

András Jakab: Sustainability in European Constitutional Law

Now civilisations, I believe, come to birth and proceed to grow by successfully responding to successive challenges. They break down and go to pieces if and when a challenge confronts them which they fail to meet.¹

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Sustainability, as compared to the rule of law, human rights, sovereignty or democracy, is a relatively new constitutional key concept.² It is mentioned explicitly more and more in constitutional discourses, and – even more importantly – it helps to reconstruct a number of current constitutional debates under one conceptual umbrella.³ Sustainability comprises different responses to long term social challenges which cannot efficiently be responded to via democratic mechanisms. Democratic mechanisms are based on election terms and which are,

¹ Arnold J. Toynbee, *Civilization on Trial* (OUP 1948) 56.

² For critical remarks and advice on literature, I am grateful to the participants of the ‘Sustainability as a Legal Principle’ workshop at the IVR XXVIth World Congress of Philosophy of Law and Social Philosophy in Belo Horizonte (Brazil) on 22 July 2013, of the conference ‘Model Institutions for a Sustainable Future’ in Budapest on 25 April 2014 and of the workshops at the Centre for Social Sciences of the Hungarian Academy of Sciences on 11 September 2014 and 26 March 2015, further to Lídia Balogh, Attila Bartha, Eszter Bodnár, Giacomo Delledonne, Róbert Iván Gál, Matthias Goldmann, Béla Janky, Klára Katona, Lando Kirchmair, Zsolt Körtvélyesi, Károly Mike, András Simonovits, Pál Sonnevend, Ákos Szalai, Jörg Chet Tremmel, Leonie Vierck and David Wineroither. The present paper is based on a research project funded by the Hungarian Scientific Research Fund OTKA (K 112900).

³ On doctrinal reconstruction as one of the main tasks of legal scholarship see Armin von Bogdandy, ‘The Past and Promise of Doctrinal Constructivism’ (2009) 7 *International Journal of Constitutional Law* 364–400; András Jakab, ‘Seven Role Models of Legal Scholars’ (2011) 2 *German Law Journal* 757–784, esp. 758–765.

consequently, structurally short-sighted. By ‘European constitutional law’, I mean in this paper both the primary law of the EU and domestic constitutional documents.

In the present paper I am first going to sketch the nature and the types of the sustainability challenges that contemporary societies face, with a special focus on Europe (1). In the main part of the paper, I am going to show possible constitutional responses to these challenges (2.). Finally, I will summarise the main argument of the paper (3.).

A short preliminary terminological remark: I am using the expression ‘sustainability’ instead of the more popular ‘sustainable development’.⁴ The concepts are almost identical, the former being slightly less ambitious: sustainability does not require an improvement, it merely requires that a situation does not deteriorate.

1. Sustainability Challenges

The moral instinct and the common sense of most people would probably suggest that sustainability should be aimed for in every society. One approach that could be used to justify sustainability would be to refer to the idea of distributive justice (more precisely: intergenerational justice),⁵ another approach would be to refer to the long term interests of the political community. Instead of the first, moral philosophical approach, in the present paper we are going to employ the second, rather pragmatic one, in the hope of minimising overheated emotional debates. Sustainability is nothing more than the *long term* interest of the political community. ‘Long’ basically means anything that is beyond the usual four or five year election period that is mostly the time span of democratic politicians.

There are several factors that might endanger sustainability. For example, the EU Sustainable Development Indicator (prepared by Eurostat on the basis of the 2006 EU Sustainable Development Strategy) consists of 106 individual indicators (some of them being composite themselves) including education, public health, fertility rate, different aspects of environmental protection, public debt, just to name a few.⁶ Composite indicators imply ‘weak sustainability’, meaning the (at least partially) mutual substitutability of the different types of capitals (environmental, demographic, etc.).⁷ We are only going to mention here some aspects: those that the present author considers the most pressing ones and that have constitutional relevance.⁸

1.1 Environmental Challenge

⁴ See e.g. ‘Sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs. [...] It aims at the continuous improvement of the quality of life and well-being on Earth for present and future generations.’ *Sustainable Development Strategy* (2006) European Council DOC 10917/06 para 1.

⁵ For excellent overviews of the intergenerational justice approach see Axel Gosseries, ‘What do we owe to next generations?’ (2001) 35 *Loyola of Los Angeles Law Review* 293-355; Lawrence B Solum, ‘To our children’s children’s children. The problems of intergenerational ethics’ (2001) 35 *Loyola of Los Angeles Law Review* 163-234; Axel Gosseries and Lukas H Meyer (eds), *Intergenerational Justice* (OUP 2009); Lukas Meyer, ‘Intergenerational Justice’ (2008) in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/justice-intergenerational/>.

⁶ For further aggregated sustainability indicators see Armin Grunwald and Jürgen Kopfmüller, *Nachhaltigkeit* (2nd ed. Campus Verlag 2012) 81-86.

⁷ On the concept in general see Eric Neumayer, *Weak versus Strong Sustainability. Exploring the Limits of Two Opposing Paradigms* (4th ed. Edward Elgar 2013).

⁸ For another usual classification (ecological, economic and social components) see e.g. Guy Beaucamp, *Das Konzept der zukunftsfähigen Entwicklung im Recht* (Mohr Siebeck 2002) 19-31 with further references.

The concept of sustainability stems from *environmental protection*, or more precisely from 18th century German forest economics literature.⁹ The originally ethical¹⁰ and economical concept was later widely dispersed in legal thinking by UN documents in the 20th century.¹¹ It is usually defined in environmental protection as the prohibition of the use of natural resources which would impede the satisfaction of comparable future needs (through exhaustion or through pollution).¹² For our topic, this is not primarily relevant; it is mentioned only because it shows the origin and the multifaceted nature of the concept. The sustainability of social security systems rather concerns fiscal and demographic challenges, which will be analysed in the following paragraphs.

1.2 Fiscal Challenge

Accumulating public debt redistributes the resources of future generations amongst members of the present generation,¹³ and democracies actually do tend to accumulate debts.¹⁴ It is normally more popular to spend than to save money, and people like to enjoy public services but they do not like to pay taxes to finance them.¹⁵ And democracies, by their nature, tend to go for popular things. As a matter of fact, the more competitive a democracy, the more likely its public deficit will grow, as in a hard competition parties feel forced to (promise to) buy votes in order to win.¹⁶ Another explanation for public debt in democracies is that they tend to be less centralised, i.e. their politics is fragmented.¹⁷ If you have fragmented politics then every political group is trying to spend the common money on its own electorate and/or supporters.¹⁸ The more fragmented politics is (i.e., coalition governments instead of one-party

⁹ Andreas Glaser, *Nachhaltige Entwicklung und Demokratie: Ein Verfassungsrechtsvergleich der politischen Systeme Deutschlands und der Schweiz* (Mohr Siebeck 2006) 42; Deithelm Klippel and Martin Otto, 'Nachhaltigkeit und Begriffsgeschichte' in Wolfgang Kahl (ed), *Nachhaltigkeit als Verbundbegriff* (JCB Mohr 2008) 39-59, esp. 44-45 referring to Hans-Carl von Carlowitz, *Sylvicultura Oeconomica* (Leipzig, 1713).

¹⁰ For an analysis of the ethical issues of environmental sustainability see Hans Jonas, *Das Prinzip Verantwortung* (Frankfurt aM 1979). On Hans Jonas from a legal perspective see Jörg Schubert, *Das "Prinzip Verantwortung" als verfassungsstaatliches Rechtsprinzip: rechtsphilosophische und verfassungsrechtliche Betrachtungen zur Verantwortungsethik von Hans Jonas* (Nomos 1998); Olivier Fuchs, 'Le principe responsabilité de Hans Jonas. Contribution à l'étude de la médiation juridique des rapports de l'homme à la nature' (2006) 2 *Revue de la recherche juridique - droit prospectif* 1027-1045.

¹¹ On the history of the concept of 'sustainable development' in UN documents since the 1970s see Ulrich Beyerlin, 'Sustainable Development' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP [electronically available at <http://www.mpepil.com/>]), marginal numbers 2-6; Katja Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* (Mohr Siebeck 2011) 11-71.

¹² See e.g. the Brundtland Commission's definition: sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (*Our Common Future*, 1987, 43).

¹³ Görg Haverkate, *Verfassungslehre* (Beck 2007) 324-328; James M Buchanan, 'The Constitution of Economic Policy' (1987) 77.3 *American Economic Review*, 243-250, esp. 250. On the economic nature of public debt and on its future effects see Geoffrey Brennan, 'The political economy of public debt' (2012) 23.3 *Constitutional Political Economy* 182-198.

¹⁴ James M Buchanan and Richard E Wagner, *Democracy in Deficit. The Political Legacy of Lord Keynes* (Academic Press 1977) 98-105.

¹⁵ Paul Kirchhof, *Deutschland im Schuldensog. Der Weg vom Bürgen zurück zum Bürger* (C. H. Beck 2012) 5.

¹⁶ John Cullis and Philip Jones, *Public Finance & Public Choice* (3rd ed. OUP 2009) 327-328.

¹⁷ Alberto Alesina and Roberto Perotti, 'The Political Economy of Budget Deficit', *IMF Staff Papers* 42/1995, 1-31.

¹⁸ Andres Velasco, 'Debts and Deficits with Fragmented Fiscal Policymaking' (2000) 76.1 *Journal of Public Economics* 105-125; Roberto Ricciuti, 'Political Fragmentation and Fiscal Outcome' (2004) 118.3-4 *Public Choice* 365-388.

governments, second chambers with budgetary powers etc.), the more likely it is for public debt to grow.¹⁹

Public debt, however, is not necessarily a bad thing, Lorenz von Stein even famously stated that ‘a state without public debt is either doing too little for the future or it requires too much from the present’.²⁰ Public debt on its own does not contradict the principle of sustainability, unless it reaches an excessive level. Unsustainable public debt leads to sovereign default (e.g. Mexico 1982, Russia 1998, Argentina 2001), which normally coincides with a banking crisis (no more loans for the private economy, i.e., no more private investments), an economic crisis (flight of foreign capital, combined with decreasing internal demands), and a currency crisis (either in an attempt to repay debts the state is printing excessively its own money which leads to inflation,²¹ and/or the economic crisis or the cancelation of the repayment of debts in foreign currency lead to the devaluation of the domestic currency in relation to foreign currencies).

What is excessive, i.e. what is likely to lead to sovereign default, is, however, not entirely clear. Some say, it is excessive if it endangers the credibility on the credit market, so if the creditors believe it to be too high.²² There is definitely a psychological element in financial sustainability (just think of banking runs), but we should not beg the actual question when creditors should *rightly* believe a public debt to be too high.

Even if we ask ourselves, however, the somewhat better question ‘when should creditors rightly believe that a public debt is too high?’, the question still might be the wrong one. The mere number (usually the GDP ratio of the public debt) is not conclusive on whether public debt is sustainable or not. If we have a look at the latest global financial crisis, then we see that those European countries which suffered the most from it (like Ireland or Spain) had considerably lower public debt (in GDP ratio) than Japan or the US. But in these countries, just like in the whole of the Eurozone, the internal mechanisms were missing which would have been necessary to tackle public debt issues and which are present in the US or in Japan (fiscal union, efficient European intervention mechanisms into MS budgetary matters).²³ On the one hand, there were no effective methods to enforce the purely numerical Maastricht criteria (public debt, deficit, inflation) after a country joined the Eurozone, on the other hand, these numbers on their own did not predict anyway whether an economy was sustainable or not.

Further factors which should also be considered are the origin of public debt (whether it was spent on investment or whether it was spent for non-productive purposes; pensions belong to the second one but in some other cases separating the two is not easy at all), the demographic perspectives of a country (i.e., whether the workforce is shrinking or expanding),²⁴ the interest rate for which new loans are given to the country (i.e. the debt interest is actually decisive, and the actual debt is only relevant as far as it can predict the payable interests),²⁵ the growth of the economy (a growing economy supports higher public

¹⁹ Lars P Feld, ‘Nachhaltige Finanzverfassung aus ökonomischer Perspektive’ in Wolfgang Kahl (ed), *Nachhaltige Finanzstrukturen im Bundesstaat* (Mohr Siebeck 2011) 56.

