Keele Law Review, Volume 4 (2022), 90-100
ISSN 2732-5679

Implicit Constitutional Unamendability in South Asia: The Core of the Case for the Basic Structure Doctrine

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

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I Introduction

In this response to Yaniv Roznai's extremely fascinating and engaging book *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, I have conveniently picked up the implicit unamendability aspect of the theory of limited constitutional amendment power with reference to South Asia. There are several reasons for choosing this dimension of the theory: first, I lack the comparative advantage in discussing the idea of constitutional unamendability in a wider range of jurisdictions than those in South Asia – Bangladesh, India, and Pakistan. Second, in my opinion, whether the limits of constitutional amendment powers are explicitly textually entrenched or judicially pronounced, they are the limits that owe their origin to the concept of implicit bars on a parliament's amendment power to diffuse the integrity or destroy the cores of the constitution. Third, I think it would be fruitful to embark on what is famously known in South Asia as the (implicit) doctrine of basic structure, in a comparative context. Fourth, rightly or wrongly, I think that Roznai himself, by presenting comparative evidence, has accorded the theory of implicit unamendability more prominence than other theories of constitutional unamendability.

II Roznai and the Idea of Unconstitutional Constitutional Amendment

Let me first put Roznai's book into the perspective of this Response. His central thesis is that any parliament's power to amend the constitution is subject to limits, either explicitly embedded or implicitly built into the constitution (and judicially discovered). This thesis, well known to the South Asian reader at least since the early 1970s, is both a simple yet not easy and a puzzling and difficult proposition. It is simple when the limits on amendment powers are written by either original (Constituent Assembly) or delegated constituent power (Parliament). Even in that case, it is not easy because the limits may unmanageably be broader as is the case now in Bangladesh (article 7B) or because they may be almost in an abstract form like in Nepal's 1990 Constitution ("spirit of the Preamble" being unamendable) or as is the case with the Norwegian Constitution ("spirit of the Constitution" being unamendable). In these two cases, there certainly will arise occasions for the interpreters, judicial or political, to interpret the proper ambit of explicitly written constitutional unamendability. Next, the theory of limited amendment powers is puzzling and difficult when the limits on a Parliament's amendment power are claimed to be implicit. This implicit version of the theory of constitutional

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unamendability is a perplexing idea, because it is principally the court, the unrepresentative if not the undemocratic organ of the state, which is to find out the implicit limits in the face of arguably a deliberate omission by the constituent people of an unamendability clauses from their constitution. Thus, the thesis is perplexing and puzzling for many a reason such as: whether there may be any implicit limits in the context of any given society; whether implicit unamendability is a directive (or more of a moral) principle, or a judicially justiciable mandatory norm; and the indeterminacy of the scope of those judicially or academically discovered implicit limits on amendment powers.

Roznai's thesis is explained, tested, illustrated, and provided with some guiding standards in his book. The first part of the book analyses comparative constitutional unamendability, which Roznai thinks is of three types – *explicit*, *implicit*, and *supra-constitutional*. In chapter 2 of the book on implicit unamendability, which is the main pick for the present response, Roznai discusses the status of this concept (the basic structure doctrine) in India, Bangladesh, and Pakistan as well as in eight Asian, three African, and four Central and South American countries. Interestingly, while Nepal from South Asia does not find a place in this discourse, Nepal's explicit constitutional unamendability (1990, 2007, and 2015) has figured in the third part of the book (see, e.g., at p. 194). Nepal's 1990 Constitution protected from amendment "the spirit of the Preamble" of the Constitution. Because of the abstractness of this explicit unamendability, it can be argued that Nepal's 1990 Constitution also contained implicit unamendability or the doctrine of basic structure. Also, because of a limited list of unamendable norms in the current Nepalese Constitution of 2015, there may arise an occasion for founding the idea of implicit unamendability of certain other constitutional cores by way of interpreting the explicit unamendability clauses. Seen from this point of view, I would say that Roznai would have done excellent had he explored this aspect of constitutional unamendability in Nepal.

