The London School of Economics and Political Science

Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers

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DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others.

I declare that my thesis consists of 98,746 words.

I can confirm that earlier versions or parts of certain sections (Ch. 1, sec.I; Ch. 2, sec. II; Ch.3; Ch. 4, sec. I; Ch.7, sec. IIA.B, IIIB; Ch. 8, sec. IIIB) were previously published in 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act', 8(1) Vienna Journal on International Constitutional Law (2014), 29-57; 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea', 61(3) American Journal of Comparative Law (2013), 657-719; 'The Migration of the Indian Basic Structure Doctrine', in Judicial Activism in India – A Festschrift in Honour of Justice V. R. Krishna Iyer (Malik Lokendra ed., Universal Law Publishing Co., 2012), 240-262; 'The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments', 62(3) International & Comparative Law Quarterly (2013), 557-597; 'Book Review – Dawn Oliver and Carlo Fusaro (eds), How Constitutions Change: A Comparative Study', 75(5) Modern Law Review (2012) 945–950; 'An Unconstitutional Constitutional Amendment - The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision', 10(1) International Journal of Constitutional Law (2012), 175-207 (with Serkan Yolcu); 'Article Review, Unconstitutional Constitutional Amendments in the Case Study of Colombia', ICONnect Blog (October 17, 2013).

I can confirm that my thesis was copy edited for conventions of language, spelling and grammar by Bianca Jackson.

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ABSTRACT

This research project stems from a single puzzle: how can constitutional amendments be unconstitutional? Adopting a combination of theoretical and comparative enquiries, this thesis establishes the nature and scope of constitutional amendment powers by focusing on the question of substantive limitations on the amendment power, looking at both their prevalence in practice and the conceptual coherence of the very idea of limitations to amendment powers.

The thesis is composed of three parts. The first part is comparative. It examines substantive explicit and implicit limitations on constitutional amendment powers through manifold descriptions of a similar constitutional phenomenon across countries, demonstrating a comprehensive pattern of a constitutional behaviour. This process is theory-driven, and the second part of the thesis constructs a general theory of unamendability, which explains the nature and scope of amendment powers. The third part explains how judicial review of amendments is to be conceived in light of the theory of unamendability, and further assesses the possible objections to the theory of unamendability.

The theory of unamendability identifies and develops a middle ground between constituent power and pure constituted power, a middle ground that is suggested by the French literature on 'derived constituent power'. Undergirding the discussion, therefore, is a simple yet fundamental distinction between primary constituent (constitution-making) power and secondary constituent (constitution-amending) power. This distinction, understood in terms of an act of delegation of powers, enables the construction of a theory of the limited (explicitly or implicitly) scope of secondary constituent powers. This distinction is supplemented by a further one, between various shades of secondary constituent powers along a 'spectrum', a theoretical construct that links amendment procedures to limitations on amendment powers. The theory of unamendability explicates the limited nature of amendment powers and the practice of judicial review of amendments, thus clarifying the puzzle of unconstitutional constitutional amendments.

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CHAPTER 1: INTRODUCTION

I. THE MEANING AND IMPORTANCE OF CONSTITUTIONAL AMENDMENTS

This thesis concerns the nature and scope of the power to amend constitutions. 'Constitution', in this thesis, is used to denote the narrow sense of the term, i.e. the cluster of supreme principles and rules, typically set in a written legal document (or a set of such documents), which establish and regulate the state's basic institutional arrangements and practices and express the nation's most enduring values.[1] Not every state that has a constitution (in that sense) is a *constitutional* state. Some constitutions are façade/sham constitutions, in that they exist for 'cosmetic' purposes only and have no effect in reality. Others are in line with the political reality but do not impose binding rules upon it; on the contrary, they reinforce governmental power.[2] Thus, this thesis focuses on constitutional systems in the modern context of 'constitutionalism'.[3] Constitutionalism is nowadays commonly identified by certain conditions, such as: the recognition of the people as the source of all governmental authority; the constitution is supreme law (in the sense that it carries the highest normative status within the legal hierarchy); the constitution regulates and limits the power of government; demanding adherence for the rule of law and respect for fundamental rights.[4] It also focuses on national constitutions rather than state constitutions within a Federal system due to the important theoretical distinctions between the two.[5]

Constitutions change with time. Such change can take place in various ways. It can occur outside of constitutional law, in the social sphere, for instance 'by gradually shifting the rank and importance of constitutional factors … and norms'.[6] Constitutions may also be modified according to a procedure stipulated within them. This is the constitutional amendment procedure, by which textual changes to a constitution may occur.[7] By the term *constitutional amendment*,[8] I refer to formal constitutional amendments

[1] For wide and narrow senses of constitutions, see Perry (2001, 103); Tully (2002, 204-5); Elkins, Ginsberg and Melton (2009, 38-51).
[2] See generally Loewenstein (1972, 174); Sartori (1962, 853); Murphy (1993A, 8-9); Law and Versteeg (2013, 863).
[3] McIlwain (1975, 132).
[4] See, for example, Henkin (1994, 40-42); Grimm (2010B, 9).
[5] See Saunders (2010-2011, 853).
[6] Smend (2002, 248).
[7] Schwartzberg (2009, 5).

enacted through the amendment procedure and not to any *constitutional changes*.[9] Of course, important constitutional changes may also take place outside of the formal amendment process,[10] for instance, through judicial interpretations or practice.[11] Some have claimed, for example, that certain judicial interpretations of the U.S. Constitution are better viewed as amendments.[12] Indeed, a modification of a constitutional text's meaning may often carry a greater effect than its formal modifications.[13] Nonetheless, formal constitutional amendments remain an essential means of constitutional change.[14] For some, such as Georg Jellinek, the issue of constitutional amendments is less interesting than that of transformation, which occurs outside of the constitutional text.[15] However, as this thesis demonstrates, constitutional amendments raise imperative questions about constitutional theory and are far from being tedious.

The modern phenomenon of constitutionalism emerged in the late years of the eighteenth century, first in the North American colonies and then in Europe.[16] In North America, the first state constitution – of Virginia – did not include any amendment provision. However, between the years 1776 and 1783, great advances occurred in constitutional design as state constitutions provided special amendment procedures.[17] Indeed, soon after the Declaration of Independence, six of the first thirteen constitutions included amendment provisions.[18] At the Federal level, from the commencement of the 1787 Constitutional Convention, it was clear that it would be necessary to include within the Constitution an amendment provision. The 'Virginia Plan', introduced by Edmund Randolph, contained a provision allowing for amendments 'whensoever it shall seem necessary'. When doubts were raised as for the need to include an amendment provision, George Mason replied that 'amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance

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[8] Earlier constitutional literature drew a distinction between major and minor constitutional alterations, calling the former *revisions* and the latter *amendments*. See Willoughby (1921, 128); Lutz (1994, 356). I use *amendment*s to describe any formal changes to the constitution, whether major or minor.
[9] See, for example, Oliver and Fusaro (2011); Contiades (2012).
[10] There is a great deal of work regarding constitutional change outside of the formal amendment process. See mainly the project of Ackerman (1991); Ackerman (1995, 63); Ackerman (2000A).
[11] Llewellyn (1934, 1); Strauss (2000-2001), 1457.
[12] Coudert (1904, 331); Levinson (1995B, 33).
[13] Grimm (2011, 27).
[14] Vermeaule (2006, 229).
[15] Jellinek (2002, 54).
[16] Henkin (1988-1989, 1023).
[17] Loughlin (2010, 280-81).
[18] Delaware Const. (1776), Pennsylvania Const. (1776), Maryland Const. (1776), Georgia Const. (1777), Vermont Const. (1777), and Massachusetts Const. (1780). See Martig (1937, 1254).

and violence'.[19] An amendment formula was thus considered as a 'healing principle' that would allow the Constitution to stand the test of time.[20] Such a mechanism was required, especially in light of the Articles of Confederation's almost impossible amendment process – the requirement of states' unanimity.[21] The chosen mechanism for amendments in Art. V of the Constitution,[22] as James Madison described in the Federalist No. 43, 'guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults'.[23] Art. V was described as 'the keystone of the Arch',[24] the constitution's '*vis medicatrix*'.[25] Moreover, it was claimed that the idea of including within a constitution a special provision for its amendment is 'one of America's principal contributions to political science'.[26] This is now a universally recognised constitutional method.[27] In most constitutional systems, the constitutional amendment process is different (and more difficult) than ordinary law-making, and usually involves either (or a combination of) a qualified majority in parliament, numerous decisions, time delays, etc. Bodies other than parliament are often involved. For instance, some constitutions require ratification by popular referendum or by states (in federal systems). In some constitutions, there are diverse procedures within the constitution for different subject matters (see Chapter 6).

There are several main rationales for why amendment mechanisms are deemed imperative. *First*, constitutions ought to be sufficiently flexible to allow future generations to respond to various political, economic, social, and other changes, as well as changes in

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[19] See Vile (2005, 13); Vile (2003, 300).

[20] Wood (1998, 613).

[21] Articles of Confederation, art. XIII (U.S. 1781). See Prince (1867, 105-6); Thompson (1913, 17).

[22] U.S. Constitution, art. V: 'The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'. For the history of the drafting of art. V, historical views on it, and of some of the prevailing theories surrounding it, see Denning (1997-1998, 155); Vile (1991B), 44.

[23] Madison (1817, 239).

[24] Martig (1937, 1284).

[25] Calhoun (1851, 295).

[26] Sheips (1951, 48). See, much earlier, Jameson (1867, 484): 'The idea of the people thus restricting themselves in making changes in their Constitutions is original…'

[27] Lutz (1994, 356) ('The innovation of an amendment process … has diffused throughout the world to the point where less than 4% of all national constitutions lack a provision for a formal amending process') (referring to van Maarseveen and van der Tang (1978, 80)). According to the data of the Constitutional Design Group (2008), in 2000, 96% of world constitutions included amendment provisions.

the society's system of values.[28] Constitutions that do not allow for such adaptations are in peril of becoming irrelevant and eventually avoided: 'a constitution totally unsuited for changes sooner or later is doomed to become an instrument incapable of serving its purpose, bound therefore to be superseded'.[29] *Second*, an amendment procedure is a means to correct imperfections in the existing instrument.[30] Constitutions are made by 'men, not gods'.[31] The amendment process enables the correction of flaws or shortcomings that are revealed by time, practice, and experience, thus reflecting the fallibility of human nature.[32] *Third*, the amendment process assists in fulfilling people's right to alter their form of government, and by providing a peaceful method for change without recourse to a forcible revolution, it serves as 'the safety-valve to a nation'.[33] *Fourth*, the amendment process preserves the government's legitimacy, for an unamendable constitution established in the past can hardly be regarded as manifesting the consent of the governed.[34] *Lastly*, the amendment process provides flexibility, and constitutions that are flexible are likely to endure through time.[35]

Just as constitutions should allow for changes, they should not be too easily amended. *First*, in setting the 'rules of the game', the constitution must be sufficiently stable in order to allow participants to anticipate their acts' consequences. An overly flexible constitution that allows frequent changes might cause instability, uncertainty, and undermine faith in the political order.[36] *Second*, an easy amendment process places fundamental principles and institutions at risk of being swept away by majorities momentarily fascinated with a new idea.[37] *Third*, an overly flexible amendment process, together with short-term political interests and the danger of qualified majorities, give rise to fears of abuse of the amendment power.[38] *Fourth*, a constitution that could be easily and carelessly amended might lose its authority – its value as the supreme law of the land – ultimately subverting any authentic constitutionalism.[39] *Lastly*, extreme

[28] Mueller (1999, 387); Lutz (1994, 357).
[29] Fusaro and Oliver (2011, 433). See also Grimm (2010A, 33).
[30] Levinson (1995A, 3).
[31] Pitkin (1987, 168).
[32] Lutz (1994, 356); Fombad (2007, 31); Schwartzberg (2009, 27, 115, 122-125).
[33] Williams (1928, 530-536).
[34] Dellinger (1983-1984, 386-7).
[35] Elkins, Ginsberg and Melton (2009, 81-103, 221).
[36] On the requirement that law must maintain certain stability, see Fuller (1969, 79-81). On the need for the law to be stable but not completely still see Pound (1960, 23).
[37] Suber (1999, 31-32).
[38] Conrad (1970, 415); Gatmaytan (2010, 38); Landau (2013A, 226).
[39] Wright (1994, 52); Fombad (2007, 52); Elkins, Ginsberg and Melton (2009, 82, 100); Akzin (1956, 337); Vermeaule (2006, 254).

constitutional flexibility is empirically associated with increased risk of constitutional demise.[40]

Since 'the ultimate measure of a constitution is how it balances entrenchment and change',[41] the importance of the amendment formula is clear.[42] This is why the debate on amendment rules has attracted the interest of constitutional economics and public choice theorists.[43] However, the 'rule of change'[44] is not merely a technical mechanism of balancing constitutional stability and flexibility – the great 'antinomies' of law.[45] It directly implicates the nature of the constitutional system.[46] Mads Andenas suggests that 'each country's amending formula … provides an insight into the intricacies and peculiarities of that country's social and political culture'. It is, after all, 'the space in which law, politics, history and philosophy meet'.[47] It was therefore argued, in the American context, that the amendment procedure contains 'a microcosm the most fundamental principles of our constitutional structure'.[48] Raising practical issues as well as theoretical concerns, the amendment process touches the very core of any legal system.

II. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

Constitutions can be formally changed through the amendment procedure. Are there any *substantive* limitations on the ability to amend constitutions?[49] Is the scope of the amendment power sufficiently broad to permit any amendment whatsoever, even one that violates fundamental rights or basic principles?[50] In June 2008, the Turkish Constitutional Court annulled Parliament's amendments to the Constitution regarding the principle of equality and the right to education.[51] Parliament's intention was to abolish the headscarf ban in universities. The Court ruled that because the amendments infringed upon the constitutionally protected principle of secularism they were

[40] Elkins, Ginsberg and Melton (2009, 22, 31-32, 140).
[41] Chemerinsky (1998, 1561).
[42] McKay (1963-1964, 203); Wheare (1966, 7). See contra Williams (1963-1964, 237): 'It is not the constitution-amending power that plays the major role in the American system in resoving the dilemma of stability and change in constitutional law. It is the Supreme Court.'
[43] See, for example, Giovannoni (2003, 37); Boudreaux and Pritchard (1993, 111).
[44] Hart (1961, 93-94).
[45] Cardozo (2000, 1-7).
[46] Dorfman (2007, 429).
[47] Andenas (2000, xii-xiii).
[48] Markman (1989, 115).
[49] This thesis does not focus on procedural limitations on constitutional amendment powers.
[50] Imagine Ackerman's scenario of an amendment to the U.S. Constitution repealing the 1st Amendment and establishing Christianity as state religion. Ackerman (1991, 14-15).
[51] Turkish Constitutional Court Decision of June 5, 2008, No. 2008/16; 2008/116.

'unconstitutional'.[52] The idea that amendments that were enacted according to the amendment procedure could be declared 'unconstitutional' on the grounds that their content is at variance with the existing constitution is perplexing. After all, is it not the purpose of amendments to change the existing constitution's content?[53]

At first glance, the very idea of an 'unconstitutional constitutional amendment' seems puzzling.[54] The constitution is the highest positive legal norm.[55] The power to amend the constitution presupposes the same kind of power as the one to constitute a constitution.[56] It is a supreme power within the legal system, and as such, it can reach every rule or principle of the legal system.[57] If this power is indeed supreme, how can it limit itself?[58] If it is limited, how can it be supreme? This is the legal equivalent of the 'paradox of omnipotence': can an omnipotent entity bind itself?[59] Both positive and negative answers to these questions lead to the conclusion that it is not omnipotent.[60] Moreover, if the amendment power is a kind of *constituent power*, then it remains unclear why a prior manifestation of that power prevails over the later exercise of a similar power.[61] Quite the reverse: according to the *lex posterior derogat priori* principle, a later norm should prevail over a conflicting earlier norm of the same normative status.[62] Finally, the constitution, which expresses the people's sovereign power, binds and guides ordinary law, which expresses the parliament's ordinary power.[63] The common meaning of 'unconstitutionality' is that an ordinary law, inferior to and bound by the constitution, violates it.[64] How can 'unconstitutionality' refer to an act carrying the same normative status as the constitution itself?[65] Arguably, as equal components of the same constitution, constitutional amendments simply cannot be unconstitutional.[66] As Kathleen Sullivan writes, a 'properly enacted constitutional amendment cannot literally be

[52] See Özbudun (2009, 533); Saygili (2010, 127); Roznai and Yolcu (2012, 175).
[53] Preuss (2011, 431).
[54] Jacobsohn (2010A, 34) calls it a 'conundrum' and Harris (1993, 169) writes that it is a *prima facie* 'riddle, a paradox, or an incoherency'.
[55] Kelsen (2006, 115-116).
[56] Weill (2007, 483-84).
[57] Suber (1999, 31).
[58] Rousseau (2008, 130) (claiming that limitation of sovereignty results in its destruction).
[59] Mackie (1955, 210); van den Brink (1993, 135).
[60] Mackie (1955, 210); Anonymous (1995-1996, 1751).
[61] Tushnet (2012-2013, 2005).
[62] Broom (2000, 26-270); Kelsen (1967, 206).
[63] Rawls (1993, 231-33).
[64] Dicey (1982, 371-72).
[65] Compare McDonald (1998, 259): '…there is no conceptual inconsistency between constitutionalism and allowing for constitutional amendment.'
[66] Dietze (1956, 21).

unconstitutional'.[67] Therefore, the idea of an unconstitutional constitutional amendment seems *prima facie* paradoxical.[68] Is it an actual paradox, or merely an ostensible one caused by an imprecise understanding of certain presuppositions? This thesis argues that clarifying the main concept – the constitutional amendment power, its nature, and its scope – is the first step for undoing this apparent paradox.[69]

The issue of the nature and scope of amendment powers raises important questions. Are there any constitutional principles so fundamental that they carry a *supra-constitutional* status in the sense that they cannot be amended?[70] What can and should courts do when they face a *fait accompli* in the form of a constitutional amendment adopted according to the amendment procedure but that changes the constitution's basic structure?[71] Does a radical constitutional change brought about through an amendment cease to be 'an amendment' and become an act of revolution or *coup d'état* by those holding the amendment power?[72] This thesis focuses on the nature and scope of the amendment power.[73] Its main enquiries are therefore:

1. What is the *nature* of amendment powers?
2. If amendment powers may be limited, which limitations are applicable to them?
3. What is the role of courts in enforcing limitations on amendment powers?

It seems that the puzzle surrounding the possibility of an 'unconstitutional constitutional amendment' concerns a deeper conflict between *substantive* versus *procedural*

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[67] Sullivan (1995, 24).

[68] The relationship between the problems of amendments and logical paradoxes are well known. See Ross (1969, 1); Hart (2001, 170); Suber (1990).

[69] This thesis deals exclusively with constitutional amendments. It does not deal with the possibility of an original constitution being itself unconstitutional. See e.g. Security Council (SC) Resolution 554 of 1984, regarding the new Constitution of South Africa of 1983 that entrenched apartheid. In that resolution, the SC declared that it 'strongly rejects and declares as null and void the so-called "new constitution"', due to its contradiction of the principles of the UN Charter, mainly racial equality; see also Paleveda (1992).

[70] By the term *supraconstitutional*, I refer to principles or rules that might be placed 'above' the constitutional amendment power. See, for example, Arné (1993, 461); Vedel (1993, 76). Favoreu (1993, 74-6) distinguishes between 'internal supraconstitutionality' – those constitutional principles with which the amendment power must comply – and 'external supraconstitutionality'– those international or supranational standards with which the constitutional standard must comply. This thesis focuses on the former, i.e. it examines limitations on amendment powers that derive implicitly or explicitly from within the constitutional order and not from external sources such as international law. On possible limitations of international law on amendment powers see Valdés (2008, 121) (the globalization of fundamental rights and jus cogens norms set new limits on the amendment powers); Schnably (2007-2008, 417) (certain emerging international and supranational legal rules address matters such as constitutional amendments); Samar (2008, 667) (limitations on constitutional amendment must include human rights, which are universally recognised). My own thoughts on this issue were published in Roznai (2013A, 557).

[71] Barak (2002-2003, 89).

[72] Cf., Chatterjee (1976, 70).

[73] This work does not deal with constitutional provisions that aim to block, in advance, political associations which are 'non-democratic' or strive for a revolutionary change in the nation's identity, restricting them from participating in the elections for parliamentary bodies. See, for example, Navot (2008, 91); Macklem (2006, 488); Mersel (2006, 84); Kremnitzer (2004, 157); Murphy (1993B, 173).

approaches to constitutionalism; the former focuses on the constitution's fundamental principles and the latter on the constitution's procedures.[74] A *proceduralist* 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.[75] A *substantivist* might claim that a revolutionary change can also occur through legal means.[76] The thesis advanced here might be described as a substantive constitutionalist one. It proposes to read 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. But structuralism itself is not enough; this structure is built upon certain pillars, foundations that fill its essence - hence *foundational structuralism*. Accordingly, the focus is not merely on the constitution's procedures, but also on its substance. 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.[77]

III. RESEARCH METHODOLOGY

Whereas the definition of the nature of the amendment power is among the most abstract questions of public law,[78] the question of its scope is not purely of academic interest; it has practical importance. The issue has already been adjudicated in various countries, including India, Turkey, Germany, and Brazil, and is likely to arise, sooner or later, in other countries as well. The number of proposed constitutional amendments worldwide also makes this topic highly relevant.[79] Moreover, any study on the nature and scope of the amendment power has practical importance since nowadays 'constitutional reform is neither taboo nor an extraordinary process, but part of normal constitutional

[74] Tulis (1988, 548). Others might describe it as a conflict between positivism and natural law approaches: the former focuses on the constitution's wording views the amendment power – unless otherwise stated – as unlimited, wheares the latter, which focuses on the constitution's spirit, would argue that the amendment power is never sovereign thus always limited. See Jayadevan (2010, 249); Michelman (1995, 1297).

[75] Kelsen (1967, 209); Kelsen (2006, 117).

[76] Cf., Colón-Ríos and Hutchinson (2012, 593). But see Green (2004-2005, 333): 'If Article V procedures were used to pass an amendment to the United States Constitution that prohibited private property, only a political, not a legal, revolution would have occurred'.

[77] Thus it could be deemed a revoluationary constitutional change. Cf., Preuss (1995, 81); Kuo (2010, 398). Albert (2009, 5) designates such a constitutional change as 'nonconstitutional'.

[78] Klein (1978, 203).

[79] For instance, Sullivan (1995) has diagnosed the unwarranted desire to amend the U.S. Constitution as 'constitutional amendmentitis', and Smith (1927, 18) criticised the 'craze for tinkering with the constitution.' This phenomenon is not unique to the American constitutional discourse.

life, reflecting that constitutions are no longer perceived as mystical, sacred documents but as indispensable tools used regularly and interminably'.[80] However, even though this issue has attracted increased attention in recent years,[81] it suffers from the lack of a comprehensive and coherent theoretical framework that is globally applicable.[82] Therefore, much could be gained by wider comparative and theoretical research.[83]

This project is both comparative and theoretical. It is comparative, not in the traditional sense of conducting case studies of one or two foreign legal systems, but in seeking more comprehensive patterns of 'constitutional behaviour'. It thus uses a method of comparative law at a high level of abstraction.[84] As such, this research reviews various constitutional provisions limiting amendments and analyses the rich vein of relevant jurisprudential writings and case law dealing with limitations on the amendment power from jurisdictions that have dealt with the issue. It examines the concept of 'unconstitutional constitutional amendments' through 'multiple descriptions of the same constitutional phenomena across countries'.[85] This process is theory-driven in the sense that it aims to draw an explanatory theory from this comparative practice.[86]

Indeed, the framework which contextualises the theoretical approach of this thesis is constitutional theory. As an endeavour to apprehend constitutionalism as 'a form of political practice' and to evaluate how such practice 'works against its own

[80] Contiades (2012, 2). As Peterson (1919: 189) commented, 'constitutional amending is now an established vocation'.

[81] See, for example, Halmai (2012, 182); Pfersmann (2012, 81); Bezemek (2011, 517); Barak (2011A); Weintal (2011, 449); Omejec (2010); Albert (2009, 5); Samar (2008, 667); Colon-Rios (2008, 207); Jacobsohn (2006A, 460); Mazzone (2004-2005). 1747; Da Silva (2004, 454); O'Connell (1999, 74); Wright (1990-1991, 741).

[82] To give just a few examples: Gözler (1995) calls for an extreme positivistic approach that rejects any implicit limits and accepts only expressed limits on amendment powers. This approach seems erroneous both theoretically and practically, as it appears that the global trend is moving towards accepting the idea of implied limitations. Rigaux (1985) focuses on substantive limits in the interrelationship between different legal orders, but draws mainly from three European states (Belgium, France and Germany), which might cause difficulties for common-law scholars (See White (1988, 647)). Weintal (2005) has made an ambitious effort in providing a theory of 'eternity clauses'. Nonethelss, Weintal seems to give short shrift to important issues; he touches only briefly the issues of implicit limits and ignores the phenomenon of 'unamendable amendments'. Moreover, Weintal's theory justifies unamendable provisions as a mechanism for setting the rules of the game for accepting revolutionary changes in the foundations of the nation's self-determination. However, this focus solely on 'constitutive principles' fails to explain the existence of other unamendable provisions. More importantly, Weintel (intentionally) pays minimal attention to institutional issues such as judicial review, which is one of the most burning and relevant topics regarding limitations on amendment powers. Contrary to Weintal, Schwartzberg (2009) argues against constitutional entrenchment primarily on the ground that it is undemocratic and grants too much power to the judiciary. This approach, while grounded, overlooks some important arguments to the contrary, as elaborated in this thesis. Finaly, Krishnaswamy (2010) has done an excellent work in analysing the Indian 'Basic Structure Doctrine'. However, as he clarifies early on (xxxii–xxxiii), he does not propose a general theory of judicial review of constitutional amendments.

[83] Cf., Andenas (2000, ix).

[84] Pfersmann (2009, 85).

[85] Hirschl (2008, 26).

[86] On theory-driven methodology in comparative law, see generally Adams and Bomhoff (2012, 7-8).

internal logic',[87] constitutional theory aims to 'identify the character of actual existing constitutional arrangements' and 'offer an explanation of character of the practice'.[88] The theoretical framework through which the problem of limitations on the amendment power is examined establishes the theoretical presuppositions of the subject area, i.e. the nature and scope of the amendment power.[89] The theoretical study's approach is mainly *explanatory*, aimed at describing and explaining the legal behaviour of amendment powers, and how we should conceive amendment powers and judicial review of constitutional amendments, with some *normative* proposals such as guiding principles for the future.[90]

This thesis constructs a general theory of limits on amendment powers, which relates different concepts such as power, authority, rights, democracy, and judicial review to each other in a coherent form.[91] True, one may be inclined to share Joseph Raz's scepticism about the potential of grand constitutional theories. Perhaps there really is 'no room for a truly universal theory of the subject'.[92] However, due to the foremost theoretical nature of this research, it does not focus on any specific jurisdiction and confronts the research questions from a more general perspective. Its enquiries transcend any specific boundaries insofar as they present phenomena common to all contemporary constitutional democracies. The global approach taken in this thesis is intended to allow the drawing of broad conclusions about limits to constitutional amendments, which may apply across many countries and areas. It offers fresh insights into the topic under examination and constructs a theoretical framework that addresses the puzzle of unconstitutional constitutional amendments.

IV. An Outline

This thesis is comprised of three parts. Part I is comparative. It demonstrates the different ways that various countries limit the amendment power. Chapter 2 ('Explicit Limitations') enquires into explicit limitations on constitutional amendment powers, providing a conceptual framework for understanding 'unamendable provisions'. Based upon an original collection of 735 national Constitutions from 1789 until 2013 (which is presented in the Appendix to this thesis), it describes the structure, content and

[87] Tierney (2012, 2).
[88] Loughlin (2005A, 186).
[89] Seeking to elucidate the concept of the amendment power and set its boundaries, the theory relied upon might be understood as a conceptual legal theory. Cf. Bix (1999, 17).
[90] On explanatory and normative theories see Kelsen (2002, 58).
[91] Cf., Loughlin (2005B, 62-64).
[92] Raz (1998A, 152). See also Poole (2007, 504).

characteristics of unamendable provisions, which exists (and existed) in national constitutions. Chapter 3 ('Implicit Limitations') describes the idea that even if a constitution is silent with regard to any explicit limitations on the amendment power, this does not necessarily mean that the amendment power is unlimited. Certain implied limitations, this chapter demonstrates, may be imposed upon it in order to preserve that constitution's identity.

Part II formulates a theory of the nature and scope of amendment powers, aimed at explaining the phenomena of *unamendability* described in the previous chapters.[93] Chapter 4 ('The Nature of Amendment Powers') addresses the thorny problem of the nature of the amendment power: is it an exercise of *constituent power* or *constituted power*? Reviving the old French doctrine distinguishing between *original constituent power* and *derived constituent power*, it argues that the amendment power is *sui generis*: it is neither a pure *constituted power*, nor an expression of *original constituent power*. It is an exceptional authority, yet a limited one. I term it a *secondary constituent power* and apply a theory of delegation in order to illuminate its unique nature. While Chapter 4 explains *why* the amendment power is limited, Chapter 5 ('The Scope of Amendment Powers') explains *how* it is limited. Following the delegation theory presented in Chapter 4, it is argued that the *primary constituent power* may explicitly limit the inferior *secondary constituent power*. Moreover, any organ established within the constitutional scheme to amend the constitution, however unlimited it may be in terms of explicit language, nonetheless cannot modify the basic pillars underpinning its constitutional authority so as to change the constitution's identity. A constitution, according to this chapter, has to be read in a *foundational structuralist* way – as a certain structure that is built upon certain foundations. Chapter 6 ('The Spectrum of Amendment Powers') analyses the theory of unamendability in light of the *primary constituent power*. It argues that unamendability can limit only the *secondary constituent power*, but cannot limit the *primary constituent power*, perceived as the people's democratic constitution-making power. This chapter thus calls to conceive constitutional democracies in a 'three-track' way, i.e. as encompassing ordinary lawmaking; constitutional lawmaking enacted by the limited *secondary constituent powers* and extraordinary constitutional lawmaking enacted through the reemregence of *primary constituent powers*. It is this understanding which leads to the examination of the link between the limitations upon constitutional amendment powers and the amendment

[93] I use the term *unamendability* to describe the resistence of constitutional subjects (provisions, principles or institutions) to their amendment; such subjects are described as impervious to constitutional amendment, either explicitly or implicitly. See Albert (2008, 37-44).

procedures. I develop a spectrum theory according to which the constitutional system is polymorphic: the more similar the democratic characteristics of the amendment powers are to those of the *primary constituent power*, the less it should be bound by limitations; and *vice versa*: the closer it is to a regular legislative power, the more it should be fully bound by limitations. This examination is the final step towards a theory of unamendability.