²⁰ Lorenz von Stein, *Lehrbuch der Finanzwissenschaft* (2nd ed. F.A. Brockhaus 1871) 666.

²¹ This is a real threat only if central banks are under the influence of the government. On the benefits of independent central banks, see Alberto Alesina and Roberto Perotti, ‘The Political Economy of Budget’ Deficits, *IMF Staff Papers* 42/1 (1995) 26.

²² Ekkehart Reimer, ‘Nachhaltigkeit durch Begrenzung der Staatsverschuldung – Bilanz und Perspektiven’ in: Kahl (ed) (n 18), 147-166, esp. 147.

²³ Carlo Cottarelli, ‘Sovereign Debt Crisis: Why in Europe and not Elsewhere?’ (2012) 47.2 *Intereconomics* 74-75.

²⁴ Charles Wyplosz, ‘Fiscal Policy: Institution versus Rules’ (2005) 191.1 *National Institute Economic Review* 64-78.

²⁵ Delia Velculescu, ‘Some Unconformtable Arithmetic Regarding Europe’s Public Finances’, *IMF Working Paper* 10/177, 2010 <http://core.ac.uk/download/pdf/6671906.pdf>. If the payable interest rate is more than the

debt ratio than a shrinking one),²⁶ who controls debt bonds (whether it is national or foreign creditors).

Public debt is thus an important, but incomplete indicator of fiscal sustainability. You cannot give a simple number which shows the threshold of unsustainability, also other factors should be considered which makes the judgment rather intransparent. There is no *simple* final fiscal sustainability formula.

1.3 Demographic Challenge

Two hundred years ago, overpopulation was feared.²⁷ In the XXth century, the population of the world grew from 1.6 billion to 6.1 billion.²⁸ Today, the situation is rather the opposite: low fertility rates and longer life expectancies have led to a shrinking and ageing population in Europe,²⁹ and it is predicted that in a couple of decades most of the world will suffer from this social problem.³⁰

Long life expectations are due to better and free health services,³¹ low fertility rates are due to secularisation (and, consequently, a growing emphasis on individual responsibility), education which allows for new life options (and for family planning), the medical advancement of contraception methods, the fact that children have become a financial burden instead of a financial investment, government run general pension systems (no need for children when we grow old),³² and the imbalance between the partial emancipation of women in worklife³³ and the lack of their emancipation in private life.³⁴

Human working force is deemed to shrink even more than the actual population, as longer life expectancies do not necessarily mean longer working years.³⁵ In order to avoid this, European countries can try to drive fertility rates higher, extend the active working years

total income then we deal with terminal debt, see Niels Kleis Frederiksen, 'Long-Term Fiscal Indicators: Sustainability versus Terminal Debt Constraints', Danish Ministry of Finance Working Paper 14/2005.

²⁶ Sustainable debt is when the growth rate of the economy is greater than the interest rate of the debt, see Howell H Zee, 'On the Sustainability and Optimality of Government Debt', *IMF Working Paper* 87/83, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885013 1-25, 2; Carlo Cotarelli / Lorenzo Forni e.a, 'Defaults in Today's Advanced Economies', *IMF Staff Position Note* SPN 10/12, September 2010, 5.

²⁷ Thomas Robert Malthus [under the pseudonym Joseph Johnson], *An Essay on the Principle of Population* (1798).

²⁸ Nicholas Eberstadt, 'The Demographic Future. What Population Growth – and Decline – Means for the Global Economy' 2010 Nov-Dec *Foreign Affairs* 54-64, 54.

²⁹ Half of the world's population lives in countries (all European countries, but not the US) in which the fertility rate is below 2.1 births per woman (replacement level), see Eberstadt (n. 28) 55, 62; Franz-Xaver Kaufmann, *Schrumpfende Gesellschaft: Vom Bevölkerungsrückgang und seinen Folgen* (Suhrkamp 2005).

³⁰ Danny Dorling, *Population 10 Billion. The Coming Demographic Crisis and How to Survive it* (Constable 2013).

³¹ Global life expectancy rose from 30 to 65 in the XXth century, see Eberstadt (n 28) 55.

³² 'A PAYGO system may serve as insurance against not having children and as an enforcement device for ungrateful children who are unwilling to pay their parents a pension.' Hans-Werner Sinn, 'The pay-as-you-go pension system as fertility insurance and an enforcement device' (2004) 88 *Journal of Public Economics* 1335-1357, 1335.

³³ Grunwald and Kopfmüller (n 6) 46; Klaus Leisinger, 'Bevölkerungspolitik', in: *Online Handbook Demografie*, 2007, <http://www.berlin-institut.org/online-handbuchdemografie/bevoelkerungspolitik/bevoelkerungspolitik-als-entwicklungspolitik.html>.

³⁴ Barbara Hobson and Livia Sz. Oláh, 'Birthstrikes? Agency and capabilities in the reconciliation of employment and family' *Marriage and Family Review* (2006) 39.3/4 197-227; Barbara Hobson, Susanne Fahlén and Judit Takács, 'Agency and Capabilities to Achieve a Work-Life Balance: A Comparison of Sweden and Hungary' (2011) 18.2 *Social Politics* 168–198.

³⁵ Eberstadt (n 28) 62.

of the elderly, encourage immigration³⁶ and invest in education as less people can only produce the same if they are more productive, i.e. they are better educated.³⁷

2. Possible Constitutional Responses to the Sustainability Challenge

In this section, first I am going to show why the response to the sustainability challenges has to be a constitutional one, and then we go one by one through possible constitutional solutions (general principles, fundamental rights, institutional rules on elections and referenda, and rules on public finance) which might contribute to tackling these challenges better.

2.1 Why Does the Response Have to be Constitutional?

Constitutions have the task of providing the rules of the political game, to establish taboos that politicians might otherwise perpetrate.³⁸ Structurally, democratically elected politicians are focused on short term (election period) consequences, and they are likely to go for the easy solution which buys votes for them.³⁹ In order to prevent them from being seduced, constitutions ought to bind them, like Ulysses was bound to the mast so he could resist the sirens.⁴⁰ This is an admittedly paternalistic solution (constitutions in general can be considered as paternalistic tools): it indirectly also prohibits voters from voting in favour of the wrong solutions.⁴¹

Traditionally, constitutions have only contained sustainability provisions concerning the protection of the environment,⁴² but during the last decade (mainly due to the financial crisis) financial or economic sustainability clauses have also become more common,⁴³ and with the aggravation of the European demographic situation, it is very likely that demographic sustainability provisions will also increasingly appear in constitutions. The constitutional requirements following from different types of sustainability provisions can possibly contradict each other, as stronger environmental protection requires *ceteris paribus* lower production, whereas financial sustainability requires higher production levels. There are currently no constitutional tests on how to balance or weigh these different aspects, which can partly be explained by the novelty of the issue, partly by general factual uncertainties about

³⁶ Joachim Henseler, *Mobilität und Migration in der Einwanderungsgesellschaft und der dazu gehörigen sozialpädagogischen Fragestellung*, habilitation 2006 <http://www.db-thueringen.de/servlets/DerivateServlet/Derivate-11077/henseler.pdf>. On the integration of immigrants see Wolfgang Kahl, 'Nachhaltigkeit, Migration und Integration', in: Kahl (n 8) 242-264.

³⁷ Eberstadt (n 28) 62, 64.

³⁸ For more details on the function of constitutions, see András Jakab, 'On the Legitimacy of a New Constitution - Remarks on the Occasion of the New Hungarian Basic Law of 2011' in Miodrag A. Jovanović and Đorđe Pavićević (eds), *Crisis and Quality of Democracy in Eastern Europe* (Eleven 2012), 61-76 available at: <http://ssrn.com/abstract=2033624>.

³⁹ William A Niskanen, 'The Case for a New Fiscal Constitution' (1992) 6.2 *Journal of Economic Perspectives* 13-24.

⁴⁰ Jon Elster, *Ulysses and the Syrens. Studies in Rationality and Irrationality* (CUP, Maison des Sciences de l'Homme 1984) 36-37, 87-96.

⁴¹ For constitutions as tools to protect future generations, see Axel Gosseries, 'The Intergenerational Case for Constitutional Rigidity' (2014) 27.4 *Ratio Juris* 527-539, esp. 536-538; Axel P Gosseries, 'Constitutions and Future Generations' (2008) 2 *The Good Society* 32-37.

⁴² See e.g., Alexandre Touzet, 'Droit et développement durable' (2008) 2 *Revue de droit public et de la science politique* 453-488.

⁴³ For a large number of such clauses see Joerg Chet Tremmel, 'Establishing intergenerational justice in national constitutions', in: Joerg Chet Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar 2006) 187-214; Peter Häberle, 'Nachhaltigkeit als Gemeineuropäisches Verfassungsrecht - eine Textstufenanalyse' in: Kahl (n 8) 180-203; Jörg Schubert, *Das "Prinzip Verantwortung" als verfassungsstaatliches Rechtsprinzip: rechtsphilosophische und verfassungsrechtliche Betrachtungen zur Verantwortungsethik von Hans Jonas* (Nomos 1998) 231-247.

what actually leads to sustainability and partly by moral disagreement about the relative weight of these aspects. The latter two factors also inhibit me from developing such a test in this paper, but I will at least try to sketch a map of substantive constitutional arguments on the topic with some institutional recommendations.

The most natural guardians of financial sustainability, i.e. financial markets, cannot, unfortunately, do the job as we would like it to be done: financial markets ‘penalize fiscal profligacy in a discontinuous fashion and only with significant lags’, and very often first when we are already in an extreme stage.⁴⁴

The fact that we need a constitutional response to the sustainability challenges does not mean, however, that traditional (lawyerly) constitutional courts should have a major role in sustainability issues. I will return to this seemingly paradoxical institutional problem later in 2.5.3.

2.2 General Principles

The probably most obvious, but technically least sophisticated way to deal with such an issue is to insert a general principle into a constitution. The principle can be conceptualised as a ‘general principle of intergenerational justice’ or as a ‘general principle of sustainability’. As to the former, in the Preamble of the 1946 Bavarian Constitution we can find a general precursor of this idea, without explicitly mentioning the word ‘sustainability’: ‘firmly intending moreover to secure permanently for future German generations the Blessing of Peace, Humanity and Law’. As to the latter, the Preamble of the EU Charter of Fundamental Rights can be used as an example: ‘[the European Union] seeks to promote balanced and sustainable development’ and ‘Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations’, or in the context of the protection of environment, Article 11 of TFEU with an explicit reference to a general principle of ‘sustainable development’.⁴⁵

With enough doctrinal effort, you can deduce from the vaguest constitutional provisions the solutions for the most concrete problems.⁴⁶ In this case, however, this is not possible. On the one hand, this area of law is doctrinally and judicially not developed sufficiently enough to build a coherent conceptual system, and even more importantly, it is unlikely to be substantially developed either: constitutional lawyers and constitutional courts

⁴⁴ Xavier Debrun, David Hauner and Manmohan S. Kumar, ‘Independent Fiscal Agencies’ (2009) 23.1 *Journal of Economic Surveys* 44-81, esp. 45, 51.

⁴⁵ ‘Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.’ See Beate Sjøfjell, ‘The Legal Significance of Article 11 TFEU for EU Institutions and Member States’, *University of Oslo Faculty of Law Research Paper* No. 2014-38, available at <http://ssrn.com/abstract=2530006>.

⁴⁶ Between 1992 and 1997, in lack of a fundamental rights catalogue, the Polish Constitutional Court decided most cases based on a simple ‘rule of law clause’ of the constitution, see Bogusław Banaszak and Tomasz Milej, *Polnisches Staatsrecht* (Beck 2009) 11-12. Activist examples deducing content from extremely vague concepts such as ‘human dignity’ or ‘general personality rights’ can be collected from the case-law of most European constitutional courts.

