



CONSTITUENT POWER AND LIMITS OF CONSTITUTIONAL AMENDMENTS *

Dieter Grimm **

TABLE OF CONTENTS: 1. The constituent power. — 2. The amendment power. — 3. The limits of amendments. — 4. Unconstitutional constitutional amendments. — 5. The amendability of the amendment clause.

1. The constituent power

The constituent power is a puzzle for constitutional theory ¹. Where does the authority to enact a constitution come from if it is the constitution that establishes the authority? Today it is generally accepted that the constituent power lies with the people. But does this answer the question? The people are not capable of collective decision-making before they have been constituted as a political entity. After having been constituted they are no longer acting as constituent power but as constituted power, which means: within the boundaries and according to the rules prescribed by the constitution.

No satisfactory solution of this puzzle has yet been found. Most theories help themselves by assuming that constitution-making is not conceivable in legal terms, *Carré de Malberg* being a prominent voice of this concept ². Rather it is regarded as a matter of fact or more precisely a matter of power. Those who de facto hold the power go ahead and draft and enact a constitution and claim to do so in the name of the people. Whether this claim is justified can only be ascertained in retrospect. Not the act of adopting a constitution is decisive but what follows. The constituent power is thus dissolved in a process.

Carl Schmitt takes a different approach ³. He does not escape the problem but tries to solve it by assuming that the legal constitution is preceded by an essential decision of a group of persons who understand themselves as a people. This decision determines the nature and form of the political unity. It is constitutive of a political entity although it is not an organized act and does not find expression in a text. What is usually understood as constitution, namely the

* Relazione al Convegno “*Costantino Mortati. Potere costituente e limiti alla revisione costituzionale*”, Roma 14 dicembre 2015.

** Professore emerito di Diritto Pubblico presso l'Università von Humboldt di Berlino, già Giudice del Tribunale costituzionale federale tedesco e Rettore del Wissenschaftskolleg zu Berlin

¹ See *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, M. Loughlin, N. Walker (eds.), Oxford: Oxford University Press, 2007.

² See R. Carré de Malberg, *Contribution à la Théorie générale de l'Etat*, vol. II, p. 483 ss.

³ C. Schmitt, *Verfassungslehre*, Berlin, Duncker & Humblot, 1928, pp. 20 ss.

document, is derived from the essential decision that it merely concretizes and makes operational. Here the constituent power is reduced to a decision.

If we leave the theoretical puzzle aside and instead turn to the historical emergence of constitutions the question arises: How are the people involved? One possibility is that they elect a constituent assembly which then drafts and enacts a constitution. However, this presupposes some power that orders the election to be held, defines the terms and organizes the procedure. This power is itself not legally authorized to do so. It empowers itself. Another possibility is that the factual power holders themselves draft a constitution and submit the draft to a referendum. The people may then adopt or reject it. But again they are not legally authorized to do so.

Yet another possibility is that the people are not involved at all. They are but postulated as the source of all public authority. This is the case of the German Basic Law. It was drafted on request of the three western allies after World War II. The prime ministers of the previously established *Länder* appointed a so called Parliamentary Council. Thus, differing from the constitution of the German Empire of 1871, the Basic Law did not come about by a treaty of the heads of the various German states, but the Parliamentary Council agreed on a draft which was then adopted by the parliaments of the *Länder*.

What are the consequences for the legitimacy of a constitution so enacted? Apparently, there is no necessary link between the emergence of a constitution and its legitimacy. The German Constitution of 1871 adopted in form of a treaty and then ratified by a vote in parliament was widely accepted. The German constitution that was adopted by a national assembly elected by the people, the Weimar Constitution of 1919, remained contested throughout its lifetime and finally failed without ever being formally abolished. The German constitution whose popular legitimation was the weakest, the Basic Law of 1949, became the constitution that enjoyed and continues to enjoy the highest possible degree of legitimacy.

I conclude from this that the constituent power of the people should be regarded as a fiction. We *attribute* this power to the people. We behave *as if* the constitution is a product of the popular will. The fiction helps to bring the act in line with the requirements of democratic legitimacy. However, the term “fiction” should not be misunderstood as a mere imagination. It makes a difference whether the constituent power is or is not attributed to the people. If the fiction is taken seriously it establishes a relationship of accountability between the government and the people which in spite of its fictitious basis has real consequences.

2. The amendment power

Once the constitution has entered into legal force the constituent power of the people is at the same time established and consumed. It cannot become relevant under the existing constitution. During the existence of the constitution only amendments are possible. Amendments presuppose the existence of the constitution. They cannot abolish but only change it. Even if the power to amend the constitution is given to the people they do not act in the capacity as sovereign. They act like any organ of the state. The people act as sovereign

only when they abolish a constitution. They then return into the “state of nature” where no legitimate authority exists. Under the existing constitution even the people may only do what the constitution permits.

