional change can be distinguished: Those that react only to a changed reality (and can therefore be described as changes of adaptation), and conversely those that want to control reality itself (and can thus be described as changes of behaviour).[10] This distinction is of course irrelevant under constitutional law – the formal constitution does not question the reasons for or motives behind constitutional amendments, but treats them all equally. In particular, they must satisfy the requirements of Article 79 of the Basic Law.

In Germany, the primacy of the constitution is initially secured by the requirement to amend the text as stated in Article 79(1) sentence 1 of the Basic Law: Any amendment or extension of the legal provisions contained in the Constitutional Charter require a law expressly amending or supplementing the wording of the Basic Law. Article 79(1) sentence 1 of the Basic Law thus serves the "authenticity and visibility of every constitutional amendment",[11] the primary purpose of which is to prevent (formal) breaches of the constitution. Thus Article 79(1) sentence 1 of the Basic Law deprives the parliamentary legislator of the possibility of 'hiding' norms that amend or supplement the constitution in simple (federal) laws. In this way, the Basic Law guarantees that all (formal) constitutional law is written in the Basic Law and nowhere else, and that every constitutional amendment is reflected in the Basic Law. This excludes a legal situation such as under the WRV, according to which laws amending the Constitution were valid if they had been adopted by the majorities required for constitutional amendments. Article 79(1) sentence 1 of the Basic Law is thus primarily directed against "constitutional violations from above", i.e. against attacks

10 See Peter Häberle, 'Zeit und Verfassungskultur', in: Anton Peisl, Armin Mohler (eds), *Die Zeit* (1983), 289 et seqq.

11 BVerfG, 16.06.1959 – 2 BvL 10/59 – BVerfGE 9, 334, para. 336.

by state organs themselves against the constitution, as they appear historically in *coups d'état*.[12] However, rules that remove the constitutional obligation for certain future exercise of sovereignty (as was possible by recourse to Art. 48 WRV at the time of the Weimar Republic) by recourse to the constitution itself are also prohibited.

Otherwise, constitutions can only be amended if certain specific procedural requirements are met – in Germany laid down in Article 79(2) of the Basic Law according to which constitutional amendments must be carried by an absolute majority of two thirds of the Members of each house, the *Bundestag* and the *Bundesrat*. These majorities, which can be quite difficult to achieve depending on the party-political composition of the individual houses, primarily provide protection against over-hasty change and deliberately contain elements to slow down the process. It is all the more astonishing and alarming, of course, if in times of a Grand Coalition, in which both the *Bundestag* and the *Bundesrat* are dominated by the same party-political majority, constitutional articles are amended almost arbitrarily. Apart from such special party-political constellations, the requirement of an absolute majority prevents constitutional provisions from being subjected to the usual political horse trading in the day-to-day parliamentary business. In this respect, these majority requirements have a stabilising effect.

6. Stability through unchangeable core guarantees

Lastly, the strongest protection of the constitution is found in the eternity clause of Article 79(3) of the Basic Law, abolishing any amendment to the Basic Law that affects the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 of the Basic Law – even if the majorities in the *Bundestag* and *Bundesrat* as required under Article 79(2) of the Basic Law are met. Thus the Basic Law establishes an absolute guarantee of the existence of a constitution with certain unchangeable core principles, subject only to the adoption of a new constitution as provided for in Article 146 of the Basic Law.

As the Federal Constitutional Court (BVerfG) rightly pointed out, the principles of Article 1 of the Basic Law do not only include the principle of human dignity enshrined in paragraph 1. “The commitment to inviolable

12 Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland I*, (2nd Edition, 1984), 184.

and inalienable human rights as the basis of the human community, peace and justice contained in Article 1(2) of the Basic Law also gains significance; together with the reference to the following fundamental rights in Article 1(3) of the Basic Law, their guarantees are in principle not subject to restriction insofar as they are indispensable for the maintenance of an order corresponding to Article 1(1) and 1(2) of the Basic Law."[13] Therefore, the legislature amending the constitution and the original legislature must not disregard fundamental postulates of justice, such as the principle of equality of rights and the prohibition of arbitrariness.[14] However, "Article 79(3) of the Basic Law only requires that the principles mentioned are not affected.It does not prevent the legislature amending the constitution from modifying the positive legal expression of these principles for appropriate reasons."[15]

This provision results from a distrust in the parliamentary legislature, which abused its legislative power at the beginning of the National Socialist era. The Constitution therefore protects itself not only against executive powers, but also against the constituent power by prohibiting its representatives from making certain constitutional amendments. This is new, and undoubtedly a constitutional risk as it restricts even the sovereignty of the people with regard to the core provisions of the constitution (Article 20(2) sentence 1 of the Basic Law). It thus increases the – at least theoretical – danger that, due to the normative stipulations of future generations, any pressure will not be discharged by way of a legal constitutional amendment, but via other (revolutionary) valves.[16]

