

3 The concept of “self-binding” in constitutional theory

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Das ist der edelste Vorzug des Edeln, dass er sich selbst bindet. Ketten sind für das rohe Geschlecht, das sich selbst nicht zu fesseln weiß.

Johann Wolfgang von Goethe²

Introduction

Andrew Arato's impressive academic work of the last four decades can be read from different perspectives. One perspective points to his move from an early scholar of Georg Lukács and the traditional Frankfurt School to a defender of modern liberal capitalist democracy. Another way of reconstructing his intellectual journey follows its main topics – from his early interest in questions of class conflicts in Western societies and oppositional movements in Central and Eastern Europe to the topics of civil society and finally to democratic theory, constitutionalism and institutions. Yet another way of understanding his work focuses on his active political interventions and his reform proposals. In this article, however, I will take a different perspective on Andrew Arato's academic work: I will use the analytical and historical richness of his reflections as a source for a critical investigation of one of the main justifications for constitutionalism in modern democratic theory.

This justification borrows heavily on the metaphor of “self-binding.” The idea of transferring the concept of “self-binding,” binding oneself or precommitment – the three terms are mostly used synonymously – into the context of constitutional theory dates back to the eighteenth century. According to its basic argument, political constitutions in modern democracies should be understood as a form of collective self-paternalism. A classical formulation can be found in a statement by John Potter Stockton in a debate about the Ku Klux Klan Act of 1871: “Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand on the day of their frenzy.”³

When we briefly look back into the history of political ideas, the first explicit mention of this idea in connection with a constitution can be found in Spinoza's *Tractatus Politicus*, where he already uses *Ulysses* as an illustration (Spinoza 1677: 106–109). However, his idea has always been controversial. In the eighteenth century Rousseau already rejected it as a logical impossibility, but it was

up to David Hume to do so explicitly. Hume had argued in his political writings for institutional mechanisms of coercion "by which I may impose a restraint upon myself, and guard against this weakness" (Hume 1739: 382). Rousseau, on the other hand, argued that "it is consequently against the nature of the body politic for the Sovereign to impose on itself a law which it cannot infringe" (Rousseau 1762: 25).

Concerning the reception of the concept of self-binding in our days, the renaissance of the idea began in the field of moral philosophy on the topic of the phenomenon of *akrasia* (weakness of will), and how to overcome it.⁴ A second strand of this renaissance took place in the field of decision theory. It was in particular Thomas C. Schelling who coined the term "egonomics" in order to deal with the limitations of making rational choices (see Schelling 1978, 1984; Beckmann 2007). A third strand can be seen in the work of neoclassic economic theorists such as Friedrich August Hayek, who pointed out the economic efficiency of a society governed by constitutional rules. Hayek also is the author who famously cited the saying that a constitution is a tie imposed by Andrew when sober on Andrew when drunk (Hayek 1960: 176–192).

The most influential transfer of the concept of "self-binding" to modern constitutional thought, however, must be attributed Jon Elster and his writings about the limits of rationality. After Elster's "rediscovery," the formula became prominent among a number of constitutional theorists in the 1980s and 1990s in their search for new or additional normative justifications for constitutional democracy during the political transformations in Eastern and Central Europe. More recently, the concept of self-binding has become a favorite way for neo-liberal economists to justify their proposals for more rigidity in monetary policy.⁵

As far as I am familiar with Andrew Arato's extensive academic work, he has always avoided the language of "self-binding" in connection with constitutional theory.⁶ Some of his colleagues (and close friends), however, have been less reluctant. When we look back at the debates in the field of constitutional theory from the perspective of today, two main lines of argument can be identified in this theoretical field. The first one is a liberal model of constitutional self-binding which can be found in the work of Stephen Holmes. In the liberal interpretation, self-binding has the function of a guarantor of political neutrality. The second line of argument can be coined the "critical" or "deliberative" model of constitutional self-binding and can be found in the work by Claus Offe, Ulrich K. Preuss or Cass Sunstein. Today, the intense discussion about the adequacy of the self-binding formula for constitutional theory has died out. But the term – used in a metaphorical or even literal meaning – is alive today more than ever. It can be found in statements of leading constitutional judges as well as in the recent literature in constitutional law and theory.⁷

In the following, I would like to begin with a brief reminder of Elster's rediscovery of the concept of "self-binding" for modern political theory (1). In the next section I discuss the liberal and the deliberative models of self-binding in constitutional theory with the help of four analytical distinctions (2). In the third section some of Andrew Arato's critical observations and analyses in the field of

constitutional theory will be used as a source and starting point for some objections to both the liberal and deliberative models of self-binding in constitutional theory (3). If one really wants to keep the concept of self-binding as a strong legitimizing formula for modern constitutional democracy, one has to be able to refute not just one or two, but all the objections listed above. My own view is negative: the concept of self-binding leads to a theoretical impasse in modern constitutional theory (4).

1 Sailing with Ulysses to safe constitutional ground: Jon Elster

Jon Elster's theory of self-binding was presented in a famous part of his book *Ulysses and the Sirens* (1979), where he undertakes a rational analysis of Ulysses' strategy for dealing with his desire to listen to the sound of the sirens. Since then, Elster has referred to this topic repeatedly.⁸ According to the story of Homer in *The Odyssey*, Ulysses told his comrades to bind him to a mast and to put wax in their ears, which allowed him to listen to the sirens' wonderful singing without giving in to their temptations. Whereas Theodor W. Adorno and Max Horkheimer interpreted this episode of Homer in their *Dialectic of Enlightenment* as the birth of modern instrumental rationality, Elster uses it as an early illustration for intelligent self-management techniques. Elster defines self-binding in the following way: "to bind oneself is to carry out a certain decision at time t_1 in order to increase the probability that one will carry out another decision at time t_2 " (Elster 1979: 39).

According to Elster's early writings on the topic, self-binding is the "main technique for achieving rationality by indirect ways" (37)⁹ because it is the installation of a "causal mechanism being set up in the external world" (ibid.) at time t_1 which restricts one's own actions at time t_2 . By employing such a strategy we delegate our will to an external structure for a period of time, thereby establishing a causal process that "after some time returns to its source and modifies our behavior" (43).

In certain situations, self-binding may even emerge as "acting upon one's preferences" (77). It places the actor in a position to "take an active or strategic attitude towards his own preferences" (ibid.). Self-binding is a mechanism of intentional self-control. The best-known and intuitively plausible example of such a process is that of smokers who inform all their friends of their decision to stop smoking so that they can utilize their jibes to apply additional pressure to their later behavior in the event that they contravene their own decision. Or to use another example: Take Andrew Arato's strategy of parking his car in the limited parking zone in front of the old New School GF Building on Fifth Avenue in order to force himself to leave the building in time – a real challenge for him.