The second part develops a theory of constitutional unamendability where he re-discusses, while explaining the scope of constitutional amendment powers, two of the three concepts of unamendability – explicit and implicit. It is unclear why he omitted to discuss supra-constitutional unamendability in this part. I am, however, happy with the only two concepts of unamendability, explicit and implicit, as I regard them as the two basic concepts of unamendability and see no major difference between supra-constitutional unamendability and implicit unamendability, at least for the South Asian case. The third part of the book is about the theory and practice of judicial review of constitutional amendments.

As the three South Asian countries chosen for the present response have applied or tested the application of the basic structure doctrine and interpreted the theoretical underpinnings of constituent power, issues that are covered in parts II and III of Roznai's book, my analyses can be said to capture most of the ground of the book.

III Constitutional Unamendability as the Basic-Structure Doctrine in South Asia

Personally, I have been a persistent supporter of the basic-structure doctrine (BSD) and its judicial enforceability based on a society-specific argument. Lately, however, I have been canvassing for a limited BSD in South Asia. This position of mine reflects the inherently non-universalist and theoretically puzzling character of the doctrine. The doctrine's non-universalist character is evidenced in its application in South Asia itself. Although the judicial version of the doctrine was authoritatively adopted in India in 1973 and in Bangladesh in 1989, Pakistan

entrenched the doctrine only recently through an unambiguous yet uneasy acceptance by its Supreme Court in August 2015 in *the Constitutional Petition No. 12 of 2010*.[1]

In South Asia generally, the idea of unconstitutional constitutional amendment was first mooted, albeit unknowingly or implicitly, in a 1963 decision of the then Dacca High Court in *Muhammad Abdul Haque v Fazlul Quader Chowdhury*.[2] This decision was later affirmed by the Pakistani Supreme Court in *Fazlul Quader Chowdhury v Muhammad Abdul Haque*.[3] According to Dr. Kamal Hossain, the lead counsel in Bangladesh's *8th Amendment Case*[4], it is in that 1963 Dacca High Court decision that the genesis of the BSD has to be found.[5] In *Abdul Haque,* a Presidential Order, promulgated in accordance with an enabling constitutional provision, lifting the then existing constitutional ban that a member of parliament could not be appointed a minister was challenged. The Order, though not a formal constitutional amendment, had the functional character of such a formal amendment. The Dacca High Court held the Presidential Order to be unconstitutional for breaching the "concept of a separation of the executive body from the Legislature" that was regarded as "the very basis of [the 1962] Constitution" of Pakistan.[6] In the Supreme Court, Chief Justice Cornelius observed that "franchise" and the "form of Government" were *fundamental features* of the Constitution, unalterable by a Presidential Order under that Constitution.[7] The Court also declared unconstitutional a clause in the Presidential Order that excluded judicial review of the Order. Arguably, therefore, the Court was in effect relying on the concept of implicit unamendability as the ground of its reasoning, although it explicitly invoked the Constitution as a unitary document.[8]

1. India

In India, the idea of implicit limits on parliament's amendment power has been tested since the mid-1960s. A dissenting opinion of Justice Mudhlokar in *Sajjan Singh's Case*[9] approvingly cited Cornelius CJ's above reasoning in support of his view that parliament's amendment power was not unbridled, but rather impliedly constrained. When *Kesavananda Bharati v. State of*

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[1] By a 13 to 4 majority decision. See further below.
[2] (1963) 15 DLR (Dacca) 355.
[3] 1963 PLD (SC) 486.
[4] *Anwar Hossain Chowdhury v Bangladesh*. (1989) BLD (Spl) (AD) 1.
[5] See ibid, at p. 27. Dr Kamal Hossain was a counsel in *Abdul Haque*. On Dr Hossain's contribution to the BSD see Ridwanul Hoque, 'The Evolution of the Basic Structure Doctrine in Bangladesh: Reflections on Dr. Kamal Hossain's Unique Contribution' (2021) 10 Indian Journal of Constitutional Law.
[6] (1963) 15 DLR (Dacca) 355, para 76. Justice Murshed observed as follows: "[Article] 104(1) and the allied articles relating to the same subject constitute one of the main pillars of the Constitution which envisages a sort of Presidential form of Government where the Ministers are not responsible to the Legislative Assembly, but to the President himself. […]. This concept of a separation of the executive body from the Legislature, […], is the very basis of present Constitution. Mr. Brohi has aptly described it as the corner-stone which supports the arch of the Constitution. (Emphasis mine).
[7] Justice Cornelius' observation is produced in *the Constitutional Petition No. 12 of 2010,* as in note 32 below, at p. 44, para 47.
[8] The Court considered the then arrangement of separation of powers in the Pakistani Constitution as a main pillar or a cornerstone of Constitution, indicating at the unamendability of that pillar. See Justice Murshed's observation in note 6 above. Pakistan's Supreme Court, however, has recently held in their 2015 BSD case that it did not say anything about limits on parliament's amending power in *Abdul Haque*. See *the Constitutional Petition No. 12 of 2010,* as in note 32 below, at pp. 40-41.
[9] AIR 1965 SC 867.

