BUCHBESPRECHUNGEN / BOOK REVIEWS

Yaniv Roznai, **Unconstitutional Constitutional Amendments. The Limits of Amendment Powers,** Oxford University Press, Oxford, 2017, 334 pages, £60, ISBN 978-0-19-876879-1

Comparative research on constitutional law and constitutional politics has experienced a considerable boom in recent years. Both legal and political sciences have contributed to this upsurge. In particular, studies have focused on constitution-making processes, on the actors' motives and strategies in constitutional reforms, and the role of constitutional courts in these processes. Likewise, the relationship between ethnic or national conflicts and constitutional politics, the frequency of constitutional amendments, and the relevance of formal rules for amendments have been examined. Yaniv Ronznai's book, which is based on the author's doctoral dissertation at the London School of Economics (2014), touches many of these aspects by studying "the nature and scope of the power to amend constitutions" (p. 1). The importance of this topic is beyond doubt; as the author shows, unamendable provisions and doctrines of implicit unamendability have expanded in recent decades both in terms of their numbers and the protected constitutional subjects. Particularly widespread among today's constitutions are explicit unamendable provisions, which are therefore to be considered as "an important element of modern constitutional design" (p. 15f.).

The book is divided into three parts. Part I distinguishes three different forms of constitutional unamendability. Chapter 1 examines 'explicit' unamendability, i.e. unamendable provisions in the constitutional text. This is based on an impressive (but not complete) collection of 742 national constitutions from 1789 until 2015 (pp. 235–274). Chapter 2 analyzes 'implicit' unamendability, i.e. the idea that the preservation of a constitution's 'identity' implies certain limitations to the amendment power. Starting with the genesis of the 'Basic Structure Doctrine' in India, this chapter provides an outline of the history and global migration of that concept. 'Supra-constitutional' unamendability is the topic of Chapter 3, which analyzes limitations of national constitutional amendment powers stemming from supranational, international, or even natural law. After this empirical and historical overview, Roznai develops a 'Theory of Constitutional Unamendability' (Part II, Chapters 4–6), whose aim is to explain the *empirical* phenomenon of unamendability and to develop *normative* guidelines on the question, which constitutional principles and rules could and should be taken from the scope of the constitutional amendment power. Finally, Part III of the book (Chapters 7–8) deals with the judicial enforcement of unamendability by judicial review, and the role of constitutional courts and the separation of powers.

Roznai's central hypothesis is that "any organ established within the constitutional scheme to amend the constitution, however unlimited it may be in terms of explicit language, cannot modify the basic pillars underpinning its constitutional authority so as to change the constitution's identity" (p. 11). This assumption stems from a conceptualization

of the constitutional amendment power as a 'secondary constituent power'. This power combines elements of both the constituent and the constituted power. On the one hand, the amendment power stems from a delegation decision taken by the (primary) constituent power, both in terms of its competencies and its institutional features. On the other hand, the amendment power obviously takes part in the constituent power, insofar as it is allowed to change the constitution (i.e. to make constituent decisions).

As a consequence, the secondary constituent power "inherently entails certain limitations" (p. 119) in contrast to the primary constituent power. These *implicit limitations* concern the basic principles of a constitution (on which the structure of that constitution rests), the constitutional 'identity', and the very existence of the constitution itself. In addition, the primary constituent power is legitimized to impose *explicit limitations* on the scope of the amendment power by means of unamendable provisions. This argument also leads to the conclusion that such unamendable provisions are to be deemed unamendable themselves, even if such an intent is not explicated in the constitutional text. Roznai strongly advocates both explicit and implicit limitations as a reasonable means to protect the basic principles of a modern constitutional order, such as the rule of law, human rights, democracy, the separation of powers, and the constituent power of the people.

Although generally unbound, the primary constituent power is also limited in one respect: it is not legitimized to limit itself. "Indeed, unamendability should not be viewed as an absolute entrenchment. Unamendability limits the delegated amendment power which is the secondary constituent power, but it cannot block the primary constituent power from its ability to amend even the basic principles of the constitutional order" (p. 123). For that reason, Roznai also avoids using the term 'eternity clause' (*Ewigkeitsklausel*) in the entire book.

Both explicit and implicit limits of constitutional amendments obviously run the danger of not being observed by the amendment power. The political actors in the legislative and executive branches (as well as the citizens participating in a referendum) might simply ignore or disregard those limits and amend a constitution in a procedurally correct way. In order to avoid those violations of the constitution, an institution independent from the amendment power is needed. This institution is the Constitutional Court or the Supreme Court: "judicial review of constitutional amendments fulfils the vertical separation of powers, which exists between the primary and secondary constituent power" (p. 180). In order to fulfill this function, constitutional courts must be entitled to declare amendment laws unconstitutional for substantive (and not only procedural) reasons.