– with some exceptions⁴⁷ – tend to be deferential if a case is about complicated financial issues, the implications of which they normally do not entirely grasp.⁴⁸

2.3 Fundamental Rights

We might get the impression that the language of rights encourages the overuse of resources, that it necessarily has a short time span and that it does not consider the wider concepts of the common good. This is, however, not true: the language of rights is a *language* which can be used for very different purposes. There are impressive doctrinal attempts to express sustainability issues in the emotionally (and legally) strong language of rights.⁴⁹ These attempts use lawyerly finesse and sophistication to conceptualise sustainability issues as rights. Instead of environment protection, e.g., they can talk about the right to a healthy environment,⁵⁰ or – in an even more radical turn – about the rights of (wild) animals.⁵¹

For the purpose of financial and demographic sustainability, we can introduce new right bearers which I am going to consider under the headings of suffrage for children (2.3.1) and the rights of future generations (2.3.2). Or, as shown in the last point in this part of the paper, we can introduce new rights, and new limitation tests for existing rights, specifically concerning the issues of financial intergenerational sustainability (2.3.3).

2.3.1 New Right Bearers I: Suffrage for Children

The electoral system in modern democracies only allows those citizens who have reached a certain age to vote, i.e., children are excluded from this right. It also means that their interests are less represented than those of retired people,⁵² which makes the emergence of structurally biased social security systems more likely (and in fact they are biased).⁵³ By giving suffrage to children – so the argument goes – this structural bias could be corrected,⁵⁴ as the population

⁴⁷ Cf. András Sajó, 'How the Rule of Law Revolution Killed Hungarian Welfare Reform' (1996) 1 *East European Constitutional Review* 31-41; Christina M. Akrivopoulou, 'Striking Down Austerity Measures: Crisis Jurisprudence in Europe', *Int'l J. Const. L. Blog* 25 June 2013, available at <http://www.iconnectblog.com/2013/06/striking-down-austerity-measures-crisis-jurisprudence-in-europe/>. In all these cases, constitutional courts protected the social rights of those who had already been born, and it is questionable whether they would have been ready to do so for generations who would be born in the future.

⁴⁸ The judicial deference resulting from factual (financial) uncertainty is a part of what the ECHR calls 'margin of appreciation', see Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 17-66. Other courts behave similarly without conceptualising this issue so openly.

⁴⁹ Dieter Birnbacher, 'What Does it Mean to Have a Right?' *Intergenerational Justice Review* (2009) 9.4 128-132, 128. We translate interests into rights in order to make them stronger, see Mark Tushnet, *The Constitution of the United States: A Contextual Analysis* (Hart 2009) 188.

⁵⁰ See, e.g., Amadeo Postiglione, 'Human Rights and the Environment' (2010) 14.4 *International Journal of Human Rights* 524-541; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23.3 *European Journal of International Law* 613-642, esp. 641-642.

⁵¹ Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights. Current Debates and New Directions* (OUP 2004).

⁵² Suffrage of children in order to avoid gerontocracy: Philippe van Parijs, 'The Disenfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice' (1998) 27.4 *Philosophy and Public Affairs*, 292-333. More and more of these pensioners will have no children: this also makes the probability of the consideration of children's interests lower, see *ibid.* 315.

⁵³ Paul E Peterson, 'An Immodest Proposal: Let's Give Children the Vote' (1992) 121.4 *Daedalus* 151-174; Robert I Gal, Endre Szabo, Lili Vargha, *Children cost to parents, the old cost to taxpayers: An application of National Transfer Accounts and National Time Transfer Accounts* (Budapest Demographic Research Institute 2013).

⁵⁴ Robert H Pantell and Maureen T Shannon, 'Improving Public Policy for Children: A Vote for Each Child' (2009) 9.4 *Intergenerational Justice Review* 139-144.

is growing older and it is consequently more interested in shorter term goals.⁵⁵ By granting a stronger say to children, it is also likely that the social security system (incl. social benefits) for families will be more favourable which could encourage them to have more children⁵⁶ (an issue especially pressing in countries with extremely low fertility rates like Germany, Japan and Hungary).⁵⁷

Besides the justification with reference to demographic sustainability (or intergenerational justice) there are also arguments for the suffrage of children based on democracy. As democracy is considerably more established as a constitutional principle in the constitutional discourse than sustainability or intergenerational justice (many doubt that that latter two are constitutional principles at all),⁵⁸ justifications based on democracy seem to be stronger legal arguments. The history of democracy can basically be reconstructed as an ever-broadening suffrage. Originally only the white, the male and the rich had suffrage, and step-by-step it was broadened to include poor, coloured and women citizens.⁵⁹ Children are also citizens,⁶⁰ they are also part of the 'people' from which all state power is supposed to stem.⁶¹ Today, children have remained the only major group of citizens that does not have representation in the legislature.⁶²

A further possible argument for the suffrage of children would be to state that children also pay taxes, and consequently they should also have suffrage.⁶³ This is, however, a weak argument: many foreigners (incl. tourists) pay taxes in every country, and they do not have suffrage either: connecting suffrage to taxes is an outdated view which would (if turned around) lead to disenfranchising poor people.

There are basically three ways to achieve this: (1) children themselves exercise the right to vote (i.e., lowering the age limit to 16, 14 or even to 0), (2) their parents can receive proxy-votes for them, (3) children collect their unexercised votes until they reach the minimal

⁵⁵ See van Parijs (n 50) 293 and 298 on the unavoidably short-term self-interest of the elderly and on the empirical evidence that age-related self-interest affects voting behaviour (with further references).

⁵⁶ Cf. Anne Hélène Gauthier and Jan Hatzius, 'Family Benefits and Fertility: An Econometric Analysis' (1997) 51.3 *Population Studies* 295-307, 302: a 25% increase in the benefits given to the first two children raises fertility by 0.01% child per woman in the short run and 0.07% in the long run. *Contra* Karl Hinrichs, 'Do the old exploit the young? Is enfranchising the young a good idea?' (2002) 43.1 *Arch. Europ. Sociol.* 35-58, 48 stating that pronatalist policies are hardly affective with regards to their original aims, but they normally do reduce the risk of child poverty (with further references). For the sake of testing the argument we suppose in this paper that pronatalist policies *do* positively influence fertility rates.

⁵⁷ Reiko Aoki and Rhema Vaithianatham, 'Is Demeny Voting the Answer to Low Fertility in Japan?' (2009) *Center for Intergenerational Studies, Institute of Economic Research, Hitotsubashi University*; Balázs Schanda, 'Családi választójog – alkotmányjogi képtelenség vagy a fenntartható demokrácia biztosítója?' (2010) 57.10 *Magyar Jog* 608-611; Johanna Fröhlich, 'Alapkérdések a családi választójog vitájában' *Pázmány Law Working Papers* 2011/20; Paul Kirchhof, *Das Gesetz der Hydra* (Droemer 2006) 184-185. For a wider overview including the French, Austrian, Belgian and Swiss debates see Isabel Rupprecht, *Das Wahlrecht für Kinder. Verfassungsrechtliche Zulässigkeit und praktische Durchführbarkeit* (Nomos 2012) 26-44.

⁵⁸ See Winfried Kluth, 'Demographischer Wandel und Generationengerechtigkeit' *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* vol. 68, 2009, 247-289, 282 explicitly denying the constitutional nature of the requirement of intergenerational justice.

⁵⁹ András Jakab, 'Full Parliamentarisation of the EU without Changing the Treaties. Why We Should Aim for It and How Easily It Can be Achieved', *Jean Monnet Working Papers* 2012/3 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958111, 4-13.

⁶⁰ Henri Lasserre, *De la réforme de l'organisation normale du suffrage universelle* (Palmé 1873) 66-68; Maxim Mauranges, *Le vote plural, son application dans les élections belges* (Larose 1899) 127-132.

⁶¹ Hinrichs 51; Lore Maria Peschel-Gutzeit, 'Unvollständige Legitimation der Staatsgewalt oder: Geht alle Staatsgewalt nur vom volljährigen Volk aus?' (1997) *Neue Juristische Wochenschrift* 2861-2862.

⁶² Hinrichs (n 54) 40; Konrad Löw, 'Kinder und Wahlrecht' (2002) *Zeitschrift für Rechtspolitik* 448-450.

⁶³ Robert H Pantell and Maureen T Shannon, 'Improving Public Policy for Children: A Vote for Each Child' (2009) 9 4 *Intergenerational Justice Review* 139-143, 141.

age and then they use all their ‘stored’ votes at once. The second and third solutions can be combined with the first one.

There is, in theory, also a fourth way: granting the right to vote to the parents who would not simply substitute their children but have the extra suffrage on their own rights *because* they have children.⁶⁴ This fourth option is, however, in open conflict with the equality of suffrage, a basic tenet of modern democracies, so we are not going to consider it further. Besides this, it would also open up the debate for further weighing systems (more suffrage for those who pay more taxes, who have higher education, etc.) which have all been tried and rejected in legal history. For both of these reasons, I do not consider proposals suggesting fractional votes for children either.⁶⁵

There is an obvious paradox about establishing any of these measures, nicely explained by Claus Offe: if there is a majority to vote for the children’s suffrage, then there is no need for it; if there is no majority, then it is unclear how to introduce it.⁶⁶ For the sake of the argument I am going to ignore this problem at this point of the paper and return to it later (2.3.1.5).

2.3.1.1 Option 1: Lowering the Minimal Age for Suffrage

In most European countries, the minimal age required for suffrage is 18, but in Austria this has recently been lowered to 16, just like in certain German *Länder*.⁶⁷ There are proposals to lower this to 14 in some countries (or even lower if the child can express his/her will to vote in front of an authority),⁶⁸ but this has not yet been implemented. Besides the general democracy arguments mentioned above, the arguments for such a change range from synchronising the age of criminal liability with the minimal age of suffrage,⁶⁹ the full realisation of children’s rights⁷⁰ to the denial of maturity or intellectual capacity as a

⁶⁴ Between the two world wars, each father of four children or more received an extra vote in the French colonies Tunisia and Morocco, see André Toulemon, *Le suffrage familial ou suffrage universel intégral* (Sirey 1933) 121-122. For the similar Belgian system (combining it with financial and educational aspects for extra votes) before the First World War, see Henri Lasserre, *De la réforme de l’organisation normale du suffrage universel* (Palmé 1873) 66-68; Maxim Mauranges, *Le vote plural, son application dans les élections belges* (Larose 1899) 127-132; Laurent de Briey, Aurélie Héraut and Elise Ottaviani, ‘On Behalf of Children? Plural Voting System in Belgium from 1893 to 1919’ (2009) 9 *Intergenerational Justice Review* 144-145.

⁶⁵ Andrew Rehfeld, ‘The Child as Democratic Citizen’ (2011) 633 *The Annals of the American Academy of Political and Social Science* 141-166, 158: ‘Imagine that upon turning 12, a child received 1/7 of a vote, with an additional 1/7 added for every year after (at 18 they have a full vote).’

⁶⁶ Claus Offe, ‘Zusatzstimmen für Eltern. Ein Beitrag zur Reform von Demokratie und Wahlrecht?’ in Evangelische Akademie (ed), *Zukunft wählen – Zusatzstimmen für Eltern?* (Evangelische Akademie 1993) 1-26, 20. This kind of objection can be brought against most legislative reform proposals though.

⁶⁷ For further examples outside of Europe with age limits of 16 (Brazil, Cuba, Somalia, Nicaragua) or 17 (East Timor, Indonesia, Sudan, North Korea), see Róbert Iván Gál, Attila Gulyás and Márton Medgyesi, ‘Intergenerációs alkotmány’ (2011) 5 *Nemzeti Fenntartható Fejlődési Tanács Műhelytanulmányok* 25. For proposals lowering the voting age to 16 in the UK and the US, see Alex Folkes, ‘The Case for Votes at 16’, (2004) 1 *Representation* 52-56; Daniel Hart and Robert Atkins, ‘American sixteen- and seventeen-year-olds are ready to vote’ (2011) 633 *The Annals of the American Academy of Political and Social Science* 201-222.

⁶⁸ Wolfgang Gründinger, ‘Wer wählt, der zählt’ in Stiftung für die Rechte zukünftiger Generationen (ed.), *Wahlrecht ohne Altersgrenze? Verfassungsrechtliche, demokratietheoretische und entwicklungspsychologische Aspekte* (Oekom 2008) 21-52. Before that time, the parent can exercise the suffrage for the child. For fourteen as the lowest acceptable age of suffrage see Hans Meyer, ‘Wahlrechtsgrundsätze’, Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band III* (3rd ed. CF Müller 2005) 543-604, marginal number 12. For a proposal to abolish age limits in general (without any formal procedure for expressing the will to vote) Mike Weimann, *Wahlrecht für Kinder. Eine Streitschrift* (Beltz 2002) 1-23.

