A NEW THEORY ABOUT CONSTITUENT POWER?

-Upendra Baxi[*]

I. A BRIEF CONSPECTUS

Yaniv Rozani has accomplished a formidable comparative constitutional theory (COCOS) task in reviewing the idea, practice, and movement of unconstitutional constitutional amendments. The book subtitled as the 'limits of amendment powers'[1] is also about the nature of constituent power itself, or the conventional distinction between constituent and constituted powers. For the novitiate, it is a veritable encyclopedia of amendatory power and what various apex courts have done (or not done) with it. And for the *cognoscenti*, it is a rich theory festival. I agree with the distinguished blurb writers that this work is of compelling merit; both painstakingly researched, and elegantly presented in a reader-friendly way.

Writing about this distinction is not easy. Not merely there are several ways to articulate this distinction (constituent v. constituted, original v. derived, exception v. normal, foundational v. quotidian, etc.), there is something quite disconcerting to know that the act that founds the constitution is (and be conceived as) almost replete with violence and always contrary to existing law. In this sense, the constituent power, whether prior to all law (or in contravention with it) is (or can be) legitimated by recourse to people's will in principle. Then the question becomes whether that will is intra-systemic (within the legal order) or extra-systemic (standing outside, over and against it), or simply violent and extra-legal, or in other words even constituent power is in some basic way constrained by core juridical norms. The idea of unconstitutional amendments or 'public trust', or implied limitations, on another narrative, is certainly attracted by the amendatory power but there is controversy on whether any limitations extend to constituent power. It is argued also whether, without understanding its nature there is any hope of grasping the power to amend, which is thus constructed. Nor is fully comprehensible, the judicial review of amendment, or the very idea

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[1] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford, Oxford University Press, 2017). The work will be referred to hereafter by the author.

of unconstitutional constitutional amendments. It is certainly creditworthy that Dr. Roznai has valiantly undertaken to explore this domain.

Dr. Roznai recasts the conventional distinction between constituent power and constituted powers into a difference between 'primary' and 'secondary' senses of constituent power, reminiscent of H.L.A. Hart's concept of law as a union of primary and secondary rules.[2] I do not explore Hart's concepts here save saying that the learned author through this creative borrowing asks us to rethink the commonplace difference between constitution-making power (change *of* constitution itself) and constituent amending powers (changes *in* the constitution)[3]. Instead, calling the first 'primary constituent power' and the second the secondary constituent powers (PCP and SCP respectively), Dr. Roznai offers many subtle additions.

Unamendability is certainly a 'prominent feature of modern constitutional design' but it is not 'sacred' and 'unalterable'.[4] No longer exist the 'grand delusions'[5] of unamendability; the SCP may change its contents but *noli me tengre* (or, 'not to be touched') aspects or provisions 'comprise the genetic code' of the constitution.[6] In contrast to PCP, a SCP is best understood through the notion, or even a theory, of delegation of powers. Roznai skilfully blends the legal/jural idea of delegation with the political notion of trust. Recalling Thomas Paine's dictum: 'All delegated power is trust',[7] the former necessarily implies a

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[2] H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon, 1961). For Hart, secondary rules are rules of recognition and change. lf 'primary rules' are simply rules of obligation, for Roznai, secondary constituent power furnish rules of constitutional change but cannot take place of primary constituent power, which is the power to make and unmake the constitution itself

[3] Roznai's work reminds me somewhat of the work of Jon Elster who (in his own words) took 'a few steps towards remedying the 'deficiency' of literature that deals with the 'constitution-making process in a positive, explanatory perspective'. Like Elster, too, Roznai adopts comparative constitutionalism as his whole province. The difference seems mainly (and that surely matters) is while Roznai was more concerned with the emergence of unconstitutional constitutional amendments, Elster was primarily concerned with the logics of pre-commitment. What Elster tells us is that the nature of pre-commitment matters as a prior constraint: what Roznai, too, says that unamendability (where changes of the constitution are prohibited) is the very site of change (changes in constitution are largely permitted). But the routes of understanding and explanation are indeed different. To offer one more example, Roznai does not propose de-clogging communication channels of power as does Elster: see his, 'Clearing and Strengthening the Channels of Constitution Making' In Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2012).
See also, Jon Elster, 'Constitutional Bootstrapping in Philadelphia and Paris', 57-82, In Michel Rosenfield, ed., *Constitutionalism, Identity, and Difference* (Durham, NC. Duke University Press, 2000);Id., 'Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea', *Public Administration* 71:1-2, 169-21,(1983); Id,. 'Forces and Mechanisms in the Constitution-Making Process', *Duke Law Journal* 45(2): 364-396 (1993) Id., 'A plea for Mechanisms' In *Social Mechanisms: An Analytical Approach to Social Theory* (New York, NY: Cambridge University Press, 1998; Peter Hedstrom & Richard Swedberg, eds); Id., *Ulysses Bound: Rationality, Precommitment, Constraints* (Cambridge, Cambridge University Press, 2000).