This suggests that the amendment power should be regarded as an intermediate power between the constituent power and the legislative power. Other than the constituent power, it cannot enact a new constitution. Different from the legislative power, it can change the rules for decision-making including those for legislation. All then depends on how the amendment power is regulated. Yet, there are no principles or premises which the constitution-maker has to follow when regulating the amendment process. This would be incompatible with the nature of the constituent power. It can freely determine who shall exercise the amendment power, how it is to be exercised and what may be amended, i.e. the holder, the process and the limits.

If we examine constitutions, be they historical or actual, as to these questions we will find a great variety of solutions⁴. Regarding the holder, the amendment power can lie with the people and is then exercised in form of a referendum. However, since the constituent power is not bound by any higher law it is not indispensable that the people be involved. Rather, it is generally accepted that the amendment power may be delegated to representatives of the people. The representatives can be elected especially for the purpose of amending the constitution. This is usually called a convention. It can be the ordinary representatives, to wit the legislature, or all sorts of combinations.

Regarding the procedure most constitutions provide for a regime different from the legislative procedure. If the amendment power is exercised by representatives of the people almost all constitutions require a super-majority for amendments. Some stipulate that an amendment voted by parliament will become effective only after a confirmation by the following parliament. The election in between gives the people a chance to express their opinion as to the amendment. A few constitutions do not make a difference between constitutional amendment and legislation. A simple majority is then sufficient for both. However, in this case the primacy of the constitution is sacrificed and with it the advantages that flow from the primacy of the constitution.

In Germany constitutional amendments require a two-thirds-majority in both houses of parliament. The Basic Law has been in force for 67 years and has seen 60 amendments, some of them fundamental such as the introduction of emergency rules in 1968, some technical. Many of the amendments touched more than one article of the Basic Law. Only half of the original text is preserved. Today, the Basic Law is twice as long as the original text of 1949. This raises the question of identity. Is it still the same constitution? In a formal understanding of identity the answer would be no. If a substantive notion of identity prevails one can still speak of the same constitution as it is based on the same principles whose permanence is guaranteed in Art. 79 (3) of the Basic Law.

⁴ See R. Dixon, *Constitutional amendment rules: a comparative perspective*, in *Comparative Constitutional Law*, T. Ginsburg, R. Dixon (eds.), Cheltenham, Edward Elgar, 2012, p. 96.

I have argued several times that constitutional amendments are too easy in Germany. The actors are the same that take the routine political decisions. The procedure is the routine legislative procedure. The only difference consists in the requirement of a two-thirds-majority. As a consequence, there is no sufficient awareness of the difference between making ordinary law and changing the constitution. It should be mentioned however, that constitutional amendments may also be too difficult. The best example is the American constitution. The procedure is so complex that amendments are extremely rare. The consequence is an increase of judicial power.

3. The limits of amendments

Since the amendment power is a constituted power there is no amendment power without limits. However, in many constitutions procedural rules are the only limits. The Weimar Constitution is an example. It confined itself to require a two-thirds-majority in parliament. This was interpreted as a license to change the constitution in whatever sense. As a consequence no identity guarantee existed. This understanding enabled Hitler to rise to power without a revolution. In order to prevent a repetition of 1933 the Basic Law contains not only formal but also substantive limits to constitutional amendments. Art. 79 (3) declares the principles in article 1 (human dignity) and 20 (republic, democracy, rule of law, social state, federalism) unamendable.

Substantive limits to constitutional amendments are often seen as undemocratic. But this view becomes untenable once it is understood that the amendment power is not identical with the constituent power. The reason is exactly that the amendment power is a constituted power even if exercised by the people and therefore not completely free. The democratic principle does not stand in the way of this understanding. If the constituent power lies with the people the people are entitled to limit the amendment power. The Basic Law limited the amendment power in the interest of democracy. No constituted power should be entitled to abolish the democratic system.

As a matter of fact substantive limits to the amendment power are older than usually known. Many constitutions contained such limits before the Basic Law. Very often the form of government – monarchic, republican, democratic – is exempted from amendments. Even the U.S. Constitution contains substantive limits: The equal representation of the states in the Senate cannot be altered without the consent of the states concerned. As early as 1814 the Norwegian Constitution provided for substantive limits. According to Art. 112, the principles of the constitution are not subject to an amendment. No amendment may alter “the spirit of the Constitution”. Only modifications of particular provisions are permitted.