⁶⁹ Rupprecht (n 57) 209.

⁷⁰ Weimann (n 66) 1-23.

precondition of suffrage.⁷¹ A general reference to children's rights is unconvincing: fundamental rights can be limited if they conform to the tests of rights limitation (in our case: proportionality test), the first step of which is to establish the rationale for the limitation. Synchronising age limits does not really seem a convincing argument *on its own* either: for different legal possibilities (e.g., for being elected president or senator, for being able to sell properties) most legal orders require very different ages, because there are different rationales behind the different age limits.

The question is, then, rather whether there is a rationale behind having a minimum of age for suffrage and what age this rationale would require to be set as a minimum age of suffrage. Throughout history, there seems to have been a tendency to have lower and lower age limits (now it is mostly 18, but more and more countries are introducing 16). The question about the 'right' minimum age is not a strictly constitutional one: introducing a minimum age of 40 would probably violate most international human rights instruments, but the question as to whether 14, 16 or 18 is the right one, seems to be left to political decision. The real issue is, however, whether there is a rationale at all behind any age limit. The most obvious answer would be to say that the rationale is that voters should have a minimum level of maturity (implying intellectual capacity). This would, however, be an unsatisfying answer: the right to vote is in fact not based in any democracy on intellectual capacities. If it was, then a good proportion of the mature population should be excluded from suffrage (and possibly substituted with intelligent teenagers). If we begin to introduce a minimum level of intellectual capacity as a precondition of suffrage, then there is no reason why this level should not be higher and higher, leading to the exclusive suffrage of a handful of professors in each country. Such a system would, however, result in governments which would protect the interests of professors in the name of the public interest.⁷²

The fact that the majority of children would not want to vote or that they are easily influenced (other possible counter-arguments against the suffrage of children), can also be applied to many mature voters, yet nobody proposes their exclusion. Another possible counter-argument is that lowering the age limit increases the number of voters who are actually not paying taxes, so it would lead to higher public debt again. As we noted above, however, sustainability arguments have a weaker legal force than democracy or fundamental rights arguments, so this would not outweigh our argument for the suffrage of children.

The equality of suffrage is based on the moral equality of citizens, and not on their equal intellectual capacity. The only argument which seems strong enough is self-protection: we protect them from their own bad choices. Just like in many Continental European contract laws, children are not allowed to sell their properties (under market price) *as long as they are children*, we can also protect them constitutionally from possibly making bad political choices *as long as they are children*. This paternalistic argument seems to be sufficient for a temporary limitation of the right to vote. But it is very difficult to explain why *nobody* can exercise this right for them. In the current electoral systems, we can use two conceptualisations to describe the legal situation:⁷³ (1) children do not have suffrage at all as long as they are children (this would contradict the principle of the moral equality of citizens), (2) children have suffrage but they are not allowed to exercise it as this is in their own best

⁷¹ Steven Leece, 'Should Democracy Grow Up? Children and Voting Rights' (2009) 9.4 *Intergenerational Justice Review* 133-139, 133: 'excluding children from the franchise normally rests explicitly on the premise that political authority should be knowledge-based'.

⁷² See the masterful critique of Plato by Robert A Dahl, *Democracy and Its Critics* (Yale UP 1989) 52-79.

⁷³ On the undertheorised nature of the question in political (and constitutional) theory, see Francis Schrag, 'The child's status in the democratic state' (1975) 3.4 *Political Theory* 441-457, 443: 'Children are a nuisance to most adults; they are a particular nuisance to the democratic theorist who wishes to exclude them from having a voice in the direction of the policy with as much vehemence as he wishes to include every adult (except, of course, felons, the insane, the mentally retarded, and aliens).'

interest as long as they are children. The key question thus becomes whether it should be possible for someone (in practice: for the parents) to exercise the right to vote for the children. In the following, I am going to analyse this question.

2.3.1.2 Option 2: Proxy Votes by Parents (Demeny Voting)

Parents voting vicariously for their children is often referred to as Demeny Voting as it was (also) proposed by demographer Paul Demeny in 1986.⁷⁴ This means that children do have a suffrage but they cannot exercise it themselves, their parents exercise it for them vicariously. The situation is similar to contract law: parents make contracts in the name of and for their children. With this solution, the ‘one man one vote’ principle is not violated. Similar solutions are known in the UK and in France where relatives can vote for you if you are unable to attend the elections, but this substitution can only happen if you already have the right to exercise your suffrage.⁷⁵ Sometimes proxy voting is referred to in the literature as ‘family suffrage’, but I am going to use the expression ‘suffrage for children’ as this more precisely expresses the actual doctrinal suggestion. In most European countries, this proposal has a political colour, namely a conservative one, except for Germany where you find supporters of this idea from all over the political spectrum.⁷⁶

Possible counter-arguments are manifold: (1) Some objections concern the directness of votes, i.e. whether someone can exercise the right to vote for someone else at all. Certain legal acts (marriage, will) can only be done personally, and votes – so the objection goes – are similar. (2) Others concern the equality of votes, as parents in many cases would cast two votes. (3) Some object to the implied presupposition that parents would act in the interest of their children. (4) Finally, some doubt whether there can be any solutions for the technical details (conflict between parents, etc.).

Ad (1). *Directness*. A usual answer to the first objection could be to refer to blind people for whom someone else is making the cross at the ballot. This answer can, however, be countered with reference to the fact that the blind person can give a direct order about the vote, whereas children cannot do so. Another answer could be to refer to votes via post. This, again, is not really a convincing answer, as votes via post express the will of the voters, whereas in the case of children they normally would not express any such wish. A third answer would be to refer to doubts concerning the requirement of directness of votes in a democracy. We can do so either by using comparative law arguments (UK and France, see above in FN 75), or by referring to the fact that this requirement was historically only introduced to avoid the sale of votes (purposive interpretation of the concept),⁷⁷ or by referring to the general system of democracy, with the words of Jane Rutherford: ‘Proxies are a common system for delegating the right to vote. In fact, the entire system of democracy can be seen as giving elected representatives proxies for their constituents.’⁷⁸ As a matter of fact, any of the three arguments seems pretty strong to me to counter objection (1).

⁷⁴ Paul Demeny, ‘Pronatalist Policies in Low-Fertility Countries: Patterns, Performance and Prospects’ (1986) 12 *Population and Development Review* (supplement) 335-358.

⁷⁵ Called *proxy voting* in the UK, see *Representation of the People Act 2000*, section 12(1). In French law, it is called *vote par procuration*, see *Code électoral*, article 147bis.

⁷⁶ Van Parijs (n 50) 311.

⁷⁷ David Krebs, ‘Wider die amputierte Wahl. Physiker und Philosophen als Hebammen einer echten Demokratie’ in *Stiftung für die Rechte zukünftiger Generationen: Wahlrecht ohne Altersgrenze? Verfassungsrechtliche, demokratietheoretische und entwicklungspsychologische Aspekte* (Oekom 2008) 267-300, 283.

⁷⁸ Jane Rutherford, ‘One Child, One Vote: Proxies for Parents’ (1998) 82 *Minnesota Law Review* 1463-1525, 1502.

Ad (2). *Equality*. The objection concerning equality is probably the strongest of all the concerns.⁷⁹ There are two strategies to counter it. The first one is to admit that Demeny Voting would indeed encroach upon the principle of equality, but to state that the universality of elections is more important.⁸⁰ In this case a conflict between two principles is shown, that of equality of suffrage and that of universality of suffrage, and the principle of universality is judged to be more important as it is more directly connected to the principle of democracy. The universality – so the argument goes – is logically prior, as it concerns the ‘whether’, whereas the equality only concerns the ‘how’.⁸¹

The second strategy is to deny the encroachment upon the principle of equality and to stick strictly to the doctrinal reasoning: everyone only has one vote, parents merely exercise votes vicariously for their children. This second reasoning is probably what is behind the existing French and UK (adult) proxy voting systems, and from a strictly legal point of view it also sounds more convincing than the first answer.

Ad (3). *Interests*. The objection concerning doubts about whether parents would actually cast their votes in the interests of their children is a weak one: ‘Arguing that parents cannot act as their children’s representative because they might abuse their position becomes absurd in comparison to all the other powers parents already have over their children.’⁸² Parents represent their children in court, they receive and spend the subsidies for their children.⁸³ We can also legitimately ask: if not the parents, then who else could represent them?⁸⁴

Ad (4). *Technical details*. The objection concerning technical details (esp. which parent should exercise the right to vote) is also unconvincing. As a matter of fact, there are a number of proposals with different technical solutions.⁸⁵ Referring to the technical details as an objection just begs the real question, i.e., whether we should introduce it or not. All technical details (e.g., separated or divorced parents, step parents, disappeared parents, children in state custody, etc.) are logically secondary and by no means insurmountably difficult questions.

2.3.1.3 Option 3: Storable Votes

⁷⁹ Even though doctrinally different, *in practice* it means that certain citizens have more than one vote which downgrades all other citizens in comparison to them, see Rainer Wernsmann, ‘Das demokratische Prinzip und der demographische Wandel. Brauchen wir ein Familienwahlrecht?’ (2005) 44 *Der Staat* 43-66, 55-56, 66. Some even go further and suggest that it would be such a grave breach of the constitutional principle of democracy that not even a constitutional amendment could introduce it, see Matthias Pechstein, ‘Wahlrecht für Kinder?’ (1991) 3 *Familie und Recht* 142-146, 146; Wolfgang Schreiber, ‘Wahlrecht von Geburt an – Ende der Diskussion?’ (2004) *Deutsches Verwaltungsblatt* 1341-1348; Werner Schroeder, ‘Familienwahlrecht und Grundgesetz’ (2003) *JuristenZeitung* 917-922. The latter argument is a very local (German) objection though, probably inapplicable to other European countries. Under US law, a constitutional amendment would be necessary to introduce it, see the detailed analysis by Robert W Bennett, ‘Should Parents Be Given Extra Votes on Account of Their Children?’ (2000) 94 *Northwestern University Law Review* 503-565.

⁸⁰ Krebs (n 75) 267-300.

⁸¹ Krebs (n 75) 281.

⁸² Stefan Olsson, ‘Children’s Suffrage: A Critique of the Importance of Voters’ Knowledge for the Well-Being of Democracy’ (2008) 16 *The International Journal of Children’s Rights* 55-76, esp. 72.

⁸³ Udo Hermann, *Ökonomische Analyse eines Kinderwahlrechts*, Freie Universität Berlin, Univ. Diss. 2010, 204.

⁸⁴ Krebs (n 75) 274.

⁸⁵ Van Parijs (n 50) 312-313 listing different technical proposals concerning who can exercise the vote (with references): only the father, only the mother, until 10 years the mother and then the father, fathers for their sons and mothers for their daughters, half vote to each parent, father for first child and mother for second (or the other way around) etc. According to Franz Reimer, ‘Nachhaltigkeit durch Wahlrecht? Verfassungsrechtliche Möglichkeiten und Grenzen eines Wahlrechts von Geburt an’ (2004) *Zeitschrift für Parlamentsfragen*, 322-339, 329-339 every parent should only be able to exercise one additional vote, and the parents should agree who exercises the vote for the first child (in lack of an agreement neither of them can exercise it).

A further possibility to give suffrage to children without facing the objections of proxy votes is to apply so called ‘storable votes’.⁸⁶ This would mean that children collect their uncast votes until they reach 18 and then they can cast four or five votes at once. In this way, nobody should exercise their votes for them but they still could keep all of their votes. This ensures that the moral equality of all citizens (incl. children) is abided and avoids the problems associated with parents vicariously exercising their children’s votes: no vote would be lost.

Such a suggestion is, however, conceptually flawed. A vote at a parliamentary election is not capital that you can collect and store like money, but it is an *act of deciding about somebody (or a group of people) at a certain time*. The concept of storable votes was developed as a decision making technique for expressing the intensity of preferences by minority groups about *certain issues* and not about setting up a decision making organ.