[4] Roznai, 16.

[5] *Id.*

[6] Roznai, 38.

[7] Roznai, 119. The 'separation of power' doctrine in its strict version may not to the very act of constitution-making; what however that act intended to mean by terms and phrases used is both a matter for ordinary interpretation as well of wilders of

'principal-agent' relation: the delegate may not exercise the power that has not been conferred by the act of delegation. The SCP is, then, a 'fiduciary' power to act *for certain ends*.'[8] But the constitutional organ which holds SCP as a trustee ought to 'comply with the terms of trust.'[9] In a basic sense, 'a *separation of powers* exists' between PCP and SCP: and, therefore, 'identifying' the 'amendatory power as a delegated authority is the first step in understanding its limited scope'.[10]

How to characterize this amending power---whether as constituent or merely legislative—is a 'knotty' question.[11] The amendatory power is regarded as itself a constituent power, delegated to a constitutional organ of the state, and 'different from, and more unique than ordinary law-making'[12], but Dr. Roznai believes that this claim is based on a fallacy[13] since, it is neither 'another form of constituted power' nor 'the constituent power' itself, the amendatory is '*sui generis*'.[14] SCP is subject to express or implied terms of trust, and acts of delegation, conferred by PCP.

There exist 'various shades' of SCP along a 'spectrum', linking 'amendment procedures to limitations on amendatory powers'.[15] It is the 'theory of unamendability' which 'explicates the limited nature of amendatory powers and the practice of judicial review of amendments, thus clarifying the puzzle of unconstitutional constitutional amendments.'[16] A valued elaboration of SCP is offered by five different, expressive and functional, roles: these are preservative, transformative, aspirational, conflictual, and bricolage.[17] These provide an interesting classification for future COCOS; so do the questions raised generally about secondary rules.[18]

SCP. Even for constitutional interpretation the idea of separation of powers does not work, especially if it is considered an interpretive concept.

[8] *Id.*; emphasis in original.

[9] *Id.*.

[10] Roznai, 134 (emphasis in original).

[11] Roznai, 113

[12] *Id.*.

[13] *Id.*.

[14] Roznai, 113. This distinction is a bit hard to follow since this power, more rather than less, is also delineated as SCP, though always subject to the PCP.

[15] Roznai, 159.

[16] See, Roznai, Chapter 6 where the leaned author provides various ways of 'constituting' the spectrum. The discussion on 'polymorphic' nature of amendatory power as well as the 'constitutional escalator', is of great interest in this context.

[17] Roznai, 26-37.

[18] Hart, Note 2, *supra* at 90-97 identified three main problems with a system of primary rules. It is uncertain and unpredictable, perhaps also unstable whole arrangement; too static to deal with social change, and is inefficient. He proposed a system of secondary rules as a solution. The second-ary rule known as the Rule of Recognition will address uncertainty, the secondary rules known as the Rules of Change are an answer to the static quality, and the inefficiency by the Rules of Adjudication.

