

Special Issue  
Constitutional Identity in the Age of Global Migration

## What Does a Constitution Expect from Immigrants?

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### Abstract

It is a long-established commonplace in any debate on immigration that immigrants should integrate into their receiving society. But integrate into what precisely? Into the labor market, into the legal order, into the political system, into a national culture whatever this might comprise? The Article tries to approach the question from the legal point of view and looks for hints or clues in the constitution which might help us with the answer. For this purpose, it explores the general theory of the constitution as it has been shaped by its professional interpreters as well as by political actors, the media and the public. The main intuition is that “constitution” is not only a written document, a text with a predefined, though maybe hidden meaning; instead, it is a social practice evolving over time and thereby reflecting the shared convictions of a political community of what is just and right. Talking about constitutional expectations toward immigrants then also tells us something about ourselves: about who we are and what kind of community we want to live in. As it turns out, we may not have a very clear idea of that.

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### A. Introduction: A Number of Questions

As a reaction to the migration crisis and in the aftermath of an increasingly heated debate on the country's ability to cope with the mass influx of refugees, on open or closed borders, upper limits and potential cultural clashes, Germany in summer 2016 for the first time in its history passed a special Integration Law requiring migrants and refugees to integrate into society in return for being allowed to live and work in the country.<sup>1</sup> Based on the guiding principle of "Support and Challenge" (Fördern und Fordern), the Integration Law, on the one hand, offers easier and faster access to integration measures and employment opportunities. On the other hand, the integration measures themselves—such as language classes or lessons in German laws or cultural basics—have become mandatory, and refugees face cuts to support if they reject them.

A long time before that, a number of German Länder (regional states) had already introduced oral and written integration tests as a prerequisite to naturalization, and so had other countries, such as the Netherlands and the United Kingdom.<sup>2</sup> All these measures pose a number of questions: Whether they work effectively or whether they serve the purpose they are designed for. Also, what that purpose actually is and whether it has more to do with calming down right-wing populism than with any real problem of integration. And how, after all, these measures go along with our idea of a liberal society or the idea of political liberalism itself. For constitutional lawyers, however, the most interesting question might be whether the constitution itself takes up a stance on them. Are these measures, if not directly unconstitutional, at least dubious in terms of constitutional legitimacy? Or is there, on the contrary, some statement or at least some clue in the constitution which might even endorse such practices? Does a constitution then, in one way or another, already expect immigrants to integrate so that measures like those outlined above only put into effect what is already in the constitution? And what precisely could integration mean—integration in the existing culture of a society, moral identification with constitutional values, or at least formal acceptance of its basic rules?

At a first glance, there are three possible answers to these questions. In a more or less ascending order, the first one can be called the answer of neutralism. For neutralism in a strong and resolute sense, the constitution does not expect anything of that kind, neither from the country's own citizens nor from migrants; instead, it leaves the choice entirely up to them. Constitutions, in this view, solely grant rights but do not establish commitments or obligations for citizens, so immigrants, too, are free to share the values embodied in the

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<sup>1</sup> See INTEGRATIONSGESETZ [INTEGRATION ACT], July 31, 2016, BGBl. I at 1939–49, no. 39 (Ger.), [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI#\\_bgbl\\_\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl116s1939.pdf%27%5D\\_\\_1498664823679](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI#_bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl116s1939.pdf%27%5D__1498664823679).

<sup>2</sup> See, e.g., LIAV ORGAD, THE CULTURAL DEFENSE OF NATIONS 84 *et seq.* (2015).

constitution or not.<sup>3</sup> If the legal situation is like this, all further conditions for integration—like integration interviews, mandatory confessions to constitutional values or an oath of allegiance—get under pressure and may be difficult to justify.

The second answer can be called legal formalism. With the supporters of neutralism legal formalists share a general skepticism against the idea of constitutional obligations, but insist on at least one of them, namely an obligation to obey the general laws of the country whatever the reasons may be.<sup>4</sup> From here, immigrants should at least be informed about the legal order of their selected country and the consequences they face in case of violation, be that in some kind of guidebook handed over to them or in mandatory integration classes.

For the proponents of the third answer, measures of these kind are necessary or even helpful, but do not suffice. According to them, the constitution expects some kind of general loyalty to it, some kind of identification: that is, in the very end, some kind of moral identification which, in some way or another, could be ensured or at least looked after. Let us call this answer the communitarian one, bearing in mind that communitarianism covers a vast number of disparate ideas many of which display rather illiberal tendencies and do not care much about law and constitution.<sup>5</sup>

## B. Where to Get the Answers

If these are possible answers to my question it is obviously not easy to find out which of them is the right one, i.e. which fits a particular constitution, because it is suggested by or can be derived from it. So, where would we find the answer? Not in the text, in most cases at least; unlike some older constitutions, newer and modern constitutions normally do not touch upon this point explicitly and do not even seem to notice that there might be a point.<sup>6</sup> They may, of course, speak of every citizen's rights and duties, but when they do so either they do it in very general terms, which leave us to ponder what these duties are, or they constitute particular duties, which—like the duty to serve in the military—have nothing to do with our problem.<sup>7</sup> Nor can we draw the answer from the framers' intentions; even in

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<sup>3</sup> Neutralism—or neutrality—is by many seen as the basic core of political liberalism, as will be explored. *See infra* Part F.