If we disregard the general question of whether describing certain behavioral phenomena as the expression of "lack of willpower" might not be an error in philosophical categories,¹⁰ strategies of self-binding appear to be theoretically unproblematic as long as only a single actor is involved (for example, if I place

my alarm clock so far from my bed that after waking up in the morning I must get out of bed to turn it off). Things are different if additional people are involved.¹¹ The questions Elster discusses in this context are about the authenticity of preferences. Under what conditions should a person I ask free me from the past again (105)? How should that person know whether the meta-rule or the request uttered later to take back the meta-rule articulates my preferences authentically (44)? Perhaps I have undergone a learning process and would genuinely prefer to revise my original request? The same holds the other way around for me as well, as the person who set the mechanism of self-binding in motion: "How can I know that my bright line is not constantly displacing itself 'behind my back' so as to justify, *ex post facto*, any exception to the rule?" (110) How in the world can I differentiate adaptive preferences (sour grapes) from real learning processes? So in some cases it even "may be reasonable to precommit yourself against precommitments" (89).

In spite of these misgivings, Elster presents a list of various cases in which he considers the transfer of self-binding to collective actors as a promising option. Some examples: the establishment of an independent central bank in order to "remove monetary policy from the political sphere" (61, 90); the autonomy of various countries' foreign ministries; the model of BBC radio; finally, the holding of periodic elections as "the electorate's method of binding itself and of protecting itself against its own impulsiveness" (91).

The most intriguing case, however, is the constitution. According to Elster, despotism and radical democracy are both distinguished by the fact that they lay claim to the right to intervene in all political matters at any time. By contrast, constitutional democracy is founded on a number of stable institutions which can no longer be disposed of once they have been established (93). The role of the constituent assembly is, of course, singular in this regard. It is the constitutional convention which "lays down the ground rules to be followed by all later generations" (*ibid.*). In this regard, "only the constituent assembly really is a political actor, in the strong sense of *la politique politisante*; all later generations are restricted to *la politique politisée*, or the day-to-day enactment of the ground rules" (94). According to Elster, the "nation," too, can bind itself through the constituent assembly "by entrusting certain powers of decision to the judiciary branch" (*ibid.*). Following Elster, this leads to the "paradox of democracy" (*ibid.*): each generation wants to be free to bind its successors, while not being bound by its predecessors (*ibid.*).

Elster's academic interests in constitutionalism led him in the same direction as Andrew Arato. Both began to analyze the processes of constitution-making and constitutional change in Central and Eastern Europe after 1990. In his more recent writings, the "democratic paradox" has led Elster to the conclusion that constitutional orders have to be seen most of all as fragile. In the end, there is nothing that can hinder a political community from getting rid of a constitution, even if the text claims eternity for some of its principles (as in the German case). In a society, Elster admits, "there is nothing external" and thus "societies cannot make themselves unable to renege on their precommitment" (Elster 2003: 1760).

In the following, I neither wish to discuss Elster's work on constitutionalism in Eastern and Central Europe¹² nor do I want to go deeper into the theoretical problems of his underlying theory of rationality.¹³ Instead, I would like to follow and discuss the two ways in which the concept of self-binding was adapted among theorists of constitutional democracy in the late 1980s and early 1990s. As I mentioned at the beginning of this article, the term "self-binding" – used both in a metaphorical and in its literal meaning – has become prominent today among leading theorists in constitutional law and theory and deserves a closer critical look.

2 The liberal and the deliberative models of collective self-binding

Elster's notion in his early writings of connecting the concept of "self-binding" on the collective level with the constitution was widely accepted and often quoted among constitutional theorists. In the metaphorical language of Elster's *Ulysses*: They are the rowers on Ulysses' boat who now try to rationalize the distribution of labor on their boat. However, only a few scholars in constitutional theory have developed the concept further and dealt with its theoretical flaws.

Looking back at the heydays of this discussion in the late 1980s and 1990s, one can identify two general variants of reception. The first is the liberal model of constitutional self-binding, which was paradigmatically formulated by Stephen Holmes (2.1). The second line of argument connects the concept of self-binding with the theory of deliberative democracy and can be found in the work of Claus Offe, Ulrich K. Preuss and Cass Sunstein (2.2). In the following, I will compare the two models along four analytical distinctions in order to discuss both the liberal and the deliberative model of self-binding in constitutional theory more systematically (2.3).

2.1 The liberal model: Stephen Holmes

The liberal conception of self-binding is best elucidated in an essay written by Stephen Holmes two decades ago. According to Holmes, self-binding is one of the basic features of Western democracies: "Like 'self-binding' in general, tongue-tying may be one of constitutionalism's main gifts to democracy" (Holmes 1988: 21). It is true both of individuals and groups that they are able "to ... gag themselves" (22). The idea of such "strategic self-censorship" (ibid.) corresponds to John Rawls's method of avoidance (Rawls 1992): "like individuals ... organizations and collectivities can leave selected topics undiscussed for what they consider their own advantage" (Holmes 1988: 21). Topics whose potential for triggering conflict is too high are to be kept out of the non-controversial sector of political culture. Holmes goes so far as to claim that "the shape of democratic politics is undoubtedly determined by the strategic removal of certain items from the democratic agenda" (24/25).¹⁴ In light of this sense of voluntary self-gagging, Holmes's practice-oriented question is: "Under what

cultural and psychological conditions ... can gag rules be adhered to successfully?" (58). These conditions include proving that the mechanisms of self-gagging are legitimate. Holmes attempts to provide this proof of legitimacy using the example of constitutions. Constitutions are not the only mechanisms based on gag rules; other examples include private taboos or keeping secrets. Constitutions, by contrast, are highly formalized. Precisely for this reason, Holmes considers them to be the most important practical case of gag rules in modern political systems. Holmes begins with the normative question: "Why should a constitutional framework ... have such enormous power over our own lives today?" (21). His strategy for answering the question involves rejecting the juxtaposition of democracy and constitution in the first step. He asserts that their relationship to one another must be described as a positive conditional relationship rather than as one of competition: "constitutionalism and democracy are mutually supportive" (197). Medieval "constitutions" such as the Magna Carta were a contract between the king and the Estates; but today, "rather than being presented as an exchange of promises between separate parties, modern constitutions are typically styled as frameworks which 'we the people' give ourselves" (209). Following Madison, Holmes's line of argumentation holds that "bonds are not necessarily a form of bondage; constraints can promote freedom" (215). The American constitution, for example, "was not disabling, but enabling" (215) for democracy. His hypothesis can be summed up as saying that instances of self-binding in the form of guaranteeing institutional mechanisms are necessary to make democracy possible in the first place: "the constitution is an instrument of self-government, a technique whereby the citizenry rules itself" (239). Constitutionalism is "a cluster of techniques for collective self-management" (236). Holmes coins the term "autopaternalism" for this relationship (235). Important for Holmes's liberal thrust is that he uses the concept of autopaternalism to derive the validity of existing constitutional bindings for future generations as well:

If we can take for granted certain procedures and institutions fixed in the past, we can achieve our present goals more effectively than we could if we were constantly being side-tracked by the recurrent need to establish a basic framework for political life. An inherited constitution can be democracy-enabling as well as democracy-stabilizing. It is not only and not essentially a hedge against arbitrary government. Because it is relatively hard to change, a constitution can disencumber, that is, emancipate the present generation. Thus it cannot plausibly be characterized as an oppressive force, an autocratic attempt by the past to enthrall the future. Precommitment is justified because it does not enslave but rather enfranchises future generations.

