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Unconstitutional Constitutional Amendments

Review of: Yaniv Roznai *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017)

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Going by the title as well as the author's statement, 'this book aims to present a coherent and consistent position regarding procedural and substantive dimensions of the amendment rule, as well as the non-exclusiveness of amendment provisions and the substantively explicit and implicit nature of constitutional unamendability.'[1] On survey, the author finds that 'a large percentage (40 per cent) of constitutions across the world explicitly contain unamendable principles' and '[e]ven in States where the constitution is silent on explicit unamendability, there is growing tendency of the courts, following the Indian courts' development of the 'Basic Structure Doctrine', to acknowledge a set of implicitly unamendable core principles.'[2] In his opinion, '[s]ubstantive unamendability is now a global trend of contemporary constitutionalism.'[3]

The seeds of the book were sown and germinated in the author's PhD dissertation at LSE, which acquired its present form in the course of his post-doctoral fellowship during which, besides examining every piece of directly or indirectly relevant literature on the subject, he also interviewed and consulted many scholars, judges and authors in different jurisdictions. The quality that his work acquired during his untiring endeavours places it among the prestigious *Oxford Constitutional Theory* series. Besides the preliminaries covering pages xv to xxxiii, the book includes an introduction and a conclusion, eight chapters divided into three parts and an appendix, a bibliography and the index. Part I, titled comparative constitutional unamendability, consists of three chapters, of which the first two deal respectively with explicit and implicit constitutional unamendability, while the third deals with supra-constitutional unamendability. Pointing out that the 'amendment process is a method of reconciling the tension between stability and flexibility,' this explicit unamendability is motivated either by a policy's desire to preserve its existence and identity; to sustain provisions that change its traditions and culture or is motivated by the constitution-makers' personal desires and beliefs. Examples of such provisions are available since the early eighteenth century in the West, among which the most prominent being Article V of the US Constitution, which prohibited abolition of slave trade prior to 1808 and prohibits the deprivation of any State of equal representation in the Senate without its consent. Many of the post-WW-II constitutions in Europe, prominently the German Basic Law, follow suit in that regard. Enumerating

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[1] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP, Oxford 2017) 233.
[2] ibid 227.
[3] ibid.

five characteristics of such constitutions, the author concludes that 'an increasing number of constitutions contain explicit material unamendability in order, inter alia, to protect essential characteristics of the constitutional order or principles perceived, in light of historical circumstances, as being at great risk of repeal via the democratic process.'[4] Second, 'unamendability can teach us a great deal about the polity.'[5]

Tracing the genesis of implied unamendability to the early years of the US Constitution and drawing the distinction between the making of the constitution by the people and its amendment by the state, of which the latter is done only for better operation of the constitution and not for affecting or destroying its foundations, the author finds the debate in this regard flourishing during the first three decades of the twentieth century, in the argument that the amendment power does not include the power to destroy the constitution.[6] Around the same time, the German and French scholars developed the idea of supra-constitutionality from where it migrated to India in 1965 through Heidelberg University Professor Dietrich Conrad's lecture at Banaras Hindu University in India and was used in the *Golaknath Case*.[7] This argued that 'implied limitations exist on the amendment power to prevent amendments from destroying the permanent character or "basic structure" of the Constitution.'[8] The argument was finally accepted by the majority of the Court to strike down an amendment in the famous *Kesavananda Bharati Case*.[9] Admitting the pioneering role of the Supreme Court of India in this regard, the author traces its migration to many countries in Asia, South-East and Far-east Asia, Africa and Central and South America and has also become a central argument in support of implicit limitations on the amending power in many other countries in Europe and in Canada.[10]

Chapter 3, titled 'Supra-constitutional Unamendability,' examines the impact of laws outside or beyond the constitution such as the natural law, international law and human rights law and supranational or trans-national laws. Despite their recognition and application in the national legal system, such laws do not seem to have played any decisive role on the issue of amendment of national laws, including the constitution.