<sup>4</sup> Joseph Raz, *The Obligation to Obey the Law*, in *THE AUTHORITY OF LAW 233 et seq.* (2d ed. 2009).

<sup>5</sup> For an exception, see, e.g., BEAU BRESLIN, *THE COMMUNITARIAN CONSTITUTION* (1995).

<sup>6</sup> For a famous example for an older constitution, see generally the VA. CONST. of 1776, § 15 (“That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles” which at least seem to address the citizens, too).

<sup>7</sup> For the first alternative, see, e.g., GRUNDGESETZ [GG] [CONSTITUTION], art. 33, para. 1 (Ger.) (“Every German shall have in every *Land* the same political rights and duties.”)

constitutional systems which adhere to concepts of original meaning or original intent, the true basis of interpretation is not the intention or the will of the authors, but an antecedent consensus of the actual interpreters that this intention should be considered to be binding. Besides, the founders usually had other troubles to manage, and the sources such as the records of the constituent assembly generally do not address the problem at hand.

What really matters instead is the prevailing theory of the constitution, an idea of what a constitution is and what it is about. Instead of a theory, we can also speak of the reading or the general understanding of the constitution, its inner core or teleology. But however we put it, it shapes our view on constitutional issues and can influence the interpretation of a constitution in almost every single provision.<sup>8</sup> Hence, it is not the text that tells us how the theory should be framed but the theory that informs us how the text should be read and properly understood. The Canadian Supreme Court, in his famous judgment on the secession of Quebec, once expressed this intuition as follows:

The constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the constitution. . . . Those principles must inform our overall appreciation of the constitutional rights and obligations.<sup>9</sup>

In a striking formulation, this has been labelled as the “constitution behind the constitution”, although the author himself actually meant something different by it.<sup>10</sup> Be that as it may, it is this theory we can hope will guide us to the insights we are looking for.

### C. Types and Models of Constitutions

From here, as a starting point, it should be evident that there is no such thing as “the” constitution. Instead, there are various types or models of a constitution, and there is not even a universally shared concept of the constitution as such. Whether, for example,

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<sup>8</sup> For Germany, I have tried to unfold this idea systematically. See UWE VOLKMANN, GRUNDZÜGE EINER VERFASSUNGSLEHRE DER BUNDESREPUBLIK DEUTSCHLAND (2013). For a short introduction, see also Uwe Volkmann, *Rechts-Produktion oder wie die Theorie der Verfassung ihren Inhalt bestimmt*, 54 DER STAAT 35 *et seq.* (2015). The following text takes up some of the ideas depicted there.

<sup>9</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

<sup>10</sup> MATTHIAS JESTAEDT, DIE VERFASSUNG HINTER DER VERFASSUNG (2009).

England has a constitution or not depends upon which features are deemed essential for a constitution and whether a written charter is part of them. As well we can argue about the question whether the treaties of the European Union can be called a constitution—and of course legal scholars all over Europe do just this.<sup>11</sup> Eventually, it all comes down to a question of definition, and obviously there are contending definitions. This does not mean, however, that it would be impossible to name at least some characteristics of constitutions we nowadays might easily agree upon: that a constitution contains provisions on the exercise of political authority, that it stipulates procedures for legislation and governing, and that it tells us something about the basic relations between the state and its citizens—all these features we usually ascribe to a concept of constitution as it has evolved over time. But even within this minimum definition some elements may be disputed. As to the last point for example, constitutions can comprise the legal position of citizens but they do not necessarily have to—and even some relatively successful and widely acknowledged constitutions, like that of the German Empire from 1871, did not. Above all, nearly the whole rest, beyond these basic features, remains unclear and thus open to discussion. A “Constitution,” then, is not an unchangeable and stationary concept; instead, and within certain limits, it varies over time as well as from society to society. In the end, every political community has to develop its own understanding of constitution, its character, “essence” or “spirit,” and all of this has to be taken into account when we want to approach the problem. From here the respective concept can be unfolded in pairs of opposites, that is opposed definitions, types or models of constitution. In the following sections I will focus on those which— in or more or less ascending order—are relevant for my subject. Others—like the distinction between the empirical and the normative constitution<sup>12</sup> or between constitution as a concept establishing powers and a concept constraining powers<sup>13</sup>—are left out.