(216)

According to Holmes, the problem lies not in self-binding per se; in his view, a problem of legitimacy emerges only if the rules of binding themselves contravene liberal ideas in that they lock in substantive provisions for the future which would better be left open.

Holmes's argument is problematic for two reasons. The first objection relates to the normative status of the "gag rules." As in Rawls's method of avoidance, they are supposed to limit the realm of legitimate intervention by the state a priori by guaranteeing differences and divergences in broad areas of political life. In this way, the accusation of paternalism can be avoided from the beginning, that is, when defining the subject of deliberations. The legitimation problem for institutions that protect the method of avoidance lies in the fact that their binding effect can extend only to actors who have already taken on some components of liberal thought.

As Brian Barry aptly puts it, dogmatic individuals are not distinguished by the fact that they champion a dogma, but above all by the fact that they do so dogmatically (see Barry 1990). In other words, even the liberal form of self-binding must insist on a certain position as good (in this case: the value of liberal tolerance) when grappling with opposing fundamentalist positions. The second objection is also fundamental in nature. The strategy of keeping silent about controversial topics makes sense as long as it involves questions in which no subjective rights clash with one another. In principle, however, gagging the state comes up against its limits where two incompatible individual rights oppose each other. Any attempt to depoliticize such a conflict by constitutionally mandated restraint effectively supports one of the two legal positions one-sidedly, and thus tends to have the opposite of a pacifying effect: the attempt, for instance, to solve the dispute about the question of abortion – where one side represents the rights of the woman and the other those of an unborn life – by leaving the decision to the woman mobilizes abortion opponents because they rightly consider the gagged state to be taking sides (see Preuss 1991: 17). Liberal self-binding on the part of the state is categorically overburdened when dealing with controversies having this structure.

2.2 The deliberative model: Claus Offe, Ulrich K. Preuss and Cass Sunstein

Andrew Arato in one of his polemical comments rightly observed that the label "deliberative democracy" today "often simply attempts to dress up a moribund council communism in Habermasian terms" (Arato 1996b). This observation may be true for a number of scholars, but surely not for Claus Offe, Ulrich K. Preuss and Cass Sunstein, who have always been aware of the fragility of complex institutions in modern democracies.

Following Elster, it was first Claus Offe who employed the concept of self-binding in an innovative way in the German-speaking world. Offe first used it in the context of political discussions about the best strategic orientation of Green parties in modern societies. In this context, self-binding became a central issue for Offe after he had redefined the task of leftist politics anew: In his view, a new political project of the Left had taken the place of the global goal known by the name socialism:

namely the enterprise of guaranteeing minimums instead of realizing maximums, and of curbing and fettering the destructive effects of the technological, military, economic, bureaucratic and ecological dynamics of modernization by means of appropriate procedures and institutions so that principles of responsible self-restraint are brought to bear.

(Offe 1989: 747)

In this context self-binding becomes a formula for reacting to "second-order modernization problems" (see Offe 1986). In Offe's reconstruction of Ulysses' options, to return to Elster's point of departure, Ulysses basically had three options to act: (i) he could react adaptively and even celebrate his unchecked abandon to the sirens as a learning process; (ii) he could try to react in an especially virtuous and moral way in order to resist temptation with all the means of self-discipline; between opportunism and excessive moral demands lies (iii) the "middle ground" (Offe 1989: 749) where he himself sees to it "that the undesired course of action becomes impossible by virtue of external circumstances" (*ibid.*). In doing so, he intentionally exposes himself to conditions that "accommodate his moral will" (749).

According to Offe, two reciprocal objections can be raised against the last strategy. For one thing, it might be possible that Ulysses had had exaggerated concerns regarding the quality of the sirens' singing and his reactions to it; in this case, he would have unnecessarily subjected himself and his men to the costs of self-binding. Or, and this is the point which had already been made by Elster, the person carrying out the actions has good reasons for dissolving the commitment that had been made – be it that the initial external conditions under which the order was given have changed; be it that a learning process has resulted in different preferences. The person in fetters, however, is not in a position to break free from the self-imposed binding mechanism. To repeat the problem already addressed by Elster: how should the person requested to dissolve the commitment be able to tell whether there are good reasons to do so in the particular case or whether the reasons for which self-binding occurred in the first place apply? Offe concludes from these difficulties that self-binding is obviously "not a problem of maximization, but of optimization" and that accordingly, "self-restraint is in order when it comes to the practice of self-restraint" (750).

But what does this mean in concrete terms? According to Offe, the problem of optimization cannot be solved by clever behavior alone. Instead, it requires "reference to emerging ideas of justice to which no direct path leads from the subjective sphere of the rationality of human action" (*ibid.*). Again following Elster's line of argument, Offe then introduces a differentiation between "hazardous" (758) and "adequate" (758) kinds of self-binding. The latter are characterized by the fact that "one can justify the actions that follow from them in anticipated retrospect as well," which Offe considers to be the content-related, social and temporal validation of actions and series of actions. Especially the highly differentiated societal systems of modernity are distinguished by an additional need for responsibility; if the political institutions of modernity are not to

fail through constantly expecting too much of their citizens' good qualities, they need to be redesigned to ensure increased capability for moral self-binding (760f.). In the end, Offe remains unclear about the exact institutional form of "responsible" self-binding, despite his calls for strengthening of public discourse and democratization of parties and associations, and his argument becomes an appeal:

The concept of an enlightened will of the people apparently includes the idea that it musters the strength to place itself under an "auto-paternalistic" caveat, thereby forgoing the opportunity to make its voice heard at all times and on all topics in the legislative process.