Kerala (1973)[10] established the idea of unconstitutional constitutional amendments repelling the earlier confusions as to the extent of parliament's "constituent power", the intellectual battle over the idea of substantively limited amendment power was the fiercest: it was a 7:6 split decision. In *Minerva Mills Ltd. v. Union of India* (1980),[11] however, a unanimous court (though of a bench smaller than the one in *Kesavananda*) endorsed the concept of parliament's limited amendment power and thus gave a strong footing to the basic structure doctrine.

It is important to say a few more words about the decision in *Minerva Mills Ltd.* (Roznai discusses it too in Ch. two and at p. 236 with fine insights.) Following the *Kesavananda,* the Indian Parliament amended their constitutional amendment rules (Art. 368) via the 42nd Amendment to exclude judicial review of constitutional amendments and to make it free of "doubt" that "there shall be no limitation whatever on the constituent power of Parliament to amend [...] this Constitution". Chief Justice Chandrachud reasoned that since the limited nature of parliament's amendment power is part of the Indian Constitution's basic structure, the 42nd Amendment by converting a limited power to an unlimited one violated that basic structure and hence was unconstitutional. By the same decision, the Court also in effect established that the availability of judicial review of constitutional amendments is an inviolable constitutional norm. In *Minerva Mills Ltd,* the Court, more clearly than before, established and invoked the implicit unamendability of certain constitutional cores, thereby making the notion of capital-C Constitution-compliant amendments a part of unamendable basic structures. In invalidating the 42nd constitutional amendment that asserted unlimited amendment powers, the Court indeed considered the 'limited amendment power' to be an unwritten part of the original Constitution enacted by virtue of the original constituent power. However, when this same aspect is seen from the viewpoint of the omission of explicit unamendability (by the original constituent power), the court's source of assertion can be said to be the idea of supra-constitutional unamendability, which Roznai has succinctly analysed and explained in his book.

At this stage, a comparative view of the legal backdrop of South Asian BSD may usefully be taken. Like the Indian Constitution's amended article 368 that sought to establish untrammelled amending power by making constitutional amendments non-justiciable,[12] Pakistan introduced a similar concept in 1985 by amending their amendment rule, article 239, clauses 5 and 6.[13] When the Pakistani Supreme Court authoritatively established the basic structure doctrine and its judicial enforceability in 2015, article 239 of the Constitution was in force so the judicial review of constitutional amendments was barred. Interestingly, the 8th Amendment to the Pakistani Constitution that legitimated the exclusion of judicial review of constitutional amendments[14] was upheld in *Mahmood Khan Achakzai v Federation of Pakistan* (1997).[15] In this case, Chief Justice Shah, quite intriguingly, observed that Pakistan's

[10] AIR 1973 SC 1461.
[11] AIR 1980 SC 1789.
[12] See clauses 4 and 5 of art. 368, inserted by the 42nd Amendment of the Indian Constitution of 1976, providing that no constitutional amendment can be questioned in any court on any ground.
[13] Clauses (5) & (6) of art. 239 are as follows: "(5). No amendment of the Constitution shall be called in question in any court on any ground whatsoever. (6) For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of the Majlis-e-Shoora (Parliament) to amend any of the provisions of the Constitution."
[14] This was done first by virtue of a Presidential Order during a military regime: the Constitution (Second Amendment) Order ((P. O. No. 20 of 1985).
[15] PLD 1997 SC 426. In an earlier case, Lahore High Court tacitly validated the amended Articles 239(5) & (6) that excluded judicial review of constitutional amendments: *Mustafa Khar v. Pakistan* PLD 1988 (Lah.) 49.