### *I. Constitution as Form vs. Constitution as Substance*

The first antinomy of interest here relates to the features by which the constitution is distinguished from other sources of law. According to a formal account, the differentiation has to be found in some elements of form only, such as a written charter or the normative rank as “paramount law of the nation.”<sup>14</sup> According to a substantive account, to speak of constitutions in the true sense additionally includes some requirements with regard to their content, the prototype being the famous Art. 16 of the French Declaration of the Rights of Man and of the Citizen from 1789: “Any society in which the guarantee of rights is not

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<sup>11</sup> See JOSEPH WEILER, *THE CONSTITUTION OF EUROPE* (1999); *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (Armin von Bogdandy & Jürgen Bast eds., 2d. ed. 2010).

<sup>12</sup> See, e.g., MAX WEBER, *ECONOMY AND SOCIETY* 11 *et seq.* (Edward Shild & Max Rheinstein trans., 1954).

<sup>13</sup> Christoph Möllers, *Pouvoir Constituant—Constitution—Constitutionalisation*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 171, 174 (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2010).

<sup>14</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

assured, nor the separation of powers determined, has no Constitution". Without entering deeper into the controversy, I suppose that most of us would probably agree that a constitution is—basically and with regard to its origins—a liberal concept and is thus inherently related to some core ideas of political liberalism. As a consequence, constitutions at least in a modern sense have to ensure some basic rights, a commitment to the rule of law and a certain extent of democratic participation to be able to carry the name of a "Constitution." Constitutions which lack these guarantees, or contain but do not apply them, are somehow deficient and imperfect—"semantic constitutions" as Karl Loewenstein once put it—claiming for themselves a quality or a merit they in fact do not deserve.<sup>15</sup>

## *II. Programmatic Constitution vs. Delimiting Constitution*

The second antinomy, which is of relevance for this topic, pertains to the primary effects the respective constitution deploys. Unlike the distinction between a formal and a substantive concept, it is not categorical or excluding—in the sense that a particular law is either to be qualified as a constitution or not—but more a question of gradation or of a certain profile. Hence, we should better speak of opposed types or models than of opposed concepts. The two of them which can be made out in this respect can be called the model of the delimiting constitution and the model of the programmatic constitution.<sup>16</sup> According to the first, the constitution mainly serves as a set of checks and balances, and its main function is to set limits for the exertion of political authority. Constitutions of this type can contain basic rights—and normally do so nowadays—but then these are exclusively conceived as defensive rights protecting a sphere of individual freedom against public interference. In this sense, they constitute only negative obligations for the state. According to the second model, the constitution contains a comprehensive political program, serving as a plan or a draft for the future: a "manifesto" as the comparatist Günter Frankenberg once put it.<sup>17</sup> In this sense, it sets guidelines for the evolution of a polity, it pins down some goals a society should strive at, it stipulates national objectives—like economic prosperity, social welfare, protection of the environment, of animals or maybe even of sport and culture, as it has already been discussed in Germany. In addition, the basic rights do not only appear as defensive rights, but also as a program the legislature has to carry through, for example, a state duty to protect; they serve as "guidelines and inspirations," as the Federal Constitutional Court called it in its famous Lüth judgment. Constitutions of this type usually

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<sup>15</sup> See KARL LOEWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* 149–50 (1965).

<sup>16</sup> Here, I refer to a distinction drawn by Peter Häberle. See PETER HÄBERLE, *VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT* 370 *et seq.* (2d ed. 1998).

<sup>17</sup> See Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals and Ideology—Toward a Layered Narrative*, 4 *INT'L J. CONST. L.* 439, 451 *et seq.* (2006); GÜNTER FRANKENBERG, *COMPARATIVE LAW AS CRITIQUE* 197 (2016).

also have a social relevance, an impact on society and its way of living; they “radiate” into the legal order below the constitution and from here into the society as a whole.<sup>18</sup>

### *III. Legal Constitution vs. Ethical Constitution*

The next set of opposites is often, though not necessarily, linked with the particular tailoring as delimiting or programmatic. Yet in contrast it does not refer to the main legal effects of a constitution but to its specific relation to other sources of normative orientation—like morality, ethics or culture. According to legal positivism, at least in its classical or “pure” appearance, the constitution is simply a law—a legal document and nothing more. As such, it is strictly separated from ethics and morals, there is a fundamental divide between them with no bridge over it. It is unnecessary for the purpose of this short sketch to enter into the endless, and fruitless, discussion whether this so called “separability thesis” really can count as a characteristic of legal positivism or not; there are many influential positivists nowadays who reject it.<sup>19</sup> Many constitutions, however, still follow the idea and are interpreted accordingly; in particular the Austrian Constitution, significantly influenced by Hans Kelsen, may still be seen as vivid example for this type.<sup>20</sup>