(Offe 1992: 141)

Ulrich K. Preuss, another German legal theorist in the tradition of the Frankfurt School, distinguished two characteristics in his reception of the concept of self-binding: first, it functions as a building block in a context concerning justification of constitutional rules by means of theory of democracy, and second, it is infected to an even greater extent with moral goals than is Offe's. Concerning the democracy-theoretical aspect, Preuss states that considering self-binding to be the rationale for constitutions is a recent development, because in the long history of the constitutional state "all energies aiming for its establishment and justification [had] focused on the opposites of freedom and power" (Preuss 1990: 77). In the final analysis, Preuss's deliberations mean that the constitution is maneuvered out of the position of being a theoretical opposite of democracy and can be interpreted as being compatible with the concept of the sovereignty of the people, following Holmes's formula of "autopaternalism" (ibid.). Regarding the second aspect, Preuss's hypothesis is that Ulysses' autopaternalism has taken on a new role since the simple paradigm of progress has abdicated its position in light of the manifold risks and destructions of modern societies. The difference is so distinct that by now, its original form can be considered at most as a "precursor of a paradigm of reflexive rationality" (ibid.). Preuss speaks of a precursor "because this concerns a morally undemanding variant of individual self-instrumentalization that does not necessarily include the self-constraint to principled action" (ibid.). According to Preuss, societies are subject to the "coercion to reflect" (78) to an even greater extent than are individuals. In particular in modern experimental thinking in the tradition of the natural sciences, second-order reflexive thinking has not kept up with current developments at the first order level (85). In this context, self-binding means that "power" must be used in order to create and preserve the societal space and its institutions with the goal of "forcing experiences with oneself" (87). "Morally reflexive constitutionalism," Preuss's catchy programmatic formula, has a precise idea of what modern constitutions are supposed to achieve: they are to create certain institutional conditions that can "exert benevolent coercion to self-rationalization and 'self-improvement' on society" (73).

For Preuss's variety of self-binding, it is quite significant *to what* the self is to be bound. Not every causal mechanism can create what matters to Preuss. The

goal of Preuss's coercion is the possibility of unhindered experience, in other words: learning. Means such as punishment or veto alone are hardly suitable for setting such a learning process in motion. The most suitable means is self-binding of the political process to public discourse. Of course, this goal has little more to do with Ulysses' actual concern, as portrayed by Elster. In the situation t_2 , Ulysses wanted to enjoy the song of the sirens with relish, however immoral it might be, without desiring to improve himself in any way, whereas in t_1 he thought only how he could outwit his foreseeable *akrasia*; in other words, his concern was the stability of given preferences. For Preuss, in contrast, what one is to think about above all at the time t_1 is through which means of self-deception existing preferences will have acquired sufficient moral qualifications at the time t_2 ; in other words, his concern is changing given preferences.

It is apparent that Preuss's approach results in different proposals in practical politics than does the liberal model of neutrality. The consequences in terms of constitutional theory become more distinct when we consider the points where the responsible option of self-binding is linked to the new American discussion of liberalism and constitutionalism. Along with Frank Michelman, Cass Sunstein above all is relevant here.

Sunstein's attack – formulated with recourse to the republican tradition – on the liberal teachings concerning the inviolability of private preferences and on the political model of the aggregation of private interests derived from those teachings jumps in where he can point out that preferences are not always stable, but are subject to endogenous processes of change: "preferences are shifting, and endogenous rather than exogenous, and as a result are a function of current information, consumption patterns, legal rules, and general social pressure" (Sunstein 1991: 11). For Sunstein this means that the task of democracy is not only in satisfying existing preferences "but also, and more fundamentally, in the process of preference formation" (12). Government policy can be necessary to increase the autonomy of preference formation, if not, in some cases, even to bring that autonomy into existence in the first place. Self-binding measures can be derived from this, measures that aim not only at redistributing the chances of autonomous preference formation but in some cases, such as alcohol or cigarettes, extend to a rigid policy of bans.¹⁵ The argument goes: precisely because the law has always not only restricted the actions of actors externally, but has interfered even in the processes of preference formation, democracy can and must take control. If it does not, it delivers itself up defenselessly to the egoistic and moral-free programming of preferences.

As for the mode of self-binding, Sunstein's plea results in an odd constellation. On the one hand, self-binding is supposed to legitimize the "cleansing" of preferences; at the same time, if a society desires to avoid developing totalitarian tendencies, it must respect its citizens' autonomy, thus binding itself inasmuch as it limits itself to exerting influence only if "welfare or autonomy will thereby be promoted" (24). It is a paradoxical task that is related here to the idea of self-binding.

2.3 *The two concepts of self-binding in comparison*

The modes of self-binding sketched out above can be differentiated according to four aspects:

- *Negative self-binding and positive self-binding.* Negative self-binding aims at refraining from or prohibiting certain actions, positive self-binding at mandating them. An example of positive self-binding is state goals such as the postulate of a welfare state, or environmental protection. An example of negative self-binding is the classical liberal basic rights of freedom of opinion and religion. Positive self-binding is considered a structure for enabling certain actions, negative self-binding as a bulwark against them. For this reason, the two varieties require different styles of politics.
- *Procedural self-binding and substantial self-binding.* Procedural self-binding is distinguished by binding regulations about procedural details as well as the actors who must be involved in decisions. The classic example of the latter is the separation of powers, an example of the former the required number of readings of bills in parliament. Substantial self-binding discriminates in terms of content in such a way that it blocks access to the procedures for certain content (example: the Federal Republic of Germany's "militant democracy"). In doing so, it takes sides on certain ideas about what is good. A constitution can codify the dignity of man or the privileges of an ethnic group; it can proclaim a state religion or quite concrete political goals. The procedural and the substantial aspects differ in their need for legitimacy. Procedural self-binding is legitimate if it possesses a maximum of neutrality, which means that it produces no filter effects at any stage of political processes. The requirements for legitimacy are different in the case of substantial self-binding: it is required to filter out all those positions that contradict the norms laid down at t_1 , and in the process, it necessarily conflicts with the requirement that procedural self-binding be neutral. There is no meta-rule for deciding such conflicts; dissenters in terms of substance will always claim their procedural rights, which the mainstream will deny them posthaste. It appears reasonable to assume that decisions will be in favor of substantial goals, especially in critical situations. In the German context, this assumption corresponds with the critical diagnosis that the law has become independent of the democratic process of law-making inasmuch as the constitution, in the manner it is dealt with by the Federal Constitutional Court, is no longer considered to be primarily a system of rules of the game, but has itself become a catalog of various correct contents.
- *Rigid self-binding and flexible self-binding.* Instances of self-binding can have differing degrees of rigidity. As to the rule of law, the constitution cannot claim to be exclusive; rather, modern political systems display three levels of rigidity on a scale ranging from rigid self-binding to flexible self-binding. The first case is the unconditional constitutional provision which is to be valid for eternity. In the case of the Federal Republic of Germany,