The learned author introduces PCP and SCP because the existing concepts and terms are 'imprecise'. He emphasizes that 'both powers are 'constitutive in the sense that these are powers to constitute constitutional rules'. However, the 'two are not identical'. He rejects the term 'original' constitution-making power, because 'a constitution always relates to something'. Even 'the negation of a previous legal order' bears a 'relational account'. It is original 'only in the sense that by its nature it does not necessarily derive from nor is bound to prior or existing constitutional rules' and it is 'the basic power of constitution making'. It is 'primary not only because it is the initial action, but also because it is principal in its relations with the amendatory power. Consequently, instead of derived constituent power,' SCP is a term used 'to describe the constitutional amendatory power'. The amendatory power is 'secondary' in the sense 'it necessarily comes (chronologically) after' but because it is 'subordinated to the primary constituent power and inferior to it'. Indubitably, 'old habits are hard to break', but the proposed 'terminology of primary and secondary constituent powers manifests more properly in these powers' unique nature' and sharpens the delicate distinction between them.[19]

Scattered are several crucial insights about PCP. First, the PCP 'never acts in a *tablua rasa* or as pure vacuum: some political institutions must exist'. It 'never really starts de novo'.[20] Second, 'constitution-making process is often exercised in continuity with historic or existing law or in accordance with pre-determined rules'.[21] The consequence is that PCP is never 'purely *original*'.[22] I should add that constitutional pluralism[23] thus is inbuilt in PCP, which cannot eradicate the elementary social fact of legal and social plurality but only provide a framework of what John Rawls when he asked us all to think about 'reasonable pluralism'.[24] Third, PCP shares 'populism', or the 'liberty of people to shape and reshape their society'.[25]

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[19] Roznai ,122.
[20] Roznai,121.
[21] *Id.* This tendency was inaugurated in the post-colonial constitutions by Article 12 of the Indian Constitution. Dr. Roznai instances new examples such as South African and 'transitional constitutions of modern Europe.
[22] Roznai, 122 (emphasis in original).
[23] See, recently, Ishwara Bhatt (ed.), *Constitutionalism and Constitutional Pluralism* (Delhi, Lexis Nexis; 2013)
[24] See, John Rawls, *Political Liberalism* (l993). Since society's public political culture consists of the 'political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge' (at 13–14), fundamental ideas enunciated in the design of the government, the constitutional list of individual rights, and in the historic decisions of important courts. A political conception of justice arises out of these fundamental ideas. The deep disagreement concerning what these ideas mean to different peoples, and people as such, furnishes material out of which (through the device of 'overlapping consensus). Upendra Baxi, 'The Failure of Deliberative Democracy and Global Justice,' in Okwui Enwezor et. al. Ed.) *Democracy Unrealized: Documenta 11_Platform 1* 113-132 (Ostfildren-Ruit, Hatje Cantz Publishers, 2001). See also, Charles R. Beitz, Political Theory and International Relations (Princeton, NJ. Princeton University Press, 1979: Charles Beitz, 'Economic Rights and Distributive Justice in Developing Societies,' *World Politics*, 33:3, 321-346(1981); Thomas W. Pogge (Ed.), Global Justice (Oxford, Blackwell ,2001); Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, Polity Press, 2002)
[25] Roznai 133.

However, fourth, Roznai is not willing, along with distinguished others, to abandon the entire concept of PCP with Hannah Arendt, who famously addressed the problem of dictatorial manipulation of the 'national will' in which any authoritarian leader could speak in the name of the people.[26] Rather, he takes the Schmittian view articulated well by Antonio Negri when he says that: 'To speak of constituent power is to speak of democracy'.[27] In many ways, Dr. Roznai's reworking of this distinction will resonate in future COCOS theory.

However, Roznai argues that the amendatory power specified in constitutions is 'a microcosm of the most fundamental principles of our constitutional structure'.[28] Even so, there may appear a 'puzzle' about the very 'possibility' of an 'unconstitutional constitutional amendment'[29]; that perplexity is about 'a deeper conflict between substantive and procedural approaches to constitutionalism'.[30] The 'former focuses on the constitution's fundamental principles and the latter on the constitution's procedures…; the latter 'might claim that a 'revolution' only requires a change to or a replacement of the constitution in a way that is incompatible with the amendment procedure, as understood by Hans Kelsen'.[31] A substantivist might claim that a revolutionary change can also occur through legal means.' [32] Roznai prefers a substantive constitutionalist approach; it reads a country's constitution in a foundational structuralist way, according to which each constitution has to be regarded as a structure in which all of its provisions are related'.[33]

His is a 'foundational structuralism', which focuses 'not merely on the constitution's procedures, but also on its substance'[34]. Substantively, a constitutional change may be deemed unconstitutional, even if accepted according to the prescribed constitutional procedures, if it conflicts with unamendable constitutional provisions, or collapses the existing order and its basic principles, and replaces them with new ones thereby changing its identity.'[35] Roznai himself concedes that there may not exist any *universal* theory of