The opposite view does not deny the constitution’s character as a legal order and a system of laws. But for its proponents a mere positivist account does not suffice, it does not explain the true or the deeper meaning of a constitution. In this deeper meaning, the constitution is not only law but at least at its inner core a set of moral values and principles, not only a legal but an ethical document. Ronald Dworkin, probably the most prominent advocate of this idea in international legal theory, spoke of the “moral reading” of the constitution, affecting not only the general view on it but as well its method of interpretation: “The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”<sup>21</sup> In Germany, it was once again the Lüth judgement that set the course with a new interpretation of the basic rights: These, the Court stated, are not only subjective rights meant to protect individual self-determination against the state, but also contain objective principles for the society, they constitute a system of values, and so does, as was added later,

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<sup>18</sup> For both quotations from the famous and highly influential Lüth Judgment, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 15, 1958, 7 BVerfGE 198, 198 *et seq.*; for the impact on other constitutional systems such as South Africa, see, e.g., see Frank I. Michelman, *The State Action Doctrine*, in GLOBAL PERSPECTIVES OF CONSTITUTIONAL LAW 228, 238 *et seq.* (Vikram David Amar & Mark Tushnet eds., 2009).

<sup>19</sup> Such as Joseph Raz, Leslie Green or John Gardner. See, e.g., John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199 *et seq.* (2001).

<sup>20</sup> For more information, see Ewald Wiederin, *Über den modus austriacus in der Staatsrechtslehre*, in HELMUTH SCHULZE-FIELITZ, STAATSRECHTSLEHRE ALS WISSENSCHAFT 293 *et seq.* (2007).

<sup>21</sup> RONALD DWORIN, FREEDOM’S LAW 2 (1996); see also MICHAEL J. PERRY, MORALITY, POLITICS AND THE LAW 121 *et seq.* (1988).

the constitution on the whole. Speaking of values in this context means linking law to morality; values do not belong to the pure sphere of law but to the province of morality, their basic category is not the idea of the “Right” but the idea of the “Good.”<sup>22</sup>

#### *IV. Static Constitution vs. Living Constitution*

A fourth and last antinomy is the distinction between a static—fixed, stable etc.—and a living—flexible, dynamic etc.—constitution and as such more or less self-explanatory.<sup>23</sup> Nowadays, the vast majority of constitutions can be assigned to the second model whatever the interpreters in a certain period might claim. Some jurisdictions of constitutional or supreme courts openly follow it: In Germany, the FCC made quite clear from the outset that arguments from genesis or history can play an additional role at best,<sup>24</sup> others like the Canadian Supreme Court have explicitly committed themselves to the “living tree doctrine” or the like.<sup>25</sup> But even in constitutional systems like the one of the USA, which currently give preference to arguments from original meaning or original intent, a retrospective look into history usually reveals that stances on this subject often change over time. In the long run, periods of restrictive interpretation according to the presumed will of the founders almost everywhere alternate with periods of a more dynamic interpretation—demonstrating in and of itself that no constitution is ever set in stone.<sup>26</sup> It is, however, important to note that opting for one of these models means a lot more than simply opting for a certain method of interpretation, in the sense of a more or less technical question. Instead, it affects, and eventually changes, the entire view on a society’s constitution. The constitution then cannot be reduced to a written text with a predefined, although potentially hidden, meaning. Instead, it is what courts, political actors, the media, and the public—in short, a political community—have made of it. A Constitution then is more the description of a practice, a continuing process; it is a sum of communications about and around a text that is constantly enhanced with new content<sup>27</sup>.

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<sup>22</sup> A commonplace for the identification of moral propositions. See GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* 53 *et seq.* (1994).

<sup>23</sup> For a classical debate, see HOWARD MCBAIN, *THE LIVING CONSTITUTION* (1948); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

<sup>24</sup> 1 BVerfGE 299, 299.

<sup>25</sup> See *Edwards v. Canada*, [1930] A.C. 124, 1929 UKPC 86 (Can.).

<sup>26</sup> See Jack Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, *SLATE* (Aug. 29, 2005), <http://www.slate.com/id/2125226/> (“We are all living constitutionalists now. But only some of us are willing to admit it.”).

<sup>27</sup> See LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); for Germany, see also PETER HÄBERLE, *VERFASSUNG ALS ÖFFENTLICHER PROZESS* (3d ed. 1998).



