

INTERVIEW

IJCAL: First of all, many congratulations on your new book. It's a much needed scholarship work in the area of constitutional amendability. When we talk of imposing limitations on the constituent powers of legislature, be it explicit or implicit, in bringing about constitutional amendments, doesn't that signify a failure of constitutional democracies? The leading Indian scholar, Upendra Baxi, after the Keshavananda verdict, called the basic structure doctrine as the constitution of the future. With the rise of a global trend towards preserving certain provisions in the constitution, are we moving towards what some may call as "post-constitution"?

Yaniv Roznai: Many thanks for your congratulations and I appreciate your invitation to participate in this questionnaire – I'm honoured. The question of failure is indeed a thorny one. Constitutional unamendability emphasises the thin line between constitutional success and constitutional failure. In order to maintain itself and progress with time, a constitution must be able to change and include an amendment procedure to that effect. An unamendable constitution is doomed to fail. At the same time, certain constitutional changes can themselves be regarded as constitutional failures. Amendments that alter the constitution's basic principles so as to change its identity signal a breakdown of the existing constitutional regime and its replacement with a new one. In that respect, constitutional unamendability reflects what I term 'Amendophobia': the fear that the amendment provision would be abused to abrogate the core values of society. Accordingly, it is not so much that unamendability signifies the failure of constitutional democracies" but points to some of its weaknesses, and like militant democracy evinces the fear that unfettered democracy may allow its own destruction. Are we moving to a post-constitution? That is a fantastic question. On the one hand, the similarities between some of the principles that world constitutions deem as unamendable (keeping in mind various particularities) indeed point an almost common constitutional core that is considered as beyond the constitutional power, at least for constitutional democracies. On the other hand, I do not think, however, that from the theory of constitutional unamendability one can necessarily refer limitations on original constitution-making powers. These are two different types of studies. Since the constitutional amendment power is a legal power, or competence, described in the constitution, the question of its limitation is mainly a legal one. In contrast,

since constituent power is extra-legal, the question concerning its possible limitation is not one of *legality* but of *legitimacy* - what is a legitimate exercise of constituent power? It is a normative theory of constituent power which, in that respect, is more like political philosophy.

IJCAL: In your book, you have elaborately discussed concepts of explicit and implicit constitutional unamendability. What are the possible differences between the two approaches of imposing limitations on the secondary constituent powers, in declaring the most basic values of a polity, and their respective effect on the power of judicial review?

Yaniv Roznai: The theory I present in the book supports the validity of explicit unamendability. The secondary constituent power which is a delegated power may be restricted by the primary constituent power from amending certain principles, institutions, or provisions. As I demonstrate in the book, the motives for such restrictions and the aims those are designed to accomplish vary. What is clear is that the amendment power, which is established by the constitution and subordinate to it, is exercised solely through the process established within the constitution. It is bound by any explicit unamendability that appears in the constitution, set by the primary constituent power. This reflects the idea that any exercise of the amendment power must abide by the conditions, rules and prohibitions stipulated in the constitution, including substantive limits. In addition, my theory of delegation supports implicit unamendability, even if not explicitly written in the constitutional text. Any organ established within the constitutional scheme to amend the constitution cannot modify the basic principles supporting its constitutional authority; even in the absence of explicit unamendability. Thus, according to my view, explicit and implicit limits to amendment powers should be regarded as mutually reinforcing rather than exclusive. Explicit unamendability should thus be regarded as confirmation, “a valuable indication”, in the words of Diethrich Conrad, that the amendment power is limited, but not as an exhaustive list of limitations. Of course, as you hint in your question, the two types of limitation carry implications as for the power of judicial review. When explicit unamendability exists, the judicial enforceability of these explicit limitations seems, if not self-evident, then at least legally legitimate. As we know from *Marbury v. Madison*, an effectiveness presumption exists according to which: “it cannot be presumed that any clause in the constitution is intended to be without effect”. This equally applies to explicit unamendability. If the constitution-makers declared certain provisions as unamendable, the interpreter – commonly the court – should provide the mechanism’s effectiveness, otherwise its protective function is dramatically undermined. In this respect, judicial review of amendments that violate unamendability should be recognised, just as it is recognised