It would probably also mean – as a conceptual side-effect – that everybody should have the possibility not to go to the ballots in order to collect his/her vote for future elections. Or you could even take a ‘vote loan’ and exercise your future votes immediately. Why not?

2.3.1.4 Conceptual Side-Effects

The actual social purpose of suffrage for children only necessitates the active suffrage (the right to vote), but for the sake of conceptual coherence, some also suggest the passive suffrage for children (the right to be elected).⁸⁷ A further conceptual side-effect is that if we accept the suffrage for children, then – with the same arguments – we also have to accept the suffrage for (mentally) disabled people. As a matter of fact, such arguments have already been used by the ECtHR for mentally disabled people (but not for children),⁸⁸ so we can also turn it around: a conceptual side-effect of the suffrage of mentally disabled people is the suffrage of children (at least in the form of children voting for themselves without any age limit; proxy voting is not suggested in the discourse of mentally disabled people).

2.3.1.5 Practical Consequences for the Sustainability Challenge

All the above could lead us to the conclusion that we should introduce the suffrage for children. As a matter of fact, from the perspective of the conceptual coherence of democracy, the suffrage for children (more precisely proxy votes, possibly combined with lowering the minimum age for suffrage) seems more favourable than the current situation. But for the actual issue of this paper, i.e. sustainability, the situation is much less clear.⁸⁹ To put it shortly: it seems to be a *useful but actually not decisive* change.

On the one hand, even children can be voted out with or without suffrage for children if the ageing population is large enough, and on the other hand, if we accept the premise of self-interest then children (or their parents) will only be interested in sustainability as long as they are alive.⁹⁰ This means that the time span will be longer, but structurally it just delays the problems (for a few decades).⁹¹ According to model countings on Germany, e.g., the amount

⁸⁶ For the concept see A Casella, ‘Storable Votes’ (2005) 51 *Games and Economic Behavior* 391-419.

⁸⁷ Gründinger (n 66) 31. *Contra* Rupprecht (n 57) 15 calling such proposals ‘not serious’.

⁸⁸ *Alajos Kiss v. Hungary*, judgment of 20 May 2010, no. 38832/06.

⁸⁹ On the inconclusiveness of statistical models on the practical effects see also Achim Goerres and Guido Tiemann, ‘Kinder an die Macht? Die politischen Konsequenzen des stellvertretenden Elternwahlrechts’, (2009) *Politische Vierteljahresschrift* 50-74, esp. 71-72.

⁹⁰ E.g., they might want child subsidies to be very high *now*, even if this causes long term debt for future generations, see Goerres and Tiemann (n 87) 58.

⁹¹ Tom Krieger, ‘Generationengerechtigkeit und das “Wahlrecht von Geburt an” – kritische Anmerkungen aus Sicht der Public-Choice-Theorie’, in: *Stiftung* (n 66) 301-330.

of child subsidies would only be 10% higher than currently.⁹² Depending on the voting model (probabilistic vs. median voter model), pensioner voters will take over the electoral system either in 2016 or in 2030.⁹³ Both of these data are very disappointing from a sustainability perspective.

Besides these problems, there is also a questionable implied presupposition about voting behaviour behind every suggestion on suffrage for children, according to which ‘citizens are following their own interest’ (instrumental voting). This presupposition has been criticised both from an epistemological (‘citizens do not know and cannot actually know what their own best interest is’) and from an anthropological point of view (‘citizens very often vote against their personal interest, if they think that it is the interest of the political community’).⁹⁴

Suffrage for children might thus be a useful (and doctrinally probably more coherent than the current exclusion), but for our issue definitely not a decisive suggestion, so we have to continue our search for further constitutional solutions. This combined with the practical difficulty of introducing such a change, both facing the fierce ideological debates and the paradox by Claus Offe as shown above, it is probably not worth fighting – from the perspective of sustainability – for this change at all. Instead, we should concentrate our intellectual efforts and time on constitutional solutions which serve the purpose of sustainability more efficiently.

2.3.2 New Right Bearers II: Rights of Future Generations

If we want to ensure long term sustainability, then (social or environmental) rights should be given *also* to those generations which have not yet been born.⁹⁵ As we noted above, the language of rights is supposed to provide a stronger emotional and legal force to the argument.⁹⁶ The conceptualisation of certain interests as rights is done in order to give them more weight.

It would be difficult to argue that we are unable to establish *en grosso* at least certain interests of future generations. We can indeed establish certain interests of future generations and we can give them heavier weight by conceptualising them as rights. Before we begin with possible objections, a short terminological remark: Tremmel recently suggested that we should rather talk about ‘succeeding’ generations, as both unborn generations and present children should be considered.⁹⁷ While he is right in substance, the terminology seems to be very much established, so this paper keeps using it while noticing that ‘future generations’ should be understood as including also present children.

Possible objections against the conceptualisation of sustainability as ‘rights of future generations’ are the following: (1) Every new right is by definition a reason to limit another (old) one, i.e., it can lead to the limitation of traditional fundamental rights. (2) It is unclear

⁹² Hermann (n 81) 138. The usual distortion of electoral systems favouring educated and rich people because they are more likely to vote also applies to parents voting for their children, see Hermann (n 81) 125.

⁹³ Hans-Werner Sinn and Silke Übelmesser, ‘Pensions and the Path to Gerontocracy in Germany’ (2002) 19 *European Journal of Political Economy* 153-158; Hermann (n 81) 202.

⁹⁴ Alexander A. Schuessler, *A Logic of Expressive Choice* (Princeton University Press 2000); Joel M Guttman, Naftali Hilger and Yochanan Shachmurove, ‘Voting as Investment vs. Voting as Consumption: New Evidence’ (1994) 47.2 *Kyklos* 197-207; Kamhon Kan and CC Yang, ‘On Expressive Voting: Evidence from the 1998 US Presidential Election’ (2001) 108.3-4 *Public Choice* 295-312.

⁹⁵ Peter Saladin and Christoph A. Zenger, *Rechte künftiger Generationen* (Helbing & Lichtenhahn 1988).

⁹⁶ Miklós Könczöl, ‘Future Generations: An Almost Rawlsian Perspective’ in Miodrag Jovanović and Bojan Spaić (eds), *Jurisprudence and Political Philosophy in the 21st Century: Reassessing Legacies* (Peter Lang 2012) 130-136, 131: ‘In moral and legal thinking, references to rights have to be countered by references to other rights, references to interests with references to interests.’

⁹⁷ Tremmel (n 43) 206.

who is empowered to represent future generations (ombudsman, special committees, children, anybody), and how it can be ensured that these organs or people really do represent the rights of future generations. (3) It is conceptually flawed to talk about the rights of *future* generations, as (depending on whether we include currently living children) either all of them or a very large proportion of them actually do not exist, so the subjects or bearers of rights are actually non-existent.⁹⁸ (4) It is conceptually flawed because only individuals can have rights, not *generations*. So we can only talk about the rights of ‘future humans’.⁹⁹

Ad (1). This is a legitimate objection, even if doctrinally we can always differentiate between the importances of different rights by having different rights limitation tests for them. In any case, introducing a new right or introducing the same rights for new bearers necessarily does provide for reasons to limit the rights of others. Rights are trumps and if we have more and more trumps then we inflate the old (traditional) ones. The question is thus not whether new rights lead to the inflation of old ones (yes, they do), but whether there are good reasons to do so, i.e., whether we gain enough by conceptualising the interests of future generations as rights when we give up certain rights of the present generations. Stripped from the language of rights, the question thus transforms into a question of weighing the interests of future generations and the interests of the present generation.¹⁰⁰ A question to which there is no easy legal answer (there are no generally accepted doctrines or case law on the issue), but which requires careful balancing. The objection is, to conclude, legitimate and strong but inconclusive.

Ad (2). The objection concerning the representation is a relevant, but not particularly strong one. It can either be done in a decentralised way in which everybody can step up in the interest of future generations,¹⁰¹ or we can establish some central authority, ombudsman or council to do so. We are going to return to the latter issue in 2.5.3.

Ad (3) and (4). Referring to the non-existence or the collective nature of the right bearers are interesting conceptual objections. According to traditional legal doctrine, for a ‘right’ you need (at least as a foetal form) existing and individual bearers. With the conceptualisation as ‘right’ comes not a heavier weight, but also certain conceptual constraints. One of the virtues of law as a method of social control is exactly its conceptual coherence and thus its systematic nature which is necessary for legal certainty. Law can be changed in many ways, and even its conceptual system can be rewritten, but it always has a price: the legal machinery (courts, authorities, solicitors, enforcement agencies, legal academics) have to accommodate and to learn the novelties. If the novelties do not fit to the old system, i.e., if the old conceptual system is questioned, then the solution of new and not explicitly regulated cases will be difficult when applying the law. The concept of ‘rights’ is a fundamental one in modern constitutional democracies, and they are perceived as *individual* rights or *existing* people. It is possible to change this but it is a highly risky move which should only be done if no other options are available to achieve sustainability and if we consider the gains (in sustainability) more important than the potential losses in rights

⁹⁸ Miklós Könczöl, ‘Future Generations and Deliberative Democracy: What and How to Represent?’ (2014), available at <http://ssrn.com/abstract=2487082>, with an overview of the relevant literature.

⁹⁹ Herwig Unnerstall, *Rechte zukünftiger Generationen* (Königshausen & Neumann 1999) 63-67, 117-126.

¹⁰⁰ Matthew D Adler, ‘Future Generations: A Prioritarian View’ (2009) 77 *The George Washington Law Review* 1478-1520.

¹⁰¹ A Filipino lawyer represented 43 children who were considered as representatives of future generations at the Federal Constitutional Court of the Philippines. He was granted *locus standi* on 30 July 1993 with the following explanation: ‘We find no difficulty in ruling that they [the children] can, for themselves, for others, in their generation and for succeeding generations, file a class suit. Their personality to sue on behalf of succeeding generations can only be based on the concept of inter-generational responsibility [...] [to make the natural resources] equitably accessible to the present as well as to future generations’. Antonio Oposa, ‘In Defence of Future Generations’ (2002) 2.3 *Intergenerational Justice Review* 7.

protection. Fundamentally redefining the conceptual structure of basic and established terms such as rights reminds me very much of Lewis Carroll's tale of Alice, and it seems similarly absurd to me:¹⁰²

"And only one for birthday presents, you know. There's glory for you!"

"I don't know what you mean by 'glory'." Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't – till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean a 'nice knock-down argument'." Alice objected.

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all."

Thus while not doubting that a new conceptual system would be possible,¹⁰³ I suggest that the question of the 'rights of future generations' is left open (or more frankly: I am rather sceptical about it) and that other possible constitutional solutions which could achieve the same result without destroying traditional doctrinal frameworks are concentrated on.¹⁰⁴

2.3.3 New Fundamental Rights and New Interpretations of Traditional Fundamental Rights

The most well-known sustainability right is the 'right to a healthy environment',¹⁰⁵ which, according to a recent study by David R Boyd, is mentioned in 92 constitutions all around the world.¹⁰⁶ As a disappointing result of Boyd's study, we also know that there is actually no causal relationship between the mentioning of this right in a constitution and the level of environmental protection that actually exists: its value is limited to giving impetus to the legislator by emphasising the topic in public discourse and in some cases it can help against backsliding.¹⁰⁷ The level of environmental protection that exists in a given country correlates much more strongly with whether there are detailed statutory rules on environmental protection and whether individuals have the right to enforce these rules in independent courts.¹⁰⁸

More specifically to our topic, constitutions do not mention fundamental rights to financial sustainability, in international law recently – as a more general and partly financial

¹⁰² Lewis Carroll, *The Annotated Alice* (Alice's Adventures in Wonderland & Through the Looking Glass), (Bramhall House 1960) 269.

¹⁰³ For a general attempt to conceptualise collective rights, see Miodrag Jovanović, *Collective Rights. A Legal Theory* (CUP 2011). For advocating rights of future persons, see Axel Grosser, 'On Future Generations' Future Rights' 2008 16.4 *The Journal of Political Philosophy* 446-474. For a conceptualisation as 'rights of future individuals' (but not those of generations), see Ori J Herstein, 'The Identity and (Legal) Rights of Future Generations' (2009) 77 *The George Washington Law Review* 1173-1215. The concrete doctrinal operationalisation (esp. in cases of conflicts of fundamental rights) remains, however, in all these cases unclear.