#### D. What Follows for the Obligation of Immigrants

If we unfold the concept of the constitution in this way, the consequences for the question the Article started with seem clearly visible. The more features a constitution displays from the second side of our typology and, in consequence, is shaped and characterized by these features, which is to say, the more it is seen as

- a bundle of substantive principles, like basic rights, rule of law or democracy
- a political manifesto and a draft for the future of a society
- a set of values fusing law with elements of political morality
- and a social practice including all members of society,

the more it opens up to the idea of integration and calls for, at least expects some kind of inner acceptance, a basic identification by those who “live under” it. The constitution then serves as an order of political justice that reflects the shared convictions of a political community and eventually merges with them—one of the effects being that these, in fact and to a certain degree fluctuating, convictions influence the interpretation of the constitution. From a critical view, it simply offers a “framework for ideology.”<sup>28</sup> But whatever you call it, the constitution establishes, or at least tries to establish, an overlapping consensus between citizens, a kind of “us-consciousness” and a “sense of belonging” linking constitutionalism itself to a communitarian project or at least maneuvering it into proximity of the communitarian answer from my beginning.<sup>29</sup> The constitution thus takes over the function of the social contract of older political philosophy, the difference being that it is no longer a hypothetical construct establishing criteria for a legitimate polity but has turned into a valid legal document whose provisions are considered by everyone as binding.<sup>30</sup> From here, it seems evident that the consensus laid down in the constitution has some kind of binding character as well, it is more than a tentative proposal which can be accepted or rejected at will. Instead, it lays down a set of expectations citizens, and hence also immigrants, have to comply with. One may very well discuss, however, how to qualify this expectation in terms of legal doctrine: Is it a genuine legal obligation? Not very likely. Is it some form of imperfect or soft law then? Or is just some content lurking in the background of the constitution, in its deeper layers of understanding where constitutional theory and interpretative approaches converge? The term “expectation” abstains from giving a clear answer, and does so purposely. And it is also clear that speaking of a constitutional expectation is misleading as far as the constitution is, at its basis, still a text—and a text has

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<sup>28</sup> Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals and Ideology—Toward a Layered Narrative*, 4 INT’L J. CONST. L. 439, 450 (2006).

<sup>29</sup> See PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 358 *et seq.* (1992).

<sup>30</sup> The analogy is drawn by ERNST-WOLFGANG BÖCKENFÖRDE, *STAAT, VERFASSUNG, DEMOKRATIE* 48 *et seq.* (1991); for this article in English, see ERNST-WOLFGANG BÖCKENFÖRDE, *CONSTITUTIONAL AND POLITICAL WRITINGS, SELECTED WORKS* 152–68 (Mirjam Künkler & Tine Stein eds., 2017).

no expectations. Instead it is the interpretive community which calls for them using the language of the constitution. Yet, that there is a general expectation of this kind, and that it appeals to something more than only formal acceptance—let’s say as long as you or the group you associate yourself with are in the minority position—appear simply to be logical conclusions.

#### E. What the Expectations Amount To

Maybe it is the proximity to a communitarian or even republican project that accounts for the fact that many avowed liberals, cultivating a strong sense of neutrality, often seem to be taken by surprise by these conclusions.<sup>31</sup> The idea behind this is not in the least new though, it can be backtracked to the roots of modern constitutionalism: It is immediately addressed in the first revolutionary constitution of France, which explicitly committed anybody who wanted to become a French citizen to take a civic oath to the constitution,<sup>32</sup> and it is still present in Thomas Paine’s early and common description of the constitution as “the political bible of the state;” “scarcely a family was without it,” Paine observed.<sup>33</sup> On the other hand, it is not necessarily opposed to the principle of neutrality on the “good life”, which is often defined as the inner core of liberalism.<sup>34</sup> Being itself centered around liberal principles and the concept of legitimate pluralism, the consensus the constitution aims at is neither excluding nor comprehensive. Instead, it is open for various conceptions of the good life, for conflict and diversity, simply offering a way “how we can live together in unity although divided in project, interest and conviction.”<sup>35</sup> Its content and scope are thus not only determined by the basic values of a liberal constitution, but also strictly confined by them. First and foremost, this means that the expectations towards immigrants resulting therefrom have nothing to do with the conservative project of preserving a dominant or mainstream culture, like a traditional style of life, the songs we sing and the music we like, a certain idea of how to dress or even the way we greet each other<sup>36</sup>. Culture as such is a highly vague and sometimes even contested concept; whether, for example, we shake hands for welcoming somebody—exchange high-fives, kiss on the cheeks, bow etc.—usually even

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<sup>31</sup> This, at least, I gathered from the reactions to my oral presentation on the workshop.

<sup>32</sup> See 1791 CONST. art. II, § 2 *et seq.* (Fr.).

<sup>33</sup> See Thomas Paine, *Rights of Man, Part Second*, in 1 PHILIP S. FONER, COMPLETE WRITINGS OF THOMAS PAINE 343, 378 (1945).

<sup>34</sup> See Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883 *et seq.* (1989).