Part III deals with the implications of a theory of unamendability. Chapter 7 ('Judicial Review of Constitutional Amendments') addresses the role of the courts in enforcing limits on the amendment power. It is one thing to claim that the amendment power is limited, yet it is quite another to claim that such limits are enforceable through substantive judicial review by courts. On the grounds of the forgoing theoretical analysis conducted in part II, this chapter provides theoretical explenations for the practice of judicial review of constitutional amendments. It also sketches a legitimacy scale of judicial review of constitutional amendments based upon several criteria, and proposes guidelines for the exercise of judicial review of constitutional amendments, in light of the theory of unamendability. Chapter 8 ('Assessing Objections to Unamendability') identifies the main objections to the theory of unamendability and its judicial enforcement, and evaluates them based upon the theoretical groundwork of previous chapters. Chapter 9 concludes.

PART I

LIMITATIONS

CHAPTER 2: EXPLICIT LIMITATIONS

In Chapter 1, it was argued that the amendment process is a method for reconciling the tension between stability and flexibility. 'A state without the means of some change', Edmund Burke wrote, 'is without the means of its conservation'.[1] One way in which constitution-makers balance stability and flexibility is by designing different amendment processes for different provisions.[2] They separate the constitutional subjects so that the majority of ordinary provisions require a simple amendment procedure, whilst a minority necessitate a different, more difficult procedure or are considered 'unamendable'. In other words, their amendment would be prohibited.[3]

This chapter deals solely with the latter type of cases. In order to conceptualise 'unamendable provisions', the *Appendix* presents a collection of explicit substantive limitations that were and are stipulated in 735 former and current written national constitutions. Thus, this chapter unavoidably focuses on constitutional texts. Though this approach has the disadvantage of telling only part of the story, the constitutional text itself matters for both practical and symbolic reasons.[4] Moreover, while formulating such a general conceptualisation carries with it certain drawbacks relating to its minimal intention,[5] the collecting of worldwide constitutions is necessary for the development of a general theory – as presented in this work – which can explain the broad and diverse types of unamendable provisions.

The chapter is developed in the following way: the first part examines unamendable provisions. In order to do so, it reviews the origins of unamendable provisions and supplies a general overview of this constitutional phenomenon. It then describes the structure and content of unamendable provisions, seeking any content-based or material links among them. Finally, it analyses the characteristics of unamendable provisions. It is not the aim of this chapter to argue whether unamendable provisions are necessarily good or bad, but rather to study explicit limitations on the amendment power. These limitations will be further explained in Part II of the thesis in light of the theory regarding the nature and scope of amendment powers. Furthermore, any substantive limitations on the amendment power, and as such unamendable

[1] Burke (2004, 16).
[2] Eisgruber (2001, 14).
[3] Ducháček (1973B, 32-36); Bezemek (2011, 528-541).
[4] Breslin (2009, 9).
[5] Sartori (1970, 1044).

provisions as well, raise objections. This chapter does not attempt to deal with any objections to unamendability; they are treated separately in Chapter 8. This is because the main objections to unamendability are only relevant if unamendable provisions are deemed enforceable in courts (see Chapter 7), and because these objections are not unique to explicit limitations on constitutional amendment, but rather apply, *mutatis mutandis*, to implicit limitations on the amendment power as well.

The importance of this investigation is two-fold: first, since a large percentage of world constitutions now include unamendable provisions, this practice has become an important element of modern constitutional design. Second, in recent decades unamendable provisions have expanded both in terms of their numbers and their detail, currently covering a wide range of topics. This growing phenomenon demands careful attention.

I. UNAMENDABLE PROVISIONS

John Locke, who in 1669 wrote 'The Fundamental Constitution' of the colony of Carolina, provided that it 'shall be and remain the sacred and unalterable form and rule of government of Carolina forever'.[6] Treating the entire constitution as unamendable derives either from ascribing it to a super-human source, or from the constitution-maker being afflicted with exceptional arrogance and belief that he has achieved the apex of perfection.[7] Nowadays, such 'delusions of unamendable grandeur' no longer exist.[8] However, whereas completely rigid constitutions are presently uncommon, in many constitutions the amendment of certain provisions is strictly prohibited.

In the literature, provisions that prohibit amending certain subjects are referred to as 'immutable', 'unchangeable', 'unalterable', 'irrevocable', 'perpetual', or – drawing from the German term *ewigkeitsgarantie* – 'eternal'.[9] I prefer the term 'unamendable'. The terminology should not be dismissed as mere semantics; it bears normative implications. The other terms imply everlasting provisions, but this implication is inaccurate. These provisions are neither eternal nor unchangeable. While they serve as a mechanism for limiting the amendment power, they do not – and cannot – limit the *primary constituent power*. Even unamendable provisions are subject to changes introduced by extra-constitutional forces. Moreover, their content can also 'change' through judicial

[6] Locke (1823, 198); Scheuerman (2004, 73). See generally Armitage (2004, 602).
[7] Akzin (1966, 43).
[8] Levinson (2001, 272).
[9] See Kokott (1999, 109).

interpretation. The Brazilian terminology – which refers to these provisions as 'petrous clauses' (*cláusula pétrea*[10]) to express their rigidity – is more accurate in that respect since even rocks cannot withstand the volcanic outburst of the *primary constituent power*. Therefore, in order to describe the legal situation more accurately, I refer to these provisions throughout this thesis as 'unamendable'.

Unamendable provisions function as a 'barrier of change' (*veränderungssperre*).[11] They reflect the idea that certain constitutional subjects ought to be protected from alteration. Different motives for the creation of unamendable provisions can be suggested. *First*, each polity wants to preserve its own existence and identity. Presumably, constitution-makers regarded the content of specific provisions to be so pivotal to the essence of the constitution or to the state's existence and identity that they should endure for generations.[12] Unamendable provisions are meant to provide 'hermetic protection' and block even the constitutional amendment process, thereby preventing violations of certain basic constitutive principles via the majoritarian procedure. Thus they reflect the idea that a nation's identity and constitutive narrative should not be subjugated to the majority's caprices.[13] *Second*, constitution-drafters need to design constitutional provisions so as to work exactly against the features of a state's tradition and culture which would probably cause damage through the ordinary political process.[14] Hence, some values that are material to the constitutional order might be considered as open to abuse, especially in light of prior experience, and thus be deems unamendable. Arnold Brecht, writing in the context of post-WWII Germany, suggested that:

> For preventing the possibility the majority rule will be abused to authorize barbaric measure ... it would be advisable for the new German constitution (and for any other democratic constitution to be enacted in the future) to contain certain sacrosanct principles and standards [which] ... could not be impaired even by constitutional amendments. They should include fundamental principles regarding respect for the dignity of man, the prohibition of cruelties and tortures, the preclusion of ex post facto laws, equality before the law, and the democratic principle that the law itself cannot validly discriminate for reasons of faith or race.[15]

[10] Mendes (2005, 451).
[11] Muth (2004, 157).
[12] Fassbender (1998, 142); Albert (2010, 672); Pinto (2007, 4).
[13] Weintal (2005, 11, 28). For example, the unamendability of fundamental rights reflects the idea that 'unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority'; See Beck (2006-2007, 615).
[14] Sunstein (1991, 385).
[15] Brecht (1945, 138).

Unamendable provisions thus reflect a kind of distrust of those who wield the amendment power. *Third*, constitution-makers are motivated by their personal desires and beliefs.[16] They also have individual and institutional interests in seeing their power protected. Unamendable provisions can function as a useful tool for political actors to preserve power asymmetry.[17] *Lastly*, constitution-makers have an interest in protecting certain constitutional subjects that threaten to tear society apart if opened to political debate [see infra Section IIIC.].

It is told that after implementing extensive reforms, Lycurgus, Sparta's great lawgiver, administered an oath that his laws would be observed without alterations until his return from a journey to the oracle. After the oracle reassured him that his laws were good for the people, he sent her words to Sparta and sacrificed his life to perpetuate his laws, which indeed lasted for 500 years.[18] The contemporary relevance of this story is not only due to the idea of 'immutable' laws, but also because of the lawmaker's motives. Just as Lycurgus wanted his laws to last forever since he believed they were good for his people, so too modern unamendable provisions largely reflect a kind of paternalistic idea according to which constitution-makers know 'what is best' for the people and 'enshrine' those well-esteemed principles or institutions. The environment in which constitutions emerge profoundly influences the character and composition of any unamendable provision included in the text. This chapter shows, however, that there are similarities in the content, aims, and characteristics of many of the world's unamendable provisions.

II. ORIGINS AND DEVELOPMENT

The idea of entrenched laws is not novel.[19] One notable example is the Pennsylvania Charter of Privileges of 1701, which declared in Art. VIII that:

> Because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences as aforesaid, I do hereby solemnly declare, promise and grant, for me, my Heirs and Assigns, That the First Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any

[16] Elster (1995, 376-386).
[17] See Schwartzberg (2009, 24).
[18] Plutarch (2009, 113-14).
[19] Ancient Athenians entrenched certain financial decrees, treaties and alliances in order to enhance their credibility in the eyes of potential allies. See Schwartzberg (2009, 32, 101-103). The Cromwellian Constitution of 1653 recognised fundamental and unchangeable laws. See Dicey (2009, 103); Friedrich (1968, 136); Schwartzberg (2009, 101-3). In Hungary, the Act VIII of 1741 on the liberties and privileges of noblemen was declared to be unamendable. See Szente (2007, 239).

Alteration, inviolably for ever.[20]

This unamendability, Gerhard Casper remarks, 'posed the ultimate conundrum of constitutionalism – the possibility of unconstitutional constitutional amendments'.[21]

The modern constitutionalist form of unamendability emerged at the end of the 18th century. According to the 1776 Constitution of New Jersey, members of the Legislative Council, or House of Assembly, had to take an oath not to 'annul or repeal' the provisions for annual elections, the articles opposing church establishment and conferring equal civil rights on all Protestants, and trial by jury (Art. 23). The 1776 Delaware Constitution prohibited amendments to the declaration of rights, the articles establishing the state's name, the bicameral legislature, the legislature's power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect (Art. 30).[22] Explicit limits on amendments were included in Art. V of the U.S. Federal Constitution, which originally forbade abolition of the African slave trade prior to 1808, and prohibits, without time limits, the deprivation of a state of its equal representation in the Senate without its consent.[23]

In France, the 1791 Constitution's Preamble stated that the National Assembly 'abolishes irrevocably the institutions which were injurious to liberty and equality of rights'. Moreover, Title VII, section 7, stated that the members of the Assembly of Revision individually take an oath to maintain the constitution with all their power. The terminology of irrevocability and maintenance implies eternity. In 1798, the Constitution of the Swiss Helvetic Republic, imposed by the French and which was based on the French revolutionary model,[24] declared that 'the form of government, whatever modifications it may undergo, shall at all times be a representative democracy' (Art. 2).[25] Yet, it was in 1884 when the idea that the amendment power should be substantially and explicitly limited first appeared in a French constitution. On 14 August of that year, the French Parliament assembled as the National Assembly in order to revise the constitutional law of 1875, which represented the Third Republic and marked the end of monarchism and Bonapartism.[26] By then, it was clear that France desired a republican

[20] Pennsylvania Charter of Privileges 28 October 1701, http://www.constitution.org/bcp/penncharpriv.htm
[21] Casper (1987, 10).
[22] See Kruman (1999, 56). For studies on amending the U.S. State Constitutions see Dodd (1910); White (1951-1952, 1132).
[23] Orfield (1942, 83-87).
[24] Suksi (1993, 47); Lerner (2004, 50).
[25] Palmer (1953, 219); Palmer (1969, 18).
[26] Bates (2005, 69).

form of government.[27] The constitutional law of 1875 was then amended, adding to Art. 8(3) the following: 'The republican form of government cannot be made the subject of a proposition for revision'.[28] This marked the triumph of the republicans over the monarchists,[29] and its object was to 'prevent the destruction of the republic by constitutional means'.[30] This formulation repeated itself in the Constitution of 1946 (Art. 95) and, with different wording, in the Constitution of 1958: 'The republican form of government shall not be the object of any amendment' (Art. 89).

Another early constitution which included an unamendable provision is the Constitution of Norway of 1814, which stipulated that amendments 'must never ... contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution' (Art. 112).[31] The idea of 'shielding' certain subjects from amendments enjoyed growing popularity both in America and in Europe. During the first half of the 19th century, Latin American states in particular, influenced by ideas from the American and French revolutions, widely used unamendable provisions in order to protect certain principles. The Mexican Constitution of 1824 stated that '[t]he Religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic' (Art. 3), and that the provisions which establish the 'Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed' (Art. 171).[32] It was later suggested that this provision was inserted into the constitution in order to guard against 'popular levity and legislative caprice'.[33] The technique of prohibiting the amendment of certain state features, such as the form of government, separation of powers, and state religion, spread like a fire in a thistle field: the Constitution of Venezuela of 1830, again influenced by American and French ideas,[34] protected the form of government; and the Peruvian Constitution of 1839 (Art. 183), Bolivian Constitution of 1839 (Art. 146), Ecuador's Constitution of 1843 (Art. 110), Honduras' Constitution of 1848 (Art. 91), the Dominican Republic's

[27] Klein (1999A, 61).
[28] Anderson (1908, 640).
[29] Valeur (1938, 281).
[30] Lowell (1918, 103).
[31] Smith (2011, 369).
[32] The original basis of the Mexican Constitution was the Spanish Constitution of 1812, which Mexico departed from by adopting a federal republican form of government, influenced by the U.S. Constitution; albeit some evident distinctions exist between the two constitutions, such as the establishment of a state religion. See Dealey (1900, 168); Mecham (1938, 177-179); Smith (1962, 113); Bishop (2009, 17).
[33] Kennedy (1841, 307).
[34] Pierson (1935, 3).

Constitution of 1865 (Art. 139) and El Salvador's Constitution of 1886 (Art. 148) have all explicitly limited the amending of certain constitutional subjects.

As can be seen in the *Appendix*, Claude Klein was correct to claim that 'the idea of protecting the regime through a limitation of the amendment power had great successes',[35] at least in the sense that unamendable provisions have become a popular constitutional design that cross continents and different legal systems.[36]

As my research demonstrates, between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions.[37] It seems that just as having a formal constitution virtually became a symbol of modernism following the American and French revolutions,[38] so too nowadays having an unamendable provision is becoming a universal fashion.

Not only did unamendable provisions grow in numbers; they grew also in length, complexity, and detail. Before WWII, the average length of an unamendable provision was 29.4 words, but after WWII, the average number of words in an unamendable provision is 39.5. Whereas in the past, unamendable provisions protected mainly the state's form of government, after WWII, with the new wave of constitutionalism and the emergence of new states, unamendable provisions were extended to protect many features of a democratic government, including fundamental rights and freedoms.[39] Indeed, before WWII, only three constitutions included explicit limits on amending rights,[40] while after WWII, nearly 30% of unamendable provisions referred to basic rights. Perhaps the most famous example is Art. 79(3) of the German Basic Law (1949). Written against the background of the Weimar Constitution's experience, Art. 79(3) prohibits amendments affecting the division of the Federation into Länder, human dignity, the

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[35] Klein (1999A, 61).
[36] Hourquebie (2007, 3) estimated that nearly 40% of world constitutions include explicit limitations on constitutional amendments.
[37] One has to be cautious that these numbers include those multiple constitutions of a same state. In other words, if State X had Y Constitutions – all included unamendable provisions – all Y Constitutions were included in the database and in the counting. This might lead to a standard deviation.
[38] Akzin (1967, 1).
[39] Mohallem (2011, 767).
[40] Honduras Const. (1848), art. 91; Mexico Const. (1824), art. 171; Panama Const. (1841), art. 163.

constitutional order, or basic institutional principles describing Germany as a democratic and social federal state.[41]

III. Examining Unamendable Provisions

A. Structure

Unamendable provisions limit the holder of the constitutional amendment power. They prohibit the amendment power from exercising its power with regard to certain constitutional subjects. They create a space in which that power is not permitted to enter. Different techniques for protecting constitutional subjects from amendments exist. As can be seen in the *Appendix*, the majority of constitutions explicitly protect certain constitutional subjects (principles or institutions). Some constitutions refer specifically to certain constitutional provisions, prohibiting any amendments to them.[42] Others combine these two approaches to unamendability.[43] Albeit rarely, some constitutions do not protect specific constitutional subjects from amendments, but rather a more general 'spirit of the constitution',[44] 'spirit of the preamble',[45] 'fundamental structure of the constitution',[46] or 'the nature and constituent elements of the state'.[47] Most unamendable provisions are located within the amendment provision, but unamendability can also appear as an independent provision[48] or inferred from a provision declaring the subject's 'eternal' character.[49] Moreover, provisions that stipulate extraordinary conditions for their amendment may also be regarded as unamendable. For example, Iran's 'Supplementary Fundamental Laws' of 1907 specified that Art. 2, which stated, generally, that laws must never be contrary to the sacred precepts of Islam, 'shall continue unchanged until the appearance of His Holiness the Proof of the Age (may God hasten his glad Advent!)',[50] thus requiring the intervention of a super-human factor (the advent of the Twelfth

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[41] On the German unamendable clause, see Goerlich (2008, 397); Schwartzberg (2009, 153-183).
[42] See, for example, Armenia Const. (1995), art. 114; Azerbaijan Const. (1995), art. 158; Ghana Const. (1969), art. 169(3); Honduras Const. (1965), art. 342.
[43] See, for example, Bahrain Const. (1973), art. 120c; Greek Const. (1975), art. 110(1); Guatemala Const. (1985), art. 281.
[44] Norway Const. (1814), art. 112(1).
[45] Nepal Const. (1990), art. 116(1).
[46] Venezuela Const. (1999), arts. 340, 342.
[47] Ecuador Const. (2008), art. 441.
[48] See, for example, Turkish Const. (1982), art 4.
[49] See, for example, China Const. (1923), art.1: 'The Republic of China shall be a unified republic forever'; Venezuela Const. (1999), art. 6: 'The government … is and shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, with revocable mandates'. See Brewer-Carías (2004, 25).
[50] Davis (1953, 118).

Imam) in order to allow its amendment. Similarly, Art. V of the U.S. Constitution, according to which 'no State, without its Consent, shall be deprived of its equal Suffrage in the Senate', seems to be a de facto unamendable provision, as it is hard to imagine a state giving its consent for such an act.

The act that is prohibited by unamendable provisions varies among different constitutions. While most constitutions simply prohibit 'amending' or 'revising' certain constitutional subjects, some state that amendments must 'respect' or 'safeguard' certain constitutional subjects.[51] Often, the prohibited act is not 'amending' certain subjects, but rather the mere 'proposal' of amendments.[52] Whereas the ultimate result of these two limitations seems similar, presumably the latter limitation positions the barrier to the prohibited change at an earlier phase than the actual act of amendment, i.e. at the beginning of the political process, so that the proposed change cannot even be debated.

B. Content

The content of unamendable provisions varies, but as can be seen in the *Appendix*, despite some minor exceptions, one can identify several common components.[53] The first notable protected group is *the form and system of government*. More than 100 constitutions protect the 'republican' form of government. A 'monarchical' form of government is also protected,[54] as well as 'amiri',[55] 'a crowned democracy',[56] 'constitutional monarchy', and 'a democratic regime of government with king as head of the State'.[57]

The second notable group is the state's *political structure*. Some constitutions explicitly protect the state's federal structure,[58] the equality of representation of states in the Senate,[59] the unitary structure,[60] the bicameral system[61] or local autonomy.[62]

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[51] See, for example, Angola Const. (2010), art. 236; Portugal Const. (1976), art. 288.
[52] See, for example, the difference between the French protections of the republican form of government in the Constitutions of 1958, art. 89(5) and 1946, art. 95.
[53] For an analysis, see the works of Rigaux (1985, 46-51); Weintal (2005, 62-108).
[54] Bahrain Const. (1973), art. 120c; Cambodia Const. (1993), art. 153; Kyrgyzstan Const. (1993), art. 85(3)(5), 98; Laos Const. (1947), art. 43; Libya Const. (1951), art. 197; Moroccan Consts. (2011), art. 175, (1992), art. 100, (1972), art. 106.
[55] See, for example, Kuwait Const. (1962), art. 175.
[56] See, for example, Greece Const. (1952), art. 108.
[57] See, for example, Thailand Const. (2007), art. 291(1).
[58] See, for example, Brazil Const. (1891), art. 90(4); Germany Const. (1949), art. 79(3); Iraq Const. (2005), art. 126(4).
[59] See, for example, Brazil Const. (1891), art. 90(4); Portugal Const. (1976), art. 288; Timor-Leste Const. (2002), art. 156.

Provisions upholding the democratic order are often unamendable,[63] and unamendable provisions also protect other principles such as 'separation of powers',[64] 'rule of law',[65] 'independence of courts'[66] and 'judicial review of statutes'.[67] Some unamendable provisions protect the 'sovereignty of the people',[68] while many constitutions stipulate that the government is 'elective' and 'representative',[69] protecting the modes and characteristics of elections and representation, such as 'multiparty or pluralistic system',[70] and 'universal', 'direct', 'secret', 'free' or 'equal' suffrage.[71] Others protect constitutional

[60] See, for example, Guineau-Bissau Const. (1984), art. 102; Angola Const. (2010), art. 236; Kazahkstan Const. (1993), art. 91(2); Laos Const. (1947), art. 43.
[61] See, for example, Bahrain Const. (1973), art. 120(c).
[62] See, for example, Angola Consts. (2010), art. 236; (1975), art. 159; Armenia Const. (1995), art. 114; Cape Verde Const. (1992), art. 313; Madagascar Const. (2010), art. 163; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288; Sao Tome and Principe Const. (1975), art. 154. On different levels of entrenching autonomy see Suksi (1998, 151).
[63] See, for example, Algeria Const. (1989), art. 178; Armenia Const. (1995), art. 114; Cameroon Const. (1972), art. 63; Czech Republic Const. (1992), art. 9; Dominican Republic Consts. (2002-2003), art. 119; (1994), art. 119; (1966), art. 119; (1961), art. 114; (1960), art. 117; (1955), art. 117; (1947), art. 111; (1942), art. 111; (1934), art. 106; (1929), art. 106; (1924), art. 107; (1908), art. 110; (1907), art. 109; (1896), art. 111; (1887), art. 112; (1881), art. 110; (1880), art. 107; (1879), art. 120; (1878), art. 118; (1875), art. 107; (1874), art. 106; (1866), art. 103; (1865), art. 139; Ecuador Const (1967), art. 258; Equatorial Guineau Const (1991), art. 104; Eritrea Const (1952), art. 91(2); Ethiopia Const. (1952), art. 91(2); Gabon Const. (1990), art. 72; Germany Const. (1949), art. 79(3); Guatemala Const. (1985), art. 281; Haiti Const. (1987), art. 284(4); Iran Const. (1979), art. 177; Morrocon Const. (2011), art. 175; Mozambique Const. (2004), art. 292; Rwanda Consts. (1991), art. 96(2); (1978), art. 91; (1962), art. 107; Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1960), art. 105; Tajikistan Const. (1994), art. 100; Thailand Const. (2007), art. 291(1); Timor Leste Const. (2002), art. 156; Turkey Const. (1982), art. 4.
[64] See, for example, Angola Consts. (2010), art. 236; (1975), art. 159; Brazil Const. (1988), art. 60(4); Cape Verde Const. (1992), art. 313; Chad Consts. (1996), art 223; (1989), art. 202; Guinea Consts. (2010), art. 154; (1990), art. 91; Madagascar Const. (2010), art. 163; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art 288; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste (East Timor) Const. (2002), art. 156.
[65] See, for example, Angola Consts. (2010), art. 236; (1975), art. 159; Armenia Const. (1995), art 114; Turkey Const. (1982), art. 4.
[66] See, for example, Angola Const. (2010), art. 236; Cape Verde Const. (1992), art. 313; Mozambique Const. (2004), art. 292; Peru Const. (1839), art. 183; Portugal Const. (1976), art. 288; Romania Const. (1991), art. 148; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste Const. (2002), art. 156.
[67] See, for example, Portugal Const. (1976), art. 288.
[68] See, for example, Azerbaijan Const. (1995), art. 158; Guatemala Const. (1985), art. 281.
[69] See, for example, Dominican Republic Consts. (2002/2003), art. 119; (1994), art. 119; (1966), art. 119; (1961), art. 114; (1960), art 117; (1955), art. 117; (1947), art. 111; (1942), art. 111; (1934), art. 106; (1929), art. 106; (1924), art. 107; (1908), art. 110; (1907), art. 109; (1896), art 111; (1887), art. 112; (1881), art. 110; (1880), art. 107; (1879), art. 120; (1878), art. 118; (1875), art 107; (1874), art. 106; (1865), art. 139; Ecuador Consts. (1869), art. 115; (1861), art. 132; (1851), art. 139; Guatemala Const. (1985), art. 281; Laos Const. (1947), art. 43; Libya Const. (1951), art. 197; Mozambique Const. (2004), art. 292; Peru Const. (1839), art. 182; Switzerland Const. (1798), art. 2; Venezuela Consts. (1858), art. 164; (1830), art. 228.
[70] See, for example, Burkina Faso Const. (1991), art. 165; Cambodia Const. (1993), art. 153; Dijbouti Const. (1992), art. 88; Mali Const. (1992), art. 118; Niger Consts. (2010), art. 177; (2009), art. 152; (1996), art. 125; (1989), art. 108.
[71] See, for example, Angola Consts. (2010), art 236; (1975), art 159; Brazil Const. (1988), art. 60(4); Guatemala Const. (1965), art. 267; Mozambique Const. (2004), art 292; Niger Const. (2010), art. 177; Portugal Const. (1976), art. 288; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste Const. (2002), art 156.

rules regarding the head of state's term limits (number and duration) or eligibility criteria for election.[72]

The third prominent component is the state's *fundamental ideology or 'identity'*. The state's religious character is often protected from amendments. Some protect Islam as the state's religion,[73] while others protect the 'Roman Catholic Apostolic'.[74] In contrast, many constitutions protect the 'secular' nature of the state[75] or the principle of 'separation between the state and churches'.[76] With regard to ideology, some constitutions explicitly prohibit amendment to their 'social' or 'socialist character' or to their 'social justice' or 'socialist' foundations.[77] In some states, formal lineaments that are strongly connected to collective identity are protected from change, such as the official language,[78] the flag,[79] the national anthem,[80] the capital,[81] or even the date of the proclamation of independence.[82]

The fourth notable group is that of *basic rights*. Many constitutions protect 'fundamental rights and freedoms'.[83] Others protect a more specific set of rights, such as 'human dignity',[84] 'freedom and equality',[85] 'liberty',[86] 'liberty of the press'[87] and 'the right of workers and trade unions'.[88]

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[72] See, for example, Central African Republic Const. (2004), art. 108; Dominican Republic Consts. (1881), art. 110; (1880), art 107; El Salvador Consts. (1945), art. 171; (1886), art 148; Guatemala Consts. (1985), art. 281; (1965), art. 267; Guinea Const. (2010), art. 154; Honduras Const. (1982), art 374; Madagascar Const. (2010), art 163; Niger Consts. (2010), art. 177; (1999), art. 136; Qatar Const. (2004), art. 147; The Republic of Congo Const. (2002), art 185; Rwanda Const. (2003), art 193.

[73] See, for example, Afghanistan Const. (2004), art. 149; Algeria Const. (1989), art. 178; Bahrain Const. (1973), art. 120(c); Iran Const. (1979), art. 177; Iran Const. (1907), art. 2; Morroco Consts. (2011), art. 175; (1992), art. 100; (1972), art 106; (1970), art. 100.

[74] See, for example, Ecuador Consts. (1869), art 115; (1869), art. 115; (1861), art 132; Mexico Const. (1824), art. 3.

[75] See, for example, Angola Consts. (2010), art. 236; (1975), art. 159; Burundi Consts. (2005), art. 299; (1992), art. 182; Central African Republic Const. (2004), art. 108; Chad Const. (1996), art. 223; The Republic of Congo Consts. (2002), art. 185; (1992), art 178; Cote d'Ivoire Const. (2000), art. 127; Guinea Consts. (2010), art. 154; (1990), art. 91; Mali Const. (1992), art. 118; Sao Tome and Principe Const. (1975), art. 154; Tajikistan Const. (1994), art 100; Togo Const. (1992), art. 144; Turkey Const. (1982), art. 4.

[76] See, for example, Angola Consts. (2010), art. 236; (1975), art. 159; Niger Consts. (2010), art. 177; (2009), art. 152; (1996), art. 125; (1992), art. 124; Portugal Const. (1976), art 288.

[77] See, for example, Algeria Const. (1976), art. 195; Armenia Const. (1995), art. 114; Cuba Const. (1976); Madagascar Const. (1975), art. 108; Somalia Const. (1979), art. 112(3).

[78] See, for example, Algeria Const. (1989), art. 178; Bahrain Const. (1973), art. 120(c); Romania Const. (1991), art. 148; Turkey Const. (1982), art. 4.

[79] See, for example, Timor-Leste Const. (2002), art. 156; Turkey Const. (1982), art. 4.

[80] See, for example, Turkey Const. (1982), art 4.

[81] See, for example, Turkey Const. (1982), art 4.

[82] See, for example, Timor-Leste Const. (2002), art. 156

[83] See, for example, Afghanistan Const. (2004), art. 149; Algeria Consts. (1989), art. 178; (1976), art. 195; Angola Consts. (1975), art. 159; (2010), art. 236; Central African Republic Const. (2004), art. 108; Chad Consts. (1996), art. 223; (1989), art. 202; The Republic of Congo Const. (1992), art. 178; Ecuador Const. (2008), art. 441; Moldova Const. (1994), art. 142; Morrocan Const. (2011), art. 175; Mozambique Const. (2004), art. 292; Namibia Const. (1990), art. 131; Romania Const. (1991), art. 148; Russian Federation Const. (1993), art. 135; Somalia Consts. (1979), art. 112(3); (1960), art. 105.

[84] See, for example, Angola Const. (2010), art. 236; Germany Const. (1949), art 79(3).

