IMPLICIT UNAMENDABILITY IN SOUTH-ASIA: THE CORE OF THE CASE FOR THE BASIC STRUCTURE DOCTRINE

-Ridwanul Hoque[*]

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 cleverly choosing this: first, I lack comparative advantage of discussing the idea of constitutional unamendability with reference to a wider range of jurisdictions than those in South Asia – Bangladesh, India, and Pakistan. Second, in my opinion, the limits of constitutional amendment powers, whether they are explicitly textually entrenched or are judicially pronounced, 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, the broad focus of the IJCAL having been on the Indian public law, I thought 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 evidences, has accorded to the theory of implicit unamendability more prominence than other theories of constitutional unamendability.

II

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 in-built in the constitution (or 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 be unmanageably broader as is the case now in Bangladesh (Art. 7B) or they may be almost in an abstract form as was the

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case with 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 unamendability is difficult because it is principally the court, the unrepresentative if not 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 to entrench any unamendability clauses into their constitution. The thesis is thus perplexing and puzzling for many a reason such as: whether or not 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 what is the proper scope of those judicially or academically discovered implicit limits on amendment powers; and so on.

Roznai's thesis is explained, tested, illustrated, and provided with some guiding standards in his book that is neatly divided into three parts with eight chapters. The first part analyses comparative constitutional unamendability, which he thinks is of three types –*explicit*, *implicit*, and *supra-constitutional*. Under the sub-part (chapter 2) 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 8 other Asian, 3 African, and 4 Central and South American countries. Interestingly, while Nepal from South Asia does not find a place in this part, Nepal's explicit constitutional unamendability (1990, 2007, and 2015) has figured in the third part (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 previous 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 also arise an occasion of 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.

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 here. 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 is about the theory and practice of judicial review of constitutional amendments.

As the three South Asian countries chosen for the present purpose have applied or tested the application of basic-structure doctrine and have interpreted the theoretical underpinnings of constituent power, the areas covered in part III and part II of Roznai's book, the topic of my discussion can be said to be covering, albeit inadequately, most of the ground of Roznai's book.

III

Personally, I have been persistently supporting the doctrine of basic-structure and its judicial enforceability on the basis of a society-specific argument. Lately, however, I have been canvassing for a limited doctrine of basic-structure in South Asia. This position of mine reflects the inherently non-universalist and theoretically puzzling character of the doctrine. This is evidenced in the fact that although the doctrine was authoritatively judicially entrenched in India in 1973 and in Bangladesh in 1989, we can say that it has become entrenched in South Asia (India, Bangladesh, and Pakistan) only recently with Pakistan's unambiguous yet "uneasy" acceptance of the concept in August 2015 in *the Constitutional Petition No. 12 of 2010* (a 13: 4 decision).

In South Asia generally, the idea of unamendability of the constitution was first mooted, albeit unknowingly or implicitly, in a 1963 decision of the then Dacca High Court (*Muhammad Abdul Haque v Fazlul Quader Chowdhury*),[1] later affirmed by the Pakistani Supreme Court (*Fazlul Quader Chowdhury v Muhammad Abdul Haque*).[2] According to the argument of the lead counsel in Bangladesh's *8th Amendment Case* (1989), it is in that 1963 decision that the genesis of the basic-structure doctrine has to be found. There, a Presidential Order, promulgated in accordance with an enabling constitutional provision and which changed some constitutional rules, was challenged. The Order, though not a formal amendment, had the functional character of a formal constitutional amendment. The Order was held by the High Court as unconstitutional for breaching the "concept of a separation of the executive body from the Legislature"

[1] (1963) 15 DLR (Dacca) 355.
[2] 1963 PLD (SC) 486.

that was regarded as "the very basis of [the 1962] Constitution". 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. The Court also declared unconstitutional a clause of the Presidential Order that excluded judicial review thereof. 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.

India

In India, the idea of implicit limits on parliament's amendment power began being tested since the mid-1960s. A dissenting opinion of Justice Mudhlokar in *Sajjan Singh's Case*[3] 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 Kerala* (1973)[4] 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),[5] 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. 2 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 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, making thereby the notion of capital-C Constitution-compliant amendments a

[3] AIR 1965 SC 867.
[4] AIR 1973 SC 1461.
[5] AIR 1980 SC 1789.

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 view-point 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 India's basic-structure doctrine cases needs to be taken. Like the amended Art. 368 of the Indian Constitution that sought to establish untrammelled amendment power and non-justiciability of constitutional amendments, Pakistan introduced the similar concept in 1985 by amending Art. 239 of the Pakistani Constitution that was in full force at the time the Supreme Court of the country authoritatively established the basic-structure doctrine and its judicial enforceability in its 2015 decision, discussed below. Interestingly, the Amendment (8th Amendment) that legitimated the exclusion of judicial review of constitutional amendments[6] was upheld in M*ahmood Khan Achakzai v Federation of Pakistan* (1997).[7] In this case, Chief Justice Shah, quite intriguingly, observed that Pakistan's 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 judicially enforceable basic-structure doctrine, it did not, unlike its Indian counterpart, invalidate the exclusion of judicial review of constitutional amendments.

By contrast, constitutional amendment rule in Bangladesh was never amended either to assert parliament's unlimited amendment power or to explicitly exclude judicial review of constitutional amendments. The amendment rule (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 particular class of constitutional amendments, has never been tested with reference to the basic-structure doctrine.

[6] 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).

[7] PLD 1997 SC 426. In an earlier case, Lahore High Court tacitly validated the amended article 239(5) & (6) that excluded judicial review of constitutional amendments: *Mustafa Khar v. Pakistan* PLD 1988 (Lah.) 49.