<sup>35</sup> For a variation of the phrase, see RONALD DWORKIN, LAW’S EMPIRE 413 (1986). There are, of course, other ways to put it—“framework consensus,” “agree to disagree” etc.; but that does not lead us any further here.

<sup>36</sup> In Germany, the debate periodically focuses on the term “Leitkultur,” for example, the latest push in this direction from the Home Secretary Thomas de Maizière and the highly readable comment by Jürgen Kaube. See Jürgen Kaube, *Wenn Leitgedanken krankten*, FAZ (May 2, 2017), <http://www.faz.net/aktuell/feuilleton/debatten/leitkultur-thomas-de-maizieres-entfacht-diskussion-neu-14995718.html>.

varies between different groups belonging or counting themselves to the same culture.<sup>37</sup> Also, the expectations in question would not necessarily include a belief in a certain “constitutional story,” like a narrative of the birth of the constitution or a strong founding myth, either.<sup>38</sup> Usually, a constitutional story of this nature underlies the constitution, but is not a part of it, and normally of no legal relevance.<sup>39</sup> Instead, constitutional expectations in the sense discussed here can only refer to the basic principles of the constitution itself, such as basic rights, democracy, rule of law—the principles that also constitute the moral core of the constitution and form the basis of our living together. If we want to break it down to the one where they all converge it would be the principle of human dignity, which by many has been made out now as the very essence of the idea of modern human rights as well as of liberal constitutionalism as such.<sup>40</sup> In Dworkinian terms, we might also speak of a right of equal respect and concern, which anybody has but, in turn, is also obliged to recognize. Recognition would include mainly the following: a strong rejection of any kind of violence, treating others as equals and not as inferior—independent of their religion, gender, sexual orientation etc.—, tolerating them in their otherness, respecting them as potential co-authors of the democratically enacted legal order; this is, by and large, all that it amounts to. Would that be too much to demand from people who want to join our political community?

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<sup>37</sup> For a “needy culture” which faces serious threats to its existence, for example Israel, things might be different, ORGAD, see *supra* note 2, at 135 et seqq. But even if we are willing to admit that restrictions for immigration, in this special case, might be justifiable—can be reconciled with liberal principles, this would not necessarily imply that they are also part of a corresponding constitutional expectation.

<sup>38</sup> JACK BALKIN, CONSTITUTIONAL REDEMPTION, 2 (2011): “To believe in a constitutional project is to believe in a story.” Critique: ORGAD, see *supra* note 2, at 151 et seqq.

<sup>39</sup> This would still have to be discussed, and I am not yet really sure about it. The constitutional story of Germany is inextricably linked with the overthrow of the Nazi regime, which has—in the words of the FCC—the enduring “significance of a counter-image defining identity” (gegenbildlich identitätsprägende Bedeutung”), 124 BVerfGE 300 (328). In contrast, the court in the very decision refused to accept an “anti-national-socialist principle” as content of the Basic Law, thus depriving the idea of any legal effect, id. 330. The difference, however, is hard to grasp, and it is still open to doubt whether the court itself has understood it, using the so-called counter image as a tool to shift an up to then almost unanimously consented interpretation of a concrete legal term after all. Be that as it may, the difficulties of expecting someone to believe in a story are obvious. But would this, for example, hinder governments from teaching these stories in schools and trying to evoke sympathy for them?

<sup>40</sup> From a philosophical perspective: Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Modern Rights*, 41 METAPHILOSOPHY 464 et seqq. (2010). Accordingly, the Federal Constitutional Court in his recent attempt to reframe the Basic Law’s key notion of the free democratic basic order (“freiheitliche demokratische Grundordnung”) put it in the center of its entire reflections and unfolded the notion right from here, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 17, 2017, Case No. 2 BvB 1/13, ¶ 538.

#### F. How the Picture has become a Bit Blurred Recently

In the last years, however, and maybe due to a new rise of legal positivism in constitutional law, many people—politicians as well as lawyers—try to avoid that question as far as possible. In Germany, it is the Federal Constitutional Court itself—or at least one chamber of it—that in his recent case law contributed to new uncertainty on the matter. In a series of cases concerning demonstrations of the right-wing National Democratic Party—a party which, from the other chamber of the court, has now been attested that its objectives are blatantly anti-constitutional<sup>41</sup>—the Court now seemed to keep aloof from any attempt of linking the German Constitution to a notion of civic loyalty, however weak or thin it may be. The constitution, it claimed instead, only welcomes such loyalty, but does not enforce it. In the Court's own words: "The citizens are not legally presumed (*gehalten*) to share the values underlying the constitution—instead, they are free to challenge even the fundamental values of it as long as they do not threaten the legally protected goods of others."<sup>42</sup> In one of his newer decisions on the matter, the Court has not explicitly taken up the last half of the sentence, but by and large even this part might still be included as it is merely a consequence from the first.<sup>43</sup> In any case, this is a remarkable statement, shifting not only the answer to this Article's original question but the whole concept of constitution away from the idea of a communal project of citizens toward a more formal view of it, if not to neutralism itself. It is now the constitution itself that, according to this interpretation, grants a right to reject it at its inner core.