[26] See the quote from Roznai, 123.
[27] Roznai, 125. See also, 127-131.
[28] Roznai, 5 (quoting here Stephen Markman, at footnote 36).
[29] At 5-6.
[30] Roznai ,7-8.
[31] *Id.* at 5-6, 155-116
[32] Roznai, 8.
[33] *Id.*
[34] *Id.*
[35] Roznai, 8

constitutional identity of constitutions; but a 'global approach' may enable some 'broad conclusions, that may speak to the constitutional experience and horizons of many countries.[36]

The work offers an *embarrassment de riches* and for long will be a source of many COCOS studies. In what follows, I focus only on a few themes.

II. PROGRESSIVE EURO-CENTRISM?

Dr. Roznai, one should understand, is clearly not writing on a theory of world constitutionalism but merely on one basic aspect of it: namely, amendatory powers and procedures. Dr. Roznai's purpose is not to expound a theory of constitutionalism but to explain the nature of constituent and amendatory powers. However, a COCOS person is bound to ask: what may be the theory of constitutions/constitutionalism that animates this work? One immediately finds that Dr. Roznai uses the term 'constitution' in a 'modern' sense; not every parchment that proclaims itself as one is entitled to call itself thus.

We hear on the very first page of the book that many constitutions are 'façade/sham constitutions', in that they exist for 'cosmetic' purposes only and have no effect in reality. Others which are in line with the political reality reinforce governmental power rather than impose binding rules upon it. Rather, the 'modern context of constitutionalism' prescribes 'certain conditions, such as: the recognition of the people as the source of all governmental authority; the normative supremacy of the constitution; the ways constitution regulates and limits the governmental power, adherence for the rule of law and respect for fundamental rights'. The idea that some constitutions are 'façade' or 'sham' constitution is appealing only if one takes' a broadly *natural law approach* to constitutions.

To approximate some sort of response to the question, we need to understand many things. I here mention some of these rather randomly. First, if constituent power is a distinct power to make and unmake the constitution, and if it is a meta-power to enunciate certain constitutional and legal systems, what may be the relation between the idea of an 'original position' and 'constituent power? We all know how John Rawls struggled to develop as thought-experiment, for understanding the three basic principles of justice, hypothetical persons/parties under a thin veil of ignorance. Parties to a social contract will know some

[36] Roznai, 9-10.

general features of the world for which principles for just social cooperation have to be devised. Rawls also spoke of the 'basic structure' of a society.[37] Is the PCP to be likened to this basic structure of constitution/society developed independently by the Supreme Court of India, and followed elsewhere?[38] How far the constructions of constituent power are akin to those of 'original position' and attract same or similar evaluations/critiques?

Second, what assurance does one have that PCP, as a principle or method of 'normative structuralism' would always give us a modern secular constitution? Why ought people in the 'original position' ought not to choose, for example, theological constitutions? Here, also direct constituent power of referendum poses some difficult problems, when that exercise results in closely divided voting percentages.[39] How 'direct' is the voice of the 'majority' in such cases? Are all existing constitutions which are theologically based 'sham' or 'façade' constitutions? Are all non-democratic' and non- liberal constitutions so (prescinding here the discussion of the fact that not all liberal constitutions are not truly democratic, or more generally tensions and differences exist between the two)?[40] John Rawls famously offered a classification of five types of society, including decent hierarchal society or benevolent despotisms[41]; only the last – the outlaw society--appeared as anti-people. There is also the question of 'democratic dictatorship; Carl Schmitt famously spoke of 'comissariat dictatorship' (forms of total domination that suspend basic human rights—in other words, suspension of 'democracy' for the sake of preserving it). In fact, he posited that 'democracy and dictatorship are not essentially antagonistic; rather, dictatorship is a kind of democracy if the dictator successfully claims to incarnate the identity of the people'.[42]

Third, *how* questions persist even when *what* questions are somehow answered. It may be postulated that genuine freedom of will results in a preference of liberty over tyranny, freedom over unfreedom, equality over inequality, justice over injustice, and maximization of welfare of individuals over states of