Nevertheless, Article 79(3) of the Basic Law deserves unconditional approval. Certainly revolutionary upheavals with the consequence of creating new constitutional law cannot be ruled out by a single provision, and it is undisputed that every constitution lives only as long as it enjoys the appropriate standing among the people and possesses normative power.[17] However, Article 79(3) of the Basic Law prevents the core principles from being

---

13 Translated from the original German. BVerfG, 23.04.1991 – 1 BvR 1170/90 – BVerfGE 84, 90, para. 121.

14 Translated from the original German. BVerfG, 23.04.1991 – 1 BvR 1170/90 – BVerfGE 84, 90, para. 121.

15 Translated from the original German. BVerfG, 23.04.1991 – 1 BvR 1170/90 – BVerfGE 84, 90, para. 121, with reference to BVerfG, 15.12.1970 – 2 BvF 1/69 – BVerfGE 30, 1, para. 24.

16 Ludwig Thoma, in: Hans Carl Nipperdey, *Die Grundrechte und Grundpflichten der Reichsverfassung* I (1929), 25.

17 On this aspect Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, (20th Edition 1995), mn. 701.

overturned by means of a seemingly legal procedure – as in 1933 – by abusing existing constitutional provisions. Anyone who wants to eliminate the fundamental principles of the Constitution mentioned in Article 79(3) of the Basic Law – such as by abolishing elections or by entrusting the task of judicature to the executive bodies – will be forced into illegality as an opponent of the Constitution.

III. Democratic flexibility

However, the constitutional boundaries are not fixed once and for all. Constitution in the normative sense and constitutional reality have a mutual relationship. This is shaped, among other things, by state practice – which in turn is expressed in the political decisions of parliaments and governments. Such political decisions can lead to a modification of the content of constitutional provisions without explicitly changing their text. Through such a constitutional amendment, they enable the further development of constitutional law within the limits of Article 79(3) of the Basic Law, compliance with which is ensured by the Federal Constitutional Court.[18] The most recent example of this in Germany is 'marriage for all' (*Ehe für alle*): While 'marriage' implicitly meant to only include the heterosexual relationship between two people – not least because of its systematic position in connection with the protection of the family, traditionally consisting of husband, wife and children – the constitutional concept has now been changed by an amendment to an ordinary legal provision, not the Basic Law. Possibly, one must certainly add, because there is no binding decision of the Federal Constitutional Court and as such a decision is unlikely at the moment.[19]

Such a changed understanding of a central constitutional concept is by no means uncommon. It is a normal expression of democracy. Democracy

18 On constitutional change, see Ernst-Wolfgang Böckenförde, 'Anmerkungen zum Begriff Verfassungswandel', in: Peter Badura and Scholz, Ruppert (eds), *Wege und Verfahren des Verfassungslebens* (1998), 3 (3 et seq.); Konrad Hesse, 'Grenzen der Verfassungswandlung', in: Horst Ehmke, Joseph H. Kaiser, Wilhelm A. Kewenig, Karl Matthias Meessen and Wolfgang Rüfner (eds), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (1973), 123 et seqq. See also the numerous contributions in: Christoph Hönnige, Sascha Kneip, Astrid Lorenz (eds), *Verfassungswandel im Mehrebenensystem* (2011) passim.

19 In detail, see Ferdinand Wollenschläger and Dagmar Coester-Waltjen, *Ehe für alle* (2018) passim.

stands less for stability than for flexibility. The rule of the people means the will of the people, and this can change over the course of time.

1. Multi-faceted concept of democracy

Admittedly, caution is required with regard to the concept of democracy. Due to its historical-philosophical background, democracy is a complex concept that is increasingly used in an undifferentiated way. It is therefore all the more important to bear in mind that the concept of democracy under the Basic Law also encompasses four aspects:

- It is a manifestation of political domination – here there is most room for historical-philosophical references.
- It is a method of legitimising domination.
- It is a specific process of procuring justice – with numerous overlaps with the rule-of-law principle.
- It is a substantive principle aimed at participation, co-determination and equal opportunities.[20]

Against this background, it should be emphasised that the principle of democracy is not so much aimed at setting or limiting the content of policies. Rather, it aims to channel and discipline the political process, while at the same time enabling it in the first place. In this respect, the principle of democracy is also a term to describe the task of the democratic constitution to organise decision-making processes that are open to the future and to content.[21]