We may then, at a first glance, ask how the creation of the new right can be reasonably justified by common standards of interpretation. But for a constitution which is widely seen as a living document this hardly counts as an objection. The constitution then in some cases simply is what the judges have made out of it, and in German constitutional law we know a number of other creations—from the ubiquitous principle of proportionality to a whole number of specific rights like the so-called right of informational self-determination—which are equally ill-founded but by now widely accepted. Or we can confront the existence of such a right with international human rights declarations which, the experience of totalitarianism still before the eyes, explicitly deny it.<sup>44</sup> But once again, the true problem lies

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<sup>41</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 17, 2017, Case No. 2 BvB 1/13 (author translation).

<sup>42</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2001, *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 2069, 2070 (author translation). Actually, the German term ("*gehalten*") may even be a bit weaker than "obliged"; the connotation is difficult to echo in English.

<sup>43</sup> See 124 BVerfGE 300 (320) – Wunsiedel; a decision of the complete senate.

<sup>44</sup> See, e.g., Universal Declaration of Human Rights, art. 30, Dec. 10, 1948, U.N.G.A. Res. 217 A (III) ("Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein"); cf. European Convention on Human Rights, art. 17, Nov. 4, 1950, E.T.S. 5.

deeper, it is the problem what this means for and how it affects our understanding of the constitution itself. At least the following three consequences seem evident to me.

First, a right to reject the constitution undermines the common distinction between what we might call the rules of a game and the game as such. The game has to be played according to the rules, which in themselves are not subject to discussion within the game; instead, they have to be accepted by anybody who wants to take part in it, acceptance in itself being a condition to be admitted and an indispensable prerequisite for the continuation of the whole process. Giving up this distinction for the constitution would mean that it could no longer be considered as the necessary basis for dealing with political, religious or cultural conflicts but as something which has to be discussed in and of itself as a start and is more or less an object of negotiation.

Second, the existence of a right to reject the constitution as an essential part of the constitution itself inevitably brings up the question what the content of the constitution in this case truly is and whether it has an identifiable content at all. Can we still then claim that the main content is the principle of human dignity, a fundamental right of equal respect and concern, as has been identified above? Or is the main content not, the point it all comes down to in the end, that everything could just as well be otherwise? It might well be then that a constitution of this nature has no substance at all; where there should be a center or a heart of the matter there is possibly nothing but a black hole, a neutrality toward anything and everything and even toward its own validity.

Third, we can rightly ask what kind of message, in this case, the respective constitution or the political community sends out to others. Imagine, for example, a radical Salafist knocking at the door of that community and asking for admission: When enquiring about the specific character of its chosen haven, somebody explains to him the various rules and principles held there—basic rights, gender equality, freedom of religion for everyone, democracy etc. And at the end he learns that he is free to reject them all. For whom would this be an impediment?

### **G. Why it Matters?**

Either way, it is an indifference towards a society's own principles we come upon here, a relativism which the idea of the constitution as a set of, as such unquestionable, values at least at its origin was supposed to overcome.<sup>45</sup> But would it really be a loss to give up this idea? Or should we not, after a long period of political stability particularly in Germany, just come to a more relaxed view on the matter? Anyhow, the proponents of the "new

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<sup>45</sup> See, e.g., 5 BVerfGE 85 (138). The conception of the Basic Law as a system of values "excepts some basic principles for the configuration of the state from the pluralism of objectives and valuations . . . which once they have been adopted democratically shall be acknowledged as absolute values and therefore be resolutely defended against all attacks." See *id.* (author translation).

relativism” have some arguments on their side, too, which sound fairly reasonable. The first is an argument from self-confidence; it is, in fact, more an attitude than an argument: Let us abstain from any pressure on others to accept our western or liberal way of life; instead we should simply rely on its attractiveness, on the appealing language and experience of individual rights and democracy, on the achievements of modernity—life chances for everybody, economic prosperity, technical progress, and so on. All of these aspects taken together shine so brightly that they will win out anyway.<sup>46</sup> This argument is by nature not refutable, at least not on an empirical basis. It is a bit like the weather forecast: Only the future can prove you right or wrong. Sceptics may by now have reasons for a more pessimistic view: Liberal values are not as uncontested as they may have appeared only a few years ago, and even within western societies their attractiveness seems to be in decline.<sup>47</sup> Be that as it may, there is obviously no point in arguing about it.