[37] See the analysis and the literature cited in Baxi Note 23, *supra*.
[38] Roznai, Chapter 2.
[39] See, for example, Xenophon Contiades (ed.) , *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (London, Routledge 2012). Most acute, and agonizing concern arise about the amendatory power ushers in a major change in constitutional identity by small margins.
[40] Roznai at various places in the book briefly but valuably discusses the differences among the views of Arendt, Agamben, Ackerman, Kelsen, Negri, and Schmitt.
[41] John Rawls, *The Law of Peoples* (Cambridge, Harvard University Press, 1999).
[42] Ulrich K. Press, "Constitution Powermaking of the New Polity: Some Deliberations on the Relations Between the Constituent Power and Constitution' 143-162 at 155; Rosenfeld cited, supra note 3 .

impoverishment, one may still remain frankly anxious at this uni-polar view of what may constitute constitutionalism, and its non-Euro other denialism. There is wide variety of conceptions of what labours of governance democratic constitutionalism and human rights entail. Oketh Ogando, trying to understand the ideas of imperial presidency in sub-Sharan Arica, spoke of 'constitutions without constitutionalism'.[43] In pure theory of law, we have the ultimate maxim of Hans Kelsen saying that the basic norm may have any content.[44]

Fourth, distinctions within Eurocentrism are difficult to draw but a study of differential maternities underlies any attempt to grasp the structure of postcolonial constitutionalism. I draw broadly a distinction between regressive and progressive Eurocentrism, the former being mainly an attitude of superiority towards the non- Euro other and the latter being one more leaning towards equality of all human beings.[45] One principal message of Dr. Roznai's labours is that perhaps even progressive eurocentrism-- in the sense of openness to the non-Euro other-- is curable. It is the belief inherent to COCOS and generally to the traditions of comparative law. Incidentally in which other work, even of COCOS, for example, do you hear about the judicial limitations of amending power in the Kingdom of Togo[46] or the unamendability features in the Constitution of Iran? [47] This is a book where we can learn about the basic law of world constitutions. Fifth, there exist well-known difficulties in constructing people, even as a government limited by constraints of constitutionalism, particularly those of basic human rights, may be considered as a hallmark of what is regarded as 'modern' as distinct from the 'ancient' constitutionalism. But history records many forms of modern constitutionalism—the colonial, liberal, socialist, post-national, post-colonial, and transitional. And they display their own forms of limited government. The only thing that distinguishes them are provisions of fundamental rights which the judiciary may independently enforce. However, in this work, the constituent power belongs only to those texts which have democratic foundings, or which solely

[43] Oketh-Ogando. 'Constitutions without Constitutionalism: Reflections on an African Paradox', in *State and Constitutionalism: An African Debate on Democracy* (Harare: Southern Africa Political Economy Series, 1991; Issa Shivji G. (ed.).
[44] Roznai,86, 116, 181. Roznai offers a rich discussion of whether the PCP and SCP may be said to rest on *jus cogens* provided by international and transnational law (see pp, 71-104.)
[45] Upendra Baxi, *The Future of Human Rights* (Delhi, Oxford University Press, 2013; Perennial Edition).
[46] Roznai, at 33. Iran was a classic modern Sharia public law constitution which did not have a provision for its own amendment! Ayatollah Khomeini resolved the problem by de facto amending this, and resolving constitutional crisis, by his Friday sermon sayings on a 'core' Shari'a whose norms no constitution may amend and a 'peripheral' one, which the Majlis (equivalent to the British House of Common) may change. My students and I at NYU had considerable discussion on the world's first full-fledged public law constitutionalism at New York University Global Law Hauser Programme where we read (in the early years of 2000) the constitution alongside Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: MIT Press. 1996; William Rehg, trans.) We also consulted Chibbli Mallat's exciting work, which later became *The Renewal of Islamic Law: Muhammad Baqer As-Sadr, Najaf and the Shi'i International*, (Cambridge, Cambridge University Press (2004).
[47] Roznai, Id, at 22.

arise out of a struggle to resist what Carl Schmitt called 'the non-dictatorial constituent power'[48]. Roznai also adopts this sense when he speaks of the 'people' as the 'authors' of the constitution. But the distinction(s) between the sham'/façade constitutions and non-sham (democratic) ones remain real enough. If that distinction is to be maintained, the question must be faced: how many of the world's constitution are real (as opposed to being 'sham')? If constituent dictatorial powers are not acceptable forms of PCP/SCP, would any act of counterfactual daring judicial review invalidating a constitutional amendment in such a society be worthy of discourse in terms of this distinction?