Constitution had certain unamendable fundamental features but ultimately refrained from saying anything about the implicit unamendability (Roznai, p. 50). Further interestingly, as will be seen below, when the Court in 2015 accepted the notion of the judicially enforceable basic structure doctrine, it did not, unlike its Indian counterpart,[16] invalidate the rule, in article 239, of non-justiciability of constitutional amendments.

By contrast, the constitutional amendment rule (art. 142) in Bangladesh was never amended either to assert parliament's unlimited amendment power or to explicitly exclude judicial review of constitutional amendments. Bangladesh's art. 142 was once amended, however. The Constitution (Second Amendment) Act of 1973 (22 September 1973), enacted in the aftermath of India's Kesavananda Case (24 April 1973), provided that the duty of parliament "not [to] make any law inconsistent with any [fundamental rights] provisions" shall not apply to a constitutional amendment. The legality of this exclusion, which can cynically be seen to have implicitly excluded judicial review of one specific class of constitutional amendments, has never been tested with reference to the basic-structure doctrine.

2. Bangladesh

In Bangladesh, the Supreme Court authoritatively established the BSD in 1989 in *Anwar Hossain Chowdhury v Bangladesh*.[17] The Appellate Division of the Supreme Court in this momentous decision invalidated part of the 8th Amendment of the Constitution that diffused the High Court Division into six permanent benches in cities beyond the Court's constitutional seat at Dhaka, by replacing the original art. 100 of the Constitution. Article 100 provided for a unitary and integrated Supreme Court consisted of the Appellate Division and the High Court Division. The petitioners argued that the amended article 100, by way of creating several permanent branches of the High Court Division, making the judges transferrable from one branch to another, and empowering the Chief Justice to make rules to regulate the business of High Courts, violated the unamendable unitary character of the Bangladeshi State and the Supreme Court. Specifically, it was claimed that the 8th Amendment was inconsistent with the High Court Division's plenary power over the whole country, which was integral to the basic-structure feature of judicial independence. The Appellate Division held that Parliament's amending power under art. 142 is subject to the unamendability of "basic structures" of the Constitution and the diffusion of the High Court Division breached those basic structures/features. Since then, the doctrine has been applied to strike down constitutional amendments on four more occasions, leading to the invalidation of the 5th, 7th, 13th, and 16th Amendments.

Before taking up *Anwar Hossain Chowdhury,* it is necessary to discuss a 1981 decision of the High Court Division of the Supreme Court in which the basic structure doctrine received judicial attention for the first time in post-independence Bangladesh. In *Hamidul Huq Chowdhury v Bangladesh* (1981),[18] the Court refused to declare the 4th Amendment of 1975 void because, as it reasoned, the people had "not resisted it" and the Amendment was recognised by judicial authorities and many parts of it were eventually validated by the Constitution (Fifth

[16] The 42nd Amendment of the Indian Constitution, inserting clauses 4 and 5 to art. 368, was declared unconstitutional in *Minerva Mills Case* (n 11 above).
[17] (1989) BLD (Spl) (AD) 1, Afzal J dissenting but conceding to the view (at 212-3) that "the Constitution cannot be destroyed or abrogated" in the name of amending it.
[18] (1981) 33 DLR (HCD) 381.

Amendment) Act 1979. Curiously, however, the Court accepted the view that the 4th Amendment (by changing, *inter alia*, the parliamentary system to a one-party Presidential system) "altered and destroyed" "the basic and essential features of the Constitution". The Court poignantly observed as follows:

> It was, in our opinion, beyond the powers of Parliament [...] under a *controlled constitution* to alter the essential features and basic structures of the Constitution.[19]

As the above observation reveals, the Court was relying on the argument of implied limits on parliament's amendment powers, although it did not explain in any way that line of thought. On this point, however, the Court was "in agreement with the views expressed in" the Indian Supreme Court's decisions in *Golaknath v State of Punjab* (1967)[20] and *Minerva Mills Ltd.* In a sense, therefore, *Hamidul Huq Chowdhury*, though self-contradictory in reasoning, provided the Supreme Court of Bangladesh for the first time with an opportunity to engage with the question of unalterability of basic constitutional features. On appeal, the Appellate Division avoided any encounter with the basic structure arguments and the observations of the High Court Division.[21] Interestingly, this case was not discussed at all in *Anwar Hossain Chowdhury*.