when an ordinary law violates the constitution. The situation becomes more complicated when it comes to implicit unamendability. The absence of explicit unamendability undermines the legitimacy of judicial review of amendments. From the mere fact that the constitution does not contain any limitation, it may be inferred that the amendment power is intended to be very wide. However, courts around the world, in countries such as India, Bangladesh, Kenya, Colombia, Peru, Taiwan, and Belize have held that the amendment power is inherently limited, even in the absence of explicit unamendability, and that the court – as the guardian of the constitution – has the duty to enforce such implied unamendability. Therefore, the non-existence of explicit unamendability provisions does not – and according to the theory of delegation should not – necessarily mean that judicial review of constitutional amendments is impossible. The language of the constitution is not only explicit, but also implicit. Every constitution has an implicit unamendable core, which cannot be amended through the delegated amendment power, but demands appealing to the primary constituent power. Judicial review is a mechanism for enforcing this limitation. Of course, facing silence regarding unamendability, a court's decision regarding a limited amendment power may only derive from judicial activism and daring.

IJCAL: The basic structure doctrine has come to be recognized as the bedrock of Indian constitutional jurisprudence. While it is true that the basic structure doctrine saved the identity of the Indian constitution, but it is also noteworthy that it is democratically illegitimate, and it places unfettered powers in the hands of the judiciary to determine what exactly constitutes the basic structure of the constitution (giving an opportunity to the judiciary to entrench itself, owing to the doctrine's fluid nature). Various scholars have suggested that the parliament itself should declare what the basic structure is comprised of by way of an amendment, something the Bangladeshi constitution adopted in the form of Article 7-B, which finds mention in your book too. To what extent will such a measure give legitimacy to the basic structure doctrine considering the limitation will be imposed by the secondary constituent power on itself (with no role of the primary constituent power), and would such a measure help curb the very wide powers of constitutional review exercised by the Indian Supreme Court, while bearing in mind that it could strike down that amendment itself?

Yaniv Roznai: This is an excellent question. It seems to me that explicitly entrenching limits to constitutional amendments would enhance the legitimacy of both the basic structure itself and its judicial enforcement through judicial review. It could also provide clearer guidelines to the conduct of judicial

review. As I wrote with regard to the developed of the basic structure doctrine in Bangladesh, the constitutionalization of the basic structure doctrine in the constitution through the 15th Amendment Act, explicitly confirmed the limited nature of the amendment power. With that said, this raises a thorny theoretical question. According to the delegation theory, limitations upon the delegated secondary constituent power can solely be imposed by the higher authority from which it is derived – the primary constituent power. Unamendable amendments may lose their validity when they face a conflicting valid norm that was formulated by the same authority. Accordingly, provisions created by the amendment power could subsequently be amended by the amendment power itself. Because both amendments are issued by a similar hierarchical authority, their conflict is governed by the principle of *lex posterior derogat priori*. Therefore, I claimed that an ‘implicit limit’ exists, according to which a constitutional amendment cannot establish its own unamendability. Accordingly, two possible solutions exist: attempting to get the approval of the ‘the people’ to such a constitutional amendment, for example, through a national referendum (after its formal enactment in Parliament), which would provide a legitimation elevator to such unamendability in a “constitutional moment”. Alternatively, and perhaps more practically, such an amendment can simply be regarded not as constitutive but as declarative of an already limited legal power.

IJCAL: Last year, the Turkish people voted by a slim majority in favour of abolishing the position of the Prime Minister, and establishing a presidential form of governance. Before that, in 2016, the British people voted in favour of a divorce from the European Union. To what extent, do referendums legitimize a radical constitutional change, and in the context of Indian constitution, a change in its basic structure? Further, will such mobilization for an amendment, be considered equivalent to the “mobilized citizenry” at the time of constitutional founding, as defined by Bruce Ackerman?

Yaniv Roznai: I hinted to this in my previous answer. The recent proliferation of referendums is an indicator of this broader trend towards engaging the people themselves in constitutional manners. Indeed, among current existing constitutions more than forty per cent were publicly ratified by referendums and many others involved different forms of popular participation in the constitution-making process. Of course, there are many well-known difficulties associated with referendums, such as the designation of the individuals who qualify to participate; the drafting of the ballot question; the lack of knowledge of the voters; fear of tyranny of the majority; and the

historical associations of the use of plebiscites as tools for supporting authoritarian regimes. Therefore, one may claim that ratification is insufficient. Such an understanding refuses to reduce constituent power to a