In Part II, titled 'Towards a Theory of Constitutional Unamendability,' the author discusses the distinction between the constituent and the constituted powers. The former is the extra-ordinary power to form a constitution which is free and independent of any formal bonds of positive law created by the constitution, which Sieyès developed, relying on Bodin, Locke and Defoe, and asserted that this power could be legitimately claimed or reclaimed at any time. These ideas were further developed by German scholar Carl Schmitt who, accepting the distinction between the constituent and constituted power, propounded that 'the constitution is created through the act of political will and is composed of fundamental political decisions regarding the form of government, the State's structure, and society's highest principles and symbolic values.'[11] This power is

[4] ibid.
[5] ibid.
[6] ibid 39-42.
[7] IC Golaknath v State of Punjab AIR (1967) SC 1643.
[8] Roznai (n 1) 43-44.
[9] Kesavananda Bharati v State of Kerala AIR (1973) SC 1461.
[10] Roznai (n 1) 47–70.
[11] ibid 109.

unlimited and not bound by any prior constitutional rules.[12] While contradictory views exist on the nature of amendment power, according to Carl Schmitt, 'an amendment cannot annihilate or eliminate the constitution. It cannot abolish the right to vote or a constitution's federalist elements or transform the president into a monarch.'[13]

The author further explains the distinction between the constituent and amendment power with reference to delegation of powers. While the constituent power is primary in the exercise of which any norms may be set, the amending power can be exercised only within the limits of delegation. '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.'[14] The delegation theory always keeps the constituent power alive in the hands of the people who may use that power whenever the occasion arises. The constitution cannot restrict the primary constituent power, which resides outside of it and can exercise its authority de novo.[15] However, there is always a possibility of using the constituent power for undesirable goals or purposes. There is no safeguard against such possibility, except for the hope that democratic people will openly deliberate on their society's goals and objectives and will arrive at appropriate decisions. 'Hence', the author suggests 'unamendability and its institutional enforcement may provide sufficient additional time for "the people" to reconsider their support for a change contrary to their fundamental values, and thereby even impede the triumph of revolutionary movements.'[16] Having all these possibilities in mind, let us accept amendment power as a delegated authority in understanding its limited scope.

The next chapter elucidates the explicit and implicit limits on the amending power. Even though generally explicit limits on the amendability of constitutional provisions are deprecated, they have been a part of many constitutions from the earliest times. However, they may be amended by revising the provision that prohibits amendment unless such provision is made immune from amendment, as in the case of Article 79 of the German Constitution. The latter could only be amended by invoking the constituent power. As regards to implicit unamendability, the amending authority cannot use its power to destroy the very same instrument from which its authority originates and on which it is built. The amendment power is expected to be used for preserving the constitution and not for destroying it. Just as the amendment power cannot be used for destroying the constitution, it also cannot destroy its fundamental principles. 'This is the basic rationale behind the Indian "Basic Structure Doctrine" and the Columbian Constitutional Replacement Doctrine.'[17] Additionally, the amending power, like any governmental institution, must act in bona fides. This is what Dietrich Conrad and Upendra Baxi have said about the amending power in the Constitution of India.[18] In *Kesavanada*, Justice Khanna verbatim quoted Conrad's statement that 'any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure

[12] ibid 109–110.
[13] ibid 117.
[14] ibid 123.
[15] ibid 128.
[16] ibid 134.
[17] ibid 143.
[18] ibid 144-45.

change the fundamental pillars supporting its constitutional authority.'[19] Other scholars, such as Jackson and Carl Friedrich, have also used similar metaphors.[20] The same point has been supported by the argument of constitutional identity unaffected by the *expressio unius est exclusio alterious* maxim.[21] Even the textual meaning of amendment supports limits on the power of amendment which can be used to correct faults and not for any and every purpose.[22] Thus, the amendment power is limited by its very nature and in the context of India, it 'is not a creation of the Judges but a necessary consequence of the organization of the amending power in the context of a limited government.'[23]