Relativists, however, might also present another argument which deserves more attention: It says that the discussion is mainly theoretical and too far away from real life, of interest only for hardboiled constitutional theorists but of little, if any, practical relevance. As to that, I am not so sure. Which stance one takes on this point determines the range of immigration rules and informs us on what a polity can demand from immigrants constitutionally, which requirements it can legitimately set for immigration and—finally—naturalization. And it might provide us with answers to the questions from the beginning: whether we should pass special integration laws, send people to integration classes, confront them with an integration interview or an integration test, and so on.<sup>48</sup> Relativists may reply that these tests are, realistically assessed, mere formalities, passing them only requires some preparation, learning or dissimulation, and their practical effect, if there is any, is very low. But insisting on such requirements also has something to do with sending signals to others—

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<sup>46</sup> Proponents of this argument in addition usually refer to the famous dictum of Ernst-Wolfgang Böckenförde, that the liberal, secular state “lives from prerequisites which it cannot itself guarantee.” ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, VERFASSUNG, DEMOKRATIE 60 (1991) (describing that this “is the great adventure it has undertaken for freedom’s sake.”).

<sup>47</sup> Evidence would not only include the return of religious and cultural clashes but, as well, the rise of populist movements, a growing distrust against the structures of representative democracy, a new sympathy for strong and authoritarian governments and, above all, an increasing indifference toward the “blessings of liberty,” to quote the famous term from the Virginia Constitution. See VA. CONST., *supra* note 6.

<sup>48</sup> There are, of course, impacts on other fields which can be touched only briefly here, the most important one probably being education in public schools. The link to questions of integration, however, is obvious; for it is the schools where we can reach the next generations of immigrants. But how? Goals of education normally not only comprise acquisition of knowledge but also teaching of values like mutual respect and tolerance, democratic responsibility, a sense of solidarity and so on—at the very end the basic constitutional values. And by teaching we not only mean to inform about them neutrally—that they exist and what they mean—but as well to try to evoke sympathy for them, making children and adolescents, in effect: future adults, accept and— hopefully—internalize them. But once we accept the relativist account of the constitution, with a right to reject it at its bottom, it becomes unclear how these goals can be justified and whether we can stick to them any longer: Isn’t that simply wrongful or at least highly problematic indoctrination?

at least in the sense that it makes clear to anybody that there are some principles we will not have questioned or even discussed.

Of course, then, we might still say that the entire debate is highly, or even predominantly, symbolic. But that in no way means that it is not important. On the contrary, and sometimes to our own astonishment, we all notice that people often tend to take symbolic debates more seriously than debates on practical issues. At least they engage easily in more or less symbolic debates—for example, whether we should ban the niqab or the burka in the public sphere—but only with some effort in practical debates—for example, whether we should adopt a new tax system or offer free access to daycare facilities for children. The reason, I suppose, is that symbolic debates fulfil an indispensable function for a political community and its members: They touch upon questions of identity; they tell us something about who we are and what kind of community we want to live in. Debates on constitutional interpretation may have a similar effect, particularly in societies where the constitution is regarded as an order of political justice, where it embodies a “historically rooted tradition of theory and practices” and is as such part of the sometimes “centuries-long struggle over the national identity.”<sup>49</sup> So, at best, they might also provide us with answers to some pressing questions we have been agonizing over for some time now: Do we conceive liberal societies as a society of individuals living separate from each other, with each of them pursuing only his or her own egoistic interests, like the Kantian “people of devils?” Or do we still need a basic communal life, at least some common ground where we can retreat to in case of conflicts? And how should we deal then with the parallel societies?

So, there is still a lot to be learned from the discussion. Because ultimately, all these questions come down to the last and final question whether we really have an imagination of our community, an idea of its sense and form, or not. In some parts of the world the case may still be clear: Israel wants to be a Jewish society and allows—maybe not exclusively, but primarily—the immigration of Jews, even encourages it; Japan wants to remain a Japanese society and hardly allows any immigration at all.<sup>50</sup> In Germany as well as in a number of other liberal democracies the case is much more complicated. We prefer not to think about it too deeply, and once we enter into constitutional interpretation, our uncertainty becomes obvious. So it may well be that the whole discussion on constitutional expectations toward immigrants is less important for future immigrants and the potential effects on them than it is for ourselves.

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<sup>49</sup> For the source of this phrase, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L. J. 453, 477 (1989) (“[T]he [American] Constitution is best understood as an historically rooted tradition of theory and practice – an evolving language of politics through which Americans have learned to talk to one another in the course of their centuries-long struggle over their national identity.”).

<sup>50</sup> Which, of course, engenders a special need for justification in the light of the ideas of political liberalism. For the Israel case once again, see ORGAD, *supra* note 2, at 85 *et seq.*, 135 *et seq.*

