

Jakob Hohnerlein

Recht und demokratische Reversibilität

Verfassungstheoretische Legitimation und verfassungsdogmatische Grenzen der Bindung demokratischer Mehrheiten an erschwert änderbares Recht

[The Law and Democratic Reversibility. Legitimation through Constitutional Theory and the Dogmatic Boundaries of Binding Democratic Majorities to Unyielding Law.]

Published in German.

This book explores the concept of democratic reversibility: Democratic majorities at any time should be able to change previous democratic decisions. I analyze how constitutions and other legal forms limit reversibility and how constitutional interpretation can help to ensure sufficient democratic dynamics. In modern societies law is a product of contingent political decisions. To be legitimate they must result from a democratic process – and they should be subject to revision in a new democratic process. If democracy is characterized by open discussions in representative institutions and the public sphere, decisions can be no more than a “caesura in an ongoing discussion” (Habermas). The majority rule is the fairest way to decide when people disagree on the best solution – but only if the minority has the equal chance to become the majority (Kelsen). New generations should not be bound by the will of the dead (Jefferson). However, in modern legal systems democratic reversibility is significantly limited. They have developed mechanisms to entrench norms, i.e. to take them out of the hands of ordinary democratic decision-making. The very idea of constitutions is to freeze certain norms. Even if amendments are not precluded by an “eternity clause”, they have to be carried out in a particularly onerous procedure. Typically, a supermajority is required, thus a minority can block any departure from the status quo. In a similar vein, the obligations of states from international treaties can in principle only be changed by the consent of all state parties. Moreover, some constitutions require qualified majorities for legislation in certain areas. In many legal orders there are constitutional doctrines according to which new legislation must respect previously awarded rights or legitimate expectations. The intensity of all those limits on present majorities to change legal norms enacted in the past varies among legal orders, particularly depending on the existence of judicial review. But even if entrenched norms are not controlled by courts, they are normally respected as authoritative in political discussions. How can rigid forms of law be justified? I argue that it is not convincing to attribute legal norms adopted by a qualified majority a democratic superiority vis-à-vis ordinary laws because it gives the preference to the status quo. A similar concern holds for the concept of constituent power. It is not plausible to understand the constitution as the will of the people themselves which should prevail over the will of representative institutions. The idea of relatively fixing certain norms in a constitution is, rather, that such norms establish a conception to ensure the legitimacy of laws. This is especially plausible for rules relating to the form of democratic decision-making and the protection of individual rights. On the contrary, in a pluralistic society, norms that establish certain conceptions of the common good, e.g. cultural institutions or economic principles, should be open for continuous democratic discussion and easy revisions. The distinction of norms for which there are good reasons to entrench them in the constitution from issues that should be left to daily politics ought to be extended to other forms of hard law. For example, international treaties may legitimately limit democratic reversibility on the ground of human rights, whereas in the field of economic cooperation there should be mechanisms to enable the adaption or termination of states’ obligations according to the present democratic will. Beyond the theoretical considerations, the book examines the role of constitutional interpretation in relation to democratic reversibility. For example, the making of the German Basic Law can largely be understood not just as binding future majorities to the will of the framers but as transforming legitimacy conceptions from political theory into constitutional law. The task of constitutional interpretation is, then, to further develop these ideas. The example of the discussion whether it was constitutional to introduce same-sex marriage in Germany by amending the civil code only shows us how various constitutional interpretations may enhance democratic reversibility in contrast to an originalist reading. Another issue examined in this chapter is whether the constitutional amendment procedure of art. 79 GG can be used to constitutionalize any norm by qualified majority. As the “eternity clause” provides protection of the democratic principle, I



2020. XXII, 474 pages. GRW 36

ISBN 978-3-16-159131-0

DOI 10.1628/978-3-16-159131-0

eBook PDF 84,00 €

ISBN 978-3-16-159130-3

sewn paper 84,00 €



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argue for a standard of evaluation which determines the admissible scope of constitutional amendment relating to its content. The Basic Law contains a conception that certain issues should be regulated in current legislation which may not be completely abandoned by constitutional amendment.

Constitutional interpretation also determines how far the legislature is bound due to its own decisions. While some scholars understand constitutional limitations to the reversibility of past laws in an overly broad way, I suggest that limitations in the name of the protection of legitimate expectations etc. can only be defended if they aspire to individual rights protections. The promise to keep a law for a certain time is to be considered but does not lead to a self-induced freezing of the law. Another kind of self-binding occurs when treaties are concluded.

Whereas the German constitutional court argues that the democratic principle implies that legislation can always override treaty obligations, I prefer a more nuanced approach. I suggest that one should analyze whether the treaty contains sufficient withdrawal mechanisms and distinguish the content of the treaty in relation to democratic reversibility.

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