Bangladesh

In Bangladesh, the Supreme Court authoritatively established the basic-structure doctrine in 1989 in *Anwar Hossain Chowdhury v Bangladesh.*[8] The Appellate Division of the Supreme Court in this momentous decision invalidated part of the Eighth Amendment to the Constitution that diffused the High Court Division into six permanent benches in cities beyond the Court's constitutionally declared permanent seat at Dhaka, by replacing original Art.100 of the Constitution. The Appellate Division held that Parliament's amendment power under Art. 142 is subject to un-alterability of "basic structures" of the Constitution. It was successfully argued that the amended article 100 that created many permanent branches of the High Court Division and made the judges transferrable from one court to another and empowered the Chief Justice to frame Rules to regulate the business of High Courts was incompatible with the unamendable unitary character of the Bangladeshi State with a unitary Supreme Court and the High Court Division's plenary power over the whole country. Since then, the doctrine has been applied to strike down constitutional amendments on four more occasions, leading to invalidation of 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 doctrine of basic-structure received judicial attention for the first time in post-independence Bangladesh. In *Hamidul Huq Chowdhury v. Bangladesh* (1981),[9] 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 also because many parts of it were eventually validated by the Constitution (Fifth Amendment) Act 1979. Curiously, however, the Court accepted the view that the Fourth 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 (at para. 17) 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 (*per* Sultan Hossain Khan, J; emphasis mine).

[8] 1989 BLD (Spl.) 1 (Afzal J dissenting, but conceding to the view (at pp. 212-3) that "the Constitution cannot be destroyed or abrogated" in the name of amending it).
[9] (1981) 33 DLR (HCD) 381.

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)[10] 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 totally avoided any encounter with the basic-structure arguments and the observations of the High Court Division.[11] Interestingly, this case was not discussed at all in *Anwar Hossain Chowdhury.*

When unambiguously establishing the concept of limited constituent power of parliament in *Anwar Hossain Chowdhury,* the Court considered a limited parliament to be an original intention of the framers. As Justice Shahabuddin Ahmed insightfully observed, 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 would serve as "an effective guarantee" against frequent amendments "in sectarian and party interest". Supplying further rationale, Justice M.H. Rahman premised the legitimacy of the basic-structure doctrine on the need to tackle the overwhelming and excessive parliamentary majoritarianism. Arguments of this sort 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 certain provisions were amendable subject only to a positive affirmation in referendum. Article 100 of the Constitution that was replaced by the 8th Amendment was not within the list of those hard-to-amend provisions. Obviously, 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

[10] AIR 1967 SC 1643.
[11] *Hamidul Huq Chowdhury v. Bangladesh* (1982) 34 DLR (AD) 190.

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, 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 Supreme Court. As regards the other Amendment invalidated in Bangladesh, the 16th Amendment, the amending Parliament was an absolute parliament in every sense constituted through elections boycotted by a major political party. In some but not all of these cases, these background factors seem to have influenced the court's reasoning. As will be seen below, Pakistan Supreme Court in its 2015 decision on the basic-structure doctrine questioned the representational legitimacy of parliament that endorsed the exclusion of judicial review of constitutional amendments. As such, as regards the question of when not to invalidate a constitutional amendment, there should be certain jurisprudential standards. In the 3rd part of his book, Roznai has proposed certain such guidelines and standards for the judicial enforcement of the doctrine of limited amendment powers.

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 which seem to be missing from Roznai's otherwise impressive list of Pakistani decisions. In *Dewan Textile Mills Ltd. v.*

Pakistan (1976)[12] 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),[13] 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 in reality 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).[14] 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 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, at p. 52). Ultimately, Parliament further amended the Constitution (via the 19th Amendment) so that the structure of the judicial appointments 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*. 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

[12] 1976 PLD (Kar.) 1380.
[13] 1979 PLD (Pesh.) 67.
[14] PLD 2010 SC 1165.

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.[15]

To arrive at this basic-structure decision, the Court had to disapply a clear constitutional bar on judicial review of constitutional amendments. Article 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 the 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 scrutinize the legality of any amendment. Some judges pointed at the undemocratic character of the very 8th Amendment that introduced (legalized) the bar on judicial review of constitutional amendments. Nonetheless, because of this decision and given the fact that art. 239(5) was a result of secondary constituent power, it seems that the basic-structure-incompatibility of this exclusionary clause has been implicitly ruled. 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

The objective of the above fairly detailed discussion of the growth of the doctrine of basic-structure 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 doctrine of basic structure, South Asia's engagement with the doctrine remains relatively divergent. For example, of the three countries, only Bangladesh has enacted an explicit (and also unwieldly wide) unamendability clause (art. 7B) in 2011. Roznai's book gives us a wonderful theoretical and practical perspective with which to look at that diversity of the application of constitutional unamendability.

[15] Yet it is interesting that 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 functional difference between the doctrine of basic-structure and the doctrine of enforceable 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)[16] 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.[17]

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),[18] South Asian constitutional

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

[17] 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. (2015), "*Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment,*" *Int'l J of Const. L.* 13(3): 605-638.

[18] 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

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 undoubtedly to be a sound classification. Having said this, there is no reason to think that the argument of supra-constitutional limits will not ever visit South Asia. In the most recent case of constitutional invalidation,[19] 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 in itself. I further argue 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.[20]

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.

Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament … cannot abolish".

[19] *Bangladesh* v *Asaduzzaman Siddiqui* (Civ Appeal No 6 of 2017, 3 July 2017, Appellate Division).

[20] Ridwanul Hoque (2017), "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 (2016), "Can the Court invalidate an original provision of the Constitution?", 2(1) *Univ. of Asia Pacific Journal of Law and Policy,* pp. 13-27.