However, Roznai's advocacy of amendment limitations leaves some questions unanswered and even leads to new problems. The first and most obvious objection is raised – but not shared – by the author himself: "The existence of implicit unamendability is contentious. Had a constitution's framers intended to prohibit certain amendments, one could reasonably expect them to have included a provision to that effect" (p. 150). In other words: asserting the existence of implicit limits is a subsequent rationalization. Even if we follow Roznai's plea "to read a country's constitution in a *foundational structuralist* way, accord-

ing to which each constitution has to be regarded as a structure in which all of its provisions are related" (p. 8, emphasis in original), this does not solve the problem that the interpretation of a constitutional text is always controversial – even more, when it comes to the determination of implicit amendment limitations that are not to be found in the very constitutional text. Against this background, it is probably not by accident that Roznai does not provide a detailed list of constitutional principles and rules that should be regarded as unamendable in a democratic constitutional order. This problem of constitutional interpretation might be smaller, but does not disappear in case of explicit unamendable provisions. If, say, 'human dignity', 'democracy', and the 'rule of law' are declared unamendable (as for example in the German Basic Law), how can we unequivocally identify what these principles mean and whether an amendment draft violates them or not?

This leads to another open flank in Roznai's argumentation, which is again recognized by the author himself: "The courts can use unamendability as a strategic trump card, by applying it selectively and generally elevating their powers vis-à-vis other branches" (p. 193). One could add that the doctrine of implicit limitations allows courts in practice to include whatever they want under the scope of the principles (or the 'spirit') of a constitution. Therefore, the question must be answered why a constitutional court is generally deemed better suited to protect a constitution's core against erosion or violation than a constitutional blocking minority in a democratically elected parliament or, in case of a referendum, the citizens themselves. Whereas the *empirical* world provides numerous positive and negative examples for all those institutions and actors in amendment processes,[1] Roznai just states somewhat apodictically that his *normative* "theory behind unamendability manages to moderate this concern" (p. 194).

A solution to these problems could lie in the primary constituent power. In this regard, Roznai argues:

> *Since the primary constituent power has extra-juridical dimensions, it cannot be fully regulated or stipulated legally. This, however, does not mean that a constitution cannot stipulate the means by which a new constitution would be constituted. […] These mechanisms can thus be viewed not as containing primary constituent power, but rather simply as vehicles for its exercise (p. 168, emphases in original).*

1 Just two recent examples: In 2011, the Hungarian party Fidesz under Prime Minister Victor Orbán used its two-thirds majority in parliament to adopt a new constitution by means of the ordinary constitutional amendment procedure. This new 'Fundamental Law' reflects the nationalist-conservative ideology of Fidesz, politicizes previously independent institutions, and curtails the competencies of the parliament. In contrast, the Bulgarian Constitutional Court obstructed in 2003 large parts of an envisaged reform of the judiciary by interpreting the relevant unamendable provisions in the constitution in a self-contradictory, disputed, and very extensive way. Quite obviously, a majority of the judges aimed to protect certain sinister interests of parts of the highly politicized and (allegedly) corrupted judicial elite. See *Sonja Priebus,* Hungary, in: Anna Fruhstorfer / Michael Hein (eds.), Constitutional Politics in Central and Eastern Europe: From Post-Socialist Transition to the Reform of Political Systems. Wiesbaden 2016, pp. 101–143 (117–120); *Michael Hein*, Bulgaria, in: *ibid*., pp. 145–171 (152–155).

Thinking Roznai's concept to the end, one should go one step further and claim that because of the (implicit or explicit) limitations of the secondary constituent power, constitutions *should* entail a mechanism to recall the primary constituent power. This mechanism would have to be accessible in a politically realistic manner, i.e. its hurdles must not be so high that politicians would generally refrain from activating it. One could think, for instance, of the possibility to call a constitutional convention (parallel to the parliament) by means of a parliamentary resolution that needs to be adopted by the same qualified majority as for a constitutional amendment. That way, a counterbalance might be found to the power of the constitutional court to interpret the contents of both implicit and explicit unamendability.

Finally, almost all modern constitutions are generally entrenched, i.e. harder to amend than ordinary laws and other sub-constitutional norms. In most cases, this is achieved by requiring qualified majorities in parliament and/or the adoption of an amendment law in an additional referendum. Roznai does not only leave this aspect (which is quasi "below" the limits of the amendment power) out, but perstringes a democratic critique of unamendability as theoretically thin: "the argument that *any* form of unamendability presents a challenge to democracy relies on a narrow view of formal or majoritarian democracy" (p. 191, emphasis in original). A 'Theory of Constitutional Unamendability', however, would have to include the general entrenchment of constitutional amendments. If we understand it as a compromise between the principle of democratic self-determination and the protection of the constitutional core principles and values (including democracy itself), what is then the additional value of explicit or implicit amendment limitations, given the fact that both protection mechanisms can fail?

These critical remarks show the thought-provoking capability of Yaniv Roznai's book. It provides a persuasive and both normatively and empirically well-informed contribution to the debate on the limits of constitutional amendments. For its clear-cut normative theory alone, this book is seminal reading and will be an essential reference to scholars of constitutional law and constitutional politics for years to come. In the end, one will certainly agree with the author's insight that "unamendability is a complex and controversial mechanism, which must be applied with great care" (p. 196) – whatever perspective a reader might take on the appropriateness of unamendable provisions and implicit limitations of constitutional amendments.

Michael Hein, Göttingen