The fifth notable group is that of the *state's integrity*. Many constitutions[89] protect one or more of the following principles: 'national unity', 'territorial integrity', the 'state's existence', 'sovereignty', or 'independence'. These principles commonly appear in the constitutions of states that were former colonial territories in order to claim their independence and sovereignty. Also, unamendable provisions regarding territorial integrity might express a state's prioritisation of national integrity over self-determination claims that may arise.[90]

Lastly, some constitutions protect unique constitutional subjects, such as immunities, amnesties, reconciliation and peace agreements,[91] mandatory international law norms,[92] the institution of chieftaincy,[93] taxation,[94] or rules governing nationality.[95]

One can identify two types of protected principles: universal and particular. Such protected principles are universal not in the sense that they are common to all world constitutions, but rather, that they are considered common to all modern democratic societies, such as separation of powers and human dignity. Others, such as federalism, official language, and religion, might be regarded as particular because they reflect specific ideals and values of a distinct political culture.[96]

C. Characteristics

This part analyses the characteristics of unamendable provisions – their functions and meanings – following and advancing the works of mainly Richard Albert and Beau

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[85] See, for example, Bahrain Const. (1973), art. 120(c); Kuwait Const. (1962), art. 175; Laos Const. (1947), art. 43.
[86] See, for example, Tonga Const. (1875), art. 79.
[87] See, for example, Mexico Const. (1824), art. 171.
[88] See, for example, Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288.
[89] See, for example, Angola Consts. (1975), art. 159; (2006), art. 206; Azerbaijan Const. (1995), art. 158; Burundi Consts. (2005), art. 299; (1992), art. 182; Camaroon Const. (1972), art. 63; Cape Verde Const. (1992), art. 313; Chad Consts. (1996), art. 223; (1989), art. 202; Cote d'Ivoire Const. (1960), art. 73; Cuba Const. (1940); Djibouti Const. (1992), art. 88; Equatorial Guinea Const. (1991), art. 104; Kazakhstan Const. (1993), art. 91(2); Madagascar Const. (2010), art. 163; Mauritania Const. (1991), art. 99(3); Guatemala Const. (1985), art. 281; Mexico Const. (1824), art. 171; Moldova Const. (1994), art. 142; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288; Romania Const. (1991), art. 148; Rwanda Consts. (2003), art. 193; (1991), art. 96(2); Sao Tome and Principe Const. (1975), art. 154; Somalia Const. (1979), art. 112(3); Tajikistan Const. (1994), art. 100; Timor-Leste Const. (2002), art. 156.
[90] Cop and Eymirlioglu (2005, 124).
[91] See, for example, Fiji Const. (1990), art. 164(5); Niger Consts. (2010), art. 177; (2009), art. 152; Burundi Const. (2005), art. 299; Sudan Const. (2005), art. 224(2).
[92] See, for example, Switzerland Const. (1999), arts. 193(4), 194(2).
[93] See, for example, Ghana Const. (1969), art. 169(3).
[94] See, for example, Ghana Const. (1969), art. 169(3).
[95] See, for example, Mozambique Const. (2004), art. 292.
[96] Weintal (2005, 20-25, 62-108).

Breslin.[97] It identifies five features of unamendability, which are not necessarily exclusive and often overlap. The perspective through which unamendable provisions are examined is therefore a combination of both functional and expressive approaches.[98] I directly link the two terms, as there are qualities between them that overlap. An unamendable provision can have a certain function to fulfil, but at the same time that unamendability reflects certain cultural values. Also, the mere expression of unamendability itself fulfils a certain educational and symbolic function. Just as constitutions carry out expressive functions serving as important symbols for the polity,[99] the unamendability of a principle or an institution conveys its symbolic value.[100] It sends a message to the citizens and to external observers regarding the state's basic constitutional principles. Jon Elster notes that 'the purpose of … unamendable clauses is … mainly symbolic'.[101] If nothing else, it creates the appearance of respect for that principle or institution and 'makes a statement' regarding its importance to the constitutional order.[102]

1. Preservative

Preservation of core constitutional values is the most common aim of unamendable provisions. As every political order is established with a clear ambition to preserve itself, the first identified and central goal of unamendable provisions is to preserve the primary constitutive values ('universal' or 'particular') of the constitutional order.[103] Unamendable provisions thus protect an inviolable core that ensures the constitution's stability and permanence, and preserve it against changes that might annihilate its essential nucleus or cause disruption to the constitutional order itself.[104]

> [Unamendable provisions] define the essential elements of the foundation myth. In other words, they define the collective "self" of the polity—the "we the people." If the "eternal" normative stipulations were changed, the collective self—or identity—of the polity as embodied in the constitution would collapse.[105]

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[97] Albert (2010, 678-69) identifies 3 characteristics of entrenchment: preservative, transformational and reconciliatory. Breslin (2009) identifies various roles of constitutions, such as trasnformative, aspirational, empowering and limiting, and as managing political conflicts.
[98] For an explanation of expressivism and functionalism in comparative constitutional law see Tushnet (1999, 1225).
[99] Ginsburg (2011, 118); Přibáň (2007, 4).
[100] On the expressive function of amendment provisions see Albert (2013B, 225).
[101] Elster (1991, 471). See also Albert (2010, 699-702).
[102] On the function of law in 'making statements' see Sunstein (1995-1996, 2024-25).
[103] Albert (2010, 678-685).
[104] Pedra (2009, 222).
[105] Preuss (2011, 445).

One can identify different kinds of preservative unamendability. When unamendable provisions protect democracy or human rights, their basic underlying idea is that of a 'militant democracy'[106] – evincing the fear that unfettered democracy will allow its own destruction.[107] Unamendable provisions, as one commentator notes, 'are the outcome of the experience of western constitutionalism to create safeguards to the preservation of constitutional democracy against the authoritarian encroachments or totalitarian takeover'.[108] Thus, they reflect some kind of what I term 'amendophobia': the fear that the amendment clause would be abused to abrogate the core values of society.[109]

In this sense, unamendable provisions aim not only to prevent abuse of the system by leaders who wish to fulfil their own ambitions,[110] but also to serve as a pre-commitment mechanism of the 'people' to protect itself against its own weaknesses and passions.[111] We limit ourselves so that in times when we might lose control of our reasonable judgment we will not be able to amend the constitution in a way that we will later regret.[112] Ulysses and the Sirens is often the metaphor used to illustrate this idea: '[w]hen Ulysses bound himself to the mast and had his rowers put wax in their ears, it was to make it *impossible* for him to succumb to the song of the sirens'.[113] Making certain subjects immune to amendment, Elster notes, is 'a perfect protection against impulsive rashness'.[114] However, Elster reminds us that unamendable provisions 'do not bind in a strict sense, because extraconstitutional action always remains possible'.[115]

Unamendable provisions can not only limit governmental power, but also empower it. When unamendable provisions protect the rights of a monarch, the principle of inherited rules, and succession to the throne, they serve as a mechanism to preserve the existing power of the rulers rather than limit it. The Constitution of Albania of 1928, for example, stipulates that Art. 50, according to which 'The King of the Albanians is His Majesty Zog I, of the illustrious Albania family of Zogu' cannot be amended (Art. 224).

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[106] See the classical articulation of Loewenstein (1937, 417, 638). For contemporary debates see Sajó (2004); Thiel (2009).
[107] Schwartzberg (2009, 7, 21) terms this 'democratic autophagy'. Fox and Nolte (1995, 1) call it 'intolerant democracy'.
[108] Tanchev (2000, 81).
[109] Albert (2010, 663); Landau (2013A, 189). For the use of term 'amendophobia' see Jackson (2010, 433-453).
[110] Fombad (2007, 57).
[111] Holmes (1995, 135).
[112] This is often termed 'Peter when sober imposes chains on Peter when drunk'. However, it is doutable whether a constitution drafted in times of crises was indeed drafted by 'sober' constitution-makers. See Elster (1997, 135).
[113] Elster (2000B, 94). See also Elster (1979, ch II); Klarman (1997A, 496).
[114] Elster (2002, 146).
[115] Elster (2000B, 94).

The unamendability of the throne is also common in some of the Arab countries' constitutions.[116] This is a manifestation of the more general character of the Arab world's constitutionalism in which written constitutions enhance rather than limit governmental power.[117]

Political actors can also use preservative unamendability as a tool in order to preserve power asymmetry. Parties enshrine existing political majority preferences in the constitution in such a way that it cannot be amended in order to protect against future alterations of the decisions that they advocated for if they subsequently become a minority.[118] Examples of such unamendability could be the French unamendability of republicanism, which preserved the superiority of the republicans in their conflict with the monarchists, or the Mexican unamendability of confederalism, which marked the victory of the Mexican federal party over the Centralists after a long struggle that existed between the two parties over the country's formation.[119]

2. Transformative

Unamendability aims to assist in transforming political communities.[120] In its extreme form, it is used to assist creating and maintaining a wholly new political entity. For example, a unique type of unamendable provision appears in constitutions of independent entities created as part of multilateral agreements. For example, by the Zurich treaty of February 1959, Greece, Turkey, and Great Britain guaranteed Cyprus's independence, territorial integrity, and security. The treaty was then incorporated within the Constitution of 1960 (Art. 181),[121] and its basic articles were declared unamendable (Art. 182.1). The treaty's provisions have been constitutionally nationalised, and simultaneously the basic constitutional principles have been internationalised so that they can only be amended by an agreement between the parties to the Zurich treaty.[122] Likewise, Hong Kong's Basic Law of 1990 (effective as of 1997), which can be amended by the National People's Congress of the People's Republic of China, prohibits in Art.

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[116] See, for example, Bahrain Const. (1973), art. 120(c); Jordan Const. (1952), art. 126(2); Libya Const. (1951), art. 197; Qatar Const. (2004), art. 145; Morocco Consts. (1970, 1972, 1992), arts. 100, 106, 100, respectively.

[117] Brown (2002). Elsewhere, Brown (2003, 74) notes that the Arab world, though generous with constitutional text, suffers from weak enforcement of the provisions that relate to human rights.

[118] Cf., Knight (2001, 367).

[119] On this struggle see Dealey (1900, 163-164); Guerra (2007, 134-135).

[120] On constitutional transformation see Breslin (2009, 30-45).

[121] Papastathopoulos (1965, 139).

[122] Alptekin (2010, 8-9); Özersay (2004-2005, 34); Polyviou (1980, 21).

159(3) amendments that contravene the established basic policies of China regarding Hong Kong as formulated in the Sino-British Joint Declaration of 1984 and in the Basic Law's Preamble.[123] This self-limitation provision not only forms a bridge to connect Hong Kong and Beijing, but also safeguards Hong Kong's key elements of autonomy.[124]

The more dominant character of unamendable provisions, however, is its ability to transform polities. New constitutions aim to mark a dividing line between the past and the future, representing a new era and an attempt to cultivate a distinct political community. Reacting to past events, constitution-makers mainly have in mind the previous regime's failures, atrocities and abuses.[125] Constitutions 'reflect fear, originating in, and related to, the previous political regime', and their guarantees reflect 'the institutional negation of the oppression recently endured'.[126] Emerging out of previous and dysfunctional regimes, new constitutional unamendable provisions largely react to the faults of past political leaders as an attempt to undo historical injustice. Unamendable provisions therefore have much to teach us about a country's past (and often grave) experiences. The technique of explicitly limiting the amendment power, which migrated among different jurisdictions, at time retained its original expression, whereas on other occasions it absorbed local content, primarily as a response to prior events and past experiences, reflecting the drafters' ambitions to direct the nation away from past tragedies into a more 'just' future.[127]

There are many examples of this 'negative' role that unamendable provisions play, as a lasting reminder of recent past devastations, and as an attempt to transform – and never return to – 'legacies of past injustice'.[128] The post WWII constitutions, Carl Friedrich claimed, were motivated by 'a negative distaste for a sordid past'.[129] Elsewhere, Friedrich described the constitutional efforts to block the option of reverting to a grave past:

> Since the experience of totalitarian dictatorship proved more terrible, the antagonism aroused by it was correspondingly more fanatic. From this experience there arose a constitution-making sentiment, a constituent power, so to speak, which was very strongly determined to bar the recurrence of any such

[123] Ghai (2007, 7). Fiss (1998, 497-498) argued that since the Basic Law is a statute, this provision itself can be repealed or amended by simple legislation.
[124] Mushkat (1992, 135). On the Basic Law as a bridge to connect Hong-Kong and China see Hualing and Cullen (2006, 3).
[125] Scheppele (2008, 1377).
[126] Sajó (1999, 13).
[127] Albert (2010, 685-693). Teitel (2009, 2014) was right to claim that 'the conception of justice that emerges is contextual: What is deemed just is contingent and informed by prior injustice'.
[128] Schwartzberg (2009, 158); Teitel (2009, 2057); Scheppele (2009, 233).
[129] Friedrich (1968, 151).

transformation of a free society into voluntary servitude.[130]

Indeed, the German Basic Law's unamendability of democracy and human dignity must be understood against the background of the Weimar Constitution, Nazi rule and the Holocaust.[131] Even the German unamendability of federalism can be understood not only as a result of insistence by the allied forces, but also due to the German drafters' realisation that one of the Weimar's constitutional failures was the suspension of federalism.[132] Another example is the new constitutional orders in Central and Eastern Europe upon the collapse of communism, which protect human rights and recognise the practice of judicial review.[133] Although some have argued that it would be a mistake for these new democracies to import the German 'fondness for unamendable provisions', since the vexing questions that they face ought to be resolved in the political sphere rather than in constitutional courts,[134] many of them adopted unamendable provisions.[135] In the post-communist states, unamendability is to be understood in light of a 'bitter experience' and as a rejection of the past when constitutions were utilised as political weapons.[136] Greece could be another example for how the country's past impacted unamendable provisions. Greek Constitutions have traditionally been characterised by a high degree of rigidity.[137] Whereas the Constitution of 1844 did not include any revision procedure,[138] the Constitutions of 1864 (Art. 107), 1911 (Art. 108) and 1927 (Art. 125) prohibited revisions of the entire constitution, allowing revisions only of non-fundamental provisions. The Constitution of 1952 prohibited the revision of the entire constitution along with those provisions: 'which determine the regime as that of a crowned democracy as well as its fundamental provisions' (Art. 108). Between the years 1967-1974, Greece was ruled by a dictatorship, an experience that strongly influenced Greek constitutional limitation on the possibility of parliamentary obstruction.[139] Consequently, the Constitution of 1975 specified certain unamendable

[130] Friedrich (1971, 124).
[131] Benda (2000, 445); Haupt (2008, 208); Currie (1994, 9).
[132] Scheppele (2003, 300-301).
[133] See generally Schwartz (2002); Sadurski (2007); Osiatynski (1994, 111).
[134] Holmes (1993A, 22).
[135] See, for example, Bosnia and Herzegovina Const. (1995), art. X(2); Czech Republic Const. (1992), art. 9; Kazakhstan Const. (1993), art. 91(2); Kosovo Const. (2008), art. 144(3); Moldova Const. (1994), art. 142; Romania Const. (1991), art. 148. On constitutional revisions in Eastern Europe see Holmes and Sunstein (1995, 275).
[136] Sajó (1996, 72).
[137] One might suggest that this is due to the historical Athenians' respect for the 'fundamental principles that animated their law' as described by Sundahl (2008-2009, 483).
[138] Venizelos (1999, 99).
[139] Trantas, Zagoriti, Bergman, Müller and Ström (2006, 377).

principles, such as the form of government as a parliamentary republic, separation of powers, and certain fundamental rights and freedoms (Art. 110.1). Lastly, in Africa, during the continent's first few decades of independence, African leaders frequently amended their constitution in order to further their own political agendas, which undermined constitutionalism and constitutional stability.[140] In an effort to break from the past, many African states' constitutions now include unamendable provisions protecting human rights[141] and limiting presidential terms.[142] A similar unamendability of term limits exists in some Latin American states in response to a problematic history of military coups, authoritarian rule, and leaders' efforts to seize control of the state.[143] Constitutional unamendability of presidential term limits not only highlights their normative importance,[144] but also raises the political costs of trying to abrogate them.[145]

All these are examples of what Kim Lane Scheppele terms the 'negative meaning of constitutions':

> The evils of the prior regime ... are highlighted, condemned, and publicly displayed as exactly what the new regime is against, and these evils define by negative example the core of what the new democratic transformation is for. ... The new state stands first and foremost as a repudiation of its own immediate past. And the negative content of that asserted identity – whatever we are, the new state indicates, we are wholly different from the regime immediately before us – provides the point of the new state's constitutive identity.[146]

The transformative feature of unamendability wears 'multifocal lenses'; It is simultaneously short-sighted and long-sighted; both backward and forward-looking.[147] It plays two conflicting roles: positive and negative. On the negative side, unamendable provisions represent the destruction of an existing political design. On the positive side, unamendable provisions represent the birth of a new and different version of the polity – the aspirational feature of unamendability.

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[140] Fombad (2007, 28).
[141] See, for example, Democratic Republic of Congo Const. (2005), art. 220; Namibia Const (1990), art. 131; Albert (2010, 686-687).
[142] See, for example, Central African Republic Const. (2004), art. 108; Mauritania Const. (2006), art. 99. See generally Fombad and Inegbedion (2010, 1).
[143] El Salvador Const. (1983), art. 248; Guatemala Const. (1985), arts. 165(g), 184, 280; Honduras Const. (1982), art. 374; see Albert (2010, 687-689). On the prohibition of re-election in Latin America see Kantor (1992, 102).
[144] Based upon the unamenable provision prohibiting any amendment concerning presidential term limits, in 25 May 2009, the Constitutional Court of Niger declared as unconstitutional a call for a referendum, which would have suspended the constitution and allow the President to continue in office as an interim president for a period of three years. See Cour Constitutionnelle AVIS n. 02/CC of 26.05.2009, http://cour-constitutionnelle-niger.org/documents/avis/2009/avis_n_002_cc_2009.pdf
[145] Maltz (2007, 141).
[146] Scheppele (2009, 242).
[147] Cf., Scheppele (2008, 1379); Teitel (2009, 2057).

3. Aspirational

Unamendable provisions offer a 'shorthand record' of the memories and hopes of their framers.[148] They both 'reflect the birth pangs of that particular society',[149] and promise a brighter future.[150] They imagine a more perfect polity, the kind that the citizenry aspires to become and preserve. If a constitution 'reflects the triumphs and disappointments of a nation's past and embodies its hope for the future',[151] this is properly illustrated by the constitution's unamendable provisions.

A notable example is the Brazilian Constitution of 1988. This constitution, which includes broad unamendability of federalism, suffrage, separation of powers, and individual rights (Art. 60.4), functioned as a transition to democracy after twenty-one years of military rule from 1964 to 1985. As a direct response to the military junta's government, the Brazilian Constitution not only represents recommitment to constitutionalism,[152] but also 'points to the future and it shows where it wants to get to'.[153]

András Sajó explains that when constitutions affirm an emerging national identity, they aim, *inter alia*, to make selections that will cause the people to feel good, in contrast with the feelings of fear and outrage about past abuses.[154] Aspirational unamendability, as Richard Albert writes, 'endeavours to repudiate the past by setting the state on a new course and cementing that new vision into the character of the state and its people'.[155] The constitutional aspirations for a fresh design, as we have seen, are inevitably informed by the faults and mistakes of the past.[156] Therefore, the aspirational and transformative aspects of unamendability are strongly connected.

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[148] Cf., Ducháček (1968, 93).
[149] Issacharoff (2007, 1430).
[150] On constitutional aspiration see Breslin (2009, 46-68).
[151] Cutler and Schwartz (1992, 512).
[152] Maia (2000, 54).
[153] Mendes (2005, 452-453).
[154] Sajó (2010, 362-363, 383).
[155] Albert (2010, 685).
[156] Breslin (2009, 52).

4. Conflictual

Unamendable provisions can be used to manage certain conflicts, for example, by functioning as 'gag rules' for silencing contentious issues.[157] Even in democratic societies – where the desire is to publicly debate disputes and to use political mechanisms for decision-making – there might be strong rationales not to openly debate certain disputes. A dispute might be so severe that a public debate would not bring about an accepted solution, but rather, might excite negative feelings and deepen social divisions.[158] As Stephen Holmes explains, 'by tying our tongues about a sensitive question, we can secure forms of co-operation and fellowship otherwise beyond reach'.[159] In such cases, silencing can play a positive role.

Contrary to preservative unamendability, conflictual unamendability does not protect grandiose values. Rather, it protects issues that are a 'bone of contention' in society, such that if they were open to constitutional debate might tear the bonds of community. They anchor compromises that no one really likes; yet the society can agree about their necessity under the existing circumstances.[160] The best example of this function could be Art. V of the U.S. Constitution, which originally prohibited abolishing the African slave trade before 1808.[161] The unamendability of this provision was the result of a compromise because South Carolina and Georgia would not consent to an immediate prohibition of slave trafficking. Insisting on ending slavery at the constitutional convention might have resulted in the collapse of the entire constitutional enterprise.[162] The unamendability of equal suffrage in Art. V also reflects a compromise rather than a constitutive principle, aimed to moderate the smaller states' fear that they would be overrun by larger states.[163] As Adam Samaha notes, 'the most entrenched textual norm is equal representation in the Senate for every state, but no one appears to believe this provision is the most central moral value in our law'.[164] In that respect, James Fleming was correct in observing that American unamendability 'hardly looks like

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[157] On the function of constitutions as managing conflicts see Breslin (2009, 87-112).
[158] Sapir (2010, 223).
[159] Holmes (1993B, 19).
[160] Sapir (2010, 224).
[161] Balkin (1996-1997, 1708). For the background of the constitutional accommodation with regard to slavery see Finkeman (2001, 413).
[162] Schwartzberg (2009, 129-139).
[163] *Id.*, 139-143.
[164] Samaha (2008, 619). A strong indication of the fact that art. V did not express any acceptance of slavery can be found in Madison (2008, 170).

constitutive principle of a constitutional order', and in offering the alternative role of Art. V as reflecting 'deep compromises with our Constitution's constitutive principles'.[165]

A much less known example comes from the Kingdom of Tonga.[166] Tonga's Constitution of 1875, which is still in force, prohibits amendments that 'affect the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles' (Art. 79).[167] This unamendability should be understood from a historical perspective. The Constitution of 1875 transformed the prior chieftainship into a kingship and established a new aristocracy, which was composed of selected former chiefs. The aristocracy was actually established in an attempt to settle the on-going conflicts over power and keep peace between the king and the former chiefs, who would otherwise have remained without any authority. The unamendability of nobility both reflects this compromise and perpetuates the traditional privileges of chiefs in Tonga's modern day aristocracy.[168]

Importantly, along with their advantages, unamendable provisions as gag rules carry the risk that whatever is silenced might explode in the future.[169] The silencing tactic thus has the practical disadvantage of intensifying the tension with regard to delicate issues, a process that might end in an uncontrolled revolutionary explosion, which the gag rule was originally intended to prevent.[170] One might argue that it is perhaps better to use a 'sunset provision', a temporal unamendability, which allows the removal of the contentious issue from the public agenda for a while without long-term restraints.[171] The risk of using revolutionary forcible means to override unamendability is not unique to gag rules and is discussed in Chapter 8.

The second way through which unamendable provisions can assist in managing conflicts is by serving as a tool for reconciliation in post-conflict societies. Constitution-building can play a vital role in post-conflict societies,[172] as can unamendable provisions. This can be attempted by ensuring that peace agreements, immunities that have been

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165 Fleming (1994-1995, 362-363). See also Balkin (1995, 147).

166 Tonga is an independent state compromising approximately 150 islands, with a population of about 100,000 people. See Powels (1993, 286).

167 In 2004, the Supreme Court of Tonga faced a challenge to a constitutional amendment carving exceptions to freedom of speech and press which are, as the Supreme Court held, included within 'the law of liberty' which is protected by art. 79. Since some of the justifications for restricting expression were excessively wide and vague (such as 'the public interest' or 'cultural traditions of the Kingdom'), they were declared unconstitutional and void. See *Taione and Others v Kingdom of Tonga*, [2004) TOSC 48, [2005] 4 LRC 661; 32 *Commw. L. Bull.* (2006), 156.

168 Salomon (2009-2010, 376). See generally Marcus (1977A, 220) and Marcus (1977B, 284).

169 Kolarova (1993, 51).

170 Holmes (1993B) 56.

171 Sapir (2010); Holmes (1993B) 25-26. On temporal limits and sunset provisions see Eule (1987, 384-385); Varol (2014).

172 Samuels (2009, 173).

granted, or the principle of reconciliation itself are protected from amendment. Burundi, a country which has constantly suffered from internal civil wars and major political instabilities,[173] prohibits in its Constitution of 2005 amendments which would undermine reconciliation (Art. 299), probably in order to support the efforts undertaken by Burundians to bring about national reconciliation, as provided under the 2000 Arusha Peace and Reconciliation Agreement. In Sudan, a country that since its independence has been suffering from internal wars over its national identity,[174] the second major civil war (1982-2005) ended with a Comprehensive Peace Agreement between the government of Sudan and the Sudan People's Liberation Movement, which initiated a six-year interim period at the end of which the people of southern Sudan were given opportunity to exercise their right of self-determination through a referendum.[175] In order to protect the peace agreement, the Constitution of 2005 prohibited amendments that affect the peace agreement without the approval of both signatory parties (Art. 224.2).

As a way of leaving the past behind and starting anew, reconciliation could also be fostered through unamendable provisions by protecting immunities granted for prior wrongful acts by members of conflicting groups.[176] For example, both Niger's Constitutions of 1999 (Art. 139) and 2009 (Art. 152) protect amnesties granted to the perpetrators of human rights violations, which occurred during the coups of 27 January 1996 and 9 April 1999. Although it was argued that this impunity has undermined the rule of law,[177] this technique was repeated in the Constitution of 2010 (Art. 177), which prohibits amendments to the amnesty granted to perpetrators of the coup of 18 February 2010. This provision was meant to guard the ruling junta and its military backers from being hunted down once they quit power.[178] Another example is Fiji, in which the Constitution of 1990 granted immunity to all members of the security forces involved in the military coup in 1987, and prohibited any amendments to the granted immunity (Art. 164.5).[179] Whereas the grant of amnesties is a recognised (albeit divisive) mechanism in post-conflict transformation,[180] establishing amnesties as unamendable principles raises them to the highest level of entrenchment.

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[173] See Vedirame (2000, 302); Akwanga and Ewusi (2010, 8-20).
[174] Deng (2006, 155).
[175] Dagne (2010, 15).
[176] On entrenchment as a tool for reconciliation see Albert (2010, 693-698).
[177] Amnesty International (1999, 2).
[178] Anonymous (2010).
[179] On the role of the military in Fiji see Firth and Fraenkel (2009, 117).
[180] Doxtader and Villa-Vicencio (2003).

5. *Bricolage*

Anthropologist Claude Lévi-Strauss coined the term 'bricolage', meaning borrowing from what is readily at hand.[181] Mark Tushnet uses 'bricolage' in the constitution-making context: '[a] constitution is assembled from provisions that a constitution's drafters selected almost at random from whatever happened to be at hand when the time came to deal with a particular problem'.[182] Since constitution-makers use whatever available materials are at hand to solve urgent problems, 'bricolage' shifts the focus from constitutional harmony to constitutional compromise and contingency,[183] and reflects the tendency of constitutional borrowing in the modern constitutional design.[184]

It must be emphasised that unamendable provisions do not necessarily reflect the basic principles of that political regime. Some do, but as the conflictual characteristic of unamendability demonstrates, the protected values could simply be indicative of a compromise and therefore ought to be viewed within the historical context of contingency. Others are simply the result of constitutional borrowing. An historical review of unamendable provisions strengthens the argument that they exemplify the wider phenomenon of constitutional 'borrowing' or 'migration',[185] most notably in post-colonial constitutions.[186] Africa is the clearest example for this. While certain African states include in their constitutions unamendable provisions,[187] the influence of French and Portuguese origins is evident, as unamendability appears especially in Francophone[188] and Lusophone[189] countries, with minimal Anglophone exceptions.[190]

Portugal and Brazil are notable examples of both 'recipients' and 'donors' of unamendable provisions. Portugal's Constitution of 1911 abolished the monarchy and

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[181] Lévi-Strauss (1966, 16-17).
[182] Tushnet (1999) 1287.
[183] Schneiderman (2002, 401-402).
[184] Friedman and Saunders (2003, 177).
[185] On this phenomenon see Choudhry (2007); Perju (2012, 1304). The 'migration' and 'borrowing' of constitutional ideas are not identical terms. See Choudhry (2007, 20-22).
[186] Suber (1990, 9) wrote that unamendable provisions are likely to appear in constitutions which were imposed by a foreign or imperial power since 'a sovereign people will not ordinarily want to limit its power to make law'. This is not completely accurate as many self-drafted constitutions include such provisions.
[187] Fombad (2007, 34-51); Fombad (2013, 382).
[188] Algeria Const. (1989), art. 178; Burkina Faso Const. (1991), art. 165; Chad Const. (1996), art. 223, (2006), art. 124; Gabon Const. (1991), art. 117; Mali Const. (1992), art. 118; Morocco Const. (1992), art. 100; Senegal Const. (2001), art. 103. On constitutional amendments in the African Francophone states see Djedjro (1992, 111).
[189] Equatorial Guinea Const (1991), art. 104; Mozambique Const. (2004), art. 292; Angola Consts. (1975), art. 159; (2010), art. 236; Burundi Const. (2005), art. 299.
[190] Namibia Const. (1990), art. 131.

established its first republican government.[191] Fearing the monarchists' counter-reaction and remembering the monarchy's abuse of power, the constitution-makers stipulated that amendments which purport to abolish the republican form of government cannot be admitted to discussion (Art. 82.2). This limitation, which was omitted in the Constitution of 1933, is similar to earlier French and Brazilian limitations. Indeed, the Brazilian and French constitutional models played a vital role in the making of the Portuguese Constitution of 1911, which, as one commentator noted, 'resembled a conglomeration of Republican systems in France, Brazil, and Switzerland'.[192] The current Constitution of 1976 is exceptional insofar as it includes the most detailed unamendable provision, protecting no less than fourteen subject matters from amendment, and some of them, like the rights of workers and trade unions, are unique (Art. 288).[193] The only countries that have similarly detailed and unique unamendable provisions are those that were formerly Portuguese colonies.[194]

Brazil also has a long history of explicitly limiting the amendment power.[195] The Constitution of 1891 was a democratic constitution enacted soon after the abolition of the Unitarian monarchy.[196] Inspired by the French and U.S. Constitutions,[197] it prohibited amendments 'tending to abolish the republican federal form or the equality of representation of the states in the senate' (Art. 90.4). Both the 1934 and 1946 Constitutions prohibit amendments which tend to abolish the federal or republican form of government (Arts. 178 and 217 respectively). Additionally, during the 1988 constitution-making process, three major Portuguese constitutionalists visited the country, bringing the experience of the Portuguese constitutional process.[198] Influenced by Portugal, the current Brazilian Constitution includes a broad unamendable provision. These events demonstrate the borrowing of explicit limits on amendment powers.