III. UNDERSTANDING CONSTITUTIONS

Every work must choose its own focus and there is enough here on the plate with the distinction between PCP and SCP. Even so as the author rightly speaks of the context as they relate to the exercise of both forms of constituent power, it may not be remiss to point out to a dynamic reading of all constitutionalism. In an early study, I made a distinction between 3Cs of a constitution. CI stands for the constitutional text; C2 comprises that interpretation which lawpersons know as constitutional law and C3 as constitutional theory and ideology.[49] I subsequently engaged the Category 2 as citizen interpretation of C1 which often translates as a rights movement and becomes the initial C2 (constitutional law) and then moves to the other varieties of C2. This included interpretation of C1 by the political executive, legislation, administration (bureaucracy), tribunals, human rights institutions, and other governance institutions. C2 is also often provided by non-state actors such as democratic political parties, corporations, labour unions, social action and human rights groups, print and electronic media, irredentist groups, armed opposition groups among others.[50]

[48] The conception of 'non-dictatorial' PCP fascinates but there exists wide-variety of powers and events of constitutional dictatorship within a broadly democratic constitution. Professor Sanford Levinson distinguishes between the 'Constitution of Conversation' and the 'Constitution of Settlement'. The former consists of the 'majestic generalities' that lawpersons typically like to think about; the latter are rules and settled practices of constitutional politics on which the labours of governance are typically based and rarely litigated and studied (such as the electoral college, the requirement of two Senators for each state, the date of inauguration, the inability to remove a President by vote of confidence, and amendment procedures of Article V). He insists: 'I now believe that the Constitution of Settlement serves to make difficult, if not impossible, the achievement of the magnificent vision instantiated in the altogether commendable Preamble'. See, Sanford Levinson, *Constitutional Faith*, 246-247 (2d ed. 2011). If SCP belongs to the Constitution of Settlement, one task surely, I suggest, for SCP discourse is to bring it back as an integral part of the Constitution of Conversation

[49] Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices, *Cardozo Law Review*, 24:1.1183-1210 (2000).

[50] See, Upendra Baxi. 'Outline of a 'Theory of Practice' of Indian Constitutionalism', in Rajeev Bhargava, *Politics and Ethics of the Indian Constitution*, 92-119 (Delhi, Oxford University Press, 2008); Preliminary Notes on Transformative Constitutionalism in

At least two consequences ensue out of this hermeneutic expansion. The first relates to governmental apparatus which also claims a right to the official interpretation of C1. In many societies, this right extends to the official publication of the constitutional text. At least, in the Indian case the government of India press prints the text as if any basic change in the apex courts interpretation had never happened![51] In other words, since no textual changes in C1 had been carried out, judicially binding interpretation does not form the part of the official text published by the Government. This case, also, raises the question of the meaning of official oath: Justices swear an oath, among other things, to uphold the Constitution as *by law established*[52] is published by the Government of India Press as containing article 368(4) enacted by the 42nd Amendment declaring that there shall be no limitation on the *constituent power of Parliament* to *amend* by way of addition, variation, or repeal the provisions of this Constitution under this article. Article 141, however declares that the law declared by the Supreme Court of India shall be binding on all courts throughout the territory of India. And the law has been declared by the Court from 1973 onwards that imposes, since *Kesavananda*, the judicial and constitutional discipline of the basic structure and essential features.[53] Since the Indian C1 embodies both these provisions, assuming that the Constitution is the touchstone of validity of all legislative and executive action, the question arises: To which Constitution is the Oath applicable? There is thus a question of how the normative identity of the constitution itself as interpreted by various constitutional authorities, which all swear the same oath to uphold the constitution as by law established.[54]

Aside from the conflict between the executive-legislative combine on the one hand and judiciary on the other, there is also the question of divergent interpretations offered by various non-state actors. The important question of how these affect the eventual consensus national will formation, so does the crucial question in terms of PCP is how far they comprise the 'people'—a very difficult and nebulous concept.[55] Of course, whether 'outlaw' peoples and others[56] are a part of the concept of 'peoples' is very crucial threshold issue, even when one were to regard it somehow as comprising *only* those people who share the will to a democratic social ordering.