When unambiguously establishing the concept of the limited constituent power of parliament in *Anwar Hossain Chowdhury,* the Court considered a limited parliament to be an original intention of the framers. Justice Badrul Haider Chowdhury refused to accept the Attorney-General's argument that the amending power is wide and unlimited as the Constitution-makers had not imposed any such limitations on Parliament. For Justice Chowdhury, the Attorney-General was "clearly wrong" and reasoned that because of the principle of constitutional supremacy in article 7, powers of the Republic belong to the people and each state organ must exercise those powers on behalf of the people in accordance with the Constitution.[22] As such, the amending power of parliament is within and not above the Constitution.[23] The Attorney-General further argued the amending power is a constituent power as opposed to legislative power, and hence unlimited. Justice Chowdhury reject this argument as "untenable" and commented that, unlike the Indian Constitution's art. 368 (amended in the aftermath of the *Golak Nath Case*), Bangladesh's art. 142 did not consider the amending power as constituent power.[24]

On limited amending power of Parliament, another judge in the majority, Justice Shahabuddin Ahmed, held as follows:

> ... constituent power [...] belongs to the people alone. [...]. People[,] after making a Constitution[,] give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures. [...]. Even if the 'constituent power' is vested in the Parliament the power is a derivative one and the mere fact that an amendment has

[19] Ibid., at para. 17 (*per* Sultan Hossain Khan, J) (emphasis of the author).
[20] AIR 1967 SC 1643.
[21] *Hamidul Huq Chowdhury v Bangladesh* (1982) 34 DLR (AD) 190.
[22] (1989) BLD (Spl) (AD) 1, 88, paras 163-166.
[23] Ibid. Justice Chowdhury also took the help of the then article 142 that made some principles unamendable except with the help of a referendum, to argue that parliament's amending power can be limited.
[24] Ibid., at para. 166. Justice Chowdhury thought that it will "not be proper to express any opinion as to the merit of any constitutional amendment made in Constitution of another country". Ibid.

> been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.[25]

Justice Ahmed relied on Conrad's argument of limited amendment procedure[26] and insightfully observed that the people's sovereignty in Bangladesh is often assailed and denied through many political devices. In that context, Justice Ahmed thought, the doctrine of limited amendment power ("the doctrine of bar to change of basic structure") would serve as "an effective guarantee" against frequent amendments "in sectarian and party interest".[27] Supplying further rationale, Justice M.H. Rahman premised the legitimacy of the BSD on the need to tackle the overwhelming and excessive parliamentary majoritarianism.[28] These arguments were neatly tied with the overarching constitutional principles such as popular sovereignty (art. 7), constitutional supremacy (art. 7), and the rule of law (preamble).

At the time the doctrine was established, Bangladesh's constitution had no explicit unamendability except that some provisions were amendable subject only to a positive affirmation in a referendum. Article 100 of the Constitution that was replaced by the 8th Amendment was not within the list of those hard-to-amend provisions. Therefore, the Court had first to discover and highlight the higher normative source than the amendment rules (art. 142) pursuant to which the impugned 8th Amendment could be tested. An almost unanimous court (3:1) reasoned that the parliament, being a creature of the Constitution enacted by original constituent power, is bound to apply amendment power within that constitution. In exercising amendment powers, parliament exercises indeed "derived" or delegated or secondary constituent power. The Court took a holistic approach to constitutional interpretation, taking the Constitution as an integrated whole to be understood with reference to and beyond the text, and concluded that a parliament with unlimited amending power is an anathema to constitutional supremacy which it said was a basic pillar of the Constitution.