In addition, a quick look at the *Appendix* reveals that many of the unamendable provisions simply repeat themselves (often with slight changes) in a nation's subsequent constitutions. This again demonstrates the 'bricolage' idea of using unamendable provisions that 'are at hand'. An obvious example is the Dominican Republic in which

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[191] Solsten (1994, 51).
[192] Wheeler (1998, 79).
[193] Comella (2009, 107).
[194] See Mozambique Const. (2004), art. 292; Angola Const. (1975), art. 159, (2010), art. 236; Cape Verde Const. (1992), art. 313; Sao Tome and Principe Const. (1975), art. 154; Timor-Leste Const. (2002), art. 156.
[195] Mendes (2005, 452); Pedra (2009, 222).
[196] Gordon (2001, 150).
[197] Maia (2000, 61).
[198] The three are: Jose Joaquim Canotilho, Jorge Miranda and Marcelo Rebelo de Souze. See Nogueira (2004, 7); Sato (2003, 11).

the exact same unamendable provision repeats itself in thirteen constitutions from 1907 to 2002, and a similar (but not identical) provision repeats itself in ten constitutions from 1865 to 1896. Such repetition seems more like an expression of historical or cultural convention than necessarily reflecting the result of a constructive, rational constitution-making process. Therefore, one should be cautious in imputing unamendable provisions a high degree of productive prudence.[199]

IV. CONCLUSION

Unamendability is undeniably a 'complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order'.[200] Indeed, alongside the legal issue rests the policy question of whether adopting unamendable provisions as a constitutional strategy in order to protect the constitutional order is favourable. There is no clear answer to that question. The proverb '*Malum est consilium quod mutari non potest*' ('a plan that is incapable of change is a bad plan') may apply with great force to constitutional design. Whereas for some states unamendable provisions could form a protective shield for the constitution's nucleon to remain essential, [201] for others, unamendability might lead to dangerous extra-constitutional means in order to force a change. The difficulties created by unamendability are dealt with separately in Chapter 8.

Moreover, as the Venice Commission maintained, explicit limits on constitutional amendments are not a necessary element of constitutionalism.[202] Nonetheless, 'the core notion', Richard Kay correctly notes, 'that there is something wrong with the idea that an "amendment" might alter the essential character of a constitution while simultaneously invoking its authority – has been embraced by many modern constitution-makers'.[203] Indeed, an increasing number of constitutions contain explicit material limitations on the constitutional amendment power in order, *inter alia*, to protect essential characteristics of the constitutional order or principles perceived as being at great risk of repeal via the democratic process, in light of historical circumstances.[204] Neil Walker was thus correct

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[199] Cf., Dicey (1899-1900, 71) (stating the a constitution's form of government 'has in many cases been determined not by any rational conviction that a particular kind of government was adapted to meet the wants of a given people, but by the inconscious desire of constitution makers to follow the reigning fashion of their day…')
[200] European Commission for Democracy Through Law (2009, para. 218).
[201] Da Cunha (2007, 14).
[202] European Commission for Democracy Through Law (2009, para. 217).
[203] Kay (2011, 725).
[204] Fleming (1994-1995, 362-363).

in asserting that unamendability 'tells a story about a people and its common purpose that not only resonates with more general and powerful myths of peoplehood but which is partly vindicated by the historical record that constitutional law itself creates'.[205] A nation's constitutional identity is defined by the intermingling of universal values with the nation's particularistic history, customs, values and aspirations.[206] It is never a static thing but dynamic and can evolve with time, for example through constitutional amendments.[207] Regardless of how the constitutional identity can be modified, a nation usually remains faithful to a 'basic structure' that comprises its constitutional identity.[208] Unamendable provisions assist in remaining true to that basic structure. They tie the past, present, and future, and carry out expressive functions serving as important symbols for the polity. Therefore these *noli me tangere* provisions are utilised, in a way, for creating and maintaining a polity's constitutional identity.

In Chapter 5 I explain how explicit limits should be understood in light of the theory distinguishing between the *primary constituent power* and the constitutional amendment power. In general, these limitations *reflect* the idea that the amendment power can be substantially limited. Yet, they *function* as a manifestation of the delegation theory according to which the delegated amendment power must abide by the rules established in the constitution, including the material ones, and as such, those limits should be considered valid. As a delegated power, the amendment power must be conceived as implicitly limited even in the absence of any explicit limits. This issue is dealt with in the following chapter.

[205] Walker (2010A, 23).
[206] Jacobson (2006B, 316).
[207] Rosenfeld (2010, 209); Dixon (2011-2012, 1847).
[208] Jacobsohn (2010A).

CHAPTER 3: IMPLICIT LIMITATIONS

In the previous chapter, we have studied explicit limitations, which may be imposed on the constitutional amendment power in the form of unamendable provisions. A more complicated issue concerns the question of whether any implicit limitations on the amendment power exist, regardless of the existence or absence thereof of any unamendable provisions. This issue is more contentious than explicit limitations. In the latter case, the existence of clear constitutional provisions may ease and simplify the courts exercise in enforcing any such limitations by substantially reviewing constitutional amendments. As argued in Chapter 7, when explicit limits exist, judicial review of constitutional amendments usually enjoys greater legitimacy and suffers less from institutional difficulties than when the constitution is silent with regard to any limitations.

This chapter begins with studying the theoretical genesis of the idea of implicit limits. It then uses a comparative study to demonstrate manifold accounts of similar constitutional occurrences across countries – the phenomenon of courts holding that even in the absent of any explicit limits, the amendment power is implicitly and substantively limited. In Chapter 5, it will be argued that this phenomenon rests upon a solid theoretical ground.

I. THE GENESIS OF THE THEORY OF IMPLICIT LIMITATIONS

It appears that the genesis of the modern idea of implicit limitations on the amending power originated in the U.S. As noted in Chapter 2, Art. V of the U.S. Constitution originally contained two explicit limitations on the amending power: a prohibition on abolishing the African slave trade prior to 1808, and, without time limits, prohibiting the deprivation of a state of its equal representation in the Senate without its consent. The more intense controversy regarding the scope of the amending power did not concern these explicit limitations, but rather the existence of any implicit limitations on the amendment power. In the first American Congress, Roger Sherman – whom Thomas Jefferson described as 'a man who never said a foolish thing in his life'[1] – argued that there is a difference between the authority upon which the constitution rests and that upon which amendments rest:

[1] Anonymous (1824, 450).

> The Constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the State Governments. Again, all the authority we possess is derived from that instrument; if we mean to destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build.[2]

The U.S. Supreme Court case *Dodge v. Woolsey* adopts a somewhat similar position in Justice Wayne's majority opinion, ruling that the amendment power is a delegated power because it is exercised by agents and, therefore, is limited.[3] This approach was later abandoned.[4] Edward Everett gave one of the more vibrant arguments in favour of implicit limitations on the amendment power in a speech delivered in the House of Representatives in 1826:

> The distinction still recurs, that to amend is one thing, essentially to change another. To amend is to make changes consistent with the leading provisions of the Constitution, and by means of which those leading provisions will go into happier operation. Can this be the same thing as to change … those essential provisions themselves?

After examining the unamendability stipulated in Art. V, Everett continued to ask:

> One of two propositions must be maintained: either that these two expressed limitations are the only limitations of the amending power, or, that there is a prior limitation of the amending power, growing out of the nature of the Constitution as a compact. Unless we admit the latter proposition, there is nothing to prevent [the majority required for amendments] … from depriving the remainder of the States of any advantage they possess in these provisions of the Constitution, which guaranty the Federal equality, which was not to be touched without unanimous consent. Nay, sir, without this prior limitation of the amending power, there is nothing to prevent the only express limitation which not exists from being itself removed by way of amendment … I am, therefore, strongly inclined to think, that the principle of this implied limitation must always be consulted; that this must show us in each case how far alterations may go, and that it does dictate to us that amendments must be confined to those changes which are necessary, not to alter the essential provisions of the constitution, but to carry them into more perfect operation.[5]

This notion led to the recurring argument that even the amending power cannot lead to the destruction of the Union or the States, or interfere with their sovereignty.[6] In his *Discourse on the Constitution and Government of the United States*, published shortly after his death in 1850, John Calhoun advocated for implicit limits on the amendment power,

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[2] Annals of Congress (1789, 735).
[3] 59 U.S. (18 How.) 331, 347-348 (1885), http://supreme.justia.com/us/59/331/case.html.
[4] *Dillon v. Gloss*, 256 U.S. 368, 374, 41 S. Ct. 510, 65 L. Ed. 994 (1921), see Corwin and Ramsey (1950-1951, 189).
[5] Everett (1826, 3-6).
[6] See Haines (1930, 228).

writing that if an amendment is 'inconsistent with the character of the constitution and the ends for which it was establishes, - or with the nature of the system', or 'radically change the character of the constitution, or the nature of the system…', then the amendment power transcends its limits.[7] Not everyone, of course, accepted this view. Others regarded the amendment power as 'absolutely unlimited'.[8] In 1893, Thomas Cooley, perhaps the foremost advocate of the doctrine of implicit limitations on legislatures in order to protect rights, believed that there are certain inherent limitations – principles which underlie the Federal Constitution and which prevent its radical amendment. Amendments, he insisted, 'cannot be revolutionary; they must be harmonious with the body of the instrument'.[9] A similar argument was made by George Curtis in 1896 that the amendment power 'was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three fourths of the states to grasp new power at the expense of any unwilling state'.[10]

The debate regarding implicit limitations to the amendment power flourished during the first three decades of the 20th century, when some scholars argued, for example, that amendments cannot fundamentally change the scheme of government,[11] while others strongly defended the view that the amendment power knows no inherent limits, at least apart from those expressly provided in the constitution.[12] The scope of the amendment power became especially relevant to the debates regarding the Eighteenth Amendment.[13] E.V. Abbot, for example, asserts that there are certain natural and inalienable rights that cannot be abrogated, not even through the amendment power. Thus, the Eighteenth Amendment, which established the prohibition of alcoholic

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[7] Calhoun (1851, 300-301).
[8] Pomeroy (1868, 72).
[9] Cooley (1893, 109). In his 4th edition to Story's Commentaries of 1873, Cooley wrote that the Union is 'indissoluble' through constitutional means and 'can only be overthrown by physical force effecting a revolution'. See Story and Cooley (2008, 216).
[10] Curtis (1896, 160-161).
[11] See, for example, Wheeler (1921, 75); Child (1926, 28); Brown (1924, 33); Holding (1923, 484-489); Bacon (1929-1930, 777-778).
[12] Coleman (1910, 424); Frierson (1919-1920, 659); Orfield (1929-1930, 550); Williams (1928, 529).
[13] E.g, White (1920, 113); McGovney (1920, 499); Pierson (1925, 54); Emery (1920, 122). The briefs presented before the Supreme Court against the validity of the Eighteenth amendment (see the briefs in the case of *Rhode Island v. Palmer*, pp. 29, 66; *Kentucky Distilleries and Warehouse Co. v. Gregory*, p. 41; and *Feigenspan v. Bodine*, p. 64), are extremely interesting as they present various arguments in favour of implicit limitations on the amending power based upon the nature of the federal system. See most notably Mr. Root's brief in the *Feigenspan* Case, at p. 92: 'It is inconceivable that both the nation and the states may to all practical intents have their fundamental characters changed or destroyed whenever it pleases two-thirds of the houses of Congress, and three-fourths of the legislatures of the states, which latter may readily represent only a minority of all the people of the United States. The possibility of any such outcome should condemn any rule that would permit it'. For a summary of these arguments see Dodd (1921, 330-332).

beverages, might violate the natural right to pursue happiness.[14] Others have argued that repealing the Bill of Rights or the Fourteenth Amendment may be considered so fundamental in nature that it is beyond the amending power.[15] Most notably, three American scholars, branded by some as 'conservative',[16] expounded on the idea of intrinsic limitations on the amendment power. Arthur Machen contends that an 'amendment must be a real amendment, and not the substitution of a new constitution', since 'a wholly new constitution can be adopted only by the same authority that adopted the present constitution'.[17] George Skinner asserts that amendments cannot depart from the scheme and purpose of the original constitution and that 'the essential form and character of the government being determined by the location and distribution of powers cannot be changed'.[18] Lastly, William Marbury claims that the amendment power does not include the power to destroy the Constitution nor does it include the power to enact ordinary legislation.[19] In contrast, others have argued that even significant constitutional provisions may be amended, as part of the people's right to 'revise the scale of values handed down to it from the past'.[20]

Around that same period, French scholars developed the idea of 'supra-constitutionality'. Pierre Guillemon argued that 'supra-constitutional laws' exist above constitutional laws, such as the principles of the French *Declaration of the Rights of Man and Citizen of 1793*, which are beyond the scope of the amendment power.[21] Another defender of such a view was Léon Duguit, who claimed that the *Declaration of the Rights of Man and of the Citizen of 1789* simply recognised and proclaimed pre-existing rights and thus gave it a supra-constitutional status, imposing limits on constitutional legislation and *a fortiori* ordinary legislation.[22] The famous French institutionalist Maurice Hauriou[23] argued not only that the explicit limitation on amending the republican form of government of 1884 was valid and that an amendment revising the 'republican form of government would be unconstitutional', but also claimed that 'above the written constitution' there must be certain 'fundamental principles' even if these are not written

[14] Abbot (1920, 183). Such a claim was rejected in *United States v. Sprague*, 282 U.S. 716, 717 (1931).
[15] Jessup (1927).
[16] Vose (1972, 343).
[17] Machen (1909-1910, 170).
[18] Skinner (1919-1920, 223).
[19] Marbury (1919-1920, 225).
[20] Rottschaefer (1926, 393); See also Frierson (1919-1920, 659); Orfield (1942, 99, 103).
[21] Guillemon (1921, 10-11), cited in Haines (1930, 270-271).
[22] Duguit (1930, 603-7), cited in Laquièze (2007, 267).
[23] On Hauriou's work see Broderick (1970).

in the constitutional text.[24] According to Hauriou, such principles are unamendable and justiciable:

> The Constitutional Law itself does not escape before the judge, there are occasions where the check could be conducted on it. For example, in essence, an amendment to the Constitution in conflict with the constitutional legitimacy ... which is above the superlégalité itself because it consists of principles and the principles that are always above the text.[25]

Drawing on the writings of Hauriou,[26] the German Scholar Carl Schmitt claimed, for example, that the certain basic freedoms contain:

> … a "superlegalite constitutionelle", which is raised not only above the usual simple laws, but also over the written constitutional laws, and excludes their replacement through laws of constitutional revision. … it is not the intent of constitutional arrangements with respect to constitutional revisions to introduce a procedure to destroy the system of order that should be constituted by the constitution. If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the constitution, even less a legitimate means to destroy its legitimacy.[27]

According to Schmitt, the constitution's basic substantive principles, such as the state's character, cannot be set aside by the constituted powers, not even through the amending procedure, which was designed to effectuate the essence of the constitution. Thus, the constitution contains a core of implicitly unamendable principles that embody the constitution's identity. [28] Schmitt became the most famous proponent of implicit limitations on the amendment power and I return to his theory throughout this thesis.

The notion of principles that carry a *supra-constitutional* status was revived after WWII. German jurisprudence in the post-Nazi regime era was characterised by the rejection of pure positivism and the endorsement of natural law ideas,[29] raising the possibility that even the constitutional amendment power is limited by certain principles.[30] Of particular interest is Gustav Radbruch, the leading jurist, who argued after WWII that certain minimum standards of justice exist which positive law cannot violate.[31] 'Where there is not even an attempt at justice', Radbruch wrote, 'where equality,

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[24] Hauriou (1923, 297).
[25] Hauriou (1929, 296) [my translation].
[26] Balakrishnan (2000, 162). Schmitt claimed that Hauriou's work was the 'first systematic attempt of a restoration of concrete-order thinking since the dominance of juristic positivism', cited in Bates (2006, 424).
[27] Schmitt (2004, 58-60).
[28] Schmitt (2008, 150-153).
[29] See Bodenheimer (1954, 379); Cole (1958, 302-4); Rommen (1959, 1).
[30] See Dietze (1956, 1); Rommen (1959, 17-19); Herdegen (1994-1995, 591).
[31] Radbruch (2006A, 14). See Cole (1958, 302); Bodenheimer (1954, 382); Paulson (2006, 17).

the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law'.[32] The idea of supra-constitutional limitations on the constitutional amendment power was best summarised and developed by Otto Bachof in his book *Verfassungswidrige Verfassungsnormen?*, published in 1951.[33] According to Bachof, 'above' positive law exists natural law, which limits even constitutional legislation. A constitution is valid only with regard to those sections within the integrative and positivist legal order that do not exceed the predetermined borders of 'higher law'. [34] An amendment that violates 'higher law', as recognised by Art. 79(3) of the German Basic Law, would contradict both 'natural law' and the constitution, and it should be in the power of the courts to declare such an amendment as unconstitutional and thus void.[35] This was the accepted approach in German courts at that time. In 1950, the Bavarian Constitutional Court famously declared: 'There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms … can be void because they conflict with them.'[36]

The Federal Constitutional Court in the 1951 *Southwest* case involving equal rights of men and women later cited this paragraph with approval.[37] Two years on, in the *Article 117* case, the Federal Constitutional Court acknowledged the possibility of invalid constitutional norms in the extreme case where positive constitutional laws severely transcend the limits of justice.[38] However, these statements were mere *obiter dictum*. As elaborated in Chapter 7, in later years, the Federal Constitutional Court declined to refer

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[32] Radbruch (2006B, 7).
[33] Bachof (1951).
[34] *Id.*, 29-32.
[35] *Id.*, 47-57. Bachof's book, which was translated into Portuguese, was quite influential in Portuguese-speaking countries. On Bachof's influence see the following experience in post-dictatorship Portugal. In 1975, the Council of the Revolution issued a constitutional Law (8/75) which declared the dictatorship political police (abolished after the revolution) to be a terrorist organization. On this basis, former prime ministers and home ministers were incriminated. Law 8/75 had a constitutional status which allegedly prevented any claim of unconstitutionality. However, in one case, a military court (which had an authority to adjudicate crimes based upon this law) invoked Bachof's theory to find that the law, due to its retroactive nature, contradicted supra-constitutional norms. This argument was nevertheless rejected by the Supreme Military Court. See Opinion no. 9/79 from the Constitutional Commission (Pareceres da Comissão Constitucional), vol. 8, 3 ff. This is taken from Teles (2009, 430-31).
[36] Decision from April 4, 1950, 2 Verwaltungs-Rechtsrechung No. 65, quoted in Dietze (1956, 15-16) and Bachof (1951, 15). Interestingly, based upon this para., Judge Sussman of the Israeli Supreme Court recognised the existence of supra-constitutional norms steaming from natural law which are supreme to any law. See *Yeredor v. Chairman, Central Election Committee for the Sixth Knesset*, 19(2) PD 365, 390 [1965] (Isr); Guberman (1967, 458).
[37] 1 BverfGE 14, 32 (1951); see Gözler (2008, 84-86).
[38] 3 BverfGE 225, 234 (1953), see Dietze (1956, 17-19); Gözler (2008, 86-87); Kommers (1989, 55).

to *supra-constitutional* principles, concentrating on the unamendable provision as stipulated in Art. 79(3) of the Basic Law.

The argument in favour of implicit limitations on amendment powers did not remain a theoretical debate. It 'migrated' from Germany to India in the 1960s, where, due to stormy political events, it was applied practically and most notably elaborated.

II. THE INDIAN 'BASIC STRUCTURE DOCTRINE'

The Indian Constitution excludes any unamendable provisions. Likewise, Indian jurisprudence, rooted in British tradition, initially rejected the notion of implicit limitations on the amendment power. That position, however, was revised in the 1960s and 1970s following Prime Minister Indira Gandhi's far-reaching attempts to amend the constitution, which eventually led to the judicial development of 'the basic structure doctrine', according to which the amendment power is not unlimited; rather, it does not 'include the power to abrogate or change the identity of the Constitution or its basic features'.[39] This doctrine was used by the Indian Supreme Court to review and even annul constitutional amendments several times. Since much has been written on this doctrine and its development – both within India[40] and abroad[41] – I shall only give a relatively brief account of the events.

Events leading to the development of the 'basic structure doctrine' began already in the early days of the Indian republic, when the government attempted to pursue vast land reforms which affected landowners' constitutional right to property.[42] In *Shankari Prasad v. India* of 1951,[43] facing a challenge to the 1st Amendment that abridged the right to property, the Supreme Court held that fundamental rights *were not beyond reach of the amendment power*. Again, in *Singh v. Rajasthan* of 1965,[44] facing a challenge to the 17th Amendment, the majority of the Supreme Court rejected the argument that amendments cannot violate fundamental rights. With two judges dissenting from this view, another challenge was brought before a large bench of eleven judges in 1967 in *Golaknath v. State*

[39] See *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
[40] See, for example, Krishnaswamy (2010); Lakshminath (2011); Garg (1975, 243); Baxi (1974, 45); Palkhivala (1973); Rao (2002, 463); Sathe (1969, 33); Tripathi (1974); Desai (2000, 90); Chopra (2006). See also the NUJS Law Review (2008).
[41] See, for example, Morgan (1981, 307); Jacobsohn (2006A, 460); Abraham (2000, 195); O'Connell (1999, 48); Buss (2004, 23); Mate (2010, 175); Randhawa (2011); Sathe (2007, 215); Singh, (2011A, 169).
[42] For an account of these events see Merillat (1960, 616).
[43] AIR 1951 SC 458.
[44] AIR 1965 SC 845.

of Punjab.[45] Overruling its previous decisions, the majority of a divided court (six to five) held that *Parliament's power to amend the constitution could not be used to abridge the fundamental rights* since an amendment was deemed to be a 'law' under Art. 13, which prohibited Parliament from making *any law* abridging fundamental rights. Notwithstanding the fact that the Court delivered a prospective judgment and did not invalidate the amendments in question, this judgment triggered a powerful political reaction. It signified the opening shot of a 'great war …over parliamentary versus judicial supremacy'.[46]

One noteworthy element of the case was the introduction in the hearings of the 'basic structure' concept by M. K. Nambyar, one of the counsels for the petitioner in the *GolakNath* case.[47] Apparently, a German Professor who was an expert on South Asian law – Dietrich Conrad – had influenced Nambyar. In February 1965, Conrad visited India and delivered a lecture on 'implied limitations of the amending power' at the law faculty of Banaras Hindu University. The paper upon which the lecture was based was brought to the attention of Nambyar. In October 1966, Nambyar asked Conrad's permission to use his lecture's manuscript when arguing before the Supreme Court. It is told that Conrad 'readily and enthusiastically agreed', stipulating 'that the whole manuscript may be presented to the Court'.[48] Based upon Conrad's paper, Nambyar argued before the Supreme Court that implied limitations exist on the amendment power so that amendments cannot destroy the permanent character or 'basic structure' of the Constitution.[49] In its decision, the Court stated that 'there is considerable force in this argument'; however, focusing its attention on the narrower question of the scope of the amendment power *vis-à-vis* fundamental rights, deemed it unnecessary to express any opinion in that regard.[50]

As a consequence of the *GolakNath* case, Indira Gandhi sought to re-establish parliamentary sovereignty. In light of the political desire for social reforms, and after a decisive win of Gandhi's congress party in the elections, granting it two-thirds of the Parliament's seats, in 1971 the Parliament passed the 24th and 25th Amendments. The 25th Amendment was aimed at allowing property reforms, while according to the 24th

[45] AIR 1967 SC 1643.
[46] Austin (1999, 198).
[47] *Id*., 198-199.
[48] A correspondence of 20 and 27 October 1966 between Nambyar and Conrad, cited in Divan (2009, 70). See generally Noorani (2010); Noorani (2001); Austin (1999, 201); and also Singh (2001): 'by bringing [the doctrine] to the notice of the lawyers in India and by convincing them about its natural existence in the Indian Constitution, or for that matter in any constitution, Conrad bridged the common law and the civil law.'
[49] Sorabjee (2007, 22) claimed that this argument was 'Nambyar's most significant contribution in the field of constitutional law'.
[50] 1967 SCR (2) 762, 805.

Amendment, in exercise of its *constituent power,* Parliament may amend by way of addition, variation or repeal *any provision of the constitution*, including those protecting fundamental rights. These amendments were challenged before thirteen judges of the Supreme Court in *Kesavananda Bharati v. State of Kerala* of 1973.[51] The Supreme Court overruled *GolakNath*, holding that the term 'law' does not refer to constitutional amendments; hence, Parliament can amend any part of the Constitution. More importantly, seven of the judges held that the amendment power *does not include the power to alter the basic structure, or framework of the constitution so as to change its identity,* creating what has come to be known the 'basic structure doctrine'.[52] Six judges dissented, arguing that all parts of the Constitution have an equal status and thus all can be amended. The *Kesavananda* case did not provide a precise list of unamendable features that constituted the Constitution's basic structure, thus forming a sort of common-law doctrine that develops on a case-by-case basis. Some of the judges, however, offered examples of such features, such as the supremacy of the Constitution; the democratic form of government; federalism; the separation of powers; and secularism. The *Kesavananda* judgment created a 'constitutional quicksand'.[53] A day after the announcement of judgment, the furious Indira Gandhi, appointed a new Chief Justice upon the retirement of Chief Justice Sikri. But instead of appointing the most senior judge as was the accepted custom, she appointed Justice Ray, the most senior member of the minority judges.[54] But this was merely the beginning.

In June 1975, a High Court invalidated Gandhi's 1971 election due to electoral fraud, barring her from elections for six years. Gandhi's reacted by proclaiming a state of emergency, after which Parliament used its amending power to enact two astonishing amendments: according to the 38th Amendment, the President's decision to issue a Proclamation of Emergency and any laws adopted during the emergency were immune from judicial review; and the 39th Amendment altered, retroactively, the laws under which Gandhi was convicted and prohibited any court from adjudicating any issue on the election of the President, Vice-President, Parliament Speaker and Prime Minister, even if such a matter was already pending before a court.[55] Thereafter, Gandhi's appeal came before the Supreme Court. In *Indira Nehru Gandhi v. Raj Narain* in 1975,[56] five judges

[51] AIR 1973 SC 1461. For the story behind the case see Andhyarujina (2012).
[52] It is important to note that it is very difficult to extract a coherent *ratio* from this 800 pages judgment, as the judges were severally divided and offered different views and separate judgments.
[53] Baxi (1974, 45).
[54] Scheppele (2002, 254).
[55] O'Connell (1999, 71) cynically remarked that 'one must appreciate the tact of Mrs Gandhi in not limiting the exception just to the office of Prime Minister!'
[56] AIR 1975 SC 2299.

unanimously confirmed the basic structure doctrine. Whereas the Court validated Gandhi's election in the 1971 election, it held that by excluding judicial review the 39th Amendment violated three essential features of the constitutional system: fair democratic elections, equality, and separation of powers, and was therefore invalid.

In an effort to put an end to judicial intervention, in 1976 the Parliament retaliated and enacted the 42nd Amendment. This amendment, comprised of 59 sections, declared, among other things, in section 55 that: 'No amendment of this Constitution … shall be called in question in any court on any ground', and 'for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution…'.[57] Meanwhile, in the 1977 elections, Gandhi's party lost to the Janata party. The Janata party reduced the powers of the Government during the emergency, but was unable to reverse the 42nd Amendment's sections dealing with Parliament's absolute amendment power. After Gandhi returned to power in 1979, the 42nd Amendment was challenged on the grounds that it destroyed the basic structure of the Constitution. In *Minerva Mills v. Union of India* of 1980,[58] four months after Gandhi returned to power, five Supreme Court judges held, unanimously, that since section 55 of the Amendment removed all limitations on the Parliament's amendment power, conferring upon it the power to destroy the Constitution's essential features or basic structure, it was beyond Parliament's amendment power and therefore void. By so doing, the Court established Parliament's limited amendment power:

> Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. … Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.[59]

The Supreme Court explained that:

> If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally

[57] The Constitution (Forty-second Amendment) Act, 1976, http://indiacode.nic.in/coiweb/amend/amend42.htm
[58] AIR 1980 SC 1789.
[59] *Id.*, at para. 22.

changing its identity.[60]

In the words of Justice Chandrachud: 'the theme song of … Kesavananda Bharati is: Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity'.[61]

The limited nature of the amendment power is now an established constitutional principle in India.[62] Since *Minerva Mills*, the basic structure doctrine has been accepted and applied in various other cases.[63] It now includes general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, freedom and dignity of the individual, unity and integrity of the nation, free and fair elections, federalism, and secularism.[64]

The 'basic structure doctrine' attempts to identify the philosophy upon which a constitution is based.[65] In Chapter 5, I claim that the basic structure doctrine rests on a solid theoretical ground and is in accordance with the general theory advanced in this work, according to which the amendment power is delegated and thus implicitly limited in scope. But before laying the arguments supportive of the basic structure doctrine, I wish to demonstrate how the idea of implicit limitations on amendment powers has migrated through different jurisdictions, progressing toward becoming a universal trend and an almost globally recognised doctrine.[66] This is the aim of the rest of this chapter.

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[60] *Id.*, at 1824.
[61] *Id.*, at 1798 para. 21.
[62] Iyer (2004, 68).
[63] See *Waman Rao v. Union of India*, AIR 1981 SC 271 (the Supreme Court ruled that any addition to the Ninth Schedule which is immune from judicial challenge could be challenged for violating the basic structure); *S.P. Gupta v. Union of India*, AIR 1982 SC 149 (1981) (the independence of the judiciary is a basic structure of the constitution); *S.P. Sampath Kumar v. Union of India*, AIR 1987 SC 386 (the Supreme Court did not invalidate the 42nd Amendment which excluded High Court Jurisdiction, holding that judicial forums alternative to the jurisdiction of High Courts may be created by laws, conditioned that such forums are no less effective than that of High Courts); *P. Sambamurthy v. State of Andhra Pradesh*, AIR 1987 SC 663 (the Supreme Court unanimously invalidated the 32th Amendment, which granted state governments the power to annul orders issued by administrative tribunals, for violating the rule of law which is a basic feature of the constitution); *Chandra Kumar v. Union if India*, AIR 1997 SC 1125 (a seven judges panel of the Supreme Court unanimously invalidated a provision of the 42nd Amendment which excluded the Supreme and High Courts' jurisdiction in those cases in which administrative tribunals had jurisdiction, holding that judicial review is a basic feature of the constitution).
[64] Jacobsohn (2003-2004, 1795); Kashyap (2006, 103-105); Klein (1999B, 36).
[65] Khurshid (2006, 98).
[66] See Roznai (2012, 240); Roznai (2013B, 657).