¹⁰⁴ Some constitutions do contain references to the rights of future generations, but their doctrinal operationalisation still remains unclear. See e.g. Japanese Constitution (1946) Art. 11; Norwegian Constitution (as amended in 1992) Art. 110b; Bolivian Constitution (1967 as amended in 2002) Art. 7(m). The current Bolivian Constitution of 2009 only contains a reference to the 'well-being of present and future generations' in Art. 9(6), and the concept of 'rights of future generation' from the former Constitution has been omitted.

¹⁰⁵ For recent works on environmental fundamental rights see e.g. Richard P Hiskes, *The Human Right to a Green Future. Environmental Rights and Intergenerational Justice* (CUP 2009); Dinah L Shelton (ed), *Human Rights and the Environment* (Elgar 2011).

¹⁰⁶ David R Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 251.

¹⁰⁷ Boyd (n 103) 233-252.

¹⁰⁸ Boyd (n 103) 117-123.

right – the ‘right to development’ has emerged.¹⁰⁹ This, however, is rightly criticised because it conceptually lacks the actual obliged party,¹¹⁰ so it would be difficult to apply (similarly to the above mentioned rights of future generations).

What seems to be more promising on a conceptual level is rather constitutionally guaranteed family subsidies or tax deductions. These make family planning easier by reducing financial risks, thus increasing the likelihood of a growth in the fertility rate. Almost all authors agree that such measures are legitimate, with many even thinking they are a constitutional imperative – deduced from provisions concerning family protection or the protection of minors, to be found in many constitutions.¹¹¹ The constitutional imperative can either be conceptualised as a duty of the state to act, or in an even stronger form as the fundamental right of those concerned (implying a better *locus standi* and a proportionality test in case of limitations).¹¹² The difference between direct subsidies and tax deductions is, unfortunately, normally not considered to be constitutionally relevant, even though from a demographic point of view cash benefits are clearly more effective than tax allowances.¹¹³ Only very few think that these are not legitimate because the state should remain neutral in questions of family planning,¹¹⁴ an argument which seems to be blind to the demographic challenges that European societies face, and which consequently has to be discarded.

A different problem is how pensions and related demographic changes can be conceptualised in constitutional law. In most legal orders, pensions are generally not protected by the right to property,¹¹⁵ but rather by general principles of predictability and legal certainty. A protection by the right to property is only applicable as far as the pension is based on the pensioner’s own former financial contribution.¹¹⁶ This conceptualisation seems to be a harmful legal fiction, or to put it more bluntly, a systemic lie as in most European countries pension systems run *in fact* on a pay-as-you-go basis. Consequently, even though we pay public pension contributions and the pensions we receive after retirement are dependent on the amount we paid under this title, in fact the money that we pay is a type of tax which will basically be spent immediately at the moment of payment on the pensions of other people. If we want to be more pragmatic about sustainability challenges then pensions should also recognise that bringing up children is at least as important for establishing the just amount of pensions as the amount of contributions paid – a principle which has also been considered by the German Federal Constitutional Court.¹¹⁷ In this way the external cost of not having children can partially be internalised.

Both child subsidies (tax allowances) and pension issues are relevant, and their above mentioned constitutional reconceptualisations help in the sustainability issues that we are concerned with in this paper. But they suffer from the same problem as the suffrage for

¹⁰⁹ See the Resolution of UN Assembly General 41/128.

¹¹⁰ Andreas Ausprich, ‘Entschuldung, Menschenrechte und das Recht auf Entwicklung’ in Martin Dabrowski e.a. (eds), *Die Diskussion um ein Insolvenzrecht für Staaten. Bewertungen eines Lösungsvorschlages zur Überwindung der Internationalen Schuldenkrise* (Duncker & Humblot 2003) 81-88.

¹¹¹ Christian Seiler, ‘Entwicklung der Bevölkerung und Familienpolitik’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band IV* (3rd ed. CF Müller 2008) 507-529.

¹¹² Cf. the statement that the living costs of those who have no children is considerably lower, see BVerfGE 103, 242, 263f.

¹¹³ Van Parijs (n 50) 318 with further references.

¹¹⁴ Gerd Roellecke, ‘Geburtenrückgang, Volk, Recht, Moral’ (1990) 45.19 *JuristenZeitung* 877-883. *Contra* Felix Ekart, ‘Familienförderung durch Steuerrecht?’ 2004 *Kritische Justiz* 116-131 referring to the state’s (supposed) obligation to remain neutral in questions of family planning.

¹¹⁵ For an exception see the case law of the ECHR, e.g. *Stec v. UK* (nos. 65731/01 and 65900/01), judgment of 12 April 2006.

¹¹⁶ BVerfGE, 58, 81, 109ff, see Kluth (n 56), esp. 256, 260-261 with further references.

¹¹⁷ Based on Art 3(1) and art 6(1) GG, see BVerfGE 87, 1 (41f); 103, 242 (263). Görg Haverkate, *Die Zukunft der sozialen Sicherungssysteme*, DVBl 2004, 1061-1070, esp. 1067-1068.

children (see above in 2.3.2.5): they only concern those generations which are already alive. And if we try to include future generations, then we will face serious doctrinal problems concerning the concept of rights.

2.4 Institutional Rules on Elections and Referenda

We know that proportional electoral systems tend to lead to coalition governments which normally result in higher deficits. This is so because the compromises that the parties in government have to make normally include extra payments for their specially favoured social groups.¹¹⁸ So first-past-the-post voting systems (like in the UK) are more likely to generate lower public debts.¹¹⁹ We also know that veto referenda on major public investments are effective in curbing public deficit.¹²⁰

There are also empirically (yet) unsubstantiated, but plausible theses about institutional electoral rules concerning sustainability. E.g., it is quite possible that prohibiting the re-election of politicians would result in politicians who are somewhat less likely to buy votes,¹²¹ but the organisations (parties) behind them will still have the same motivations which would work against such changes. And it is also possible that politicians might pay more attention to the common good if voters could change their ranking on the party lists,¹²² but no empirical research has confirmed this suggestion yet.

All these are interesting and some of them are definitely useful suggestions if we look for financial sustainability in general.¹²³

2.5 Rules on Public Finance

There is a very strong tendency in the Member States of the European Union to establish more and more legal (mostly constitutional) rules in order to achieve financial

¹¹⁸ Lars P Feld, 'Nachhaltige Finanzverfassung aus ökonomischer Perspektive' in Kahl (ed) (n 18) 52-53 with further references.

¹¹⁹ Torsten Persson, Gerard Roland and Guido Tabellini, 'How Do Electoral Rules Shape Party Structures, Government Coalitions, and Economic Policies?', *CESifo Working Papers* No. 1115 (2004).

¹²⁰ Lars P. Feld and John G. Matsusaka, 'Budget and Government Spending: Evidence from Swiss Cantons' (2003) 87.12 *Journal of Public Economics*, 2703-2724; John G Matsusaka, 'Fiscal Effects of the Voter Initiative' (1995) 103.3 *Journal of Political Economy* 587-623.

¹²¹ Walter Schmitt Glaeser, 'Abhängigkeit der Politiker als Funktionsmangel der Demokratie' (2006) 39.1 *Zeitschrift für Rechtspolitik* 10-15, esp. 13.

¹²² Volker von Prittwitz, 'Wahl ohne Auswahl? Probleme des deutschen Wahlrechts im europäischen Vergleich' in Hans Herbert von Arnim (ed), *Die deutsche Krankheit: Organisierte Unverantwortlichkeit?* (Duncker & Humblot 2005) 73-80.

¹²³ For general financial sustainability purposes, a similarly useful suggestion (which is not electoral in its nature) might be to let subnational entities go bankrupt in order to reward responsible (and to punish irresponsible) financial decision making on a local level, see Charles B. Blankart and Achim Klaiber, 'Subnational Government Organisation and Public Debt Crisis' (2006) 26.3 *Economic Affairs* 48-54. For further institutional solutions helping to lower public deficit, see Min Shi and Jakob Svensson, 'Conditional Political Budget Cycles', (April 2002). *CEPR Discussion Paper* No. 3352. Available at SSRN: <http://ssrn.com/abstract=315248> (the higher the rent for the politicians (e.g. via corruption), the higher the probability to buy votes); Jonathan Rodden, 'The Dilemma of Fiscal Federalism: Grants and Fiscal Performance around the World' (2002) 46.3 *American Journal of Political Science* 670-687 (long-term balanced budgets in subnational governments are most likely if (1) either the centre imposes borrowing restrictions, (2) or subnational governments have wide-ranging taxing and borrowing autonomy. If you have no restrictions, but also no autonomy, then large and persistent deficits are likely to occur); Joachim Wehner, 'Cabinet structure and fiscal policy outcomes' (2010) 49 *European Journal of Political Research* 631-653 (the fewer members the cabinet has, the lower the deficit is likely to be).

sustainability.¹²⁴ The existence and the strength of such rules normally correlates with the financial sustainability of a country, but it is unclear whether financial sustainability is caused by such rules or the other way around: whether the existence of a rule is just a symptom of a political climate which would care anyway about financial sustainability. We choose here to analyse those rules which either seem to be very innovative, or *prima facie* directly relevant to sustainability.¹²⁵

2.5.1 Transparency Rules

There are thoughtful suggestions about how to increase transparency concerning both on the side of taxpayers and on the side of the government in order to achieve financial sustainability. Making the amount of tax paid by everybody (natural and legal persons) public would definitely make tax evasion more difficult and therefore help in achieving a balanced budget.¹²⁶ There are, however, legitimate privacy concerns, which would also have to be balanced in a proposal for such a change, and the suggestions do not address this possible objection.

On the other side of the game, transparency of budgetary numbers, esp. public debt figures might have a shocking effect on the public and on the politicians, which would encourage them to pay more attention to financial sustainability. A usual way of hiding government spending is to use separate special accounts and funds, which is proven to lead to higher public debt.¹²⁷ The aging of government infrastructure could be discounted in order to have a more realistic description of the situation,¹²⁸ and the obligations to pay pensions should also be discounted in public debt figures.¹²⁹ Leaving out the future pension obligations of the government from the public debt figure amounts to systemic lying and self-deception,¹³⁰ because we are afraid to see the reality that, on average, the public debt figures of Western states are around 130% higher than the current ones.¹³¹ Such rules could also be enshrined into the constitutions, so governments ‘can resist’ the temptation to meddle with numbers.

More transparency about the amount of pension obligations is definitely necessary for any constitutional response to sustainability challenges. But information on its own, without institutional enforcement mechanisms, is insufficient. The electorate cannot function in

¹²⁴ For a quantification of the strength of such rules, showing growing numbers, see the regularly updated Fiscal Rule Index of the European Commission: http://ec.europa.eu/economy_finance/db_indicators/fiscal_governance/documents/nfr_2012_graph_3.pdf.

¹²⁵ We are not going to analyse medium term budgetary frameworks, ‘rainy day’ funds and different budgetary procedures which might indirectly be relevant to our topic. For these issues, see *Report on the Public Finances in EMU* (European Commission 2010).

¹²⁶ Kirchhof (n 57) 278-280; Klaus Tripke, *Die Steuerrechtsordnung*, vol. I (2nd ed. Schmidt 2000) 213-214. For Norway, see <http://skattelister.no/>.

¹²⁷ James E. Alt and David Dreyer Lassen, ‘Transparency, Political Polarization, and Political Budget Cycles in OECD Countries’ (2006) 50.3 *American Journal of Political Science* 530-550. The authors claim that the other main factor explaining stronger political budget cycles in advanced democracies is the level of political polarisation.

¹²⁸ Reimer (n 21) 165.

¹²⁹ For a suggestion to take discounted future income and expenditure flows into account, see Alan J Auerbach e.a., ‘Generational accounting: a meaningful way to evaluate fiscal policy’ (1994) 8.1 *Journal of Economic Perspectives* 73-94.

¹³⁰ Giuseppe Eusepi and Richard E Wagner, ‘Indebted state versus intermediary state: who owes what to whom?’ (2012) 23.3 *Constitutional Political Economy* 199-212, esp. 209-210.