Transformative Constitutionalism: Comparing The Apex Courts of Brazil, India and South Africa 19,24 (Pretoria, University of Pretoria Press, 2013; Oscar Vilhena, Upendra Baxi *et al* ed.)

[51] See Roznai, chapter 2.

[52] Emphasis added.

[53] See, Roznai 44-47

[54] In the Indian case at least the terms of the oath are not judicially interpreted, but at least in the contexts of the distinction between PCP and SCP this question assumes some importance, A question had already arisen in relation to Indian Preamble; a government -advertisement in 2015 published its text without the words 'socialist; and 'secular' on the specious plea that there words were inserted by the 42nd emergency amendment and were not in the original constitution drafted by Dr B R. Ambedkar and approved by the Constituent Assembly. See, Upendra Baxi, 'No Plaything', *Indian Express,* 24 February, 2015, http://indianexpress.com/article/opinion/columns/no-plaything/

[55] See, Baxi, note 24 *supra*

[56] Such as 'artificial persons', refugees, stateless persons.

IV. JUDICIAL REVIEW

But Dr. Roznai (again rightly so) suggests that the question of '*how'* is not concluded upon answering the question *'why'*. And it is here that he uniquely suggests the importance of' 'foundational structural interpretation', which *'requires the development of a theory of unamendable principles* by interpreters…'.[57] Judicial actors are prime among these but Dr. Roznai seems to include a wider community (of C2 interpretation) when he mentions 'other institutions'.[58]

What are the incidents of such a theory? Dr. Roznai valuably illustrates some 'dos' and 'don'ts'. First, there exists an epistemological problem: how does one know that there are any unamendable features to a constitution? We cannot know these from C1 when it does not foreground these. The respose of Dr. Roznai is (as far as I can tell) is 'foundational structuralism'—a method of reading *a constitution as a whole* (meaning here strictly C1). Such 'holistic' reading considers not merely the 'explicit' but the 'implicit' language of the Constitution. One should look at (in Akhil Reed Amar's words) its 'overarching themes' – or as Dr. Roznai puts it: 'holistic interpretation considers the constitution's surrounding values and principles, basic structure, constitutional history, preambles' and 'basic principles' provisions'.[59]

The second problem implicates the act of postulation of basic values. Assuming that these can be ascertained readily, how do we theorize it? Dr. Roznai says: 'the German need a theory of dignity… the French or Italian will require a theory of republicanism, and the Norwegian need a theory of the spirit of the Constitution'.[60] But such general theories require the labours of many minds, not just the judicial. And, open-ended conceptions provide 'a great deal of discretion' but at the cost of 'a high degree of uncertainty'.[61]

Third, implied restrictions of amendatory power (or 'implicit unamendability') pose a 'contentious issue in itself'; and finding and aggregating 'basic structure, type limitations is 'ambiguous' since 'their demarcation

[57] Roznai, 222 (emphasis in the original).
[58] *Id.*
[59] Roznai, 215.
[60] Roznai, 212.
[61] *Id.*

is not an easy task'.[62] However, 'vagueness' by itself is not dispositive of the articulation of basic structure; it is marked by an 'inherent flexibility' as it 'leaves space for subsequent judicial interpretation, clarification, and public and political deliberations and dialogue'.[63]

If one were to take this welcome move of basic structure and essential features further there exist certain complexities in the Indian experience. Originally, judicial disciple norms required that only the Supreme Court of India may exercise PCP over amendments of the constitution under Article 368. Thereafter, it has been extended to an examination of legislations, and even Presidential actions; and has further been applied to some administrative action and even as a rule of statutory and constitutional interpretation.[64] The argument or reasoning which suggests that basic structure doctrine may extend only to constitutional amendments seems to have been considered and surpassed in the Indian legal development. The appellate Indian courts seem to exercise both PCP and SCP in demosprudential adjudicative leadership.[65] Is the Indian legal development a deviant case or a new norm in the exercise of constituent power?

Dr. Roznai's response, I think, will lie in the direction of a theoretically correct understanding of SCP. Such an understanding strictly explores the nature and terms of unamendability and places 'great power in the hands of the judiciary'.[66] This calls for 'judicial restraint' and as a 'general rule courts should not overturn the policy choices of the amendment authority'.[67] Only 'clearest cases of transgression would justify judicial intervention'.[68] The counsel for judicial restraint is well urged and is also sustained by vagueness or indeterminacy argument. However, principled differences are not constitutive of vagueness': for example, in *Kihoto Hollohan* [69], while the Court was unanimous concerning the fact that the Tenth

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[62] Roznai, 214.