III. THE 'BASIC STRUCTURE DOCTRINE': A TOUR D'HORIZON

A. Bangladesh: Implicit Limitations

After India adopted the basic structure doctrine, it migrated to its neighbouring countries, most notably to Bangladesh.[67] The Appellate Division of the Supreme Court of Bangladesh adopted the Indian basic structure doctrine in its 1989 case, *Anwar Hossain Chowdhury v. Bangladesh*,[68] which expressly refers to the Indian *Kesavananda* case. In that case, the Constitution (Eighth Amendment) Act 1988, which had affected the judicial review jurisdiction of the Supreme Court by means of the decentralisation of its High Court Division, was declared unconstitutional and void. The majority in the Appellate Division endorsed the basic structure doctrine, ruling that although the amendment power is not an ordinary legislative power, but rather a *constituent power*, it is nevertheless merely a power granted to parliament by the constitution and is thus limited. As Judge B.H. Chowdhury wrote:

> Call it by any a name - 'basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself-namely, the Parliament. … Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution.[69]

Judge Shahabuddin Ahmed reasoned that *constituent power* – as the power to make a constitution – belongs to the people alone. The constitutional power that is vested in the Parliament is a 'derivative' power, and thus limited.[70] Judge Ahmed listed a number of principles, such as the peoples' sovereignty, supremacy of the constitution, democracy, unitary state, separation of powers, fundamental rights, and judicial independence, which he contends are the structural pillars of the Constitution and therefore beyond the amendment power. According to Ahmed, if the amendment power transgresses its limits,

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[67] See generally Hoque (2011, Ch. 4); Conrad (2003, 187-191); Talukder and Ali Chowdhury (2009); for a summary of the Supreme Court of Bangladesh decisions, see also *Siddique Ahmed v. Bangladesh*, (2010) 39 CLC (HCD) (26.08.2010), pp. 107-14, http://www.thedailystar.net/newDesign/images/text/7th%20Amendment_full%20text_The%20Daily%20Star.pdf.

[68] 41 DLR 1989 App. Div. 165.

[69] Chowdhury, J, *id.*, para. 195. At paras 292-293 Chowdhury listed 21 'unique features' of the constitution, some of which are basic features unamendable by the amending power of the Parliament.

[70] Shahabuddin, J, *id.*, para. 381.

it is in the power of the court to strike down even constitutional amendments.[71] This line of reasoning was reaffirmed in subsequent cases.[72]

In 2005, the High Court Division of the Supreme Court delivered its judgment on the Constitution (Fifth Amendment) Act, 1979. In a 391-page long decision, J. Khairul Huq ruled that the Fifth Amendment, which was enacted to ratify, confirm, and validate the Martial Law Proclamations, regulations, and orders, was illegal and void.[73] The Court repeated and affirmed that Parliament may amend the Constitution, but it cannot abrogate it, suspend it, or change its basic feature or structure. 'The power to destroy' according to the court, 'is not the power to amend'. The amendment provision 'confers enabling power for amendment but cannot swallow the constitutional fabrics. The fabrics of the Constitution cannot be dismantles even by the Parliament which is a creation of the Constitution itself', and while the amendment power is wide, it is 'not that wide to abrogate the Constitution or to transform its democratic republican character into one of dictatorship or monarchy'. Lastly, 'the Court has got power to undo an amendment if it transgresses its limit and alters a basic structure of the Constitution'.[74] The Appellate Division of the Supreme Court upheld this ruling.

In a recent decision of 2011, *Abdul Mannan Khan v. Government of Bangladesh*,[75] the Supreme Court Appellate Division faced a challenge to the Constitution (Thirteenth amendment) Act, 1996 (Act 1 of 1996), which mandated elected governments, on completion of their term, to transfer power to an unelected non-partisan caretaker administration to oversee new parliamentary elections. Due to its violation of democratic values, which are basic features of the Constitution, this amendment was prospectively declared *ultra vires* the Constitution and void. Thus, even in the absence of unamendable provisions, in a series of cases it was decided that the amendment power under the Constitution of Bangladesh is implicitly limited. Consequently, substantive judicial review of constitutional amendments, *vis-à-vis* implicit limits in the form of the 'basic structure' doctrine, has developed into an accepted practice.[76]

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[71] Shahabuddin, J, *id.*, paras. 416-417.
[72] See, for example, *Alam Ara Huq v. Government of Bangladesh,* 42 DLR (1990) 98; *Fazle Rabbi v. Election Commission*, (1992) 44 DLR 14; *Dr. Ahmed Hossain v. Bangladesh*, (1992) 44 DLR (AD) 109, 110; *Mashihur Rahman v. Bangladesh*, 1997 BLD 55. See also Fazal (1996, 499).
[73] *Bangladesh Italian Marble Works Ltd v Bangladesh*, (2006) 14 BLT (Special) (HCD) 1; (2010) 62 DLR (HCD) 70 (29.08.2005), p. 317, 335.
[74] *Id.*, pp. 187-188.
[75] Civil Appeal No. 139 of 2005 with Civil Petition For Leave to Appeal No. 569 of 2005 (10.05.2011). I thank Saifuz Zaman for this reference.
[76] Hoque (2011, Ch. 4); Talukder and Ali Chowdhury (2009).

B. Pakistan: Implicit Limitations Without Judicial Enforcement

The 'basic structure doctrine' has also reached Pakistan, where it has been addressed in the courts under the title: 'salient features of the Constitution'.[77] In the 1970s, the Supreme Court held on several occasions that it has a limited authority with regard to constitutional provisions.[78] In the case of *Darvesh M. Arbey v. Federation of Pakistan*, Justice Shameem Hussain of the Lahore High Court stated that 'the Parliament is not sovereign to amend the Constitution according to its likes and dislikes much less than changing the basic structure of the Constitution'.[79] The Supreme Court later relaxed this position, for example in *Fouji Foundation v. Shamimur Rehman*, where the Court indicated that 'the learned Judge failed to notice that the amending power, unless it is restricted, can amend, vary, modify or repeal any provision of the Constitution'.[80] In *Al-Jehad Trust v. Federation of Pakistan*,[81] the Supreme Court nearly recognised a 'basic structure doctrine' when it held that in order to resolve a conflict between a constitutional provision and a later amendment, the Constitution has to be interpreted as a whole, taking into account the spirit and 'basic features of the Constitution'.[82] In the case of *Mahmood Khan Achakzai v. Federation of Pakistan* of 1997,[83] the then Chief Justice of the Supreme Court, Sajjad Ali Shah, observed that Pakistan's Constitution has salient features – 'federalism, parliamentary form of Government blended with Islamic provisions' – which are beyond the amendment power.[84] However, in the final order the Court remained ambiguous on the question of implicit limits to the amendment power, stating that 'what is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality'.[85] In *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*,[86] it was claimed that an amendment is void since it violated the Constitution's basic structure. While Justice Akhtar left the applicability of the basic

[77] See generally Newberg (2002, 237-45); Lau (2006, 81-88); Conrad (2003, 191-192).
[78] See *Asma Jilani v. Government of the Punjab*, PLD 1972 SC 139; S*aeed Ahmed Khan v. Federation of Pakistan*, PLD 1974 SC 151; *Brig. (Ret'd.) F.B. Ali v. The State*, PLD 1975 SC 506; *Islamic Republic of Pakistan v. Abdul Wali Khan*, PLD 1976 SC 57; *Federation of Pakistan v. United Sugar Mills Ltd.*, PLD 1977 SC 397. See in Houlahan (2008).
[79] PLD 1980 Lah. 846, quoted in Lau (2006, 82).
[80] PLD 1983 SC 457, 627. See also *Pir Sabir Shah v. Federation of Pakistan*, PLD 1994 SC 738.
[81] PLD 1996 SC 367.
[82] *Id.*, 410, 516, 537. Conrad (2003, 192) notes that using an extraordinary 'interpretation' in order to bring to the result of an original constitutional provision prevailing over a later amendment, albeit an expressed stipulation to the contrary, is 'but a veiled manner of striking down a later amendment – on very legitimate grounds – for inconsistency with basic principles of the Contitution as originally enacted.'
[83] PLD 1997 SC 426, 458, 479-80. See Lau (2006, 81-85).
[84] *Id.*, 458.
[85] *Id.*, 446.
[86] PLD 1998 SC 1263.

structure doctrine open, Chief Justice Ajmal Mian noted that, despite *Achakzai*, Pakistan's courts had not accepted the basic structure doctrine:

> … in Pakistan instead of adopting the basic structure theory or declaring a provision of the Constitution as ultra vires to any of the Fundamental Rights, this Court has pressed into service the rule of interpretation that if there is a conflict between two provisions of the Constitution which is not reconcilable, the provision which contains lesser rights must yield in favour of a provision which provides higher rights.[87]

Eventually, the Supreme Court declined to decide upon the issue, holding that even if the doctrine was recognised in Pakistan, the amendment under review did not violate it. Importantly, the dissenting judge, Justice Raja Afrasiab Khan, upheld the basic structure doctrine in such a way that the Islamic character of the state, as well as its basic constitutional rights, could not be repealed by Parliament.[88] Similarly, Justice Mamoon Kazi asserted that the basic structure doctrine exists in Pakistan, noting that the Court, as the guardian of the Constitution, has a right to annul amendments that violate the basic structure or fundamental rights.[89]

In *Syed Masroor Ahsan and others v. Ardeshir Cowasjee and others*,[90] the Supreme Court observed that Parliament could not transgress its limits by affecting the Constitution's basic structure. If it does so, the judiciary enjoys ultimate judicial review authority. In its ruling in *Zafar Ali Shah v Pervez Musharraf,*[91] the Supreme Court approved General Musharraf's military coup on the basis of the doctrine of state necessity.[92] Importantly for our matter, in the operative part of the order, the Court emphasised the following: 'that no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions'.[93]

Notwithstanding these statements, the Supreme Court did not invalidate any amendment. Moreover, it appears that the Supreme Court is distinguishing between implicit limits on the amending power and judicial enforcement of these limits. In the

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[87] *Id.*, at 1313.
[88] *Id.*, at 1423.
[89] *Id.*, at 1436.
[90] PLD 1998 SC 823,
[91] PLD 2000 SC 869.
[92] See Qureshi (2009-2010, 491).
[93] [2000] 52 PLD SC 869, 1221, section 6(iii). See Pattanaik (2004, 277). On federalism as a salient feature of the Constitution see Chaudhry (2011).

Seventeenth Amendment Case of 2005,[94] the Supreme Court faced a challenge to the 17th Amendment, which, *inter alia*, allowed the President to hold both the office of President of Pakistan and the Chief of Army Staff, exempting General Musharraf from the Constitution's explicit ban on maintaining the dual offices. The Supreme Court limited its scope of judicial review, holding that review of constitutional amendments can only be made on procedural grounds and that it had no jurisdiction to invalidate amendment on substantive grounds.[95] The Court stated that:

> There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary … but by the body politic, i.e., the people of Pakistan.[96]

The Court concluded this point by ruling that:

> No constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the courts. A constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.[97]

In a recent case before the Supreme Court regarding the 18th Amendment, it was argued that sections of the amendment concerning the appointment of judges violate the judiciary's independence, which is a salient feature of the Constitution, and that the Supreme Court has the power to review amendments if the Constitution's basic features or the core values have been tinkered with.[98] In response, it was argued that the concept of 'basic structure' as a touchstone to strike down constitutional provisions is alien to Pakistan jurisprudence.[99] The Supreme Court admitted the petition; however, it decided in its order not to express its opinion on the merits of the issues raised at this stage, but

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[94] Judgment on Seventeenth Amendment and President's Uniform Case (2005) [*Pakistan Lawyers Forum v. Federation of Pakistan*, reported as PLD 2005 SC 719].
[95] *Id.*, 27, paras. 32, 35, 41.
[96] *Id.*, 42, para. 56.
[97] *Id.,* 42-43, para. 57.
[98] Constitution Petitions No. 11-15, 18-22, 24, 31, 35, 36, 37 & 39-44/2010, *Nadeem Ahmed and others v. Federation of Pakistan and others* (order delivered on October 21, 2010), p. 9-10, http://www.supremecourt.gov.pk/web/user_files/File/18th_amendment_order.pdf.
[99] *Id.*, 10.

rather, to refer the matter first to Parliament for reconsideration.[100] It thus remains to be seen whether the Supreme Court will override three decades of jurisprudence according to which even if the amendment power is limited by the Constitution's 'salient features', it is not the role of the judiciary to decide whether a certain amendment impinges these limits or not. This is especially intriguing in light of the judiciary's independence and the Supreme Court's activism in the post-Musharraf era and since the restoration of Chief Justice Chaudhry in 2009 after his 2007 suspension.[101]

C. Africa

In Africa, case law concerning the judicial review of constitutional amendments is still scant.[102] Nonetheless, there have been a number of interesting developments with regard to the scope of amendment powers in several notable judgments and academic writings, which are based upon the Indian basic structure doctrine.[103]

1. Kenya – Acceptance of the Doctrine

In Kenya in 1991, the High Court was confronted with the question of whether the constitutional amendment power is limited while reviewing an amendment that transformed Kenya into a one-party state. The High Court held that the constitutional amendment was valid.[104] The question arose again during the constitution-making

[100] *Id.*, 11-15.
[101] See Waseem (2012, 19). Chief Justice Chaudhry was forced to resign for begin 'overly independent' and 'unreliable' from governmental point of view. See Hirschl (2010, 99).
[102] For an analysis see Muigai (2003, 7-8).
[103] To give one example, in Zimbabwe, the amendment procedure is weak, as the dominant political party can easily achieve the required majority for amendments (Hatchard (2000, 19)). At the opening of the High Court in 1991, the Chief Justice Anthony Gubbay, in what seemed to some as 'preparing the ground to adopt the basic structure doctrine', asserted that certain basic principles enshrined in the Declaration of Rights are not subject to curtailment. See Hatchard and Slinn (2009, 55); Hatchard (1991, 96). Gubbay (1997, 252) (2003, 61) repeated this idea years later in his academic writings where he argued that 'there are certain immutable, fundamental aspects of a constitution that cannot, and may not, be altered under any circumstances whatsoever, no matter how express the purported amendment.' See also Gubbay (2001, 52) stating that if the 'structural pillars of the Constitution are damaged or destroyed the whole constitutional edifice will crumble. Therefore it is the duty and function of the judiciary to protect the Constitution against such damage'. But see Van Horn (1994, 154-160) (arguing that the 'basic structure doctrine' is unsuitable for Zimbabwe, due to the lack of constitutional preamble or reference to the people's sovereignty. Moreover, 'In an infant nation where the judiciary has yet to establish its legitimacy and the fear of freewheeling judicial activism is excessive, the doctrine is destined to fail; and if pressed, it may be with devastating and destructive consequences for the Supreme Court').
[104] See *Gitobu Imanyara v. Attorney General*, Misc. Civil Application Number 7 of 1991 (unreported); *Salim Damwe and others v. Attorney General*, HCCC 253 of 1991 (unreported); cited in Muigai (2003, 7).

process in 2004.[105] In the case of *Njoya v. Attorney General,*[106] the High Court rejected the claim that the amendment power includes the power to make changes which amount to the replacement of the Constitution: 'the [amendment] provision', it was held, 'plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution', and that 'alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered'.[107] Based on the Indian 'basic structure' doctrine, the Court held that fundamental constitutional change could solely be made by the exercise of *original constituent power.*[108]

2. *South Africa: Towards Acceptance?*

India was a great source of inspiration for the drafting of the South African Constitution, and South African judges have been profoundly influenced by Indian judgments. As former South African Constitutional Court Judge Albie Sachs remarked:

> We look to the Indian Supreme Court which had a brilliant period of judicial activism when a certain section of the Indian intelligentsia felt let down by Parliament. They were demoralized by the failure of Parliament to fulfil the promise of the constitution, by the corruption of government, by the authoritarian rule that was practiced so often at that time. Some of the judges felt the courts must do something to rescue the promise of the constitution, and through a very active and ingenious interpretation bringing different clauses together they gave millions of people the chance to feel "we are people in our country, we have constitutional rights, we can approach the courts…"[109]

Despite such a positive approach towards Indian jurisprudence, the Indian basic structure doctrine has not been formally accepted as a fundamental element of South African constitutionalism.[110] One can extend the issue back to the Interim Constitution of 1993. In the case of *Premier of KwaZulu-Natal v. President of the Republic of South Africa,*[111] Mahomed DP, in a judgment to which all of the members of the Court concurred, declared:

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[105] The 2005 draft Constitution was rejected in a referendum. Only later, the Constitution of 2010 replaced the Constitution of 1963. See Stacey (2011, 597).
[106] *Njoya & Others v. Attorney General & Others*, [2004] LLR 4788 (HCK), high Court of Kenya at Nairobu, 25 March 2004, http://www.chr.up.ac.za/index.php/browse-by-subject/336-kenya-njoya-and-others-v-attorney-general-and-others-2004-ahrlr-157-kehc-2004-.html
[107] *Id.*, paras. 59-60.
[108] *Id.*, para. 61. See Stacey (2011, 603-606).
[109] Sachs (1999, 10).
[110] See Govindjee and Kruger (2011); Devenish (2005, 243).
[111] 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC).

> There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the constitution, might not qualify as an 'amendment' at all.[112]

In contemplating that an extreme amendment could not be deemed an 'amendment' at all, the Court not only followed the line of reasoning of the Indian basic structure doctrine,[113] but also 'left open the possibility that it may subsequently incorporate a basic-structure doctrine into South African law'.[114] In *Executive Council of the Western Cape Legislature v. President of the Republic*,[115] Justice Sachs noted:

> There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life – the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.[116]

The idea of fundamental principles as limiting constitutional politics received interesting treatment during the establishment of the new Constitution. The interim Constitution of 1994 stipulated that the constitution-making process would take place within a framework of thirty-four agreed-upon principles.[117] These principles ensure that political parties publicly pledge themselves to a definite vision, clarifying the direction of the constitution-making process.[118] The Constitutional Court of South Africa was empowered to review the draft Constitution's compliance with those principles. In its review (the famous *Certification case*), the Court declared that the Constitution, although establishing democratic institutions and protecting human rights, failed to comply with

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[112] *Id.*, para. 47.
[113] Robertson (2010, 236). Indeed, in his judgment, Mahomed DP specifically referred to Indian jurisprudence. See *KwaZulu-Natal* case, 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC), paras. 47-48.
[114] Henderson (1997, 553).
[115] 1995 10 BCLR 1289 (CC).
[116] *Id.*, para. 204, cited in Devenish (2005, 249); see also Govindjee and Kruger (2011).
[117] Chaskalson (2003, 153).
[118] Brooke (2005, 3-10).

certain agreed-upon principles, and was therefore unconstitutional.[119] Only after the amendment of the draft Constitution did the Constitutional Court declare that it complied with the principles.[120] Against that background, the entire notion of unconstitutional constitutional norms should not come as a surprise. As Heinz Klug remarks with regard to the *Certification case*:

> Significantly, at least two Justices of the Constitutional Court have made reference to the notion of the basic structure of the Constitution used by the Indian Supreme Court in its jurisprudence striking down validly enacted Constitutional Amendments. To this extent the Constitutional Assembly and the Court have left open the future of the Court's role in the formal constitution-making or amending process under the final Constitution.[121]

In line with Klug's conclusion, the Court has continued to leave this issue open. In a case of 2002, *United Democratic Movement v. President of the Republic of South Africa and Others*,[122] the Constitutional Court assumed, for the sake of argument, the application of the basic structure doctrine, but then found that no basic feature was violated. Consequently, the precise status of the basic structure doctrine in South Africa remains ambiguous.[123]

3. Tanzania – One Step Forward, Two Steps Back?

The basic structure doctrine also travelled to Tanzania, where, the Constitution of 1977 (as the 1965 one) does not include unamendable provisions. The case of *Christopher Mtikila v. Attorney General* of 2006,[124] concerned a constitutional amendment that banned the participation of no-party candidates in the general elections. The High Court of Tanzania stated that 'it may of course sound odd to the ordinary mind to imagine that the provisions of a constitution may be challenged for being unconstitutional', however, it later declared that 'this Court may indeed declare some provisions of the Constitution, unconstitutional'.[125] The High Court, borrowing heavily from Indian jurisprudence,

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[119] *Re Certification of the Constitution of the Republic of South-Africa*, 1996(4) SALR 744 (CC); Sachs (1996-1997, 1249).
[120] *Re Certification of the Amended Text of the Constitution of the Republic of South-Africa* 1997(2) SALR 97 (CC); Brooke (2005, 23-24).
[121] Klug (1997, 202).
[122] (11) BCLR 1179 (October 4, 2002), http://www.saflii.org/za/cases/ZACC/2002/21.pdf; see also Devenish (2005, 249-250).
[123] See Devenish (2004, 55-56). For a review of constitutional amendments in South-Africa see Corder (2011, 261).
[124] *Mtikila v Attorney General* (10 of 2005) [2006] TZHC 5 (5 May 2006), http://www.saflii.org/tz/cases/TZHC/2006/5.pdf/
[125] *See id.*, 27-29.

expressed the proposition that Parliament's powers were limited, citing Professor Issa Shivji's article 'Constitutional Limits of Parliamentary Powers',[126] according to which:

> [T]he power to amend the Constitution is also limited. While it is true that parliament acting in Constituent capacity ... can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution.

The High Court then examined whether the infringement of the fundamental right to join a political party was proportionate. After deciding that the infringement was substantial and unjustified, the court again cited Shivji's article that 'this is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications of and amendments to all its provisions?' [127] It then declared the constitutional amendment to be unconstitutional.[128]

However, in the appeal of that decision in June 2010, the Court of Appeal of Tanzania reversed the 2006 judgment, holding that Parliament can alter any provision of the Constitution.[129] After noting that *Kesavananda* was influenced by the German scholar Dietrich Conrad, the court pointed out that 'even Professor Conrad himself conceded that there is no litmus test as to what constitutes basic structure', and that this lack of precision carries its own distinct dangers. [130] After examining the Constitution's provisions regarding amendment, the Court of Appeals took a rather formalistic view and stated that 'there is no Article which cannot be amended. In short there are no basic structures', concluding that: 'It is our considered opinion that the basic structures doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case persuasive, when considering our Constitution'.[131]

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[126] Shivji (2003, 39), cited *id*., 32.
[127] *Id*., 42-43, citing Nyerere (1995, 9).
[128] *Id*., 43. For the history of the case see also Ellett (2008, 371-374).
[129] The Court of Appeal of Tanzania, Civil Appeal No. 45 of 2009, *The Attorney Gerneral v. Christopher Mtikila* (17 June 2010), http://www.kituochakatiba.org/index2.php?option=com_docman&task=doc_view&gid=655&Itemid=36
[130] *Id*., 57-61. The rejection of implicit limitations based upon this passage is unconvincing, as Conrad was mearly advocating for 'tightening judicial scrutiny'. For such criticism of the court's reasoning see Samatta (2011, 242).
[131] *Id*., 61-64.

D. South-East Asia

1. South Korea, Japan, and China – Voices from Academia

Modern constitutionalism is developing in East-Asian countries,[132] and with it the recognition of the doctrine of implicit limitations on amendment powers. In South Korea, the 1948 Constitution does not explicitly include any substantive limits on the amendment power;[133] yet in scholarly writing it has been suggested that it is commonly accepted that the amendment power is substantially limited.[134] In the same vein, the Japanese Constitution of 1946 does not contain any explicit prohibition on amendments. However, many scholars believe that the three basic principles upon which the Constitution is built – popular sovereignty, the guarantee of fundamental human rights, and pacifism[135] – cannot be altered through the process of constitutional amendments.[136] This argument finds some textual support, as according to the Preamble, the Japanese people reject all constitutions which conflict with the principle that 'sovereign power resides with the people', and in Art. 9 the Japanese people pledge to 'forever renounce war…'[137] The argument is particularly convincing with regard to the guarantee of rights, since Art. 97 (which is positioned immediately after Art. 96 that regulates constitutional revision) states that: 'the fundamental human rights by this Constitution guaranteed to the people of Japan … are conferred upon this and future generations in trust, to be held for all time inviolate.'

Lastly, in China, the Constitution of 1923 explicitly prohibited amendment to the republican form of government (Art. 138). While the Constitution of 1982 does not include any explicit limitations, scholars in China have suggested that some implied principles limit the amendment power.[138]

Whereas in these countries, the voices from academia have not (yet) reached the courts, it is in Taiwan where the idea of implicit limitations on the amendment power was judicially recognised.

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[132] On East-Asian Constitutionalism see Yeh and Chang (2010); Symposium (2010, 766-987).
[133] See generally Yoon (1988, 1).
[134] Gatmaytan (2010, 25). On the Constitutional Court in Korea see generally Park (2008-2009, 62).
[135] Maki (1990, 73).
[136] Fassbender (1998, 144); for a useful review of this notion, see Ofuji (2004, 619).
[137] On this provision see Beer (1998, 815).
[138] See in Liangliang (2007, 48).

2. *Taiwan and Thailand – Recognition*

On 4 September 1999, the Third National Assembly of Taiwan, fearing abolishement, ratified a 5th Amendment to the Constitution, which provides that the Fourth National Assembly shall be appointed from the various political parties according to the ratio of votes each party received in the corresponding Legislative Yuan election. In other words, the Amendment turned the National Assembly into an unelected body. It also extended the National Assembly term to two additional years. This was challenged by a group of Legislative Yuan lawmakers as inconsistent with Art. 25 of the Constitution, which requires the Assembly to exercise its powers 'on behalf of all citizens of the nation'.[139] On 24 March 2000, the Council of Grand Justices[140] announced Interpretation No. 499, which declared the Amendment unconstitutional on the grounds that it violated certain basic constitutional principles.[141] The Council of Grand Justices stated:

> Although the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Among the constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of the fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental tenets of the Constitution as a whole.[142]

In its decision, the Council of Grand Justices cited the Turkish and German Constitutional Courts' jurisprudence regarding judicial review of constitutional amendments.[143] It was especially interested in the Italian Constitutional Court decision recognising basic constitutional principles as limits to constitutional amendments,[144] and worked hard to get it translated into Chinese.[145] One month after this judgment, the National Assembly re-amended the Constitution accordingly.[146] It was thus argued that

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[139] Ip (2011). For a history of constitutional revisions in Taiwan see Yeh (2001, 55-58).
[140] The Taiwanese Council of Grand Justices is a special body established by the Constituton, within and as the head of the judiciary (art. 79II), with the special competence to 'interpret' the constitution (art. 78).
[141] J. Y. Interpretation No. 499 (2000/03/24); an English version of the interpretation is available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499. See also Yeh (2009, 188); Lo and Luo (2006, 31).
[142] J. Y. Interpretation No. 499, *id.*, para. 2.
[143] Trone (2008, 302).
[144] Corte Cost., 29 dicembre 1988, n. 1146, Giur. it. 1988, I, 5565 (It.)). On this case see further Chapter 8.II.B.
[145] Law and Chang (2011, 564).
[146] Yeh and Chang (2009, 170).

with this judgment the Council of Grand Justices not only 'gained trust from the Taiwanese public',[147] but also became the most significant organ for fulfilling the rule of law.[148] Moreover, it was claimed that this judgment was essential in preserving the democratic constitutional order in Taiwan.[149]

In Thailand, the 2007 Constitution prohibits amendments that affect 'the democratic regime of government with the King as Head of the State or changing the form of the State' (Sec. 313).[150] In a recent decision of July 2012, the Thai Constitutional Court declared that it has jurisdiction to review amendments to the Constitution, ruling that a re-write of the entire Constitution, which had been approved by the people in a referendum, is impossible by way of constitutional amendments. Amendments can only amend certain articles but not the whole Constitution. Such an act would require a national referendum.[151]

3. Sri Lanka, Malaysia, and Singapore: Rejection

The Indian basic structure doctrine migrated to other neighbouring states as well, although in certain states, it faced difficulties in 'crossing the borders'. In Sri Lanka, the Supreme Court dealt with the question of whether the constitutional amendment power is limited with regard to the 13th Amendment, which established Provincial Councils and granted them decentralised powers (and recognised Tamil as an official language). Relying on decisions of the Supreme Court of India, it was argued before the Court that the scope of amendment power is limited and that there are certain basic features of the Constitution that cannot be altered, not even through the amendment process. In its judgment of 1987, the Supreme Court rejected this argument based upon the wording of the Constitutions of both 1972 and 1978, which expressly provide for the amendment or repeal of any provision of the constitution or of the entire constitution. The Supreme Court held that due to this exhaustive language, there is no basis for the contention that some fundamental principles or provisions are unamendable, thereby refusing to apply the basic structure doctrine in Sri Lanka.[152]

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[147] Wang and Chou (2010, 23). For an analysis of judicial behaviour in Taiwan see Garoupa (2011, 1).
[148] Chen (2000, 111).
[149] See Sheng-Wen (2005).
[150] Harding (2001, 256).
[151] Limsamarnphun (2012); Yoon (2012); Johnson (2012).
[152] In *Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill*, (1987) 2 Sri LR 312, 329-330, http://www.lawnet.lk/docs/case_law/slr/HTML/1987SLR2V312.htm. For elaboration see Jacobsohn (2010, 61-69); Halmai (2012, 187-188).