¹³¹ Data from Paul van den Noord and Richard Herd, *Pension Liabilities in the Seven Major Economies* (OECD 1993) 31 which, because of demographic changes, has probably become worse in the meantime.

elections as an enforcement agency, as they are often just as short-sighted as politicians, as the last couple of years in Europe have shown.¹³²

2.5.2 Fiscal Rules

A fiscal rule is often defined as a *permanent (mostly constitutional) constraint* on fiscal policy, expressed in terms of a summary indicator of fiscal performance such as the government budget deficit, borrowing, debt or a major component thereof.¹³³ There are three types of such rules which are relevant for us: (a) Balanced Budget Rules (Deficit Brakes), (b) Debt Brakes, (c) Expenditure Brakes.¹³⁴

In practice, we very often find a combination of these rules, even the Maastricht criteria (EMU member states public deficit below 3% and total public debt under 60% of GDP) contain a combination of deficit brake and debt brake for the MSs,¹³⁵ which – just to show one of the main problems of these rules – many of the EMU MSs have never actually achieved. The purpose of establishing such rules is normally twofold: on the one hand, these can express a genuine intention to achieve financial sustainability, and on the other hand, these can help to signal towards financial markets that the respective country is trying hard, and consequently, taking into account its hopefully bright future, its interest rates should sink lower.

There are inherent limits to such rules which we have to bear in mind: (1) Without similar rules applied to subnational units¹³⁶ and without the prohibition of the bailout of subnational units,¹³⁷ debts and deficits will climb their way up to the central government.¹³⁸ (2) These rules are normally good for prevention, but once the public debt is high, they do not seem to be particularly efficient.¹³⁹ (3) Introducing these rules also means limiting

¹³² But on the other hand, once politicians are successful in fiscal adjustments, then these do not decrease the chances of re-election (suggesting that politicians actually underestimate the ability of voters to understand the need for adjustments), see Alberto Alesina e.a., ‘The political economy of fiscal adjustments’ (1998) 1 *Brookings Papers on Economic Activity* 1 (1998) 197.

¹³³ George Kopits and Steven A Symanski, ‘Fiscal Policy Rules’, *IMF Occasional Paper* (1998) No. 162. The definition is widely used, see e.g. Xavier Debrun e.a., ‘Tied to the mast? National fiscal rules in the European Union’ (2008) *Economic Policy* 297-362.

¹³⁴ *Report on the Public Finances in EMU* (European Commission 2010) 103, 149. A fourth type, Revenue Rules, will not be considered here. Revenue rules are about higher-than-expected revenues *ex ante* in the budget law; e.g. they prescribe to allocate such unexpected revenues to the purpose of debt reduction. Examples are to be found in France, Lithuania, and the Netherlands. See *ibid.* 103.

¹³⁵ For the excessive deficit procedure, see Art. 126(1) TFEU deficit brake, and the special Deficit Protocol (Protocol No. 12 on the Excessive Debt Procedure, 9 May 2008 OJ C115 279) which according to Art. 51 TEU is part of primary EU law. For the debt brake see Art. 3 Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012) which prescribes for 25 MSs (all but the UK and Czech Republic) that they must have a debt brake on a constitutional level by 1 January 2014. For more details see Anne Levade, ‘Les normes de l’Union européenne et l’équilibre budgétaire des Etats’, *Revue française de finances publiques* n. 112 2012/February 66-84; Loïc Azoulay e.a., Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty, *EUI Working Paper. Department of Law* 2012/9. 4-5; Steve Peers, ‘The Stability Treaty: Permanent Austerity or Gesture Politics?’ (2012) 8.3 *European Constitutional Law Review* 404-441; Paul Craig, ‘The Stability, Coordination and Governance Treaty’ (2012) 37 *European Law Review* 231-248, esp. 247-248

¹³⁶ Lars P Feld and Gebhard Kirchgässner, On the Effectiveness of Debt Brakes: The Swiss Experience, *Crema Working Paper* 2006/21 <http://www.crema-research.ch/papers/2006-21.pdf> 18-19.

¹³⁷ Hermann Pünder, ‘Gerechte Lastenverteilung zwischen den Generationen’ (2008) *Deutsches Verwaltungsblatt* 946-956, esp. 955-956.

¹³⁸ In theory, there is a no-bailout clause in EU law (art. 125 TFEU), but in practice it is ineffective, see Maurice Adams e.a., ‘Introduction’ in Maurice Adams e.a. (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014), 1-15, 2.

¹³⁹ Reimer (n 21) 153.

parliamentarism and democracy¹⁴⁰ – just like all fundamental rights and other constitutional provisions do.

2.5.2.1 Balanced Budget Rules (Deficit Brakes)

A well-known European constitutional example of the balanced budget rule is to be found in Arts. 109 and 115 of the German *Grundgesetz*.¹⁴¹ These explicitly state that revenues and expenditures shall in principle be balanced without revenue from credits, and that this principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 percent in relation to the nominal [GDP].¹⁴² This seems to be even stricter than the 0.5% allowed by Article 3(1)(b) of the Fiscal Compact,¹⁴³ but in fact, the German constitutional provisions also contain an escape clause which is very easy to apply: the simple majority of the lower house (*Bundestag*) can exempt from the application.

A similar logic is behind the Italian regulation (Arts. 81, 117, 119 Italian Constitution; Statute No. 243/2012 of 24 December 2012) enshrining the balanced budget principle from which it is possible to deviate only after a cumbersome procedure in which both chambers agree on the change.¹⁴⁴

The Spanish rules contained in Art. 135 Spanish Constitution are more complicated.¹⁴⁵ Even though they were also inspired by the German rules,¹⁴⁶ they explicitly refer to EU requirements ('the limits established by the EU for their member states') containing both the 3% deficit brake and the 60% debt brake (and have been doing so since 2011, so well before the Fiscal Compact). And, of course, the article contains the usual escape clause concerning natural disasters, economic recession or extraordinary emergency.¹⁴⁷

2.5.2.2 Debt Brakes

Debt brakes are to be found, e.g., in Art. 216(5) of the Polish Constitution and in Art. 36(4)-(5) of the Hungarian Basic Law (in Slovakia a special constitutional statute, No. 493 of 2011

¹⁴⁰ Luis Jimena Quesada, 'La reforma del artículo 135 de la Carta Magna Española' (2012) 30 *Teoría y Realidad Constitucional* 335-356; Octavio Salazar Benítez, 'La constitución domesticada: Algunas reflexiones críticas sobre la reforma del artículo 135 CE' (2012) 29 *Teoría y Realidad Constitucional* 409-432.

¹⁴¹ Rules on borrowing existed even in the 1919 Weimar Constitution (Art. 87), although without any enforcement mechanism. Later attempts to curb public debt (before 2009) also failed, see Reimer (n 21) 148-150.

¹⁴² Maxi Koemm, *Eine Bremse für die Staatsverschuldung? Verfassungsmäßigkeit und Justiziabilität des neuen Staatsschuldenrechts* (Mohr Siebeck 2012); Christian Seiler, 'Konsolidierung der Staatsfinanzen mithilfe der neuen Schuldenregel' (2009) 14 *JuristenZeitung* 721-728; Christofer Lenz and Ernst Burgbacher, 'Die neue Schuldenbremse im Grundgesetz' (2009) 35 *Neue Juristische Wochenschrift* 2561-2567; Lars P Feld and Thushyanthan Baskaran, 'Federalism, budget deficits and public debt: On the reform of Germany's fiscal constitution' (2010) 3 *Review of Law & Economics* 365-393.

¹⁴³ Federico Fabbrini, 'The Fiscal Compact, the "Golden Rule", and the Paradox of European Federalism' (2013) 36.1 *Boston College International & Comparative Law Review* 1-38, 11.

¹⁴⁴ Tania Groppi, Irene Spigno and Nicola Vizioli, 'The Constitutional Consequences of the Financial Crisis in Italy' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis* (Ashgate 2013) 89-113; Antonio Arroyo Gil and Isabel M Giménez Sánchez, 'La incorporación constitucional de la cláusula de estabilidad presupuestaria en perspectiva comparada: Alemania, Italia y Francia' (2013) 98 *Revista Española de Derecho Constitucional* 149-188, 167-171.

¹⁴⁵ For further details see *Organic Law 2/2012 on Budgetary Stability and Financial Sustainability* (2012 April 27).

¹⁴⁶ Violeta Ruiz Almendral, 'The Spanish Legal Framework for Curbing the Public Debt and the Deficit' (2013) 9 *European Constitutional Law Review* 189-204, 195.

¹⁴⁷ Agustín Ruiz Robledo, 'The Spanish Constitution in the Turmoil of the Global Financial Crisis' in Contiades (ed) (n 142) 141-165.

regulates the issue). These rules concentrate on public debt expressed in the ratio of the GDP: they basically prohibit the adoption of budgets which would result in overstepping the threshold of 60% (Poland) or 50% of (Hungary, Slovakia).

2.5.2.3 Expenditure Brakes

Expenditure brakes consider spending which is within the control of the government (public debt and deficit also depend on economic growth or interest rates which are outside government control). In this sense, it is fairer in terms of the responsibility of the government concerning financial sustainability: the revenue forecast in the budgets shall cover the appropriations included in them. The most well-known example is Art 126 of the Swiss Constitution,¹⁴⁸ but also Estonia (Art. 116 Constitution) and Finland (Art. 84 Constitution) apply similar rules. Since a mere expenditure brake would over-encourage tax deductions (as they fall outside of the scope of the brake),¹⁴⁹ expenditure brakes normally appear in combination with other rules, e.g. with balanced budget rules.

2.5.2.4 Criticism

There are several problems with strict numerical brakes:¹⁵⁰ (1) They fail to encourage procyclical expansion, but they encourage procyclical contractions (making the crisis even graver).¹⁵¹ In order to avoid a crisis being aggravated even more by cuts, the numerical brakes often contain escape clauses. The problem on a substantive level, however, is that the mathematical counting in these cases is far from obvious, and this combined with the political weight of these countings makes them vulnerable to populist criticism. On the procedural level, we often find a seemingly strict fiscal rule with a very soft escape clause making the whole institution questionable. (2) These rules are mostly silent on the composition of the required fiscal adjustment (thus cuts are normally made on areas which are long term detrimental but which are politically less risky, e.g., education, research, infrastructural investment).¹⁵² If we allow the growth of deficit/debt in the case of investment, then it will be a simple question of accountancy to labelling any investment as the cause of the deficit/debt, while registering welfare payments in the normal budget.¹⁵³ (3) In lack of genuine commitment these brakes just encourage creative accounting which makes finances intransparent, which in turn makes democratic accountability more difficult regarding these issues.¹⁵⁴ (4) It is largely unclear how the exact number is chosen, and once the number is chosen, it encourages the debt/deficit to grow until that number even if formerly the

¹⁴⁸ For more details see Stephan Danninger, A New Rule: The Swiss Debt Brake, *IMF Working Papers* WP/02/18 (January 2002) <http://www.imf.org/external/pubs/ft/wp/2002/wp0218.pdf>; Lars P Feld and Gebhard Kirchgässner, 'On the effectiveness of debt brakes: The Swiss experience' in Reinhard Neck and Jan-Egbert Sturm, *Sustainability of Public Debt* (MIT Press 2008) 223-255; Jean-François Aubert and Pascal Mahon, *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, (Schulthess 2003) 1002-1007; Thomas P Stauffer, 'Art. 126' in Bernhard Ehrenzeller e.a. (eds), *Die schweizerische Bundesverfassung* (Dike – Schulthess 2002) 1284-1294.

¹⁴⁹ Report on the Public Finances in EMU (European Commission 2010) 102.

¹⁵⁰ Debrun e.a. (n 44) 53.

¹⁵¹ International Monetary Fund, Has fiscal behavior changed under the European economic and monetary union? *World Economic Outlook* 2004/September, 103-118.

¹⁵² Criticising the Stability and Growth Pact of the EU: Olivier J Blanchard and Francesco Giavazzi, 'Improving the SGP through a Proper Accounting of Public Investment', *International Macroeconomics* 4220 www.cepr.org/pubs/dps/DP4220.asp.

¹⁵³ Markus Heintzen, *Das neue deutsche Staatsschuldenrecht in der Bewährungsprobe* (De Gruyter 2012) 22.