Article 79, 3 of the Basic Law defines which constitutional provisions claim such eternal validity; if society desired to change them, this would amount to a revolution and the abolition of the existing constitutional order. If we follow the authors of the German Basic Law, mistrust due to the susceptibility of the democratic sovereign, the German people, to what they considered seduction was an important motive for the postulate of eternal validity. The conflict between constitutionalism and the sovereignty of the people appears in its sharpest form in such rigid cases of self-binding. For the normative status of such eternally valid constitutional provisions, this means that they must be able to refer back to foundations that are as universal as possible, not merely to particularistic motives arising from the prevailing circumstances of the day. The second case, placed roughly in the middle of the scale, concerns legal provisions that can be changed only under considerably more difficult conditions (a qualified majority). The purpose of making such changes difficult is obviously that short-term political majorities should not be placed in a position that would enable them to change fundamental political structures at their convenience. In addition, society employs this difficulty to protect it from itself, as it makes it harder to give in directly to impulsive changes of preferences straight away. Nonetheless, it remains open to longer-term changes of preferences. The form of self-binding that is easiest to handle in terms of its flexibility is the simple law or administrative regulation which can be adapted to altered circumstances with little effort within the framework of the two restrictions mentioned first, and which therefore displays the lowest degree of self-binding. Its lower degree of convincing normative foundation correlates with its lower degree of self-binding.

- *Self-binding of action and self-binding of deliberation.* Instances of self-binding can also be differentiated according to what they are supposed to bind. In the liberal case, as with Ulysses, it is about self-binding of the future ability to act. The means of costs and coercion (employing mechanisms constructed by institutional designers trained in rational choice theory) are to hinder actors from carrying out certain actions. Forms of self-binding that are designed to influence the interests of the actors themselves go much further. They use input filters rather than liberal output filters. Because actions are, as a rule, first desired – or must have at least entered the realm of being imaginable – before they can be carried out, this approach is particularly effective. For individual actors, a strategy based on thinking would follow the following logic: as it is possible that the consumption of certain pornographic films would modify my sexual preferences so much that I would then desire things which I now desire that I will never desire (example: child pornography), to be on the safe side I will not subject myself to such influences at all. Censorship and bans are conventional methods of stifling “dirty preferences.” The difficulty begins with the question which preferences fulfill this incriminating criterion. In the final analysis, the verdict which preferences can be considered dirty and which clean can only be made with recourse to a substantial idea of what is good.

Constitutions are not only institutions of society acting upon itself as well as forms of societal self-organization; they also constitute the forms in which societies perceive themselves. The alternative to liberal self-binding takes up the provision mentioned last. Located between the variants of action- and thought-oriented self-binding, it could be called rationalist self-binding. This is where the positions of Offe and Preuss would be placed, which rely on coercing people and institutions into reflecting. This approach targets the “throughput” of the political process by institutionalizing reflection loops, thereby intervening via deliberations (with oneself or with others) in the process of preference formation itself.

These four differentiations are useful for giving the differences between the liberal and the deliberative concepts of self-binding more distinct contours. We can make the following attributions:

Against the background of these four differentiations it becomes apparent that mutual accusations of paternalism contribute little to bringing light to the controversies. Both concepts offer gateways for using the concept of self-binding paternalistically, which can result in political abuses. In the case of the liberal position, it is its rigidity which draws the criticism of being paternalistic in terms of the law; in the case of the deliberative position, it is the expansion of self-binding to future preferences that provokes accusations such as manipulation and totalitarianism. Each side accusing the other of paternalism is nothing more than an indicator of the actually important question which the concept of self-binding has to answer (and which Elster and Offe mentioned quite clearly): How can good reasons for dissolving self-binding arrangements be differentiated sufficiently clearly from bad reasons, the reasons because of which the arrangements were entered into in the first place, without making additional metaphysical assumptions?

The answer to this question given by the political system of the Federal Republic of Germany may be understood as the installation of a series of loops of self-binding. This means that, although the responsibility of acting as “*Hüter der Verfassung*” (“custodian of the constitution”) resides with the Federal Constitutional Court, in conflicts considered to be particularly serious, the possibility of a haphazard result, as can occur in the case of simple majority decisions, is ruled out: a two-thirds majority is required in banning political parties, setting aside basic rights, or impeaching the president or a judge. Putting such a series of controls in place certainly makes sense politically speaking, but it does not provide a conclusive answer to a basic theoretical question: the question

Table 3.1 The liberal and the deliberative concepts of self-binding

<i>Liberal concept</i>	<i>Deliberative concept</i>
negative	positive
procedural	substantial
rigid	flexible
action	thinking

whether the formula of self-binding helps to solve basic problems of modern constitutional theory.

3 Problems of the concept of self-binding in modern constitutional theory

How convincing are these variants of the concept of self-binding for a theoretical justification of constitutions in general and of a certain constitution in particular? Although Andrew Arato has not discussed this issue explicitly, some of his analytical and historical reflections on constitutionalism can serve as a helpful source and intriguing starting point for a critical investigation of both the liberal and the deliberative models of collective self-binding. It turns out, however, that the differences between these two models are not worth being discussed too deeply because both models share the same theoretical flaws. These flaws are so serious that I suggest we should give up the notion of self-binding altogether for the context of constitutional theory.

The presentation of my list of objections against the use of self-binding in constitutional theory is inspired by some major and some marginal arguments in Andrew Arato's work of the last two decades in the field of constitutional theory and constitutional politics. The list includes seven main points.

3.1 Internal changes: autonomous learning processes

In his article "Slouching toward Philadelphia?" Andrew Arato discusses competing theoretical options for constitutional reform in the US. He describes the rigidity of the current way of constitutional reform and reminds the reader of Thomas Jefferson's preferred option of a periodic convention. Arato's next move is to interpret Article V of the US Constitution as a formula in this Jeffersonian sense. According to Arato, such an interpretation of Article V has the potential to lead to a second and hitherto entirely unused method of constitutional revision: he mentions Sanford Levinson's proposal of calling a national constitutional convention to amend the constitution (Arato 1996a: 233–234, 241; Levinson 1996). Arato's discussion about opportunities to free the American people from the rigidity of its constitutional provisions for revising the constitution leads to a general question in modern constitutional theory: Under what circumstances may "the people" claim that they have "learned" autonomously and thus should be enabled to free themselves from constitutional mechanisms that are too rigid?