The Indian basic structure doctrine was also presented in Malaysia in several cases; however, in what seemed to some an abandonment of its responsibility to guard constitutional rights,[153] the Malaysian Federal Court rejected the Indian basic structure doctrine, granting Parliament an unlimited power to amend the Constitution.[154] In the *Loh Kooi Choon* case, Justice Raja Azlan contended, with direct reference to *Kesavananda*, that, in contrast with Indian jurisprudence, any provisions of the Malaysian Constitution could be amended.[155] In *Phang Chin Hock*,[156] again with direct reference to *Kesavananda*, the Federal Court held that the basic structure doctrine does not apply in Malaysia due to the differences between the Indian and Malaysian Constitutions – mainly historical differences and the fact that in contrast with the Indian Constitution, the Malaysian Constitution of 1957 has no preamble.[157]

Following the Malaysian cases, the basic structure doctrine was also presented – and rejected – in Singapore.[158] In the case of *Teo Soh Lung v. Minister for Home Affairs*,[159] constitutional amendments that established the non-justiciability of detaining persons without a trial on security grounds were contested. Relying on the Indian basic structure doctrine, counsel argued that Parliament's amendment power was implicitly limited,[160] an argument which was rejected by the Supreme Court. Justice Chua, writing for the majority, reasoned that an amendment, being part of the Constitution itself, could never be invalid if it was enacted in compliance with the amendment procedure. Had a Constitution's framers intended to prohibit certain amendments, one could reasonably expect them to have included a provision to that effect. Furthermore, judicially imposing limitations on the amendment power would thwart Parliament's legislative function.[161] In his rejection of the basic structure doctrine, Justice Chua specifically drew upon both Indian and Malaysian judicial opinions.[162] Relying on the Malaysian case *Phang Chin Hock*, Justice Chua claimed that considering the differences between the Constitutions of India

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153 See Hegde (2005, 564).
154 *Government of the State of Kelantan v. Government of the Federation of Malaya and Anor* (1963) MLJ 355; *Loh Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187; *Phang Chin Hock v. PP* (1980) 1 MLJ 70; see Kaur (1994, 248); Harding (1979, 368); Harding (2000, 255-57).
155 *Loh Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187; see Harding (1979, 369).
156 Phang Chin Hock (1980) 1 MLJ 70.
157 See Harding (1979), 371.
158 See, for example, Kaur (1994, 266).
159 (1989) 2 MLJ. 449, 456-7.
160 *Id.,* 471, 474–75.
161 *Id.*, 456-57; see also Penna (1990, 207); Kaur (1994, 248-250).
162 Justice Chua cited Justice Ray's dissent in Kesavananda to support the premise that 'fundamental or basic principles can be changed,' and Justice Raja Azlan Shah's majority opinion in the Malaysian case of Loh Kooi Choon that 'a constitution has to work not only in the environment in which it was drafted but also centuries later.' (1997) 2 MLJ 187, 189, cited in Kaur (1994, 250).

and Singapore – mainly the different processes by which the two were constituted and the lack of a preamble in Singapore's Constitution of 1963 – the application of the basic structure doctrine in Singapore should be rejected.[163] Following *Teo Soh Lung*, the doctrine was rejected in another case.[164]

E. Central and South America

As elaborated in Chapter 2, Latin American states were some of the first to contain unamendable provisions in their constitutions. Nowadays as well, many state constitutions include unamendable provisions, whether expressed or implicit in provisions that imply a principle's 'eternal' character.[165] More importantly to this chapter, even in the absence of any explicit limits, some courts in Central and South America have ruled that the amendment power is inherently limited by implicit limits.[166]

1. Argentina – A Limited Constituent Assembly

In Argentina, the Constitution of 1994 allows for a total or partial reform of its contents, which must be declared by at least two-thirds of members Congress and carried out by a special constituent assembly assembled for that purpose (Art. 30). When initiating a reform, Congress must specify which provisions demand revisions and the assembly cannot introduce amendments to provisions other than those specified by Congress. In other words, the summoned assembly is a limited one.[167] In the *Rios* case of 1993,[168] the Supreme Court stated in an *obiter dictum* that 'the authority of a constituent convention is limited solely to the review of those matters submitted to them for resolution and *within the principles of the Constitution*' [emphasise added].[169] Put it differently, it added implicit limits on the convention's power to act within the Constitution's principles.

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[163] (1989) 2 MLJ 449, 457.
[164] *Vincen Cheng v. Minister for Home Affairs* (1990) 1 MLJ 449.
[165] See generally Brewer-Carías (2004, 22).
[166] In other states, courts made *obiter dicta* statements in this spirit. See, for example, case *Berríos Martínez v. Roselló González* II, 137 d.p.r. 195 (1994), 201, 221, in Puerto Rico (which is of course unique due to its character as an unincorporated territory of the United States), in which the Supreme Court states that it starts from the premise that, in the exercise of its sovereign power, the people included in art. vii(3) of the Constitution expressed and implied limitations on the scope of amendments (not to alter the republican form of government or to abolish the bill of rights). Such limitations can be explicit in the Constitution or implicitly when their existence can only be deduced indirectly, as a logical consequence of the assumptions upon which the constitutional system – considered as a whole – rest. See Colón-Ríos (2013B, 227-228).
[167] Gomez (2000, 103).
[168] 'Rios', [1994-C] L.L. 46, 48.
[169] *Id.*, 48, cited in Gomez (2000, 107-108).

It is interesting to note that the Court does not regard the constitutional amendment process as a political question and regards itself as competent to adjudicate the process of amendments. For instance, in the *Fayt* case of 1998,[170] a district court, for the first time in Argentina's history, partially invalidated a constitutional amendment enacted by a constituent convention, on the basis that the convention exceeded its delegated authority.[171]

2. *Belize – Basic Structure Doctrine*

The Indian basic structure doctrine has also migrated to the Caribbean, where it was recently adopted and applied by the Supreme Court of Belize.[172] In *Bowen v. Attorney General* of 2008,[173] the constitutionality of the Sixth Amendment Bill 2008 was challenged. The Bill was aimed to allow the government to exploit a recent oil discovery, and therefore it excluded certain natural resources such as petroleum and minerals from the constitutional protection of property rights.[174] Defending the amendment, the Attorney General's argument was that since the amendment was adopted according to the procedure prescribed in s. 69 of the Constitution, its constitutionality cannot be challenged. This argument was rejected by Chief Justice Conteh, who held that s. 69 is a mere 'procedural handbook', and that any amendments to the constitution must conform with s. 68 according to which all laws enacted by Parliament must be 'subject to the Constitution'.[175] Any view to the contrary would subject constitutional supremacy to parliamentary supremacy.[176] Therefore, Parliament's law-making powers are limited so that it cannot enact laws which are contrary to the 'basic structure' of the Constitution itself. According to Conteh CJ, the basic structure of the Constitution of Belize includes the characteristics of Belize as a sovereign and democratic state; the supremacy of the Constitution; the protection of fundamental rights and freedoms that are enumerated in the Constitution; the limited sovereignty of Parliament; the principle of separation of

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[170] 'Fayt', Suplemento de Derecho Constitucional, L.L., 18 de Agosto de 1998, at 1.
[171] *Id.*, 8-9. This decision was affirmed by the appellate court, but on different grounds. See Gomez (2000, 111-112).
[172] See Colón-Ríos (2013A, 521); O'Brien (2013); Bulkan (2013, 81).
[173] *Barry M Bowen v. Attorney General of Belize* (Claim No. 445 of 2008), BZ 2009 SC 2, http://www.belizejudiciary.org/web/civil-judgments/2008/
[174] See Clause 2 of the Sixth Amendment: 'petroleum minerals and accompanying substances, in whatever physical state located on or under the territory of Belize…the entire property and control over which are exclusively vested, and shall be deemed always to have been so vested, in the Government of Belize.'
[175] *Barry M Bowen v. Attorney General of Belize* (Claim No. 445 of 2008), BZ 2009 SC 2, paras. 101, 105-107.
[176] *Id.,* para. 120.

powers; and the rule of law.[177] According to the Supreme Court, by obstructing access to the courts in order to challenge alleged infringements of the right to property, the amendment violated the principles of separation of powers, the rules of law and the protection of the right to property, thus offending the basic structure of the Constitution. It therefore declared the Sixth Amendment to be unconstitutional and void.

In reaction to *Bowen v. Attorney General*, the Sixth Amendment was amended to as to include a provision according to which nothing in the amendment would affect the royalty rights of the owner of any private land, beneath which any petroleum deposits are located. However, as in India, the adoption of the basic structure doctrine triggered a conflict between the court and the government.

As a direct response to *Bowen v. Attorney General*, the Eighth Amendment Act 2011 stipulated, among others, that s. 2 of the Constitution, according to which 'this Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void' does not apply to 'a law to alter any of the provisions of this Constitution which is passed by the National Assembly in conformity with s. 69 of the Constitution.' Moreover, it declared, 'for the removal of doubts', that the constitutional amendment provision is 'all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution.'

In *British Caribbean Bank Ltd v AG Beliz* of June 2012,[178] the Supreme Court upheld a challenge to the constitutionality of the Eight Amendment. In its judgment, Judge Oswell Legall held that there are implied limitations on the National Assembly's amendment power so that it cannot destroy or remove the basic structure of the constitution.[179] Referring to the Indian basic structure doctrine, Legall J held that 'though the Constitution of Belize is different in several respects from the Indian Constitution, both Constitutions have basic features such as the Judiciary, Rule of Law, fundamental rights and separation of powers,[180] adding that he has 'no doubt that the basic structure doctrine is a feature or part of the Constitution of Belize.'[181] For the reason that the

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[177] *Id.,* para. 119.

[178] *British Caribbean Bank Ltd v AG Beliz* (Claim No. 597 of 2011), http://www.belizejudiciary.org/web/supreme_court/judgements/Legal2012/EIGHTH%20AMENDMENT.pdf

[179] *British Caribbean Bank Ltd v AG Beliz* (Claim No. 597 of 2011), para. 44.

[180] *Id.,* para. 47.

[181] *Id.,* para. 50. Referring to Kemal Gözler's argument that in the absence of explicit limitations on the substance of constitutional amendments, the court cannot review the substance of amendments, Legall J notes at para. 52 that 'the views of the author are not consistent with the several decisions quoted above on the basic structure doctrine.'

Eighth Amendment was contrary to the principle of separation of powers and the basic structure doctrine of the Constitution, it was declared null and void.

3. Colombia – Constitutional Replacement Doctrine

In Colombia, Congress, a Constituent Assembly, or a referendum can reform the Constitution of 1991 (Arts. 374-378).[182] The Constitution empowers the Constitutional Court to review constitutional amendments 'only for errors of procedure in their formation' (Arts. 241 and 379). In addition, the Constitution excludes any unamendable provisions. However, the Constitutional Court gave a wide definition of the concept of 'procedural error'. In opinion C-551/03, the court noted that the amendment power does not extend to the *replacement of the constitution* with a different one. Procedure and substance are thus related since when the amending power 'substitutes' the constitution it acts in *ultra vires*. It is only the *constituent power*, acting through extraordinary mechanisms such as a constituent assembly, which can constitute a new constitution. This is known by the Court as 'substitution' or 'replacement' theory.[183] The Constitutional Court repeated this proposition in its opinion C-1040/05 regarding presidential re-election, in which it upheld an amendment permitting presidential re-election, but invalidated an amendment empowering an unelected body – the Council of State (the highest administrative court) – with a temporary authority to legislate without being subject to any form of judicial review. This amendment, according to the Court, contradicted the principles of separation of power and of constitutional supremacy, and amounted to the formation of a new constitution:

> There is a difference, then, between the amendment of the Constitution and its replacement. Indeed, the reform that is incumbent upon Congress may contradict the content of constitutional norms, even drastically, since any reform implies transformation. However, the change should not be so radical as to replace the constitutional model currently in force or lead to the replacement of a "defining axis of the identity of the Constitution," with another which is "opposite or completely different".[184]

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[182] See Banks and Alvarez (1991-1992, 89-90).

[183] Sentencia 551/03, 09.07.2003, cited in Colón-Ríos (2011A). See also judgments C-1200/2003 and C-970/2004; Bernal (2013, 339); Cepeda-Espinosa (2013, I27-I32). More generally on the replacements of constitutions in Latin America see Negretto (2012, 749).

[184] Opinion C-1040/05, cited in Bonilla and Ramirez (2011, 99 fn 10). See also Colón-Ríos (2010B, 1); judgment C-588/2009 in which the court, for the second time, invalidated an amendment which granted tenure to certain employees of the Public Administration without passing the necessary merits exams. The Court held that this amendment replaced the principle of equality and the principle of merit which are essential elements of the Constitution. See Bernal (2013, 345).

According to the Court:

> Congress derives its power to reform the Constitution from the constitution itself. It has a derivative or secondary status as a constituent force. Therefore, it can reform or amend the Constitution, but it cannot replace it or substitute it for another constitution. If Congress crosses the line between amending the Constitution, and replacing it, it violates its constitutional powers and competence. If that happens, the Court can overturn Congress´s decision, not on the grounds of content review, but based on the fact that a branch of government has ignored its constitutional competence, and therefore, violated constitutional procedural rules.[185]

Modifying an essential clause that transforms the nature of the constitutional regime can be considered a 'constitutional substitution', a change that can only be decided by a constitutional assembly convened extraordinarily to review the constitutional regime.[186]

Again, in judgment C-141/2010 in 2010, the Constitutional Court, in a 7-2 vote, invalidated a law that called for a referendum on a constitutional amendment which would allow the President to run for a third term of office. Such a reform, according to the Court, violates a basic principle of democracy, which would affect the entire constitutional order.[187] The substitution doctrine has been used since then in several other occasions.[188]

4. *Peru – Principios Juridicos and Valores Democraticos Basicos*

In Peru, the Constitution of 1993 does not include any unamendable provisions. Yet, in a series of cases regarding 'reform of the pensionary system', decided in 2005,[189] the Peruvian Constitutional Tribunal declared that it is competent to invalidate constitutional amendments that violate basic legal principles (*principios juridicos*) and basic democratic values (*valores democraticos basicos*). While upholding the amendment at issue, the Court

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[185] Taken from the English summary of the decision which is available on the website of the Constitutional Court of Colombia, http://english.corteconstitucional.gov.co/sentences/C-1040-2005.pdf

[186] *Id.*

[187] Opinion C-141/2010, cited in Bernal (2013, 345-346); Brewer-Carías (2010, 42-44).

[188] The Colombian Constitutional Court has used the constitutional replacement doctrine twice recently. In the Judgment C-1056/2012 (Colom.) of 6 December 2012, the Court declared that an amendment prescribing that rules about conflict of interests of congressmen would not be applicable in the discussion and passing of constitutional amendments was a constitutional replacement. The Court held that this amendment infringed basic constitutional principles concerning the respect of public morality in a democracy. Furthermore, in the Judgment C-10/2013 (Colom.) of 23 January 2013, the Court declared that an amendment modifying certain rules concerning the distribution of income from mining taxes between administrative regions was not a replacement of the constitution. See Bernal (2013, 346 fn 16).

[189] Opinion No. 050-2004-AI/TC, 004-2005-PI/TC, Sentencia No. 007-2005-PI/TC, and Opinion No. 009-2005-PI/TC (03.06.2005).

refuted the argument that the control of a constitutional reform bill could be seen as a 'non-justiciable political question'. It found that such a proposition yields under the consideration that the Court, as the main guarantor of the Constitution, has to ensure that the Supreme Norm is not in itself violated by amendments that could harm basic legal principles and basic democratic values on which it is based, as against the established procedures for constitutional reform.[190]

In another case in 2005, the Court emphasised the material limits of a reform, i.e., what it considered the fundamental principles that give identity to the Constitution. These are the principles of human dignity, the republican form of government, the democratic rule of law, people's sovereign power, or any other evaluative component that Charter recognises as a matter of fundamental.[191]

IV. CONCLUSION

The notion of implicit limitations entails the idea that even in the absence of explicit limitations on the amendment power, there are certain *supra-constitutional* principles beyond the constitutional power. At first look, it is thus closely connected with a natural law approach. As Roscoe Pound explains: 'there are rights in every free government beyond the reach of the state, apparently beyond the reach even of a constitution, so that there might be a constitutionally adopted but unconstitutional constitutional amendment'.[192] If natural law constitutes a superior and autonomous set of norms, it is thus above the constitutional amendment power.[193] Therefore, it has been argued that the Indian basic structure doctrine is linked to the concepts of natural law and natural rights.[194] However, as I explain later in this thesis, the two approaches are not identical. True, the doctrine of implied limitations posits that certain principles have a *supra-constitutional* status, in the sense that they are superior to the constituent will,[195] but that

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[190] *Id.*, para. 3, http://www.tc.gob.pe/jurisprudencia/2005/00050-2004-AI%2000051-2004-AI%2000004-2005-AI%2000007-2005-AI%2000009-2005-AI.html; See Colón-Ríos (2010B, 1); Jacobsohn (2010A, 37); León (2005, 38).

[191] Opinion No. 0024-2005-PI/TC, (02.11.2005), para. 12, http://www.tc.gob.pe/jurisprudencia/2005/00024-2005-AI.html

[192] Pound (2008, 498-99 fn 92). See also Rice (1999, 115): '… although it is the highest enacted law of the nation, the Constitution is itself a form of human law and is therefore subject to the higher standard of the natural law. That standard is supra-constitutional. It sets limits to what the legal system, however it is structured, can do even through constitutional provisions'; Rosen (1990-1991, 1073) (arguing that constitutional amendments may only be used to secure rather than restrain individual's natural rights).

[193] Garlicki and Garlicka (2011, 355).

[194] Samanta and Basu (2008, 516); Jayadevan (2010, 268-280).

[195] Rials (1986, 64).

does not necessarily mean that they derive from natural law, i.e. from a source external to the constitutional order; rather, they derive from within the constitutional order.[196]

What is clear, as demonstrated in this chapter, is 'that the international trend is moving towards accepting the Basic Structure doctrine'.[197] Even in those states where constitutions lack unamendable provisions, various courts from different legal traditions, *inter alia* in Asia, Africa and Latin America, have identified a certain constitutional core, a set of basic constitutional principles which form the constitutional identity and which cannot be abrogated through the constitutional amendment process. Importantly, such identification does not necessarily carry with it judicial review of constitutional amendments. Some courts have acknowledged that even if the amendment power is implicitly limited, it is not their role to enforce these limits (e.g., Pakistan). On the other hand, other courts have rejected the entire notion of implicit limits, claiming that, in the absence of any explicit limits, the amending power is unlimited (e.g., Sri Lanka, Malaysia, and Singapore).

This chapter coveres some of the main jurisdictions in which courts have confirmed that certain constitutional principles implicitly limit the constitutional amendment power. Yet, it is important to remark that even in countries in which the constitution lacks any limitations on amending certain principles, and courts have not recognised implicit limits – such as in Hungary,[198] Slovakia,[199] and Finland[200] – recent scholarship has begun to argue that certain fundamental principles should be implicitly unamendable, drawing mainly from comparative experience.

The next part of this thesis develops a theory that explains the limited (explicitly and implicitly) scope of amendment powers. The first step in understanding their limited scope must begin with considering their nature, which is the theme of the next chapter.

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[196] I elaborate on this point in Roznai (2013A, 557).
[197] Dlamini (2009, 10).
[198] Legény (2006, 129); Scheppele (2013); See also Halmai (2012, 182) in which he criticises the Hungarian Constitutional Court decision of July 2011 for not recognising its authority to substantively review constitutional amendments. In that respect, it is important to mention Judge Laszlo Kiss, who held in his dissenting opinion that the court has jurisdiction to review the substance of constitutional amendment based on the 'essential core' of the republican constitution such as the rule of law and fundamental human rights. It is also important to note that in Hungary, the parliament is considered to be the holder of the *constituent power* and often incorporates to the constitution laws which were previously declared unconstitutional. See Szoboszlai (2000, 183-85).
[199] Val'o (2010, 30-31).
[200] See in Suksi (2011, 105).

PART II

TOWARDS A THEORY OF UNAMENDABILITY

CHAPTER 4: THE NATURE OF AMENDMENT POWERS

This chapter examines the nature of constitutional amendment powers. It serves as a base for developing a theory of unamendability since the theoretical path for comprehending any limitation on the amendment power must commence by explaining the nature of that power. The hypothesis is that perceptions regarding limitations on the amendment power must be rooted in the distinct organisation of the state's powers and of the relationship between governmental institutions. The manner in which we grasp the nature of the amendment power affects our thinking about its scope. In other words, a basic inquiry into the nature of amendment power simultaneously develops into an inquiry into its limits.[1]

The Chapter begins by illuminating the theoretical distinction between *constituent power* and *constituted power*. It then explores possible understandings of the amendment power, both as a *constituent* and a *constituted power*. It proposes that the amendment power has to be regarded as *sui generis*, a unique power situated in a grey area between the two powers. It is distinguished from *constituent power* in that it ought to be comprehended in terms of delegation, but it is also a distinctive form of a *constituted power*. Understanding the exceptional nature of the amendment power as a secondary power serves as the theoretical starting point for understanding its limited nature and scope.

I. CONSTITUENT POWER AND CONSTITUTED POWER

In 1792, Thomas Paine articulated that 'all power exercised over a nation, must have some beginning'.[2] What is this beginning? 'The generative principle of modern constitutional arrangements' is that of *constituent power*.[3] *Constituent powe*r is the power to establish the constitutional order of a nation. The definition of *constituent power* is among the most elusive terms within constitutional theory. Julien Oudot best illustrated this in 1856: 'What is constituent power? Everything you please, reader! Given the multiple definitions, history has more to tell than what a priori logic reasons'.[4] Oudot explained

[1] In that respect, a theory of limitations on the amendment power is connected to a larger theory of constitutionalism and how the constitution is conceived. See Linder (1981, 718).
[2] Paine (2008, 238).
[3] Loughlin (2004, 100).
[4] Oudot (1856, 397-398) [my translation].

that 'sometimes it is the act of a skilful and strong dictator, winning the power due to his genius, and then bearing by the recognition or the habit of governed. Sometimes it is a partial riot, a beginning of a revolution that the general citizens accept'.[5]

It is often argued that the concept of *constituent power* is relatively modern, emerging almost simultaneously in French and North America revolutionary thinking.[6] In order to understand the features of that principle, one has to return to Abbé Emmanuel Joseph Sieyès, who stated in a speech before the National Assembly in 1789: '*Une Constitution suppose avant tout un pouvoir constituant*'.[7] Sieyès distinguished between *constituent power* (*pouvoir constituant*) and *constituted power* (*pouvoir constitué*). In his famous political pamphlet *Qu'est-ce que le Tiers état?*, he writes that 'in each of its parts a constitution is not the work of a constituted power but a constituent power'.[8] The latter is the extraordinary power to form a constitution – the immediate expression of the nation and thus its representative. It is independent of any constitutional forms and restrictions. The former is the power created by the constitution, an ordinary, limited power, which functions according to the forms and mode that the nation grants it in positive law.[9] Egon Zweig proposed that Sieyès managed to apply Montesquieu's concept of separation of powers to Rousseau's notion of sovereignty.[10]

Georges Burdeau explains that these two powers exist on different planes: *constituted power* is inseparable from a pre-established constitutional order, while *constituent power* is external to a constitutional order and exists without it.[11] Hence, contrary to constituted powers, *constituent power* is free and independent from any formal bonds of positive law created by the constitution. 'The nation', Sieyès wrote, 'exists prior to

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[5] Oudot (1856, 398-99) [my translation].

[6] Dippel (1996, 26); Klein (1996, 31); Palmer (1959, 215-216). In a letter to the settlers of Vermont of 1777, Thomas Young calls the people 'the supreme constituent power.' See Young (1873, 394-395); Adams (2001, 63). The terms 'constituent' and 'constituted' power appear in English writings in the end of 18th century. See Anonymous (1770, 730): 'That the house of commons was not a self-constituted power, acting by an inherent right; but an elected body, restrained within the limits of a delegated authority'; Anonymous (1795, 50): 'The constitution of England has never protected nor preserved the constituting power of the people'.

[7] Sieyès (1789, 18).

[8] Sieyès (2003, 136).

[9] *Id.*, 134-37; See Negri (1999, 216-7). French journalist Prudhomme (1790, 23) wrote that the distinction between the constituent power and legislative power is 'childish' and it is as a result of 'the silly vanity of some of our politicians who invented this nonsense, in purpose to prevent legislatures from discovering their mistakes. It is a vile and despicable jealousy that makes them aspire to infallibility'. Although he himself admitted that 'it would be frightening if every legislature has the right to make alterations to the constitution'.

[10] Zweig (1909, 116-117, 135-137), cited in Vishniak (1945, 361). On the relation between Sieyes' constituent power and Rousseau's social contract see Baczko (1988, S98-S125). Barshack (2003, 1161) writes that 'through separation of powers the Political expels omnipotence — the sacred communal body, the constituent power which transcends separated powers — to the corporate, absent realm.'

[11] Burdeau (1983, 173), cited in Agamben (1998, 39).

everything; It is the origin of everything. Its will is always legal. It is the law itself'.[12] Whereas Sieyès is famous for his contribution to the refinement of the distinction between *constituent* and *constituted* power,[13] he was not the first to articulate this distinction.[14] It can be traced back to Bodin's distinction between sovereignty – the locus of authority – and the government – the instituted form through which the sovereign rules.[15] Bodin's idea of sovereignty (*majestas*) was further developed into the idea of a 'double sovereignty': a personal sovereignty (*majestas personalis*) held by the ruler and 'real sovereignty' (*majestas realis*) held by the people.[16] Johannes Althusius wrote:

> … if sovereignty is therefore twofold, of the realm and of the king, as Bodin says, I ask which is greater and superior to the other? It cannot be denied that the greater is that which constitutes the other and is immortal in its foundation, and that this is the people.[17]

Likewise, in his *Politica Sacra et Civilis* (1657), George Lawson claimed that a clear distinction exists between the power of the constituted commonwealth to make a law ('personal Majesty') and the superior power of constitution – the power 'to constitute, abolish, alter, reform form of governments' ('real Majesty').[18] For Lawson, 'real Majesty', which was invested in the community, cannot be exercised at any given moment, but only once the government has dissolved itself by breaching the people's trust.[19] This resembles John Locke's claim that the people possess 'a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them…'.[20] Locke claimed that there is a 'supreme power' to established, alter and even overthrow an existing form of government, possessed by the original constituting community, which is a superior power to the 'constituted commonwealth'.[21] This notion re-appeared in Daniel Defoe's writings, roughly eighty years before Sieyès elaborated on the distinction between *constituent* and *constituted* powers. Defoe wrote that 'the Peoples Right, to preserve their own Liberties in case of failure in any, or in all the Branches of

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[12] Sieyès (2003, 136).
[13] Klein (1996, 15).
[14] According to Colón-Ríos (2012C, 96 fn. 12), this distinction can be traced earlier to Kirchner (1608). Of course, the idea of 'original sovereignty of the people' has appeared even earlier, for instance, in de Bèze (1574) as cited in Loughlin (2010, 65).
[15] Loughlin (2010, 58, 70).
[16] See Loughlin (2010, 71-72); Loughlin (2013, 3).
[17] Althusius (1964, 73).
[18] Lawson (1992, 47-48). See also Loughlin (2010, 3 fn 7); Loughlin (2007, 40); Yack (2012, 99).
[19] Lawson (1992, 48): 'As the community hath the power of constitution, so it hath of dissolution, when there shall be a just and necessary cause'.
[20] Locke (1821, 317).
[21] *Id.*

the Constituted Power',[22] 'all Constituted Power is Subordinate, and Inferior to the Power Constituting', and the inferior body 'cannot have the power to alter its own foundation or act against the power which formed it'.[23]

Understanding the community's *constituent power* to create and alter constitutional regimes is important, yet it was limited to explaining the right of resisting an oppressive regime.[24] Sieyès' conception of *constituent power* seems to be different. It was not restricted to those circumstances where the government was dissolved by breaching trust or tyranny. For him, *constituent power* can be legitimately reclaimed at any time.[25] The constitution, as a positive law, emanates 'solely from the nation's will'.[26] For Sieyès, the *constituent power* was unlimited for 'it would be ridiculous to suppose that the nation itself could be constricted by the procedures or the constitution to which it had subjected its mandatories'.[27] The nation is free from constitutional limits: 'not only is the nation not subject to a constitution', Sieyès insists, 'it *cannot* be and *should* not be…'.[28] The sovereign people, according to his idea of *constituent power*, are exterior to their institutions.[29]

What is 'the nation'? For Sieyès, it is 'a body of associates living under a *common* law, represented by the same *legislature*, etc.'[30] This could mean that the *political will* of the people to be linked to each other (politically and legally) is what creates a national bond.[31] It is 'the people', rather than a divine Monarch, who is the subject and the holder of the *constituent power*.[32] Indeed, in the modern era, a nation's constitution is regarded as receiving its normative status from the political will of 'the people' to act as a constitutional authority,[33] and through which 'the people' manifest itself as a political and legal unity.[34] The ultimate source of legitimacy is bottom-up, originating in 'the

[22] Defoe (1702, 12).
[23] Defoe (1709, 37). See also MacCormick (2010, 154).
[24] Colón-Ríos (2012C, 80-82).
[25] Cristi (2011, 358).
[26] Sieyès (2003, 136).
[27] *Id.*
[28] *Id.*, 137.
[29] Jaume (2007, 67-8). According to Whitt (2010, 159-160), Sieyès positions the constituent power in a state of nature, thus trying to avoid the paradox of sovereignty.
[30] Sieyès (2003, 97). This definition appears to be contradictory to Sieyes' claim that the nation is to be conceived as a 'pre-political entity'. This is part of the circularity problem of 'we the people' idea behind the *constituent power*. As Ivison (1999, 84) wrote: 'constitution constitutes the People who in turn constitute it'. On this dilemma see Oklopcic (2005, 134).
[31] Van De Putte (2003, 61); Brubaker (1992, 7).
[32] Corrias (2011A, 31).
[33] On 'the people' as the subject of constituent power see Preuss (2007, 211-22).
[34] Barents (2004, 89-90).

people'.[35] This idea of 'the people' as a collective of individuals, standing as a distinct force behind all constituted forms of sovereignty, can be traced to Hobbes' *Leviathan*.[36] The notion that all powers originate from the people – which Tocqueville believed lies 'at the bottom of almost all human institutions'[37] – is now explicitly stated in various constitutions.[38]

Giorgio Agamben raises the concern that identifying *constituent power* with the people's constituent will makes the distinction between *constituent power* and sovereign power ambiguous.[39] For Antonio Negri, the concepts are not identical; sovereignty arises upon the establishment of the *constituent power* – it is 'a summit, whereas constituent power is a basis'.[40] It appears that to better understand this debate, one has to distinguish between two conceptions of 'sovereignty'. One is the juristic expression of sovereignty, which concerns supreme power within institutional arrangements that were constituted during or after the formation of the state (which is compatible with Negri's idea). Another is political sovereignty, which is the power to establish a state, synonymous with the idea of *constituent power*.[41] This latter conception is compatible with Andreas Kalyvas's definition of that term: 'the sovereign is the one who makes the constitution and establishes a new political and legal order'.[42] To minimise confusion, this thesis employs the term 'constituent power' throughout and avoids the word 'sovereignty'. However, where 'sovereignty' is utilised, it is with reference to Kalyvas's definition of the term.