It would be interesting to note here that three of the five Amendments that have so far been declared void (8th, 5th and 7th) were in fact extra-constitutional amendments by military regimes that were legitimated by Amendments enacted by pliable and ingeniously composed parliaments through sham elections. Of the other two, the 13th Amendment was a result of a political consensus regarding the mode of election-time government (caretaker government). This was, thus, something like India's 99th Amendment relating to judicial appointments that has been invalidated by the Indian Supreme Court. As regards the other Amendment invalidated in Bangladesh, the 16th Amendment, the amending Parliament was in all sense an absolute parliament constituted through elections that were boycotted by major political parties. In some but not all these cases, these background factors seem to have influenced the court's reasoning. As will be seen below, the Pakistani Supreme Court in its 2015 BSD decision questioned the representational legitimacy of parliament that endorsed the exclusion of judicial review of constitutional amendments. As such, regarding the question of when not to invalidate a constitutional amendment, there should be certain jurisprudential standards. In the third part

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[25] 1989) BLD (Spl) (AD) 1, 143, para 341.
[26] Citing D Conrad, 'Limitation of Amendment Procedure and the Constituent Power', (1970) *The Indian Yearbook of International Affairs* 375.
[27] (1989) BLD (Spl) (AD) 1, 156, para. 377.
[28] Ibid., at 169, para 435.

of his book, Roznai has proposed certain such guidelines and standards for the judicial enforcement of the doctrine of limited amendment powers.

3. Pakistan

The basic structure doctrine has a troubled history in Pakistan, although the genesis of the South Asian version of the doctrine is arguably traceable to a 1963 Pakistani decision. Roznai has most usefully captured the trajectory of the basic structure doctrine in Pakistan (pp. 49-52). By citing almost all the relevant cases, Roznai tells us that until recently the Pakistani position has been twofold: (i) that judicial review of constitutional amendments exists, if at all, only on procedural grounds (explicit unamendability ground), and (ii) that parliament's power to amend the Constitution is subject to some implicit limits that are not judicially enforceable. As such, until the 2015 decision to which I will soon come, Pakistan followed the basic structure doctrine in a non-functionalist sense, which I would term as the thin or proceduralist version (or a weak form) of the basic structure doctrine, as opposed to India's and Bangladesh's thick or substantive version (or a strong form) of the doctrine.

Before I proceed to Pakistan's thick basic structure doctrine case, I cite two High Court cases that seem to be missing from Roznai's otherwise impressive list of Pakistani decisions. In *Dewan Textile Mills Ltd v Pakistan* (1976)[29] which presented the court with a very early post-1973 Constitution chance to test the idea of constitutional unamendability, the Karachi High Court held that parliament's power to amend is unlimited, so long amendment procedures are followed, while at the same time dismissing the argument of supra-constitutional limits on amendment powers. In another early case, *Jehangir Iqbal Khan v Pakistan* (1977),[30] the Peshawar High Court in 1977 held that "there are no fetters on the powers of the Parliament to amend the Constitution" short of complete abrogation or abrogation of the fundamentals of the Constitution. This latter judgment, thus, is probably the first of its kind in Pakistan to raise the argument of implicit unamendability of constitutional "fundamentals". This observation can also be seen to have invoked the argument that is akin to *the theory of constitutional replacement*, a Colombian version of the South Asian doctrine of basic structure that speaks for a stricter test for the courts to apply when adjudicating constitutional amendments. Whether or how these two cases were taken further forward in Pakistan is to be found in Roznai's analyses in chapter 2.

I want to discuss one more Pakistani case, because of its exceptionality in terms of the Court's actual dealing with the impugned amendment: *Nadeem Ahmed v Federation of Pakistan* (2010).[31] Although Roznai does not tell this in clear words, his book informs the curious reader that the Pakistani Supreme Court in fact once strategically enforced the basic structure doctrine. In *Nadeem Ahmed*, the Court was faced with the question of the legality of the 18th Amendment that introduced the judicial appointments commission. It was argued that the new appointment mechanism breached judicial independence, a "salient feature" of the Constitution. The Court "decided not to express its opinion on the merits [of the case] and referred the matter to Parliament again for reconsideration" (Roznai, p. 52). Ultimately, Parliament further amended the Constitution (via the 19th Amendment) so that the structure of the judicial appointments

[29] 1976 PLD (Kar.) 1380.
[30] 1979 PLD (Pesh.) 67.
[31] PLD 2010 SC 1165.

commission became compatible with the Court's notion of basic-feature-compliant judicial independence.