It needed the experience of failed democracies and of authoritarian regimes for a breakthrough of substantive limits to constitutional amendments. Most countries that adopted new constitutions in the last quarter of the 20th century included provisions like Art. 79 (3) of the Basic Law. Meanwhile it has become usual to call them “eternity clause”. Of course, this can only be a limited eternity. It is valid for the lifetime of the constitution. It is not binding

for a new constitution written after the old one was abolished, although there are a few constitutional lawyers in Germany who believe that Art. 79 (3) is also binding for a new constitution.

But what about constitutions without explicit substantive limits to amendments? Constitutional theory developed the idea of inherent limits. *Carl Schmitt* was particularly influential in this respect⁵. He criticized the prevailing formalist understanding of the Weimar Constitution according to which parliament was completely free to determine the content of the constitution. *Schmitt* based his theory on the distinction between constitution and constitutional law. A constitution originates from an act of the constituent power. This act constitutes the form and substance of the political unity whose existence is presupposed. The act precedes the drafting of constitutional law. It is not taken in a formal procedure and not fixed in writing. It is ontological.

Constitutional law, on the contrary, is set down in a text and adopted in a formal procedure. It gives legal expression to the original act by which it is bound. It may add concretizations and more technical provisions. *Schmitt* concluded from this distinction that the constitution may only be altered by the political entity itself, the constituent power, while amendments are limited to constitutional law. They are possible only within the boundaries of the constitution. Exceeding these boundaries would amount to an “annihilation” of the constitution. It can never be done by those who hold a competence as opposed to original power.

4. Unconstitutional constitutional amendments

Eternity clauses like Art. 79 (3) of the Basic Law establish a hierarchy within the constitution. There is now a super-norm. This entails the possibility of unconstitutional constitutional amendments⁶. Who is authorized to determine whether an amendment violates the constitution and what are the consequences of a violation? The Basic Law does not give an explicit answer to these questions. The same is true for the most other constitutions with an eternity clause. According to the Federal Constitutional Court the court is the guardian of the constitution. It has the power to review laws, and as amendments are laws they are also subject to judicial review. An amendment that violates Art. 79 (3) is null and void.

There are a handful of cases where the Court was called upon to review amendments. But the series was preceded by a 1953 case that raised the question whether a provision of the original constitution can be unconstitutional⁷. The Constitutional Court did not completely exclude this possibility, relying on arguments that remind of natural law, but it declared it extremely unlikely that this might be the case in the Basic Law. Most of the cases in which Art. 79 (3) of the Basic Law was invoked concerned an enlargement of the surveillance powers

⁵ C. Schmitt, *Verfassungslehre* (see note 3), pp. 99 ss.

⁶ See Y. Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, in *American Journal of Comparative Law*, 61, 2013, p. 657.

⁷ BVerfGE 3, 225.

of the secret services. The Court upheld all amendments, but in some of the cases dissenting opinions were published⁸.

How do courts react in the absence of a clause equivalent to Art. 79 (3)? Some constitutional courts conclude that in this case no limits to amendments exist and consequently no review can take place. A special argument can be found in the jurisprudence of the French *Conseil constitutionnel*⁹. In France the constitution can be amended either by a vote of parliament or by a referendum. The *Conseil* refuses to review amendments adopted by way of referendum because the people are the holders of it the constituent power. The court did not take into account, however, that the referendum is created by the constitution and thus puts the people into the position of a constituted power.

Other courts found ways to review constitutional amendments without a positive provision in the constitution. The argument was that there are inherent limits to amendments. Some derived them from the notion of amendment. It presupposes the constitution and therefore cannot turn it into the opposite. Some started from the difference between constituent and constituted power and concluded that an unlimited amendment power would turn around the relationship between the two. Many relied on the notion of constitutional identity to develop inherent limits to amendments. The identity of the constitution is determined by the maker of the constitution and may be altered by no one else.

The most interesting case comes from India. The Indian Constitution does not know an eternity clause. The amendment power lies with the Indian Parliament. The Indian Supreme Court was confronted with the question of unconstitutional constitutional amendments in a period when the ruling Congress Party had a two-thirds-majority in Parliament. Whenever it disliked a decision of the Supreme Court it overruled it by a constitutional amendment. In a 1000 pages judgment with all members of the Court writing separately the majority reached the conclusion that the amendment power is plenary and includes the power “to add, alter or repeal” the various articles of the constitution but does not extend to the basic structure of the constitution¹⁰.

There is an illuminating story concerning the migration of constitutional ideas behind the decision. The specialist on Indian public law at the Max-Planck-Institute for Foreign Public Law and Public International Law in Heidelberg, *Dietrich Conrad*, gave a lecture on *Carl Schmitt* and Art. 79 (3) of the German Basic Law in Delhi. Lawyers involved in the *Kesavananda* case were present and introduced the theory into the procedure where the court adopted it without mentioning *Carl Schmitt* or the Basic Law, but one judge (*Khanna*) explicitly referred to *Conrad*. The Indian decision then exercised considerable influence on other courts in South East Asia that followed the basic structure doctrine.