mere acclamation – a ‘soccer-stadium democracy’, such as Schmitt’s conception of constituent power, according to which ‘the people’s constitution-making will always express itself only in a fundamental yes or no. Such an approval by the people lacks any rational deliberations as there is no discourse or rational considerations. In a recent chapter in Gary J. Jacobsohn and Miguel Schor’s edited book “Comparative Constitutional Theory” I claim that for constitutional moments to truly manifest the people’s will, popular participation in constitutional moments should be before, throughout, and after the constitution-making process and not be limited to a solely ‘yes’ or ‘no’ vote in a referendum. It is the manifestation of ‘we the people’, not simply ‘oui, the people’. A similar notion can be applicable to constitution-amending. The exercise of constituent power should incorporate actual, well-deliberated and thoughtful, free choice by society’s members. Importantly, I should mention the recent shift in modern constitutional design towards more inclusive and participatory mechanisms, by which the people can assume their constituent role and be actively involved in constitutional change, as expressed in the recent collection edited by Xenophon Contiades and Alkmene Fotiadou on Participatory Constitutional Change: The People as Amenders of the Constitution. When constitutional amendment processes include the people’s direct involvement through mechanisms such as referendums, this is an attempt to create an environment in which the people are ‘awaking’, in a sense; an attempt to imitate a constitutional moment in which the people’s constituent power is incarnated.

IJCAL: You argue in your book that once the constituent power has fulfilled its task of framing the constitution, it becomes dormant or in Thayer’s words, “retires into the clouds.” Doesn’t the fact that the constituent power is not dissolved or abolished, rather adjourned sine die (like in the case of Indian Constituent Assembly) imply a continuing nature of the constituent power and with it the absolute power to amend the constitution?

Yaniv Roznai: True, once the constituent power has fulfilled its extraordinary constituting task, it ‘becomes dormant’ and from that moment public authority is exercised under the constitution. Here I would agree with Carl Friedrich that “no matter how elaborate the provisions for an amending power may be, they must never ... be assumed to have superseded the constituent power”. However, this does not mean that the constituent power is abolished. My theory of delegation rejects an approach according to which constituent power is exhausted after the constitution’s establishment and maintained that the people, the grantor, always possess the power to establish and change their constitutional order. Constituted

organs, including the amendment process, neither represent the primary constituent power nor consume it. This primary constituent power is neither exhausted nor is it bound by the existing constitutional limitations. The authorising primary constituent power remains in the constitutional background and can re-emerge to take its role thereby changing even the constitution's basic structure. The tricky question, of course, is how to identify when and how the people can legitimately exercise this extraordinary constituent power.

IJCAL: Finally, what is the general “higher law-making track” which a body is required to adhere to, in order to enact a new constitution? Further on what grounds, can such a constitution be declared as an “unconstitutional constitution”?

Yaniv Roznai: The book was aimed at constructing a theory of constitutional amendment powers, not of the original constituent power, a power that deserves a full treatment of its own in light of its complicated nature. Of course, the book does touch upon some of that power's characteristics that are essential for the development of the theory. For one, by accepting the traditional distinction between people and government it rejects the notion that primary constituent power is exclusively expressed in constitutional amendment powers. In other words, it accepts as a presupposition that constituent power is, in a way, extra-constitutional. However, it intentionally leaves undecided various complicated issues concerning the scope of original constituent power, who are the people and how can the people speak in one voice? Questions that I thought were unnecessary to answer, in order to develop a theory of amendment power. I praise any scholarly attempt to further develop these thorny issues. I can merely say that while there is no precise algorithm to define when ‘a people’ exercise constituent power, I believe that an exercise of primary constituent power should be inclusive, participatory, and deliberative. After all, the word *constituere*, Andreas Kalyvas reminds us, marks the act of founding together, jointly. Can a new constitution be declared as unconstitutional and on what grounds? In the book's conclusion, I hint to further areas of research, one of which concerns the scope of constituent power. I raised the question whether the fact that the primary constituent power is unbound by prior constitutional rules, does this mean that it is unlimited in the sense that it can disregard any basic principles, or should Benjamin Constant's declaration that ‘sovereignty of the people is not unlimited’ be endorsed? One may think of possible limits on original constitution-making, such as international law or basic principles of constitutionalism. My general approach is that the very concept of constituent power may carry certain inherent limitations in order to be consistent with the idea of ‘the people giving itself a constitution’. Accordingly, it must observe certain

fundamental rights which are necessary for the constituent power to preserve itself and reappear in the future. I further develop this approach in my next monograph which I call “We the (limited) people – the boundaries of constitution-making.”