Presenting the spectrum of constitutional amendment powers in chapter 6, the author establishes that if the exercise of amendment power is closer to the constituent or constitution making power, whether inclusive, participatory or deliberative, then it is subject to less limitations and vice versa. Supporting his point from several examples of amendment procedures in different constitutions, the author concludes:

> [T]he more an amendment process contains inclusive and deliberative democratic mechanisms, the more closely it resembles 'the people's' primary constituent power. Congruently, since primary constituent power is by its nature unlimited, popular secondary powers, which present a fuller – while still limited – presence of the people's sovereignty, should be allowed greater latitude when it comes to constitutional changes. [24]

In the last part of the book, consisting of chapters 7 and 8, the author discusses issues concerning the enforcement of constitutional unamendability. In the former chapter, he discusses the nature of judicial review of constitutional amendments. Referring to the criticisms of unamendability such as the dead hand of the past, undemocratic, judicialization of the constitution etc, the author supports it primarily on the foundations of his prime argument, drawing the distinction between the constituent and amendment powers. Constituent power represents the will of the people in the constitution and the will of their representatives in the amending body. As the constituent power always remains with the people, it could be invoked to amend any or all provisions of the constitution, but their representatives could not change the basic structure of the constitution in the exercise of their amending power. Such a limitation on the amending power neither enforces the dead hand of the past, nor is it antidemocratic. On the contrary, 'by reviewing constitutional amendments, courts protect the vertical separation of powers between the primary and secondary constituent powers, ensuring that the amendment authority does not act *ultra vires*.'[25]

In the last chapter, preceding the conclusion, the author examines the exercise of judicial review of constitutional amendments. Pointing out the difficulty in justifying the legitimacy of the judicial review of constitutional amendments, he states that some constitutions expressly authorise the courts to review amendments.[26] But such express

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[19] ibid 146.
[20] ibid 147.
[21] ibid 148–154.
[22] ibid 154-156.
[23] ibid 156–57.
[24] ibid 175.
[25] ibid 196.
[26] ibid 197-98.

provision may be confined to form or procedure of amendment and may lack in checking its substantive impact on the constitution. However, courts may examine the substantive impact of the amendment even when it is confined to procedural aspects as they have done, for example, in Turkey, Pakistan and India where the initial power of amendment found subject to substantive judicial review was tried to be restricted to procedural aspects. In this regard, invalidation of clauses 4 and 5 introduced by an amendment of Article 368 of the Constitution of India, were declared unconstitutional because the implied limitations on the original amending power could not be removed by an amendment of this power.[27] 'Every constitution,' in the author's view, 'has an implicit unamendable core that cannot be amended through the delegated amendment power.'[28] Subject to difference of opinions that core may be established on foundational structuralism about which again there may be serious disagreements.[29] Once the core is identified and the theory of unamendable principles is developed, the judicial review of amendments follows. However, annulment of an amendment by the courts must be a matter of last resort. Beyond preserving the constitutional identity, it should not become a severe barrier to change. Much depends upon the amendment process. The easier the process, the more scope there is for judicial review, but the more difficult the process, resembling the exercise of constituent power, the less scope there is for judicial review.[30] The author suggests applying a proportionality test for judging the validity of an amendment, but also goes on to suggest that so long as an amendment preserves the constitutional identity, it should be presumed to be valid. Finally, he arrives at the conclusion which resembles Dietrich Conrad's test laid down more than half a century back. He says, 'only the clearest cases of transgression would justify judicial intervention. Such cases will be apparent either by an element of abuse of power or when an amendment changes the essence of basic feature of the constitution, thus threatening its fundamental structure. Invalidation of constitutional amendments should be a remedy of last resort, or judgment day weapon.'[31]