How may the nation exercise its *constituent power*? According to Joseph de Maistre, 'the people are the sovereign which cannot exercise their sovereignty…'. However, if the people are said to 'exercise their sovereignty by means of their representatives', this, de Maistre believed, 'begins to make sense'.[43] Indeed, according to Sieyès, since 'members of the association will have become too numerous and occupy too widely dispersed to be easily able to exercise their common will themselves' there is a need for

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[35] Wintgens (2001, 274).
[36] See Forsyth (1981, 191).
[37] Tocqueville (1835, 64).
[38] A survey of 1978 revealed that 53.6%, of states' constitutions referred explicitly to the sovereignty of the people. See van Maarseveen and van der Tang (1978, 93). Interistingly, the Constitution of Armenia (1995) stipulates in art. 114 that the people's sovereignty is an unamendable principle. On how constitutions portray the people's sovereignty see Galligan (2013, 1). On how the U.S. Supreme Court refers to the phrase 'we the people' see Anonymous (2013, 1078).
[39] Agamben (1998, 42). See also Borislavov (2005, 177).
[40] Negri (1999, 13).
[41] Loughlin (2004, 80-5).
[42] Kalyvas (2005, 226).
[43] de Maistre (1965, 93).

representation.[44] This representation is *extraordinary*, since it is holds 'whatever new powers it pleases the Nation to give' it.[45] These representatives should not be confused with the 'ordinary representatives of a people', who possess only limited powers, confined to those granted to them by the positive constitution; whereas extraordinary representatives are free from any prior constitutional restrictions or procedures. They serve as 'a surrogate for the Nation in its independence from all constitutional forms'.[46] Sieyès' conception of *constituent power* is thus attached to representation.[47]

Carl Schmitt developed the doctrine of *constituent power* almost 140 years later. Like Sieyès, Schmitt declared in his 1928 book *Verfassungslehre* that 'the constitution does not establish itself'.[48] It 'is valid because it derives from a constitution-making capacity... and is established by the will of this constitution-making power'.[49] This constitution-making power (*verfassungsgebende Gewalt*) 'is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence'.[50] For Schmitt, the constitution is created through the act of political will and is composed of fundamental political decisions regarding the form of government, the state's structure, and society's highest principles and symbolic values.[51] This represents 'the core constitutional identity of a democratic political order'.[52] Schmitt accepted Sieyès' distinction between *constituent* and *constituted power*, and conceived *constituent power* to be unlimited and unrestricted by positive constitutional forms or rules.[53] By conceiving *constituent power* as external to (and above) the constitution, and as never exhausted within the positive juridical constitution,[54] Schmitt's rejects 'juridicial normativism'.[55] However, contrary to Sieyès, Schmitt rejects the theory of the 'representation of the people', deeming it 'antidemocratic': 'the constitution-making will of the people cannot be represented without democracy

[44] Sieyès (2003, 134).
[45] *Id.*, 139.
[46] *Id.* Soboul (1974, 54) interpreted these 'extraordinary representatives' as those 'who embody the constituent power'. But of course, they are not 'the constituent power' but only its representatives. See Somek (2008A, 28 fn 54).
[47] Loughlin (2003, 58).
[48] Schmitt (2008, 76).
[49] *Id*, 64.
[50] *Id*, 125.
[51] According to Schmitt, one has to distinguish between 'the constitution' which is the fundamental political decisions of the constituent power and ordinary 'constitutional laws' which are constitutional norms or provisions but which lack any true fundamental character. See *id*, 76-77.
[52] Kalyvas (2008, 139).
[53] Schmitt (2008, 126-27): 'The constitution-making power is… the comprehensive foundation of all other "powers" and "divisions of powers."'
[54] *Id*, 125.
[55] Cristi (1997, 198).

transforming itself into an aristocracy'.[56] The belief that *constituent power* cannot be represented is a notable distinction between Sieyès and Schmitt.[57] This could be seen as Schmitt's acknowledgment of democratic sovereignty.[58] However, William Scheuerman cautions that one must not overemphasise the people's democratic *constituent power* in Schmitt's theory, which is limited to a mere acclamation: 'The people's constitution-making will always expresses itself only in a fundamental yes or no and thereby reaches the political decision that constitutes the content of the constitution'.[59] This conception of *constituent power* can be criticised for its lack of any rational deliberations or discourse.[60] This important criticism is elaborated in Chapter 6, and ought not to worry us at this stage. For now, the focal point is that *constituent power* was understood by Schmitt as an 'unmediated will', which cannot be regulated or restricted by legal procedures or process.[61] Any attempt to formalise it would be 'akin to transforming fire into water'.[62]

Expounding upon the concept of *constituent power*, Antonio Negri explained that *constituent power* could not be understood from the perspective of constitutionalism since the latter is fundamentally a theory of limited government.[63] For Negri, *constituent* and *constituted power*s are not only strictly separate, but contrasting, concepts.[64] Any legal approach to *constituent power* fails since: 'the radical quality of the constituent principle is absolute. It comes from a void and constitutes everything'.[65] Negri proposes to understand *constituent power* as a 'creative work of strength' – a purely creative and revolutionary power of the multitude, which can disrupt constituted boundaries.[66]

Contrary to such a somewhat optimistic view of *constituent power*, some scholars regard the conception of a formless and limitless power of 'the people' to break any

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[56] Schmitt (2008, 128). Therefore, Arato (1995-1996, 203) notes: 'Schmitt considers it a fatal omission that … the [1791 constituent] assembly did not consider it essential to have its constitutional product ratified in a popular referendum…'
[57] See Kalyvas (2008, 116-117, 155); Colón-Ríos (2012C, 88). For Schmitt's theory of representation see generally Kelly (2004, 113).
[58] Norton (2011, 389); Kalyvas (1999-2000, 1536-7).
[59] Schmitt (2008, 128). See Scheuerman (1999, 71-72).
[60] Burchard (2006, 13); Cohen (1999-2000, 1591).
[61] Schmitt (2008, 132).
[62] Scheuerman (1999, 71).
[63] Negri (1999, 10): 'constitutionalism's claim of regulating constituent power juridically is nonsense not only because it wants to divide this power but also because it seeks to block its constitutive temporality'.
[64] *Id.*, 3, 11.
[65] *Id.*, 14, 16.
[66] *Id.*, 333.

constitutional bounds at any time as a dangerous idea, open to abuse.[67] Hannah Arendt wrote about:

> The extraordinary ease with which the national will could be manipulated and imposed upon whenever someone was willing to take the burden or the glory of dictatorship upon himself. Napoleon Bonaparte was only the first in a long series of national statesmen who, to the applause of a whole nation, could declare: "I am the pouvoir constituant".[68]

For Arendt, Scheuerman observes, the legacy of a radical *constituent power* is 'a poisonous recipe for permanent revolution, for repeated attempts to dismantle legal and constitutional forms in the name of any of a diversity of political and social groups likely to claim the awesome power of the *pouvoir constituant*'.[69] Indeed, experience teaches us that dictators seized governmental powers through revolutionary acts or coups, claiming to be the bearers of the *constituent power*.[70]

More recently, David Dyzenhaus has argued that the question of *constituent power* exists outside of normative constitutional theory.[71] He urges constitutional theorists to avoid the idea of *constituent power*, which has its basis outside of the legal order, and instead to focus on the question of the constitution's authority as completely internal to the legal order, as founded on the intrinsic morality of law.[72] In contrast, Martin Loughlin argues that 'constitutional legality is not self-generating: the practice of legality rests on political conditions it cannot itself guarantee. … Consideration of the origins of constitutional ordering invariably brings the concept of constituent power into play'.[73] János Kis's approach to this matter seems lucid. On the one hand, Kis acknowledges the risks carried with the concept of *constituent power*:

> Since the "people" is a totally undefinable reality, totalitarian leaders and organizations may claim themselves, by pointing to the unarticulated mass support that manifests itself on the streets, to be the mouthpiece of "popular will" and thus abolish democratic institutions and the collective decisions

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[67] See Parlett (2012, 42): 'Relying on appeals to the constituent power … magnetic leaders have been able to convert a moment of popular endorsement into an opportunity to unilaterally reshape the institutional framework of the state and secure constitutional dictatorship'. On the risks of unlimited constituent powers see also Landau (2013B, 923).

[68] Arendt (1965, 163). See also Scheuerman (2002, 383): 'Constitutional dualism reminds us that no single political institution can legitimately speak in the name of "the people" as a whole. The executive's attempt to claim the mantle of the constituent power is always especially dubious: Whereas a broadly based, multi-vocal legislature can sometimes plausibly represent a sizable portion of the diverse views and interests found in society, a single univocal executive generally cannot do so.'

[69] Scheuerman (1997, 151).

[70] Cristi (1999-2000, 1763-1775); Parlett (2012, 1); Landau (2013B, 923).

[71] Dyzenhaus (2007, 143–5).

[72] Dyzenhaus (2012, 229). See also Hasebe (2009, 39) (the mythical concept of constituent power is dispensable for constitutional scholarship).

[73] Loughlin (2013, 6).

regulated by them.[74]

However, at the same time, Kis rejects calls to abandon the doctrine of *constituent power* as based on 'the people', since there is no other satisfactory answer but 'the power of the people' as the ultimate source of state power. Instead of being abandoned, *constituent power* should be reconceived: 'it should be given an interpretation that, on the one hand, arrests the regress, and on the other, may not be mobilizes for the purpose of totalitarian politics'.[75] Claims to abandon *constituent power* give short shrift to the connection between *constituent power* and democracy.[76] Interpreting *constituent power* as a mere arbitrary power for establishing and replacing constitutional regimes would simply miss its essence.[77] 'To speak of constituent power', Negri pronounces, 'is to speak of democracy'.[78] It is the power of the people – together – to constitute for themselves a constitutional regime. As Alexander Somek notes, 'constituent power proper is not exercised by a dictator, a monarch or any other autocrat. Constituent power, rather, originates from a collective'.[79] Thus, a dictator's pronunciation that he holds or speaks for the constituent power is a sheer act of force, which does not represent true *constituent power*. *Constituent power*, properly construed, is a democratic concept that 'belongs solely to the context of a democratic constitutional theory'.[80] This point is elaborated in Chapter 6.

What is the relationship between *constituent* and *constituted* power and why is it relevant to our enquiry? The conceptual relationship between *constituent* and *constituted powers* is that of subordination. *Constituted powers* are legal powers (competence) derived from the constitution (and are limited by it). They owe their existence to the *constituent power* and depend on it; thus, *constituent power* is superior to them. In contrast to *constituted power*, *constituent power* manifests unlimited power[81] – unlimited at least in the sense that it is not bound by previous constitutional rules and procedures.[82] On that account, the conceptualisation of a certain power as *constituent* or *constituted* carries with it significance as to its scope. As Martin Loughlin and Neil Walker write, 'the legal norm remains

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[74] Kis (2003, 136-7).
[75] *Id.*, 137.
[76] Colón-Ríos (2012C, 122 fn 45).
[77] *Id.*, 110.
[78] Negri (1999, 1). See also Wall (2013): 'Constituent power is democracy – the force (cracy) of the demos – in its most raw and unattenuated of senses'; Wall (2012, 6): 'at its most basic, democracy suggests that power belongs to the people to make and remake the polity'.
[79] Somek (2012, 34).
[80] Böckenförde (1991, 90), cited in Kalyvas (1999-2000, 1538).
[81] Corrias (2011B, 1559); Corrias (2011A, 35-36).
[82] This does not mean that *constituent power* is not restricted by any principles. See Chapter 9.

subject to … the expression of the constituent power of the people to make, and therefore also to break, the constituted authority of the state'.[83] However, reducing *constituent power* to the existence of strength or force of a multitude is a materialist fallacy. In that respect, one has to grasp *constituent power* as a more complicated concept than sheer power. First, *constituent power* does not act without purpose, simply as a burst of energetic power. As Ulrich Preuss explains, 'being directed at the creation of an order whose structure is, so to speak, anticipated in its actions, the constituent power ceases to be mere force'.[84] *Constituent power* and *constituted powers* have an internal relation.[85] *Constituent power* has a legal aim – the creation of a legal constitutional order. Ultimately, this is a juridical exercise.[86] As one French commentator wrote in 1851, '*La constitution est une loi; donc le pouvoir constituant est une sorte de pouvoir legislative'*.[87] An inevitable interaction thus exists between power and law.[88] Therefore, Andreas Kalyvas is right in his claim that 'the constituent power is a juridical category par excellence', and that its 'juridical character…, its true finality, is to fulfill the idea of law'.[89]

Second, in order to be exercised, *constituent power* requires a certain representational form.[90] In a way, it must act as an already *constituted power*, since the constitution-making process necessitates a certain institutionalised framework through which the people can express their will (such as a constituent assembly).[91] Such an understanding seems to be acceptable even to Schmitt, for whom *constituent power* is unlimited and cannot be restricted by a constitutional process. Schmitt distinguished between the 'initiation' of *constituent power* (which is unlimited) and the 'execution and formulation' of the decisions of the *constituent power*, which undeniably require certain procedures and organisation. Otherwise, *constituent power* would be left powerless and ineffective.[92] Legal constructs (such as constituent assemblies and referenda) thus aid the exercise of *constituent power.*[93] I return to the ways in which *constituent power* may exercise itself in Chapter 6.

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[83] Loughlin and Walker (2007, 1-2).
[84] Preuss (1995, 4).
[85] Vatter (2007, 66-67).
[86] See Beaud (1994, 207); Kalyvas (2008, 86); Kalyvas (2005, 233).
[87] Saint-Prix (1851, 2).
[88] Cf., Bodenheimer (1948, 233).
[89] Kalyvas (2005, 232-233). See also Colón-Ríos (2012C, 112).
[90] Loughlin (2004, 113).
[91] Loughlin (2010, 227); Hasebe (2009, 41).
[92] Colón-Ríos (2012C, 87).
[93] Somek (2008B, 473). For Negri (1999, 3-4), closing constituent power within mechanism of representation is the negation of constituent power's reality.

This distinction between *constituent* and *constituted* powers is imperative for any investigation regarding possible limitations on the amendment power, since if this power is conceptualised as *constituent power*, then it should be regarded as unlimited, in that it is not bound by prior constitutional rules.[94] If it is conceptualised as a *constituted power*, it is subordinated to the constitution. As the Luxembourgian scholar François Laurent explained in 1869, the ordinary powers established by the constitution (including the legislative itself) must obey the superior *constituent power*. But while the ordinary legislature may not change the constitution nor derogate from it, the *constituent power* may do so.[95] However, as demonstrated in the next section, this classification seems extremely thorny when one has to assess the nature of the constitutional amendment power.

II. THE AMENDMENT POWER AS SUI GENERIS

The *constituent power* establishes the constitution, which in turn regulates the ordinary *constituted powers*, such as the executive, legislative, and judiciary, which govern every-day political life. Once the *constituent power* has fulfilled its extraordinary constituting task, it 'becomes dormant' and from that moment public authority is exercised under the constitution.[96] Thus, by establishing a constitution, the *constituent power* is 'digging its own grave'.[97] 'The sovereign himself', to use James Bradley Thayer's words, 'had retired into the clouds'.[98] However, the constitution also establishes a mechanism for its own amendment. What is the nature of this mechanism? Does it express the *constituent power* or an ordinary *constituted power* assigned with the task of amending the constitution? The struggle over concepts should not be regarded as an intellectual exercise divorced from any real consequences, since labelling the amendment power as a *constituent* or *constituted* power bears implications for its scope.

The amendment power, Carl Schmitt correctly indicated, is an extraordinary authority, not like an ordinary law-making faculty.[99] It is 'peculiar and not fully understandable in terms of the hierarchical model of the legal pyramid'.[100] The reason

[94] See, for example, Kay (2011, 719): 'constituted powers [are] … exercised within an accepted set of legal institutions and procedures. The hallmark of [constituent power] … is exactly its freedom from such institutions and procedures'.
[95] Laurent (1869, 216). See also Saint-Prix (1836, 118, 187).
[96] Preuss (2011, 434); Barents (2004, 90-1); Maiz (1990).
[97] Preuss (2007, 220).
[98] Thayer (1893, 5).
[99] Schmitt (2008, 150).
[100] Preuss (2011, 430).

for that is because, as Stephen Holmes and Cass Sunstein observe, the amendment power:

> does not fit comfortably into either category. It inhabits a twilight zone between authorizing and authorized powers. ... The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution.[101]

The amending power possesses characteristics of both *constituent* and *constituted* power, hence its puzzling nature.

On the one hand, one might suppose that the amendment power expresses the ultimate *constituent power*, the 'final controlling power'.[102] Sujit Choudhry, for example, claims that amendment rules 'stipulate the ultimate locus of political sovereignty'.[103] This is a plausible theoretical approach. If 'the people' control the government (qua *constituted powers*) through the constitution, then arguably, 'control over the authority to amend the text represents the highest power in the nation's political life'.[104] Viewed in that respect, the amendment process serves as a mechanism for constitution-makers to 'share part of their authority' with future generations so that every generation holds a part of this *constituent power*.[105] Ostensibly, if it is permissible for 'the people' to re-shape their constitution, amending a constitution, like constitution-making, is part of the people's *constituent power*.[106] This is the prevailing approach of American constitutionalism, where it is assumed that after the establishment of the U.S. Constitution, Art. V, through which 'the people' may amend the Constitution, contains the *constituent power*.[107] The concept of *constituent power* 'plays no direct role in American constitutionalism, other than through the amendment process'.[108] 'Americans', as

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[101] Holmes and Sunstein (1995, 276).
[102] Paine (2008, 245).
[103] Choudhry (2008, 171). See also Choudhry (2005, 939).
[104] Breslin (2009, 106).
[105] Tribe and Landry (1993, 631): 'a constitution can allocate constitutive power - power to shape and reshape political and social reality - in ways that crucially affect the relationship between the founding generation and later generations.'
[106] Recall, Lawson (1992, 47-48) considered 'real Majesty' to be the power 'to constitute, abolish, alter, reform form of governments.'
[107] Griffin (2007, 50); Corwin and Ramsey (1950-1951, 188). In *Hollingsworth v. Virginia*, 3 U.S (378 Dall.) (1798), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=3&invol=378, the U.S Supreme Court seemed to hold the view that the amending power is an expression of the people's constituent power and thus unlimited, contra to ordinary legislative powers.
[108] Griffin (2007, 66). This in especially interesting in light of the First Congress's decision that constitutional amendments would appear in a supplementary form to the constitution and not incorporated within it. This separation is the ultimate vizualisation of the distinction between constitution-making and constitution-amending powers. Indeed, it was this distinction between the two sources of authority based upon which Sherman argued that amendments and the original constitution should not be intermingled. See Payandeh (2011, 101-105).

Gordon Wood wrote, 'had in fact institutionalized and legitimized revolution'.[109] This approach may be supported by several arguments:

Supremacy argument: constituted powers are bound by the constitution. By means of constitutional amendments, 'the people' may alter *constituted powers*. Therefore, this power differs from ordinary *constituted powers* and is superior over them. It therefore must be of a constitutive nature. Not only can it modify other *constituted powers*, but also, contrary to *constituted power*s, may arguably change its own boundaries since it possess 'competence over the competence' (*Kompetenz-Kompetenz*).[110]

Procedural argument: most constitutions provide different procedures for ordinary legislation and constitutional amendments (see Chapter 6). They dedicate a special procedure, which emphasises the exceptional process of constitutional amendment. Often, it is not merely a matter of a different process, but of organs; the amendment power is often exercised by bodies that are separate to the ordinary legislature (for example, constituent assemblies) or supplement it (for example, by requiring a referendum to ratify amendments). The procedures and organs that are involved in the constitutional amendment process are distinct from those that are involved in the ordinary legislative process. This distinction strengthens the argument that the amendment procedure is not an ordinary *constituted power*; it is different from and more unique than ordinary law making.[111] As it is argued below, this claim is built on a fallacy since the mere constitutional stipulation of an amendment procedure points to its *instituted* and thus *constituted* – rather than *constituent* – nature.

Consequential argument: from a juridical perspective, *constituent power* is 'the source of production of constitutional norms'. [112] Through the amendment procedure, the amendment power is also the source of producing constitutional norms. If *constituent power* produces constitutional laws that govern *constituted power*s,[113] then *amending* those constitutional laws (or producing new ones through amendments) is an exercise of

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[109] Wood (1969, 614). See also Palmer (1959, 215): 'The constituent power went into abeyance, leaving the work of government to the authorities now constituted. The people, having exercised sovereignty, now came under government'; Willoughby (2009, 219): 'any provision for the amendment of a constitution once established, the action of the sovereign State is henceforth formally limited thereby.'

[110] This thesis generally rejects this argument. As a delegated power, the amendment power cannot change its own terms of delegation. See Sieyès (2003, 136): 'No type of delegated power can modify the conditions of its delegation'.

[111] Preuss (2011, 436): 'Many of the early—and contemporary—constitutions mark the extraordinary character of constitutional revisions by establishing separate institutions or institutional devices in order to clearly distance the amendment power from the function of ordinary legislation, as well as to avoid conflicts of interest among the members of the legislative bodies.'

[112] Negri (1999, 2).

[113] *Id.*, 216.

constituent power. Based on the legal consequences of the exercise of amendment power, it may be argued that amending the constitution is not simply a legislative action, but also a constitutive one. Amending a constitutional article creates the same legal product as writing a new article. Therefore, amending the constitution is arguably an exercise of a power similar to that which created the constitution in the first place – *constituent power*. From this view, it is easy to claim, as some early French authors do, that the amendment power is the same as the *constituent power*: "*Le pouvoir de révision est évidemment le même que le pouvoir constituant*".[114]

On the other hand, the amendment power may simply be regarded as a *constituted power*. Charles Howard McIlwain writes that 'a constituted authority is one that is defined, and there can be no definition which does not of necessity imply a limitation'.[115] True, the amendment power is unique because of, *inter alia*, its remarkable capacity to reform governmental institutions; yet it is still a legal competence defined in the constitution and subject to constitutional limits.[116] Even if one applies here the term *Kompetenz-Kompetenz,* as Rene Barents notes, the *constituent power* declares the *constituted power* competent to define its competences, but only within the limits set in the constitution.[117] Accordingly, the amendment power is a legal competence established in the constitution and regulated by it. It is a *constituted power* with a special capability, but is still a defined and limited one. As Ulrich Preuss recently remarked, if within a constitutional polity all powers derive from the constitution, then the amending power must be a *constituted power* just like the legislative, judicial, or executive powers.[118] For the reason that it is a legally defined power originating in the constitution, it cannot *ipso facto* be a genuine *constituent power*.

The complexity of the nature of the amendment power can be inferred from the following paragraph by Grégoire Webber, for whom: 'amendment formulas are, by definition, means according to which a constituted authority may assume the status of constituent authority ...'.[119] Amending power is multi-faced. It carries dual features of both *constituent* and *constituted power*. Asem Khalil writes that the amendment power is 'constituent power in nature and a constituted power in function'.[120] Others might argue the complete opposite; it is *constituted* by nature, but functions as *constituent power*.

[114]Anonymous (1819, 225). See also de La Rochefoucauld (1824, 119).
[115] McIlwain (1939, 244).
[116] Suksi (1995, 10-11); Barents (2004, 91).
[117] Barents (2004, 91).
[118] Preuss (2011, 430).
[119] Webber (2009, 49).
[120] Khalil (2006, 25).

Accordingly, the question of the nature of the amendment power is a knotty one.[121] This thesis argues that since this power does not fit comfortably into any of these categories, it should neither be regarded as another form of *constituted power* nor equated with the *constituent power*; it is a *sui generis* power.[122]

III. THE SECONDARY CONSTITUENT POWER

A. The Distinction between 'Original' and 'Derived' Constituent Powers

'To know how the constitution of a given State is amended', A. V. Dicey wrote, 'is *almost equivalent* to knowing who is the person or who are the body of persons in whom, under the laws of that State, sovereignty is vested' (emphasis added).[123] Dicey is not stating that sovereignty is vested in the amendment authority. Amendment authority is 'almost equivalent' to the sovereign. This terminology of 'not quite' – but 'very nearly' – sovereignty resembles Max Radin's two notions of 'sovereignty'. Radin distinguished between real sovereignty ('hundred per cent, simon-pure sovereign'), which can materialise only in revolutions, and 'minor or lesser sovereigns', created by the real sovereign. The amendment power, created by the 'original sovereign', is a lesser sovereign, almost 'coextensive in power with itself'. It is 'almost sovereign' or 'pro-sovereign', situated between the real sovereign and lesser sovereign, such as governmental functions.[124] The basic presupposition underpinning Radin's argument, and the one this thesis advances, is that the amendment power is a special power, weaker than the *constituent power* but greater than the ordinary legislative powers. This proposition revives and relies upon the French doctrine that distinguishes between *original constituent power (pouvoir constituant originaire*) and *derived (*or *derivative*) *constituent power* (*pouvoir constituant derive*). The first is a power that is exercised in revolutionary circumstances, outside the laws established by the constitution, and the latter is the power exercised under legal circumstances according to rules established by the constitution.[125] Where does this idea originate? One could trace indications of the idea

[121] Preuss (1994, 158).
[122] Cf., Orfield (1942, 118-119); Conrad (1977-78, 14-15).
[123] Dicey (1895, 388).
[124] Radin (1929-1930, 525-526).
[125] Burdeau (1972, 78-94); Burdeau, Hamon and Troper (1988, 76-84).

that the constitution may establish the form for its amendment to Rousseau.[126] The notion cannot be attributed to Sieyès, who did not distinguish between *constituent power* and *amendment power* and for whom the sovereign *constituent power* could not be limited.[127]

It appears that this distinction between *original* and *derived constituent powers* was developed during the debates of the French National Assembly on the 1791 Constitution, albeit with different terminology.[128] At the assembly, debates took place on how the Constitution ought to be amended in light of the fragility of the constitutional project. It was seriously considered that there should be a prohibition on any amendments for thirty years. Eventually, the process that was adopted was that the Constitution would be unamendable for ten years, after which amendments could take place through an Assembly of Revision, and after approval of three successive legislatures.[129] This near unamendability was criticised by Jeremy Bentham, who believed that the supreme legislature must always remain free to legislate in any way that it deemed suitable, rejected the Assembly's notion of infallibility, arguing that there is often a need to correct flaws in the Constitution revealed by time, practice, and experience.[130]

During the debates of the National Assembly, some argued that the Assembly could not limit or even procedurally frame the *constituent power*, while others sought to minimise the likelihood of future constitutional changes. Frochot proposed a solution to this conflict, suggesting that there be a differentiation between partial and total change to the Constitution. Frochot believed that each involves a fundamentally different power; thus, he proposed a certain procedure for partial change and another (more complex) for a total change.[131] While his proposal was rejected, the distinction he

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[126] Rousseau (2011, 204): 'it is against the nature of the body politic to impose on itself laws that it cannot revoke; but it is neither against nature nor against reason for it not to be capable of revoking these laws except with the same solemnity it put into establishing them. This is the only chain it can give itself for the future'. For such a claim see Khalil (2006, 26).

[127] Sieyès (2003, 136): 'Can it be said that a nation could, by an initial act of will that is truly free of every prescribed form, undertake to will in future only in a determinate manner? In the first place, a nation cannot alienate or prohibit its right to will and, whatever its will might be, it cannot lose its right to change it as soon as its interests require it. In the second place, to whom might a nation thus offer to bind itself? I can see how it can *oblige* its members as well as those it has mandated and everything connected to it. But can it in any sense impose duties on itself? What is a contract with oneself? Since both sides are the work of the same will, it is easy to see that it can always withdraw from the so-called engagement'. See also Khalil (2006, 29).

[128] Le Pillouer (2005-2006, 123).

[129] French Constitution of 1791, Tit. VII. See Dicey (1915, 470).

[130] Bentham (2002, 255-6). See Schwartzberg (2007, 576-579).