Any successful self-binding requires not only being restricted at time t_2 , but also the projection of "the day after" (t_3), when on looking back one is happy and thankful to have been bound, albeit grudgingly, by a meta-rule at time t_2 . But what if the original rule has fallen out of favor at times t_3 to t_n ? The criticism of "legal paternalism" leveled against liberalism stems mainly from the accusation that in cases of doubt it opts for the original binding formula and against the new preferences. Any attempt to establish a meaningful opposing view is confronted by the question how authentic learning processes – be they on the part of the

bound or the binding party – that have led to altered preferences can be differentiated from merely adapted or manipulated preferences. Self-binding mechanisms by definition neglect the idea of such a learning process which may provide good reasons to break with old rigid rules.

3.2 External changes: new conditions

Significant renovations and constitutional reforms in the US political system – as Andrew Arato has pointed out time and again (Arato 1996a: 226–228; 1999: 152–154; 2000a: 229–256) – were produced by “the least dangerous branch,” the Supreme Court. Most of these revisions had been responses to certain challenges and changes in the societal environment of the constitutional order. But the number of constitutional changes is rare in comparison to the changes in the environment of the constitution. The American constitution was written more than two hundred years ago, at a time when Benjamin Franklin invented the lightning rod. Since then, technology, the economy and society in the US have undergone tremendous changes. The old constitution of 1788 is situated today in an environment the framers could not have been able to think of.

This observation poses another very general question to the defenders of the self-binding theory: Some environmental changes of the constitution may be so tremendous that the measure designed to be self-binding contravenes the originally intended purpose. To what extent has the development of American society come into contradiction with the Second Amendment, which gives citizens the right to bear arms? Any self-binding mechanism responds conservatively to environmental contingencies. The concept of self-binding does not offer an intrinsic solution to this problem and thus it becomes a question of brute political luck or opportunity whether a rigid constitutional order will be in a position to cope with new challenges or whether an old rule may have consequences which could not have been foreseen by those who inaugurated these rules. It is a massive cost of self-binding that societies lose flexibility.

Ten years ago, Andrew Arato presented the outline for a constitutional reform in the US, proposing the constitutionalization of semi-presidentialism and cohabitation as well as a move toward a proportional electoral system (Arato 2000b). His suggestions can be read as a reaction to tremendous external changes of the American political system over the last two centuries. In order to judge these proposals in a fair way, the formula of constitutional self-binding turns out to be counterproductive. The formula systematically undermines the legitimacy of constitutional reform proposals in the name of rules from a normatively privileged past, and in its political consequences the conservative formula forces constitutional reformers to look for evolutionary ways instead.

3.3 The meaning of the binding formula

When the American framers of 1787 set the standard for impeachment in terms of “treason, bribery, and other high crimes and misdemeanors,” they left the

interpretation of these terms to posterity (Arato 1999: 145). The Republican attempt to impeach President Clinton brought the problem into full (camera) light: how is this standard to be interpreted?

In our private everyday life, binding formulas are usually unequivocal ("please don't give me cigarettes!"). But even the instruction not to hand over my car keys in case I have too much to drink leads to conflicts of interpretation in practice. For example, there may be differences of opinion about whether my blood alcohol level is already high enough for the case of self-binding to apply (although in this case we might follow the intuitive rule that the conflict itself is already an indicator of too much alcohol). In the realm of politics, the question of interpreting binding formulas arises in an incomparably more virulent way. For example, what does the statement in Article 1 of the Basic Law mean that human dignity shall be inviolable? The disagreement ranges from the question as to what qualifies as a human being, and from which point in time (abortion law, genetic engineering) to the various concepts of what constitutes dignity. This difficulty is resolved in practice in the American and German legal systems by the existence of a special institution that is to function as "*Hüter der Verfassung*" and interpret the formulas of self-binding in appropriate fashion. To what extent is this procedure legitimate if the majority of the democratic sovereign also explicitly invokes the content-related *telos* of the formula of self-binding, but gives it a competing interpretation, as has been the case several times in the Federal Constitutional Court's decisions regarding the unconstitutionality of abortion laws? Rulings handed down by the US Supreme Court during the *Lochner* era in the nineteenth century are an even more chilling example.

How high, one must ask, is the risk that the institution charged with safeguarding the formula of self-binding may distance itself from the original content of the formula? The accusation, among others, that the Federal Constitutional Court illegally constructs a higher system of values out of the constitutional provisions of the Basic Law follows this argument. No matter how you look at it: institutional decisionism (in favor of the Federal Constitutional Court or the majority of the population) is unavoidable; this decision, however, does not necessarily result from the theorem of self-binding, but is an additional obligation that modern political systems enter into.

3.4 Individual self-binding and collective self-binding

In the summer of 2010, the Turkish government conducted a referendum on a reform of the old constitution from the days of the military dictatorship. The governmental proposal won by a high margin. Andrew Arato, who originally was involved in the Turkish reform project, strongly criticized some components of the final proposal. According to him, the revised constitution gives majorities too much political power over minorities and over the constitutional court. The new constitution has the potential of majority imposition (Arato 2010). The constitutional organization of the relationship between majorities and minorities in a democracy has implications for the general relationship between individual

persons and the political collective in a constitutional order. It also raises the question about the transferability of constitutional arguments from the individual level to the collective level.

The original starting point of Jon Elster's concept of self-binding in the late 1970s and 1980s had been the individual actor. Elster simply transferred the example of Ulysses as an individual person to the level of a collective of persons. And although he acknowledged that this transfer might be problematic (Elster 1979: 123; 1991: 130), he interpreted constitutions along the way of Ulysses' strategy to have himself bound to a mast. Only in his later writings – in particular in *Ulysses Unbound* (Elster 2000: 92–96) – did Elster “recant” (Elster 2007: 245) on his early interpretation of constitutions as precommitment devices, but at this time the formula had already become common usage among constitutional theorists.

At this point, we have reached the core of the problem of using the self-binding formula in modern constitutional thought. Is it convincing to make an analogy of individual strategies for outwitting the weakness of the will on the one hand to strategies for a collective entity on the other? In my view, this analogy is misleading. It has two main flaws. First, it is theoretically inconsistent and second, it normally does not fit with the intentions of those actors who make constitutions.

In order to make such an analogy, the theory must depart from its pure contractual starting points and must assume something akin to a separate “entity” of a collective actor as a full unit of will and action. Such a collective actor must be understood an intergenerational social entity, which Andrew Arato identified in the work of European advocates of undivided, sovereign constituent power such as Carl Schmitt (Arato 1994: 99). Arato places the idea of “post sovereign constitution making” (Arato 2006b: 93–97; 2009: 59–76) in contradistinction to this old-fashioned model, as he considers it more legitimate from the point of view of democratic theory because it takes into consideration the multiplicity of political actors in a modern society.