In the conclusion to the book, expressing apprehensions and possibilities of converting a democratic constitution into dictatorship through the legitimate exercise of amending power, the author reminds us of what has been stated at the beginning of this review, that 40 per cent of the constitutions across the world explicitly contain unamendable principles and the ones which are silent on this issue have mostly adopted the Indian doctrine of basic structure to forestall amendments of certain constitutional fundamentals that give identity to that constitution. This identity is bestowed in the exercise of constituent power, which is different from the constituted power that may be used only for making such amendments, as the exigencies of the time and situation may

[27] Minerva Mills Ltd & Ors vs Union of India & Ors AIR (1980) SC 1789.
[28] Roznai (n 1) 209.
[29] ibid 215.
[30] ibid 219–20.
[31] Roznai (n 1) 225; Dieter Conrad, *Zwischen Den Tradionen* (Jurgen Luett and Mahendra Singh (eds), Stainer 1999) 102:

> Only clearest cases of transgression would justify judicial intervention, as a remedy of last resort. Regularly, such cases will be discernible by an element of abuse of power, of some collateral purpose appearing behind the purported scope of the amendment. In the absence of such elements a general presumption of constitutionality must operate even more than in the case of ordinary legislation.

require. Amendment power, which is conferred only for the purpose of required amendments in the constitution, cannot be exercised for the purpose of replacing it. Also, with the promotion of constitutionalism being the goal of constitution, making any amendment to the constitution must be in consonance with the ideal of constitutionalism. Being aware of the conflict between the democrats and the constitutionalists on amendability of the constitution, the author claims that his support for limited amending power is consistent with the democratic principle insofar as the original constitution is an expression of the will of all the people in the exercise of their constituent power, while the exercise of amending power is only the expression of the will of the amending body.[32] In the final lines of the book, the author claims that if construed correctly, the theory of unconstitutional constitutional amendments removes any paradox on the question of whether a constitutional amendment could be unconstitutional.[33]

The book is the result of hard work, through collecting and going through all directly and indirectly relevant materials, in almost all jurisdictions around the world. Quite a bit of these materials refers to very obscure sources that may have required difficulty in locating and digging them up. That is how most of the arguments and conclusions in the book have become not only authentic, but also unassailable. So far, the book is certainly the most authentic on the theme of unconstitutional constitutional amendments, which convincingly serves the interests of all who are either engaged in learning the subject or are engaged in making or plan to make a constitution or those who are engaged in interpreting and applying the constitution in day-to-day affairs of a country. Its' easy reading, with appropriate and convincing arguments and examples in support of its theme, is an additional attraction for all those who have any concern for the theory or practice of constitution making or applying. I am sure the book will attract a very wide readership, as well as keep challenging those who have a different opinion on the issues covered in it, to come up with fresh arguments supported by fresh research and articulation of an innovative vision of constitutionalism in the direction of better governance and life for each and every member of the society. The author deserves compliments for opening all those possibilities through this book.

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[32] The abuse of amending power during the 1975 –77 emergencies in India, had converted even the hard-core democrats into constitutionalists, which was judicially established by all the judges in *Indira Nehru Gandhi v Raj Narain* AIR (1975) SC 2299 by the conversion of minority judges in *Kesavananda* to majority, who unanimously invalidated parts of 39th Amendment to the Constitution of India. Since then, excepting few remarks to the contrary by Chinappa Reddy J in *Sanjeev Coke Mfg. Co.* v *Bharat Coking Coal Ltd* AIR (1983) SC 239, no other judge or court has expressed any doubts about the constitutionality of the basic structure doctrine. Most frequently and vigorously, it has been applied to amendments affecting the appointment and powers of the judiciary in the Constitution of India. Most recent in that regard is *SC Advocates on Record* v *Union of India* (2016) 5 SCC 1 in which the Supreme Court invalidated an amendment unanimously passed by both houses of Parliament regarding the appointment of Supreme Court and High Court judges and the transfer of later from one High Court to another.

[33] Roznai (n 1) 233.