Direct enforceability of the implied unamendability in Pakistan came to be established in the Supreme Court's decision of 15 August 2015 in *the Constitutional Petition No. 12 of 2010*.[32] Although the Amendments that were challenged were held to be valid, a majority court (13:4) ruled that parliament's amendment power was subject to substantive implied limits and that the Court was legitimately empowered to judge the legality or otherwise of any constitutional amendment. This is how the doctrine of basic structure achieved a firm positioning in the Pakistani constitutional law.[33]

To arrive at this basic-structure decision, the Court had to disapply the constitutional bar of judicial review of constitutional amendments. Art. 239(5) of the Constitution of Pakistan declares that "no amendment of the Constitution shall be called in question in any Court on any ground whatsoever", while Art. 239(6) provides that there will be "no limitation whatever" on parliament's amendment power. In this case, the Court did not hold unconstitutional clauses (5) & (6) of art. 239 but rather, rendered them ineffective. For the Court, because of the implicit limits on parliament's amendment powers, art. 239(5) & (6) would not stand in the way of its power to scrutinise the legality of any amendment. Some judges pointed at the undemocratic character of the 8th Amendment that introduced this bar on judicial review of constitutional amendments. Nonetheless, the basic-structure incompatibility of this exclusionary clause seems to be implicitly ruled in this decision. To borrow from Conrad (quoted in Roznai, p. 50, fn 56), this strategy can be termed as "a veiled manner of striking down a later amendment — on very legitimate grounds — for inconsistency with basic principles of the Constitution as originally [but impliedly] enacted".

IV Conclusions

The objective of the above discussion of the growth of the basic-structure doctrine in South Asia is to show: (i) how complex the application of the theory of limited constitutional amendment power is and (ii) how relevant Roznai's book will be in understanding the doctrine's scope, functionality, and danger in South Asia. The above also shows that, despite the commonality in terms of the acceptance of the BSD, South Asia's engagement with the doctrine remains divergent. For example, of the three countries, only Bangladesh enacted an explicit, though unusually wide, eternity clause (art. 7B) in 2011,[34] while Pakistan has not ever struck down any constitutional amendment[35]. Roznai's book gives us a wonderful theoretical and practical

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[32] The online version of the judgment available on the Supreme Court's website is used in this paper. For a brief commentary on this decision, see Majid Rizvi, *South Asian Constitutional Convergence Revisited: Pakistan and the Basic Structure Doctrine*, Int'l J. Const. L. Blog, Sept. 18, 2015, at: http://www.iconnectblog.com/2015/09/south-asian-constitutional-convergence-revisited-pakistan-and-the-basic-structure-doctrine (accessed 14 May 2022).

[33] Yet, interestingly, a few judges such as Justice Jawwad Khawaja thought that the reliance on the basic structure doctrine was not necessary since the enforceable limits on Parliament's amendment power were implicit. In my view, it is hard to find the functional difference between the doctrine of basic structure and the doctrine of enforceable unamendability.

[34] On Bangladesh's eternity clause, see Ridwanul Hoque, 'Eternal provisions in the Constitution of Bangladesh: A Constitution once and for all?", in Richard Albert & Bertil Oder (eds), *An Unconstitutional Constitution?: Unamendability in Constitutional Democracies* (Springer 2018) 195-229.

[35] In *Constitutional Petition No. 12 of 2010* (note 32 above), 13 out of 17 judges held that the Court has power to review the substance of any constitutional amendment. Of the 13 judges in the majority, 5 judges thought that

perspective with which to look at the diversity of the application of constitutional unamendability.