In contrast to Arato's preferred model of constitution-making, any discussion of a coherent “collective actor” in a strong sense must rely on naturalistic, ethnic, religious or other metaphysical assumptions about those who are included and those who are excluded from the collective in question. In addition, it involves a high degree of uniformity and a strong sense of collective identity. Individuals are seen as citizens who have to develop such a strong feeling of identity with the political collective that they emotionally experience the binding force of the constitution as part of their personal will. Such assumptions are in contradiction to the individualistic starting point of the self-binding formula.

Second, the framers of a constitution do not want to bind themselves; they mainly try to bind others. They want to bind those who are the minority during the process of constitution-making, and they try to make it difficult or even impossible for them to prevail with their political agenda. In addition, they want to bind future generations and make it impossible for them to do things which the constitution believes should be avoided in the future. This kind of shackles or

bindings may be justified or not – but instead of being understood as “self”-binding, it is more accurate to call them “binding of others.”

3.5 Multiple actors

The problematic analogy provokes another objection. In his article “Impeachment or Revision of the Constitution?” Andrew Arato discusses the formula “original intent of the framers” (Arato 1999: 145) and elaborates the role of this reference point for conservative theorists in the field of constitutional theory in the US. In contrast to them, liberals have grown accustomed to basing their methodology on interpretative activism in order to defend constitutional reform. This debate illuminates a question which must be raised regarding the self-binding formula, too, and points at the duty to obey collective instances of self-binding.

In order to describe the problem more clearly, it is helpful to differentiate not only the two conditions t_1 and t_2 in the process of a self-binding mechanism, but rather the three conditions past, present and future. For actors in the present, the question is: what obligations can arise from a case of self-binding that was put in place by an almost completely different population (for example the American Founding Fathers)? This leads not only to the fundamental question of what commitments we have vis-à-vis the past, but, even more, calls attention to an asymmetry. Strictly speaking, only the generation alive at the time of the constitutional convention has made use of both moments of the process of self-binding, that is, both t_1 and t_2 .

This leads to serious questions about the legitimacy of such a binding mechanism: Is the concept of self-binding suitable, or is it not rather a case of being bound by others, if we are to give reasons why citizens of the Federal Republic of Germany in the year 2010 are to be guided by provisions that were given constitutional form in 1949, as the essence of their political experience, by politicians who are now long dead? If one is to represent this condition as self-binding and not as being bound by others, one cannot avoid the additional metaphysical assumption of a collective being with a single will, for example the nation, which has bound itself.

If we look into the future, we end up with different, but similarly precarious consequences: even if we acknowledge the binding effect of the past without reservation, that acknowledgment does not yield a right for us to make commitments for future generations. If we have the desire to bind them to our regulations nonetheless, the only way to legitimate our intentions is to give them all the good reasons we know of to encourage them to establish certain binding rules themselves.

3.6 *The spirit may be willing, but the flesh is weak*

In his ingenious commentary on Georg Lukács theory of reification, Andrew Arato pointed out the limits and paradoxes of historical materialism, which was

to be applied to itself as well. According to Lukács, the industrial proletariat in developed capitalist societies is (nearly) completely integrated into the ideological framework of commodity fetishism (Arato 1972). In some of his writings in the 1980s about political sociology, about the cultural criticism of authors of the Frankfurt School and about “Eastern Marxism,” Arato also dealt with the problem of “false consciousness” and authentic desires (Arato 1982, 1993: 84–104). I do not want to rehash this debate or come up with a theoretical solution on my own with regard to the Marxist quest for the “objectively correct consciousness.” But the old Marxist suspicion that (at least) sometimes (at least) some people are not fully aware of their “objective” preferences poses the question of the status of the persons (or collectives) who try to bind themselves in certain situations.

According to the basic logic of the concept of self-binding, an actor gives an instruction at a point in time t_1 that declares in advance that another instruction given by him at t_2 will be null and void. It is important to note that this logic only offers an unproblematic solution to the problem of *akrasia*, if there is no doubt that the person who binds himself or herself really is aware of his or her own mind at t_1 . After all, one could easily imagine the opposite situation: the meta-instruction may be given in a state of insanity, and the person acting, in control of his or her senses again, cannot liberate himself/herself from these strictures.

Normally, the mental condition of people binding themselves may be relatively simple to diagnose in straightforward cases in everyday life such as the declaration to quit smoking or “no car keys if I’m drunk!” But how could one ascertain the “sober” or “drunken” state of a collective? What about the framers of the American constitution and their (irrational) fear of the underclasses (Arato 1996a)? What about the political passions during the different processes of constitution-making in the East European transitions, some of them in “instances of full-fledged revolutionary breaks” (Arato 1994: 102) and others by slowly making amendments to the old constitutions (Arato 2000a: 167–197)? When were the French people most in possession of their senses, in 1789, 1793 or 1799? Were the fathers and mothers of the German Basic Law really in their right minds when they drafted Article 16 on asylum of the Basic Law, or was their mental state that of a post-fascist trauma – as critics contended when the right to asylum was scrapped, for all intents and purposes, by a change of the constitution in the early 1990s? The same argument could be advanced (quasi from the Left) regarding the anti-plebiscite thrust of the Basic Law; after all, we know today that the plebiscitary component of the Weimar Constitution was in no way responsible for the failure of the republic. To turn a long list of historical questions into one conceptual question, which cannot be answered by constitutional theory: How do we distinguish between “morally reflexive constitutionalism” and “morally regressive constitutionalism”? Andrew Arato in his historical work has pointed out a lot of historical evidence that constitutions are sometimes written in politically turbulent times. Constitution makers are sometimes themselves in a passionate mood.

3.7 Weakness of the system

Andrew Arato felt provoked by the politics of the George W. Bush Administration to spend a large amount of his time, energy and academic work on it. He focused his critique not only on the Iraq War and the American strategy to influence the making of a new constitution in Iraq but also on the "the Specter of Dictatorship" (Arato 2002b: 457) which he identified in the emergency government and the military tribunals by the Bush Administration against so-called terrorists. Contrary to the reigning myth, as Arato points out, the US had come close to dictatorship more than once in its long history (Arato 2002a, 2002b, 2006a). Civil liberties, which are guaranteed in a constitution, are the normative core of any modern democratic political system. But how secure are these civil liberties in times when the government successfully manipulates the public and when politicians use the language of *angst*? How binding is the self-binding of the political system when the government wants to get rid of some of the rules?

Any successful mechanism of self-binding must be able to rely on the fact that the person or institution charged with ascertaining the external causality is in fact able to carry out the task. I must be able to depend on my friend not handing me my car keys in case I am inebriated, even if I threaten him or her with violence. We citizens must be able to rely on the constitutional barriers actually having the effects for which we created them in the first place. We must have good reasons to assume that – for example – a constitutional court may successfully defend these barriers and not simply follow the intentions of the government. And we must have good reasons to assume that these institutions do not serve private interests, or, in contrast, even strengthen the feared destructive effects.