¹⁵⁴ J von Hagen and G Wolff, 'What do deficits tell us about debts? Empirical evidence on creative accounting with fiscal rules' (2006) 30 *Journal of Banking and Finance* 771-779.

debt/deficit was under that number. (5) They are overly simplistic: actual financial sustainability depends on too many factors (perception of sustainability, demographic, educational, growth factors, tax/expenditure policy, capital market, possibility of bailout), which cannot be included in a simple rule (see above 1.2).¹⁵⁵ (6) It is difficult to ensure a politically independent but at the same time efficient control.¹⁵⁶

In order to respond to all these questions, it is probably better not to have simple numbers. Instead, either an aggregate index or just a list of factors to be considered should be measured. As regards to the latter, the enforcing body needs to have some discretion to weigh the different factors,¹⁵⁷ which makes conclusions politically vulnerable. As regards to the former, i.e., the aggregate index, has the advantage that statements about it are somewhat easier to falsify. There are different possible aggregate indices; one is the so called Economic Sustainability Indicator. This indicator takes into account real capital, human capital considering both the number and the education of the workforce, natural capital considering natural resources, structural capital considering formal and informal rules in society, and intergenerational debt considering all future promises of payments. It considers the starting year of measurement as 100 per cent (current capital level), and on the basis of this, every year you can calculate, whether it is increasing or decreasing.¹⁵⁸ This indicator can handle changes where one type of capital is transformed into another one: 'If the state finances goods that will benefit future generations as well (for example expensive bridges), it then makes perfect sense that they should pay their share of burden, too.'¹⁵⁹ Measures that would lead to a lower (or to a substantively lower) indicator could be deemed unconstitutional. A public methodology as detailed as possible is, of course, necessary to falsify any statement about countings on the Economic Sustainability Indicator.

The exact formulae that should be used to count such an indicator is beyond the capabilities of lawyers (such as the present author), but there are some typically lawyerly considerations that should be taken into account when setting up such a body. In the following, we are going to do exactly this.

2.5.3 Enforcing Body: a Constitutional Court Consisting of Economists

One option would be to place the competence of reviewing the effect of government measures (incl. statutes) on the sustainability indicator with a judicial body, e.g. with a constitutional court.¹⁶⁰ This would have different advantages: (1) In many countries such a body already exists, so it would institutionally be easier. As such a control over government powers is obviously anti-democratic, an already established anti-democratic institution like a constitutional court is more likely to get away with it. In questions of constitutional design, mostly constitutional lawyers are asked, who – as a specialised lobby group of the constitutional courts – are actually interested in strong constitutional courts.¹⁶¹ So they are

¹⁵⁵ Karsten Mause and Friedrich Groeteke, 'New constitutional "debt brakes" for Euroland? A question of institutional complementarity' (2012) 23.4 *Constitutional Political Economy*, 279-301.

¹⁵⁶ György Kopits, 'Fiscal Rules: Useful policy framework or unnecessary ornament?' *IMF Working Paper* 2001/145, 16; Xavier Debrun – Manmohan S Kumar, 'The discipline-enhancing role of fiscal institutions: Theory and empirical evidence', *IMF Working Paper* 2007/171.

¹⁵⁷ Debrun e.a. (n 44) 44-81.

¹⁵⁸ A further advantage is that, by using one single aggregate number, it also attempts to connect expert knowledge to political communication, see Peer Ederer e.a., 'The Economic Sustainability Indicator', in Tremmel (ed) (n 43) 129-147, esp. 131.

¹⁵⁹ Tremmel (n 43) 207.

¹⁶⁰ For a similar proposal concentrating on natural resources, see Kristian Skagen Ekeli, 'Green Constitutionalism: The Constitutional Protection of Future Generations', *Ratio Juris* 2007, 378-401.

¹⁶¹ Martin Shapiro and Alec Stone, 'The New Constitutional Politics of Europe', *Comparative Political Studies* 1994/4. 397-420, esp. 415.

more likely to support the use of constitutional courts for this purpose than the setting up of new institutions which are beyond their influence. (2) There are functioning mechanisms to ensure that such bodies are politically independent and that they do not abuse their power, such as (a) a culture of detailed reasoning in order to explain the reasons behind the decisions, (b) dissenting opinions which help the judges to control each other, (c) tradition of selecting senior academics for such positions whose motivational background is different from that of politicians.¹⁶²

The problem is, however, that lawyers are not up to this task: the opinions here would consist of mathematical countings, debates about statistical methodology etc. Lawyers are well-trained in conflict solving when there are debates about fundamental rights, but we have seen above that financial and demographic sustainability problems cannot plausibly be conceptualised in terms of fundamental rights (2.3).¹⁶³ Experience also shows that, maybe because of their mentioned inaptness, courts are shy in enforcing fiscal rules.¹⁶⁴ So basically we would need a new institution which functions like a constitutional court, with constitutionally defined clear competences and goals, limited term times for members (so to avoid the accusation of a Platonic philosophers' kingdom), and with a special emphasis on transparency,¹⁶⁵ consisting of non-lawyer experts (mostly economists).¹⁶⁶ In some countries there are already similar expert bodies (fiscal councils, budget councils, stability councils),¹⁶⁷ but their competences are normally more limited than what we are suggesting here.¹⁶⁸ The existing bodies normally just monitor, advise, exceptionally they can veto budgets, but they cannot invalidate government measures (incl. statutes *a posteriori*) and they cannot stop payments either.¹⁶⁹ Instead of conceptualising this as a new chamber of the legislature,¹⁷⁰ we should rather see it as a new type of constitutional court, where every citizen should have a *locus standi* to initiate procedures (*actio popularis*).¹⁷¹

¹⁶² It would also strengthen constitutional courts, whether we take it as an advantage or not, just like constitutional debt brakes in some countries do, see Giacomo Delledonne, 'Financial Constitutions in the EU: From the Political to the Legal Constitution?' *Sant'Anna Legal Studies (STALS) Research Paper* 5/2012.

¹⁶³ Or if they are conceptualised in terms of fundamental rights, then they should not: 'Changes in the social security institutions are typically framed in terms of 'liberty and individual responsibility' on the one hand and 'solidarity and justice' on the other hand. This sort of debate typically overrides pragmatic concerns about efficiency and sustainability.' Peer Ederer e.a., *The Economic Sustainability Indicator*, in Tremmel (ed) (n 41) 129-147, esp. 130.

¹⁶⁴ See Pieter-Augustijn Van Malleghem, '(Un)Balanced Budget Rules in Europe and America', in: Adams (n 138) 151-180 on US state fiscal constitutional limits with further references.

¹⁶⁵ On the role of transparency in such matters see Matthias Goldmann, *The Financial Crisis as a Crisis of Democracy: Towards Prudential Regulation through Public Reasoning* (July 15, 2011). Available at SSRN: <http://ssrn.com/abstract=1886518>.

¹⁶⁶ Jörg Tremmel, 'Institutionelle Verankerung der Rechte nachdrückender Generationen' (2004) 37.2 *Zeitschrift für Rechtspolitik* 44-46.

¹⁶⁷ Robert Hagemann, *Improving Fiscal Performance Through Fiscal Councils*, OECD 2010 <http://www.oecd.org/eco/surveys/46673013.pdf>; György Kopits and Balázs Romhányi, 'A Költségvetési Tanács indulásának tanulságai' (2010) 57 *Közgazdasági Szemle* 573-590.

¹⁶⁸ Also other (ombudsperson type) expert institutions only possess soft competences and tasks, like investigation and initiation of procedures by other organs, public awareness measures, reports, recommendations, but no tough sanctions. On the examples of Israel, New Zealand and Hungary, see Maja Göpel, 'Guarding our Future: How to Protect Future Generations?' (2011) 1.6 *Solutions* (www.thesolutionsjournal.com/node/821).

¹⁶⁹ On the importance of constitutionally guaranteed veto rights concerning the implementation of budget (i.e., it can stop payments), based on examples from US states, see Henning Bohn / Robert P. Inman, 'Balanced-Budget Rules and Public Deficits: Evidence from the US States' (1996) 45.1 *Carnegie-Rochester Conference Series on Public Policy* 13-76.

¹⁷⁰ Explicitly suggesting this: Beaucamp (n 7) 205-209.

¹⁷¹ Martin Leschke, 'Nachhaltigkeit und Institutionen – eine wirtschaftswissenschaftliche Sicht' in Kahl (ed) (n 8) 297-325, 320. On the importance of *locus standi* rules in sustainability issues (as opposed to substantive

An obvious problem with the idea of such an economic constitutional court is that politicians are generally not so keen on limiting their own power. It is a valid practical objection, but it also applies to constitutional courts and in most European countries there is some kind of constitutional court (or judicial review by ordinary courts). They have either been set up as a result of the rational self-limitation of politicians (a rare occasion, I admit), or as a result of external (economic) pressure, which in our case can originate from either an international organisation (IMF), the EU or financial markets. In the long run, the principles of financial self-limitation can even be internalised in the political cultures of the countries affected with the help of these institutions.¹⁷²

2.5.4 European Integration and Financial Sustainability: ‘Never Waste a Good Crisis’

The problem of financial sustainability evidently emerged with the recent economic crisis in Europe, but it is also an opportunity. The existence of the US in its current constitutional structure is to be explained by a huge debt crisis after the war of independence: the need for an efficient central government brought the federal government into existence instead of a loose confederation of states (cf. 1777 Articles of Confederation vs. 1787 Constitution).¹⁷³ The budget question even helped in 18-19th century European countries to advance the idea of representative democracy.¹⁷⁴

To some extent, the EU is financially already more centralised than the US: in the US there are no federal provisions about what a state constitution should contain on the issue, whereas in the EU, the actual novelty of the Fiscal Compact (besides restating the existing duties of MSs) was actually this.¹⁷⁵ Moreover, the Fiscal Compact showed that new quasi-primary law can be created without unanimity: two states (the UK and the Czech Republic) opted out, but for the rest of the countries the Fiscal Compact applies in the form of a traditional international treaty.¹⁷⁶

3. Conclusions

Recent developments in both European domestic and supranational constitutional laws mirror the idea of sustainability which seems to be the most important upcoming principle in European constitutional thought. The reason for the emergence of these constitutional ideas is that sustainability challenges are textbook situations for establishing constitutional rules which bind present and future political decision makers. Some of these ideas seem to fit the constitutional language that we speak in Europe better.

The general attempt of talking about the ‘rights of future generations’ is conceptually not reconcilable with the current language of rights. Fundamental rights seem to only work for the environmental aspects, but even here, any rights of present generations suffer from a

fundamental rights issues), see Kristian Skagen Ekeli, ‘Green Constitutionalism: The Constitutional Protection of Future Generations’, (2007) 20.3 *Ratio Juris* 378-401, esp. 392-393.

¹⁷² In the long run, however, institutions also form mentality, see Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Random House 2012) 302-334 and 404-427.

¹⁷³ Aart Loubert, ‘Sovereign Debt Threatens the Union: The Genesis of a Federation’ (2012) 8.3 *European Constitutional Law Review* 442-455.

¹⁷⁴ Christoph Gröpl, ‘Schritte zur Europäisierung des Haushaltsrechts’ (2013) 52.1 *Der Staat* 1-25, esp. 24.

¹⁷⁵ Fabbrini (n 141). The other difference (partly explaining the first one) is that there is no bailout of Member States in the US.

¹⁷⁶ Carlos Closa Montero, ‘Moving Away from Unanimity: Ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’, *Reconstituting Democracy in Europe Working Paper* 2011/38 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005894.

short-sightedness (even though to a lesser extent). Certain institutional rules on elections and referenda have been considered as useful instruments to help financial sustainability.

It seems that specific fiscal constitutional rules are also needed, but not the usual simplistic numerical debt, deficit or expenditure brakes. Instead, some kind of aggregate number has to be developed (not by lawyers) in order to take into account the many factors of sustainability. Furthermore, appropriate constitutional transparency rules are needed and an independent institution (similar to constitutional courts both in structure, functioning and transparency, but consisting of economists) has to be set up which is able to invalidate government measures (incl. statutes) and stop government payments. And just like with constitutional courts, these institutions can be set up either as a result of the rational self-limitation of politicians or as a result of external (economic) pressure.