Roznai's every single analysis of the doctrine is attractive and based on evidence. The most relevant part of his arguments vis-à-vis the case of South Asia is the concept of implied limits on parliament's amendment power (underpinned by the concept of parliament's 'delegated' constituent power) and standards for the judicial enforcement of this difficult and complex theory. In chapter 8, Roznai analyses methods of constitutional interpretation in regard to adjudication of constitutional amendments and proposes "a standard of review" that, he hopes, will "ensure that the exercise of this extreme power (judicial review of constitutional amendments) would only be undertaken in aggravated cases and exceptional circumstances" (p. 196). This is an excellent caveat and Roznai in essence is favouring a limited doctrine of basic structure. And this is exactly where the nicety as well as 'democratic legitimacy' of Roznai's theory of unconstitutional constitutional amendments lies. The significance of this important call cannot be more highlighted than by indicating at the problematic Indian decision striking down the 99th Amendment of the Indian Constitution (establishing the National Judicial Appointments Commission)[36] and the Bangladeshi decision invalidating their 16th Amendment of the Constitution (which in effect restored an original scheme of the Constitution concerning the removal of Supreme Court judges). In view of an increasing judicial tendency to misapply the doctrine of basic structure in Bangladesh, I elsewhere argued that the theories of constitutional supremacy and popular sovereignty require the judges to apply the doctrine of 'unconstitutional constitutional amendment' extremely cautiously and rarely, and only for the cause of preserving the 'identity' of the Constitution or the State.[37]

Through the above discussion, I have attempted to show that the principal source of the doctrine of basic structure in India, Bangladesh, and Pakistan is the concept of implicit rather than supra-constitutional unamendability. Although constitutional orders of these three countries have contained some form of British colonial legacies (in the UK, for the purpose of the concept of a limited parliament, reliance is made more on natural law arguments than structural constitutional arguments),[38] South Asian constitutional judges tend to shy away from invoking natural law reasoning. In the basic structure doctrine cases noted above, the South Asian Supreme Courts discovered the implicit unamendability from within the national constitutions that they expounded. Nevertheless, writing from a global perspective, Roznai's classification of unamendability concepts into explicit, implicit, and supra-constitutional seems to be an undoubtedly sound classification. Having said this, there is no reason to think that the

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some parts of the 18th and 21st Amendments ought to be invalidated and the remaining eight judges refused to do that.

[36] *Supreme Court Advocates on-Record Association v Union of India,* 2015 SCC Online SC 964.

[37] Ridwanul Hoque (2015), "Judicialization of politics in Bangladesh: Pragmatism, legitimacy and consequences", in Mark Tushnet and Madhav Khosla (eds.), *Unstable Constitutionalism: Law and Politics in South Asia*. New York: Cambridge University Press, 261–290, at 287. See further Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment,' (2015) *Int'l J of Const. L.* 13(3): 605-638.

[38] In *Dr. Bonham's Case* (1610) (8 Co. Rep. at 118a, 77 Eng. Rep. at 652), Justice Edward Coke of the Court of Common Pleas observed that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void [...] when an Act of Parliament [will be] against common right and reason []". See also *Jackson* v. *Attorney General* [2006] 1 AC 62, at para. 102, per Lord Steyn ("In exceptional circumstances involving an attempt to abolish judicial review", for example, "the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament... cannot abolish".

argument of supra-constitutional limits will not ever visit South Asia. In the most recent case of constitutional invalidation of the 16th Amendment,[39] Bangladesh Supreme Court was faced with an Amendment that restored *in toto* an original provision. I argue that the decision striking down that 16th Amendment is, therefore, unconstitutional itself and that a court can only hold an original provision unconstitutional if and only if that provision is to be found incompatible with any supra-constitutional law.[40]

Finally, Roznai's *Unconstitutional Constitutional Amendments* will continue to serve as an ever-relevant rich source of theories and practices of constitutional unamendability in a truly comparative context. This extraordinarily important work will also serve as a reminder that someone should undertake a nuanced and critical reassessment of the functioning of the doctrine of basic structure in South Asia.

[39] *Bangladesh v Advocate Asaduzzaman Siddiqui* (2017) 25 BLT (Special) (AD) 1 (3 July 2017, Appellate Division). This was an appeal from *Advocate Asaduzzaman Siddiqui v Bangladesh* (2016) 24 BLT (Special) (HCD) 1.

[40] Ridwanul Hoque, 'On law, politics and judicialization: Sixteenth Amendment judgment in context', a paper read at the *BILIA Symposium on Law, Politics, and Judicialization*, BILIA, Dhaka, 28 August 2017. See also Ridwanul Hoque, 'Can the Court invalidate an original provision of the Constitution?', (2016) 2(1) *Univ. of Asia Pacific Journal of Law and Policy,* 13-27.