Regardless of how one might assess the accomplishments of the US Supreme Court or the German Constitutional Court in some individual cases: the assumption that institutional binding arrangements will always work as originally designed can only be considered heroic in light of the complexity and interdependency of modern political systems. The self-binding formula distracts our attention from the possibility that the institutions which are designed to bind and to secure may potentially fail to do so.

4 Conclusion: the notorious ABC of politics

To sum up the last section: All seven objections in the list strongly call the transfer of the concept of self-binding into constitutional theory into question. If one really wants to keep the concept of self-binding as a strong legitimizing argument for modern constitutional democracy alive, one has to be able to refute not just one or two, but all seven objections. If there is even only one objection that cannot be successfully refuted, the theoretical concept of self-binding will have to be given up as a way of justifying modern constitutionalism. In my view, the seven objections are strong enough to abandon the idea of self-binding as a theoretical way of justifying the normative validity of modern constitutions. Instead,

constitutions should be understood as strong rules by which we intend to bind others (see Zintl 1994).

Jon Elster has recently also become more skeptical about the transfer of the concept of self-binding from the individual to the collective level. He acknowledges that this conceptual extension is at least “dubious” (Elster 2007: 244) with respect to constitutions: “societies are not individuals writ large” (Elster 2000: 167). Rather than a political community binding itself, minorities are bound by majorities and future generations by the present one. But he still insists that “the idea of constitutional precommitment is not meaningless” (Elster 2000: 96).

What remains today from the debate between rational-choice, liberal and deliberative variants of making use of the concept of self-binding? In my view, the debate indicates that we need to return to a more “realistic” theoretical approach of dealing with questions of constitutional theory. Political action takes place in three different dimensions: Arguing, Bargaining and Commitment – one may call it the basic ABC of politics. Any political order needs to establish a meaningful arrangement between these three modes. Constitutional patriotism cannot simply be purchased; it requires the identification attained by commitment. Bargaining entails the procedural risk that bargaining power will result in distortions in the input area of the political process; for this reason, it requires arguing as supervision. Arguing, finally, suffers from the fact that purely moral considerations lack concrete power to form motives; therefore, it needs accommodating forms of commitment. All three modes are vulnerable to self-destruction, too: Bargainers alone will be unable to deal successfully with questions of climate change and natural resources of future generations. The mode of strong commitment must be checked when it sabotages the exchange of arguments. And the moral-philosophical discourse of arguing has to be integrated and regulated in a manner that enables the production of decisions.

If we switch from Elster’s concept of instrumental rationality to the concept of communicative rationality in Jürgen Habermas’s theoretical work, arguing can be seen as the normatively privileged mode within the ABC. From this Habermasian starting point, any reflection upon the best arrangement between arguing, bargaining and commitment has to take place only in the mode of arguing. However, even such a normative switch does not avoid the following problem: of all three modes, arguing is not only the mode designated to define roles in the relationship between arguing, bargaining and commitment but at the same time it is the mode which is the most fragile among the ABC.

A promising meta-strategy to deal with the strategic vulnerability of arguing may be seen in a kind of negative approximation whose course takes an institutional detour: if we can make plausible that instances of self-binding were undertaken under procedural conditions that are favorable for the mode of arguing, then it may be plausible that we may identify cases of arguing. Such procedural standards include publicness, openness of the agenda and unrestricted participation, among others. Now, this assumption is hardly suited to find empirical evidence to support it, especially for the formulation of constitutions. The debate about the American constitution can be reconstructed as nothing less than a

classical example of a complex bargaining process (see McGuire 1990). In addition, the circumstances of the formulation of the German Basic Law as well as the new constitutions in eastern Europe (see Lijphart 1992; Arato 2000a) or in Iraq after the US invasion (see Arato 2009) also give little reason to hope that the actors involved will modify Ferdinand Lassalle's famous 1862 statement that all constitutional issues finally will turn out to be issues of power.

Thus it seems to me that any attempt by modern theorists of deliberative democracy to apply the concept of self-binding as an instrument to strengthen the rationalizing power of arguing during processes of constitution-making leads to an infinite regress. Instead, it would be beneficial if the critical theory of democracy were enriched by the more realistic perspective of those members of the Frankfurt School in the tradition of Franz L. Neumann, Otto Kirchheimer and A.R.L. Gurland who paid close attention to the use of power in their analyses of political processes. Andrew Arato's academic work in the fields of democratic theory and constitutional theory is an example that this "realistic" tradition of Critical Theory is still very much alive today.

Notes

- 1 I would like to thank Sandra H. Lustig for translating an earlier version of the paper and Kerstin Pohl for discussions about the limits of self-binding-strategies.
- 2 Johann Wolfgang von Goethe, *Goetz von Berlichingen mit der eisernen Hand* (1773).
- 3 Quoted in Elster (2000: 89).
- 4 See Rorty (1980), Wolf (1988) and Walker (1989). For an overview of the debate see the contributions in Peter/Schmidt (2007).
- 5 See Dennis/Söderström (2006) and Neumann (2007).
- 6 In an entirely different meaning, Arato used the term "self-limiting" in order to characterize the revolutionary changes in Central and Eastern Europe. See Arato (1993).
- 7 See for example the use of the self-binding formula by the President of the German Constitutional Court Thomas Voßkuhle (2010) and the references to the concept in: Böckenförde (1994), Vorländer (1999), Kis (2003), Zurn (2007), Brodacz (2009), Schaal/Ritzi (2009) and Wheatley (2010).
- 8 See Elster 1983: 114–116; 1989a: 19–23; 1989b: 36–38; 1989c: 194–200; 2000: 88–174; 2003: 1751–1772; 2007: 119–127 and 237–243.
- 9 All following quotes are taken from Elster (1979).
- 10 See Wolf (1988) regarding this discussion, which goes back to Aristotle's critical responses to an argument by Socrates.
- 11 See Thomas Schelling: "The legal, ethical, and policy issues arise mainly when a second party is enlisted. And there are the cases that appear to call for a judgment about the ambivalent person's true interests" (1984: 2).
- 12 For a critical review of Elster's account on this topic see: Offe (2008), Sauerland (2008) and Stykow (2008).
- 13 For a critical exchange about some of the logical assumptions in Elster's concept of precommitment see: Beckmann (2008) and Holzinger (2008).
- 14 This and the following quotes can be found in Holmes (1988).
- 15 Robert E. Goodin, too, followed this line of argument in his by now classic defense of political paternalism, cf. Goodin (1991).

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