[63] *Id* at 216. Also Geroge C. Chirstie, 'Vagueness and Legal Language', *Minnesota L. Rev.* 48: 885-991(1964); Timothy Endicott, 'Vagueness and Law' In G. Ronzitti (ed.), *Vagueness: A Guide, Logic, Epistemology, and the Unity of Science* 171-192 (Dordrecht Springer Science+Business Media B.V., 2011).

[64] The Supreme Court of India does not speak with one voice on the last issue. In a recent case, Justice Khehar took the view that it 'would not be wrong' to invalidate a statute on the manifest showing that it violated constitutional provisions which formed a part of the basic structure, whereas Justice Madan Lokur was very clear that the doctrine of the basic structure has no application to the statutory interpretation. See, Supreme Court Advocate -on-Reord Assn. v Union of India, (2015) 5 SCC 1. See also, *Mahmudhusen Ramrahim Kalota Shaikh v. Union of India* (2009) 2 SCC 1. I am grateful to Professor Amita Dhandha for the latter reference and for a general conversation on the subject.

[65] Roznai at 225

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Kihoto Hollohan v. Zachillher*, [1992] (Suppl.) 2 SCC 651. But in *P.V. Naraismha Rao v State* (1988) 4 SCC 626 he Court opined that the freedom of speech of a member of Parliament was a part of the basic structure of the constitution, See, S. P. Sathe, *Judicial Activism in India* 91-93 (Delhi, Oxford University Press, 2001) and contrast Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of Basic Structure Doctrine*, 23-130 (Delhi, Oxford University Press. 2009); See also, S.P. Sathe,'

Schedule violated the basic feature of judicial review, by making the decision of the Speaker final (in case of defection), Justices differed whether the Tenth Schedule violated the basic feature of 'democracy'.[70] However, if the judicial outcome enunciating unamendability is the 'remedy of last resort' and is a 'judgment day weapon', [71] routinization and spill over to non-amendment arenas will be an unconstitutional exercise of adjudicative leadership. Will this also amount to usurpation of constituent power by courts, or apex courts exercising this power in the name of people?

Constitutional cultures developed by the apex courts matter a great deal, I submit, to the tasks of judicial interpretation. In fact, such a culture develops only through cumulative styles of judicial hermeneutics. For this development, both the *legal* meanings of a text are as crucial as *social* meanings of a constitution. While urging of judicial self-restraint is perhaps sound in the abstract, it should perhaps also be borne in view that SCP is always developed through judicial and juristic[72] activism, because reading of implied limitations on the procedure and power to amend the constitution is always an act of hermeneutic valour which seeks to impart social meaning to amendatory power.[73]

From Positivism to Structuralism' in Jeffery Goldsworthy (ed.), *Interpreting the Constitution: A Comparative Study (*Oxford, Oxford University Press, 2007)

[70] See Krishnasamy, Note 68, supra.

[71] *Id.*, The invocation of Edmund Burke points to very conservative direction: Roznai says that his 'approach succeeds in reconciling Burke's concerns. By 'protecting constitutional identity, it reminds each generation that it is not autonomous but rather remains linked to its past, while simultaneously allowing the 'people' to alter even their basic principles as a means of conservation'.

[72] 'Juristic activism' designates the difference in judicial reasoning as compared with judicial result. Such activism speaks to the future of law, but does not adjudicatively result in any change of law at present. Ordinarily, one talks about judicial, not juristic, activism; this is so because we think that judicial judgment is a unity of reasoning and result. The tie between the two is severed in juristic activism. How differently one may study the varieties of judicial activism is a question as yet not posed in literature concerning the impact of judicial decisions.

[73] The argument that ultimately led to the peculiar ways of enunciation of the basic structure and essential features in *Kesavananada* was the phrase '*this Constitution'* in Article 368. Some Justices reasoned, rightly, that whatever powers had been granted must leave this Constitution (its basic structure) intact. Article 368 did not extend to a wholesale repeal of the constitution and its replacement by a new one.