In this respect, constitutional law is not only capable of being concretised, but above all it is also in need of concretisation. The density of constitutional requirements must not be overestimated: Constitutional law is "not as concrete as settled law".[22] It is to be further concretised by the legislator, which has a creative leeway that it can exercise in accordance with

---

20 Gunnar Folke Schuppert, 120 (1995) *Archiv für öffentliches Recht (AöR)*, 32, 63.

21 Gunnar Folke Schuppert, 120 (1995) *Archiv für öffentliches Recht (AöR)*, 32, 82.

22 Peter Lerche, *deutsches Verwaltungsblatt (DVBl)* 1961, 690 (692 et seq.). See also Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2004), 11.

the majority decision taken in the political decision-making process. Legislation is precisely not an 'enforcement' of constitutional law, but rather the exercise of political power to shape policy. This creative power not only presupposes flexibility, but at the same time also requires it.

2. Flexibility through temporary rule

Aside from theoretical aspects – especially from philosophically charged questions – there is virtually no doubt that in a constitutional democracy the will of the people can only be expressed through special procedures, and only when certain formal requirements are met. In a representative democracy, the expression of the will of the people – not necessarily consensus-building – is exercised through specific bodies, and first and foremost through the legislative body. However, the conferral of powers is only for a limited period of time. This already shows the special flexibility, which is immanent to democracy. Democracy means governance for a specified period, a time that is defined in the constitution. Governance is characterised primarily by the power to enact laws.

These laws decouple themselves from their respective initiator, as the enactment is the shared responsibility of the Parliament as institution and not of the individual Member of Parliament. Therefore, laws in principle remain in force and effect even beyond the duration of a legislative period. Governance for a limited period of time insofar makes it possible to rule even beyond the prescribed limited period of time.

3. Flexiblity by legislative amendments

Laws can undoubtedly be changed, and even repealed, by enacting a new law as *actus contrarius*. This changeability is an expression of the special flexibility, which is a result of the principle of democracy.

With view to the high extent of statutory standardisation in the social welfare state of the 21st century, it is no surprise that the everyday business of the legislature primarily consists of amending existing laws, and not enacting new laws. This is true irrespective of whether one takes into account only singular provisions or whole laws. The legislature deals with a series of laws that are meant either to replace, extend or repeal existing laws, and thereby is always concerned with 'settled' law. The discussion on temporary provisions insofar does not concern the question of the changeability

(and repeal) of laws, but rather the question of whether the future legislature will have to actively repeal or change a law.

Nota bene: The disadvantage of temporary provisions is that there are only two options: the temporary provision either lapses completely, or remains in force as a whole. The option to improve the law or certain provisions (the amendment of laws) is widely ignored. However, this option is not only highly relevant from a theoretical point of view of a 'learning' legislature, but also from a practical view. But if the legislature is willing (or even forced) to amend the law anyway – for instance, because the limitation of a provision also affects other legal provisions that now have to be corrected for clarification purposes – the main argument in favor of temporary provisions (which is to unburden the legislature) no longer works.

4. Path dependency of laws

Despite the fundamental changeability of laws, many legal decisions turn out to be surprisingly stable. However, considering the wide variety of laws, democratic flexibility is not only and foremost limited by the constitution, but also by the existing legal statutes. When each provision leads to a variety of subsequent amendments in other statutes, which again may involve further players – for example in the federal multi-level system – the legislature will not be inclined to amend the law. The legislative process is path dependent, and these paths are at times much narrower than the broad path provided for by the constitution.

5. Political self-restriction

But even if the path seems to be sufficiently clear to go back the same way and take another route, a surprisingly large number of laws that had faced fierce opposition from political opponents when enacted during one legislative period are not repealed by the very same opponents after a change of government in the next legislative period. This is not only the case for laws that increase taxes and levies, but also for material laws (*Sachgesetz*).

This restraint is understandable when it comes to laws that are qualified as substantive constitutional law. These are provisions that contain fundamental rules of play and that set out the conditions that govern the exercise of power. The most prominent example for such a law that is meant to have a longer legal validity is the Federal Electoral Act (*Bundeswahlgesetz*), the

Political Parties Act (*Gesetz über die politischen Parteien*), the (*Abgeordnetengesetz*), and (not least) the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) with its provisions on the Court's jurisdiction – on the Court's power, so to speak.

But even beyond this material approach, there are legal provisions that are not changed in the following legislative period, even if they had been fiercely criticised at the time of their adoption in the previous period. The reason for this might well lie in political self-restraint, but more likely it is the need for legal certainty and reliance on the law. It may also be for the very pragmatic reason of saving resources. It is impossible to implement an unlimited agenda during one legislative period – be it four or five years. The short period forces the legislature to focus on certain priorities. Moreover, if the agenda is predetermined by exogenous events – a financial crisis here, a refugee crisis there, by foreign policy issues or even by natural disasters – the possibility of dealing with all topics diminishes over time. Futhermore, the participation of all relevant actors in the legislative process reduces the timeframe to such an extent that fundamental changes cannot be reached during one legislative procedure. Democratic flexibility thereby quickly falls victim to political expediency.