⁸ See BVerfGE 30, 1 (1970); 109, 279 (2004).

⁹ Referendum Case, *Décision* no. 62-20 DC (1962).

¹⁰ *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

5. The amendability of the amendment clause

Students like to ask the question whether the eternity clause can be abolished by amendment. Scholars who answer this question in the affirmative usually argue that being subject to change is the very nature of positive law. This is certainly true. But it does not answer the question whether this may happen by way of amendment. If the difference between constituent power and amendment power is accepted and if the people are postulated to be the source of the constitution one can logically conclude that the eternity clause is exempted from amendment. But it is not immunized against being repealed by the constituent power itself.

The question gained unexpected attention in Germany when the Federal Constitutional Court reviewed the Lisbon Treaty in 2009¹¹. This treaty was generally regarded as a major step toward an ever closer union. In Art. 48 TEU it even created the possibility of minor treaty amendments by organs of the EU. Therefore, the Court found it insufficient to merely review the treaty provisions as to their compatibility with the Basic Law, as it had done in the Maastricht judgment of 1993¹². Rather, it set out to concretize the constitutional limits to further European integration, irrespectively of the Lisbon-Treaty by way of *obiter dicta*.

Explicit limits can be found in Art. 23 (1) of the Basic Law. The Court noted that this provision allows a transfer of sovereign rights but not of sovereignty. It called sovereignty a pre-condition of the Basic Law. Consequently, the representatives of the people are not authorized to dispose of sovereignty. This implies the prohibition to consent to a transformation of the European Union into a state. The sovereign existence of Germany and the self-determination of the German people are to be preserved. The legal basis for this reasoning was found in Art. 79 (3). A transfer of sovereignty would amount to a violation of the constituent power of the people.

In this context, the Court reiterated that Art. 79 (3) is not subject to amendment. The amendment power is irrevocably limited. An attempt to amend the eternity clause would thus be an act of self-empowerment and hence a breach with the Basic Law. The barrier could be overcome only by an abolition of the Basic Law as a whole and the enactment of a new constitution which either states that Germany will form a part of a European State or that authorizes the representatives of the German people to decide that Germany be integrated into a European State.

The question then is when a transformation of the European Union into a state would happen. Clearly if a treaty concluded by the heads of state and government of the member states established the EU as a federal state, the United States of Europe. The same effect would occur, however, if the member states, without explicitly proclaiming the United States of Europe, agreed to hand over the constituent power to the EU itself. This would be so because it is the difference between self-determination and hetero-determination about one's basic legal foundation that distinguishes a supranational entity from a state.

Still another possibility would be a transfer of the *Kompetenz-Kompetenz*, today held by the member states, to the EU. The *Kompetenz-Kompetenz* is closely linked to sovereignty. It is an old

¹¹ BVerfGE 123, 267.

¹² BVerfGE 89, 155.

question who is sovereign in a political entity composed by states. The answer that solved the issue for quite some time was given by *Georg Jellinek*: sovereign is the entity that holds the *Kompetenz-Kompetenz*¹³. However, the question gained new salience in the EU. Many solutions are suggested¹⁴. Nevertheless, the Federal Constitutional Court reaffirmed *Jellinek's* position and barred a transfer of the *Kompetenz-Kompetenz* under the Basic Law.

These parts of the Lisbon-judgment have drawn a lot of criticism. Many argued that Art. 79 (3) draws its meaning from the abolition of democracy in 1933. According to them, it is directed against the transformation of the Federal Republic into an autocratic regime. But it does not apply to the integration of Germany into a European *democratic* state. However, the transformation of the EU into a state would be a step of such a magnitude that it cannot be declared in the routine form of a constitutional amendment. This is for the people alone to decide. And as under the Basic Law the people cannot act as constituent power the only possible way would indeed be the enactment of a new constitution.

¹³ See G. Jellinek, *Allgemeine Staatslehre*, 7th imprint, Bad Homburg: Hermann Gentner, 1960, p. 495.

¹⁴ See D. Grimm, *Sovereignty in the European Union*, in *Constitutional Sovereignty and Social Solidarity in Europe*, J. van der Walt, J. Ellsworth (eds.), Baden-Baden, Nomos, 2015, p. 39 (in *German: Souveränität in der Europäischen Union*, in D. Grimm, *Europa ja – aber welches?*, München, C. H. Beck, 2016, p. 49).