This also applies to the constitutional amendments that are possible within the framework of Article 79 of the Basic Law. Dieter Grimm put it aptly: "In modern societies, everything is changeable, but only a certain amount of simultaneous or abrupt change is bearable. Constitutions stabilise the relationship between continuity and change by institutionalising greater continuity at the level of principles and procedures than at the level of their implementation and concretisation. They do this less often by preventing change than by increasing consensus and justification requirements." And he continues that "constitutions introduce different time horizons into politics, which have two effects: They form a self-protection of society against haste and create a space for social learning. The constitution itself cannot be exempt from change, but must provide for its own adaptation or change."[23]

23 Translated from the original German. Dieter Grimm, *Staatswissenschaften und Staatspraxis* 1990, 23.

IV. Interrelation between democratic flexibility and constitutional stability

Strangely enough, it is sometimes the stability-oriented constitution that forces the legislature to act. Legislative duties not only derive from the supranational law of the European Union, but also from the Constitution, as concretised further and formulated by the Federal Constitutional Court. This shows that democratic flexibility and constitutional stability are certainly interrelated: constitutional law draws the limits for the democratic exercise of powers, but also urges it to take action, when it is necessary to ensure the stability of the basic order. Conversely, democracy requires a flexible constitution in order not to lose the reconnection with the will of its citizens, and thereby not to lose its validity.

What is crucial is that the stabilising and dynamic elements are balanced – once they lose their balance, they threaten to damage the constitution and democracy.

Bibliography

Ernst-Wolfgang Böckenförde, 'Anmerkungen zum Begriff Verfassungswandel', in: Peter Badura, Scholz, Ruppert (eds), *Wege und Verfahren des Verfassungslebens* (C.H. Beck, Munich 1998), 3.

Dieter Grimm, 'Die Zukunft der Verfassung' *Staatswissenschaften und Staatspraxis* (Suhrkamp, Berlin 1990), 23.

Peter Häberle,'Zeit und Verfassungskultur', in: Anton Peisl, Armin Mohler (eds), *Die Zeit* (Oldenbourg Wissenschaftsverlag, Oldenbourg 1983), 289.

Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th Edition, C.F. Müller, Heidelberg 1999).

Konrad Hesse, 'Grenzen der Verfassungswandlung', in: Horst Ehmke, Joseph H. Kaiser, Wilhelm A. Kewenig, Karl Matthias Meessen and Wolfgang Rüfner (eds), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (Duncker & Humblot, Berlin 1973), 123.

Christoph Hönnige, Sascha Kneip and Astrid Lorenz (eds), *Verfassungswandel im Mehrebenensystem* (Springer, Wiesbaden 2011).

Hasso Hofmann, *Recht – Politik – Verfassung. Studien zur Geschichte der politischen Philosophie* (Metzner, Frankfurt am Main, 1986).

Peter Lerche, 'Stil, Methode, Ansicht' 76 (1961) *deutsches Verwaltungsblatt (DVBl),* 690.

Theodor Maunz and Günter Dürig (eds) *Grundgesetz Kommentar, Band III* (loose-leaf 83rd Edition, C.H. Beck, Munich, April 2018).

Hans Carl Nipperdey (ed) *Die Grundrechte und Grundpflichten der Reichsverfassung, Band I* (Reimar Hobbing, Berlin 1929).

Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (Springer, Wiesbaden 2004).

Gunnar Folke Schuppert, 'Rigidität und Flexibilität von Verfassungsrecht' 120 (1995) *Archiv für öffentliches Recht (AöR)*, 32.

Klaus Stern, Das Staatsrecht der Bundesrepublik Deutschland, Band I (2nd Edition, C.H. Beck, Munich 1984).

Heinrich August Winkler, *Weimar 1918-1933. Die Geschichte der ersten deutschen Demokratie* (C.H. Beck, Munich 1993).

Ferdinand Wollenschläger and Dagmar Coester-Waltjen, *Ehe für alle* (Mohr Siebeck, Tübingen 2018).

Register of Cases

BVerfG 17.08.1956 – 1 BvB 2/51 – BVerfGE 5, 85.

BVerfG 17.01.2017 – 2 BvB 1/13 – BVerfGE 144, 20.

BVerfG 16.06.1959 – 2 BvL 10/59 – BVerfGE 9, 334.

BVerfG 23.04.1991 – 1 BvR 1170/90 – BVerfGE 84, 90.