[131] Le Pillouer (2005-2006, 123). For full details of Frochot's proposal see Thompson (1952, 112, 158-161). Similarly, Le Chapelier suggested that the amendment power was limited to a one or more decided articles whereas the constituent power is not limited to any article but can extend to all, and change everything in the constitution. See Anonymous (1791, 405).

made allowed others, including Barnave, to justify the ability to limit and frame potential *constituent power* without forfeiting the idea of an unlimited *constituent power*. Barnave explained that the total change of the Constitution could not be predicted or controlled by the Constitution, because it is an unlimited power belonging inherently to the nation. However, the possibility of amending the Constitution is of a somewhat different nature, which may be limited and circumscribed. Barnave's discourse reveals the distinction between *original* and *derived constituent power*. This idea was evident in Title VII, Art. 1 of the 1791 Constitution, which, while acknowledging the nation's 'imprescriptible right to change its constitution', limits the amendment power procedurally 'by the means provided in the constitution itself', and substantially by allowing amendments only to 'the articles of which experience shall have made the inconveniences felt'.[132] To support the argument regarding the limited amending power, it is important to draw attention to Title VII, Art. 7, which required members of the Assembly of Revision to take an oath, 'to confine themselves to pass upon the matters which shall have been submitted to them … [and] to maintain … with all their power the constitution of the kingdom…'.[133] Thus, according to the Constitution of 1791, the amendment power is conditioned by preserving the entire constitution; *amendment power* is not *constituent power*, and abrogation of the Constitution is not similar to its amendment.[134]

Explaining this special, yet legally defined, power, Oudot wrote that some 'constitutions have organized aside the constituted power, a *regular constituent power*; they have settled the form in which the nation would be consulted to operate a subsequent change in its political mechanism'.[135] The amendment process is ordinarily stipulated within the constitution through those constitutional provisions that regulate its procedure. It is a power established by the superior *constituent power*. As Claude Klein explains, the *original constituent power* is the power to establish a new legal order (*ordre juridique nouveau*). It is an absolute power, which may set limits for the exercise of amendments, such as determining which body has the authority to amend the constitution and other conditions (e.g. procedural and substantive limitations).[136] The *derived constituent power* acts within the constitutional framework and is therefore limited

[132] Cited in Anderson (1908, 94).
[133] *Id.*, 95.
[134] Le Pillouer (2009, 6-8).
[135] Oudot (1856, 398-399) [my translation].
[136] Klein (1997, 356).

under the terms of its original mandate.[137] In same vein, Markku Suksi clarifies that while amendment powers are 'the highest normative powers as defined and limited in the constitution', the *constituent power* is:

> extra-constitutional, pre-constitutional, latent and inalienable authority of the people to adopt a constitution for itself in a situation where the people's power of enacting constitutional provisions or revising the current constitution completely or drafting a constitution in a constitutional vacuum is not subjected to any restrictions of a previous or a current constitution.[138]

Kemal Gözler recognised two schools of thought, formal and substantive, as the basis for the distinction between the *original* and *derived constituent powers,* as summarised below.[139]

B. The Formal Theory

According to the formal theory, *original* and *derived constituent powers* are distinguished by the circumstances and form of their exercise. Raymond Carré de Malberg argued in 1922 that constituent power is exercised in revolutionary circumstances, outside the laws (forms, procedures, and limits) established by the constitution. It is not a legal power, but a pure fact. On the other hand, a juridical concept of *constituent power* is exercised in peaceful and legal circumstances according to rules established by the constitution.[140] In 1930, Georges Burdeau continued this line of thought, distinguishing between *constituent power* in a strict sense, which is the establishment of the very first constitution outside of the law, and the *revision power*, which is the power invested in a statutory body to modify constitutional rules through the legal system.[141] Roger Bonnard, in 1942, distinguished between *original constituent power*, which exists outside of any constitutional authority, and *instituted constituent power* (*pouvoir constituant institué*), which requires that a constitution be in force for its exercise,[142] a distinction that was adopted by Guy Héraud in 1946.[143] Georges Vedel in fact used the term *derived constituent power*, which is nowadays employed by French authors, in 1949. According to Vedel, when the *constituent power* is exercised to amend the constitution through the conditions

[137] Klein (1970-1971, 51-2).
[138] Suksi (1993, 25-26) (noting that *constituent power* 'might be subject to natural law and human rights limitations').
[139] Gözler (1995, 12-32). See also Gözler (1999, 10-28). For a similar distinction, see briefly, Guastini (2007, 307-308); Da Cunha (2013, 20).
[140] Carré de Malberg (1962, 489-500).
[141] Burdeau (1930, 78-83).
[142] Bonnard (1942, 48-59).
[143] Héraud (1946, 2-4).

stipulated in the constitution, the 'constituent power of revision' ceases to be unconditional since it is a derived power.[144]

The formal theory can be summarised as follows: *original constituent power* is exercised in a legal vacuum, whether in the establishment of the first constitution of a new state or in the repeal of the existing constitutional order, for instance in circumstances of regime change.[145] In this theory, the nature of the *original constituent power* is extra-legal. This is traditional positivist approach as expressed by Hans Kelsen, who does not tackle the question of the *constituent power*, but rather claims that the question of the basic norm or obedience to the historically first constitution is assumed or presupposed as a hypothesis in juristic thinking.[146] Likewise, for political scientists such as Carl Friedrich, *constituent power* is not a *de jure* power but a *de facto* power.[147] It is not based on a prior legal norm; hence, it is unlimited, independent, and unconditional, and in that respect, original. In contrast, *derived constituent power*, while performing the same function of establishing constitutional laws, is a constraint power that acts according to the formal procedures as established in the constitution. Gözler makes an important clarification: for him, *original constituent power* does not have to be exercised for revising the entire constitution; it may be exercised even for amending a single provision (outside of the constitutional amendment process). Similarly, the exercise of the *derived constituent power* may cover the entire constitution.[148]

C. The Substantive Theory

For the substantive theory, the main criterion distinguishing between *original* and *derived constituent powers* is the different scope of their ability to influence the substance of the constitution. As noted in Chapter 3, this school of thought flourished in the 1920s and 1930s in American constitutional writings regarding implicit limits on the amendment power. Nonetheless, it was Carl Schmitt who sophisticated this theory. Schmitt

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[144] Vedel (1989, 115-116), cited in Gözler (1997C, 21 fn 101).
[145] Carrozza (2007, 174).
[146] Kelsen (1957, 261-63); Kelsen (2009, 201-203); Kelsen (1986, 110). See also Raz (1998B, 47).
[147] Friedrich (1937, 113-131) (noting that constituent power 'is not a juridical power nor is it availed by a whole people but by a small and well organized group. Such a power can scarcely be brought under "four corners of the Constitution."')
[148] Gözler (1999, 39-44). See similarly Willis (1932, 468) ('if people who have all sovereign power actually adopt a new constitution… such new constitution becomes the new fundamental law … and supersedes any old constitution, and this result should also be true if only one amendment instead of an entire constitution is adopted') contra Han (2010, 71) ('Article V is exclusive for purposes of amendments, even as the people retain the right to abolish their government outside of Article V and indeed outside of law itself'.)

distinguished between the *constituent power* and the amendment power. The first is the power to establish a new constitution, whereas the second is the power to amend the text of constitutional laws currently in force, which, like every constitutional authority, is limited.[149] Schmitt's doctrine is built upon a distinction between 'the constitution' (*Verfassung*) and 'constitutional laws' (*Verfassungsgesetz*). The constitution represents the polity's constitutional identity, which cannot be amended, and constitutional laws regulate inferior issues. The amendment process is designed for the textual change of constitutional provisions, but not of fundamental political decisions that form the substance of the constitution:

> The authority 'to amend the constitution' . . . means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved… The authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to change the particular basis of this jurisdiction for constitutional revisions.[150]

Thus, for Schmitt, an amendment cannot annihilate or eliminate the constitution. It cannot abolish the right to vote or a constitution's federalist elements, or to transform the president into a monarch. These matters are for the *constituent power* of the people to decide, not the organs authorised to amend the constitution.[151] Thus, an amendment that transforms a state that rests on the power of the people into a monarchy, or *vice versa*, would be unconstitutional.[152]

Olivier Beaud, for whom a hierarchical relationship exists between *original constituent power* and the revision power, further developed the substantive theory. The *original constituent power* is sovereign, while the revision power is always limited. The difference lies in their purpose: the former deals with fundamental provisions and the latter with secondary objects.[153]

D. Integration: A Theory of Delegation

Kemal Gözler argues that these two schools of thought are fundamentally irreconcilable on the grounds that according to the formal theory, as opposed to the substantive one,

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[149] Schmitt (2008, 150).
[150] *Id.*
[151] *Id.*, 152.
[152] *Id.*, 151.
[153] Beaud (1994, 315-9, 336-7, 439). On Beaud's theory see Gözler (1997B, 129).

the *derived constituent power* is limited *only* by the formal conditions under which it operates.[154] The thesis presented here rejects this narrow approach. The two theories should be regarded as *mutually reinforcing*, rather than exclusive. In order for the formal and substantive theories to coexist, the amendment power needs to be comprehended in terms of *delegation*. Delegation affords the legal framework, even if not always consciously articulated, to rationalize this state of affairs surrounding the nature of the amendment power. Alf Ross explains that:

> Delegation has, as it were, the character of a process of propagation-a new competence is created until further notice alongside the old one. It is precisely by reason of these differences that we speak, not of transfer, but of entrusting or delegation of competence. Further, in the concept of delegation is implied a vague idea that the entrusting of competence is in the nature of something exceptional in that it permits the delegatus to 'appear in the role of legislator.' This means that the delegatus exercises a function which, seen in the light of a certain presupposed norm or standard, might be expected to be exercised by the delegator himself.[155]

Through the amendment provision, 'the people' allow a constitutional organ to exercise a *constituent authority* – the authority to constitute constitutional laws. When the amendment power amends the constitution, it uses a legal competence *delegated* to it by the *original constituent power*.[156] *The amendment power is a delegated authority*. This legal authority arises directly from the constitution. Regarding the notion of constitutional sovereignty, Maurice Hauriou wrote that he has 'no liking for the theory of delegation in that it is a fiction and leads to a denial that governmental power is original'.[157] Nevertheless, as elaborated in previous sections, the amendment power is not *original* per se. A distinction exists between *constituent power* and amendment power, the latter being a legal competence authorised to exercise a certain legal action – amending the constitution. But why does this infer limitability? Surely, one may claim – as Carlos Bernal has – that this is a 'clear case of a *non-sequitur*' since it does not follow from the distinction between *original* and *derived constituent power* that the amendment power is limited, 'for it is conceptually possible for the derivative constituent power to observe

[154] Gözler (1995, 35-44); Gözler (1999, 28-30).
[155] Ross (1958, 14).
[156] Msowoya (2013): 'Constituent power vests in the people. The people can delegate constituent power to constituted powers to affect changes to the constituting document that puts constitution amendment beyond ordinary law making and which allows constitutional transformations responsive to social change. The delegation is carried through the notion of representation. Without conceiving this delegation, there would be no juridical means of transforming a constitution in the face of compelling social need.'
[157] Hauriou (1917-1918, 820).

the procedural requirements and, at the same time, derogate the Constitution or replace it with a new one'.[158] 'Why does the power to amend the constitution', Bernal asks,

> not comprise the power to change fundamental political decisions? If the foundation of the constitution is only a contingent social fact, namely, the result of a political decision, why should it be impossible to change the essential elements of the constitution by means of another contingent social fact, that is, a political decision made by means of a constitutional amendment?[159]

Allow me to offer a reply. Modern studies of delegation now adopt the model of the 'principal-agent' in order to define the act of delegation. The one who delegates authority (the *original constituent power*) is the principal, while the one whom the authority is delegated to (the amendment authority) represents the agent.[160] The amendment power is a delegated power exercised by special constitutional agents. When the amendment power amends the constitution, it thus acts *per procurationem* of the people, as their agent.[161] Having a principal-agent relationship, the delegated amendment power is subordinated to the principal power from which it draws its legal competency. Hence, contrary to the *original constituent power*, which is unlimited by previous constitutional provisions and procedures, the delegation of the amendment power inherently entails certain limitations.[162]

Since the amendment power is delegated, it ought to be regarded as a trust conferred upon the amendment authority. 'All delegated power is trust, and all assumed power is usurpation. Time does not alter the nature and quality of either', Thomas Paine reminds us.[163] Brutus (pseud.) repeated this idea by stating that the government's power 'is a delegated power, and all delegated power, we must, as freely admit, is a trust'.[164] True, the amendment authority has the 'supreme' amendment power, but it is only a

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158 Bernal (2013, 343) [see also at 348].
159 *Id.*, 349.
160 Lupia (2001, 3375-3377).
161 See, for example, González (2002, 194-219).
162 Banerjee and Khaitan (2008, 555-556): 'The view of sovereign authority being vested in the people, the members of the body politic, with the discretion to delegate certain sovereign functions for functional efficiency is much more practicable for explaining constitutionalism in modern democracies. … Since the power to amend the constitution is part of the constitutional form; a function that is mandated to be exercised by the governmental functionary, who do not possess any constituent power, by it's very structure, the power to amend is a limited power falling short of the power to reconstitute the constitutional form, which falls in the eminent domain of 'constituent power'. If ever such power to amend the constitution assumes unfettered dimensions in the hands of the governmental functionary, it would be an unconstitutional exercise for the simple reason of being ultra vires the capacity of such functionary.'
163 Paine (2008, 238).
164 Brutus (1827, 104).

fiduciary power to act for *certain ends*.[165] The most famous exponent of this idea is John Locke, for whom the 'supreme legislative power' is 'only a Fiduciary Power to act for certain ends', and the people possess 'a Supreme Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them'.[166] In similar vein, Edmund Burke emphasised the very nature of *trust*: 'it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence'.[167] If we accept this basic premise, then consequently, if the amendment power is delegated, it acts as trustee. Trustee of whom? Of 'the people' in their *original constituent power*.[168]

Delegation and trust are conceptual keys to the nature (and consequently the scope) of amendment powers. The trustee (the amendment authority) has a legal right of possession of the trust corpus (the amendment power), conditional on his fiduciary obligation to comply with the terms of the trust (procedural or any explicit or implicit substantive requirements) and pursue the ends it established to advance ('amend the constitution'). Due to its nature, the trustee is always conditional and thus the fiduciary amendment power necessarily entails limits.[169] As Akhil Amar has argued, within Art. V of the U.S. Constitution, the people delegated the amendment power to ordinary government, and limitations on the amendment power, as stipulated in Art. V, exist only when it is exercised by delegated powers following from the people.[170] Likewise, William Harris correctly claims that when the sovereign constitution-maker acts as sovereign, 'the notion of limits on constitutional change is inapposite'; however, 'when the machinery of government is acting as the agent of the people in its sovereign

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[165] Cf., Freeman (1990-1991, 348-349): 'In a constitutional democracy all political authority is understood to derive from the sovereign people who, conceived as equals, exercise their constituent power to create and define the nature and limits of ordinary political authority. Legislative authority is among the ordinary powers of government that have their source in the peoples' constituent powers. As such it is subject to whatever constraints are placed upon it by the sovereign people in exercising that authority. Like any power of government the authority to make laws is then fiduciary and is only to be exercised for the public good.' Cf. Finn (1995, 131); Fox-Decent (2011).

[166] Locke (1689, paras. 149, 367); See generally Purdy and Fielding (2007, 165).

[167] Burke (2000, 291); See Purdy and Fielding (2007, 185-186).

[168] Preuss (1992-1993, 653); Weintal (2013, 290). Compare with Chalmers (2007, 295): 'Constituent power enables law-making and ordinary politics to be conceived of in terms of agency'.

[169] See, for example, Brown (1922, 240-241) ('The Federal Constitution is not a grant of "sovereignty," but a mere grant of Federal powers to a "common agency," created to protect and preserve the rights of the people and to safeguard in perpetuity their sovereign power … The power of the Amending Agents is necessarily limited …)

[170] Amar (1988, 1054-1058); Amar (1994, 458-500); Amar (1995, 90-101). See also Bacon (1929-1930, 777-778); Ishikawa (1996, 309).

capacity, the notion of limits not only makes sense; it is necessary'.[171] The legal framework of delegation is by itself characterised by a constraints.[172]

However, one may claim that even though the amendment power is delegated, it is still limitless since it represents the unlimited sovereign. The representation of an unlimited *constituent power* must logically result in a similar unlimited amendment power. Such an argument should be rejected. There is always a hierarchical relationship between the grantor and the receiver: 'creations are always inferior to their makers'.[173] As C. V. Keshavamurthy elaborates, 'the agent is never equal of the principal… the Sovereignty as organised within the Constitution is the smaller and therefore cannot … be understood to have been vested with the full amendatory powers which the Sovereignty at the back of the Constitution inherently possesses'.[174] This is precisely the distinction between *original* and *derived constituent powers*.[175]

How does the theory of delegation manage to integrate the formal and substantive theories? *First*, delegation theory is not restricted to the substance of amendments. The amendment power must obey the procedure as prescribed in the constitution. Similarly, it is required to observe those explicit (not necessarily procedural, but also substantive) limits set upon it, as formally stipulated in the constitution.[176] Explicit limits on constitutional amendments express the idea that exercise of the amendment power – established by the constitution and deriving from it – must abide by the rules and prohibitions formally stipulated in the constitution. Again, as demonstrated in Chapter 2, these prohibitions can include substantive limits from different types. *Second*, delegation theory is not restricted to form, but also concerns substance. The delegated amendment power, as a rational understanding of that delegation, must be substantively limited, whether these limits are explicitly stated in the constitution or not. This is exemplified in Chapter 3 and further developed in the next chapter. Therefore, rather than being exclusive, the formal and substantive theories

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[171] Harris (1993, 193).
[172] Scott (1966-1967, 555).
[173] Lenowitz (2013, 87).
[174] Keshavamurthy (1982, 13, 50). See also at 78: 'As the agent can never be the equal of the principle, certain limitations ought necessarily to exist regarding the quantum of power available for exercise by the agent. For the reason that the power available with the agent is limited, it will have to be conceded that the amending power vested with the representatives cannot reach to alter certain aspects vital or basic to the constitutional scheme.'
[175] Interestingly, it is this idea of 'non-transferability of sovereignty' which stands behind the modern constitutional 'non-delegation' doctrine of legislation. See Ross (1958, 11 fn 27). On the doctrine of 'non-delegation' see also Posner and Vermeule (2002B, 1721); Alexander and Prakash (2003, 1297).
[176] See Troper (2008, 11).

distinguishing between the constituent power and amendment power mutually reinforce one another.

E. Terminological Clarifications

1. Primary and Secondary Constituent Powers

Due to the complexity of the concept of the amendment power and its relations with the *constituent power*, various versions have developed in the literature to describe these concepts. In the American literature, it was often common to distinguish between *framing power* and *amending power* – the first is the power to establish a constitution and the latter to amend it. [177] The German often term the amending power *verfassungsändernden Gesetzgeber*, the secondary constitutional lawgiver or amending legislature. [178] In French constitutional discourse, various terms have been used. Constituent power is often termed simply *pouvoir constituant*, or alternatively, *pouvoir constituant originaire*, *pouvoir constituant initial*, or *pouvoir constituant stricto sensu*. The amending power is often termed *pouvoir constituant dérivé*, *pouvoir constituant institué*, *pouvoir de révision constitutionnelle*, *pouvoir de révision de la constitution*, or even *pouvoir constituant constitué*.[179] Some of these terms, as Holmes and Sunstein note, are oxymoronic. For them, the term *derived constituent power* is 'farfetched'.[180] In order to elude any confusion, Schmitt plainly rejectes the use of the term *constituent* to describe the amendment power. Similarly, Ramaswamy Iyer argues that the amendment power is merely a power granted to Parliament under the Constitution: '"Amending power" is a good enough term for this', he claims, 'nothing is gained by calling it "constituent power"'.[181]

I agree that the oft-used terms are imprecise. Both the constitution-making and constitution-amending powers are *constitutive* in the sense that these are powers to constitute constitutional rules. Nonetheless the two are not identical, as this chapter demonstrated. As for the constitution-making power, I reject the use of the term *original constituent power*. A constitution always relates to something. Even the negation of a

[177] Klein and Sajó (2012, 422 fn 14).
[178] Reestman (2009, 385).
[179] See Gözler (1999, 7-8).
[180] Holmes and Sunstein (1995, 276).
[181] Iyer (2006, 2065).

previous legal order bears a 'relational account'.[182] Moreover, a new constituent process must be based upon a certain prior 'constitution-making moment'.[183] It never acts in a pure vacuum.[184] Additionally, in practice, constitution making takes many different forms.[185] True, some constitutions were formed in revolutionary circumstances, breaking the previous constitutional order or during state building. Others were constituted through international efforts or imposed by foreign and external forces, such as the cases of Japan and Germany after 1945 or post-2003 Iraq.[186] Importantly, the constitution-making process is often exercised in continuity with historic or existing laws or in accordance with pre-determined rules (Post-1989 Eastern Europe and South Africa).[187] Therefore, constituent power is never purely *original*.[188] 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.[189]

Therefore, in the rest of this thesis I generally use the term *primary constituent power* to describe 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 amendment power. Congruently, instead of *derived constituent power*, I use the term *secondary constituent power* to describe the constitutional amendment power. It is secondary not merely because it necessarily comes (chronologically) after the constitution-making process, but

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[182] Barshack (2006, 199) (noting that 'A moment of foundation cannot close itself to the past or to the future that it intends to shape. It cannot be a moment of sheer, stagnant presence, ignorant of past and future, a mythical time to the extreme'. For the claim that constitution-makers look to the past no less than to the future see Scheppele (2008, 1379).

[183] Klein and Sajó (2012, 422).

[184] Lindahl (2007, 21) (noting that exercising constituent power 'is never a pure decision that "emanates from nothingness"'); Tushnet (2012-2013, 1990) ('constitution-making does not occur on a desert island to which the constitution makers have just arrived. It occurs in real, historical time under real, historical circumstances'); Palmer (1959, 215-216) ('No people really starts *de novo*; some political institutions always already exist; there is never a *tabula ras*a, or a state of nature, or Chart Blance…')

[185] Klein and Sajó (2012, 422).

[186] See Arato (2009); Arato (2000); Arato (2006, 535); Dann and Al-Ali (2006, 423); Kemmerer (2008). See also Oklopcic (2012B, 81) (claiming that constituent power must be regarded in an 'enlarged perception of the geographical theatre' to include also political powers which work also externally to the political boundaries).

[187] Soltan (2007-2008, 1414-1416) (claiming, at 1419 that 'If constitution making proceeds in stages … we must abandon Sieyes's idea of the people as the constituent power. We build on what exists and on what we inherit from the past'); Arato (2012, 174) ('the Round Table form is post-(organ) sovereign in that no instance, institution or person can claim to fully embody the will of 'the people'). One may claim that in this case, constituent power was effectively reduced to constituted powers. For rejection of such notion see Botha (2010, 66).

[188] For an argument that due to the reflexive nature of the constituent power the distinction between original and derived constituent power is flawed see Loughlin (2013). See also Preuss (2011, 445): 'As the constituent power presupposes the constituted powers, there is no division of responsibilities between constituted powers and constituent power: the constituent power is not an independent agent that can exist outside of a constitution. Constituted powers and constituent power are logically interdependent.'

[189] On the various challenges to the idea of constituent power see Oklopcic (2008, 358); Oklopcic (2012B, 81). On the change of the traditional constitution-making process see Lollini and Palermo (2009, 301).

because it is subordinated to the *primary constituent power* and inferior to it. No doubt, old habits are hard to break, but this terminology of *primary* and *secondary constituent power*s manifests more properly these powers' unique nature and sharpens the delicate distinction between them.

2. *Power and Authority*

The constitution-making power is the power possessed by the people to form a constitution. Therefore, it was suggested that it might be treated as a kind of a *right*.[190] In contrast, the amendment power is a power authorised by the constitution. It should be understood as a power-in-law, a competence. Competence is 'the legally established ability to create legal norms'.[191] Amendment provision establishes this ability by stipulating the necessary conditions (personal, procedural or substantive) for its exercise.[192] The amendment power is thus the legal power to lay down constitutional rules according to an amendment process prescribed within the constitution. It is a legal competence conferred upon certain organs, which are empowered with the function of issuing constitutional norms.[193]

The term *power* is closely related – though not identical – to *authority*.[194] Authority usually refers to a power vested in an office or role, but it is a limited, restricted, and contained power. Authority is a power that may only be legitimately activated through pre-defined channels. It 'emerges as a transformation of power in a process called "legitimation"'.[195] Therefore, there is a correlation between authority and legitimacy (the latter is surely a matter of degree and could be subject to negation or denial).[196] Hannah Arendt claims that since authority demands obedience, it is mistaken for some form of power. However, 'authority precludes the use of external means of coercion; where force is used, authority itself has failed'.[197] Arendt reminds us that the distinction

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[190] See Liangliang (2007, 41). For an argument that constituent power has to be regarded as manifestation of 'political right' see Loughlin (2013, 1).
[191] Ross (1968, 130). See also Somek (2008A, 17 fn 3) (legal power and competence are not identical since while legal power is 'the ability to lay down a rule' legal competence often extends to the permission to act in a certain way without the ability to lay down rules).
[192] Cf., Bulygin (1992, 203).
[193] Cf., Schmill (2000, 286, 294).
[194] See generally De Crespigny and Wertheimer (2009). See, for example, Uphoff (1989, 315): 'Power and authority should not be used interchangeable, because one can have power without authority and, conversely, there can be authority with little if any power.'
[195] Emerson (1962, 38).
[196] Uphoff (1989, 302-3).
[197] Arendt (1961, 93).

between *power* and *authority* is an ancient one, as the Roman maxim states *'Cum potestas in populo auctoritas in senatu sit'* - the power is in the people and the authority is in the senate.[198] This proverb could *mutatis mutandis* apply to our analysis. While the aforementioned *primary constituent power* is a true power that rests with the people, the *secondary constituent power* – the amendment power vested in a constitutional organ – is an authority. It is an empowered legal competence, established by the constitution and may be limited by it. Therefore, throughout this thesis, I use the terms 'amendment power' and 'amendment authority' interchangeably. Whenever amendment power is used, it should be understood as a legal power.

IV. CONCLUSION

To sum up the argument thus far, the amendment power is a constitutional power delegated to a certain constitutional organ. Since it is a delegated power, it acts as a trustee of 'the people' in their capacity as a *primary constituent power*. As a trustee, it possesses only fiduciary power; hence, it must *ipso facto* be intrinsically limited by nature. Conceived in terms of delegation, certain acts by the amendment authority could be considered as going beyond permissible bounds, since they would flout the terms of the 'delegation'. Put differently, the understanding of the amendment power as a delegated power means that *a vertical separation of powers* exists between the *primary* and *secondary constituent powers*.[199] As in the horizontal separation of powers, this separation results in a power-block.[200] The holder of the amendment power is not permitted to conduct any amendment whatsoever; he or she may be restricted from amending certain principles, institutions, or provisions.

Identifying the amendment power as a delegated authority is the first step in understanding its limited scope. As a delegated authority, it functions as a trustee and must therefore be limited. We now move on to explain *how* – according to this theoretical presupposition – the amendment power is limited. In the next chapter, I delve into the question of what might constitute a breach of that trust and therefore an impermissible amendment.

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[198] Arendt (1961, 122). For an historical account see Tuck (1974, 43).

[199] Interestingly, Schützenberger (1850, 19) wrote that there is a separation of powers between the constituent and legislative powers. Often, he notes, the special functions of the constituent power are exercised by the legislature. This is, for him, the consequent of an imperfect separation of powers.

[200] As Montesquieu (1961, 162) taught us, since '*c'est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser*', we need separation of powers from preventing abuse of power.

CHAPTER 5: THE SCOPE OF AMENDMENT POWERS

In Part I of this thesis, I have described various explicit and implicit limitations that may be imposed on the amendment power. In this part of the thesis, I suggest that such limitations rest on a solid theoretical ground. I began the argument in the previous chapter, in which it was claimed that the amendment power is not to be equated with the *primary constituent power*. It is a power established by the constitution, delegated with the task of amending it. Due to its nature, it was claimed that it must be limited. Based upon this theoretical presupposition, this chapter aims to elucidate *how* the amendment power is limited. It provides the theoretical ground that supports various explicit and implicit limitations on the amendment power.

I. EXPLICIT LIMITS

This section develops a theory for explaining unamendable provisions. First, it outlines a framework for understanding unamendable provisions as expressed limits that are set upon the amendment power and as part of the delegation theory distinguishing between *primary* and *secondary constituent power*s. Next, it considers the conundrum of 'unamendable amendments' and whether unamendable provisions can be circumvented by a 'double-amendment procedure'.

A. The Validity of Unamendable Provisions

The idea of legal entrenchment – in both constitutional and ordinary legislation – is debated extensively in the academic literature.[1] However, when constitutions expressly prohibit the amendment of certain provisions or principles, constitutional entrenchment is taken to its extreme, hence it is often described as 'absolute'[2] or 'indefinite'.[3] Is a statement that a constitutional provision is unamendable valid?[4] 'There is no law which cannot be changed', Ferdinand Regelsberger argued, adding that 'a legislator … cannot

[1] See, for example, Katz (1995-1996, 251); McGinnis and Rappaport (2003, 102); Posner and Vermeule (2002A, 1665); Roberts and Chemerinsky (2003, 1773); Young (2007-2008, 399); Plato (2007, 1470); Sterk (2003, 231); Eule (1987, 381); Brookfield (1981-1984, 603); Elkind (1987, 158); Liu (2010, 193).
[2] See European Commission for Democracy Through Law (2009); Albert (2010, 678 fn 42).
[3] Albert (2010, 672).
[4] The question whether such a provision may be enforced in court is a separate one which is dealt in Chapter 7.

control the unchangeability of a legal norm'.[5] For this reason, the French unamendable provision of 1884 was widely criticised, with various authors claiming that while its moral or political value is evident, its legal effect is disputed.[6] It was described as 'a bit of useless verbiage'[7] and 'an empty phrase'.[8] Notwithstanding such criticism, Kelsen's view was that there is no reason to suppose that a norm cannot stipulate that it cannot be repealed:

> Contrary to a widespread opinion in the field of jurisprudence, the question whether norms exist which cannot be derogated must be answered in the positive if the question means: whether there are norms whose validity – according to their own meaning – cannot be repealed by a derogating norm, and if the question does not mean whether not every norm may lose its efficacy, and thereby its validity, and be replaced by another norm regulating the same subject matter in a different way.[9]

For Kelsen, a norm could be declared as unamendable, yet such a declaration cannot prevent the loss of its validity by a loss of efficacy.[10] Accordingly, a provision prohibiting any amendments is not invalid by its very nature. Moreover, since a norm forbidding amendment has to be considered valid, in the case of unamendable provisions, it is not legally possible to amend the protected provisions.[11]

The theory hereby presented supports the validity of unamendable provisions, but it relies on questions concerning the sources of constitutional norms, building upon the distinction between *primary* and *secondary constituent powers* presented in Chapter 4. As elaborated in that chapter, a vertical separation of powers exists between *primary* and *secondary constituent powers*. The delegated amendment power may be restricted from amending certain principles, institutions, or provisions. In other words, the *primary constituent power* can place limits on the *secondary constituent power*. As mentioned in Chapter 2, the motives for such restrictions and the aims those restrictions are designed to accomplish vary. What is clear is that the amendment power, which is a *secondary constituent power* created by the constitution and subordinate to it, is exercised solely through the process established within the constitution. The amendment power is bound by any explicit limitations that appear in the constitution, if those are set by the *primary constituent power*. I thus accept Gözler's assertion that:

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[5] Regelsberger (1893, s. 109), quoted in Kelsen (1962, 343).
[6] Barthelemy (1924, 23).
[7] Burgess (1893, 172).
[8] Valeur (1938, 281).
[9] Kelsen (1962, 343-44). See also Kelsen (1991, 109-110).
[10] Kelsen (1962, 344).
[11] Kelsen (2007, 259).

> The legal validity of these substantive limits is beyond dispute because they were laid down in the constitution by the constituent power. Therefore, the amendment power, being a power created and organized by constitution, is bound by the limits provided by the constitution.[12]

Gözler's approach is positivistic, resting on a purely textual basis.[13] Indeed, viewed from the perspective of the formal theory, explicit limitations on constitutional amendments reflect the idea that any exercise of the amendment power – established by the constitution and deriving from it – must abide by the rules and prohibitions stipulated in the constitution. These prohibitions can include substantive limits.[14] In that respect, one can understand the claim that unamendable provisions 'can be seen as a procedural constraint which can be surmounted by an entirely new constituent act'.[15]

Viewed from the perspective of the substantive theory (see Chapter 4), unamendable principles are an example of the fact that the amendment power may be limited with regard to the content of certain amendments, and can amend the constitution 'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved', to use Schmitt's words.[16] However, the substantive theory can only explain those unamendable provisions that aim to prevent fundamental changes in an effort to ensure the constitution's integrity and the continuity of its constitutive principles. But as we have seen in Chapter 2, unamendable provisions, often carrying *conflictual* and *bricolage* aspects, may simply derive from constitutional compromise and contingency and cover a wide range of topics, not necessarily the basic principles of the constitutional order. The substantive theory cannot support these explicit limitations.

The theory of delegation manages to support all types of unamendable provisions. The *secondary constituent power*, as a delegated power, acts as a trustee of the *primary constituent power*. It must obey those 'terms' and 'conditions' stipulated in the 'trust letter' – the constitution. The delegated amendment power is limited according to the conditions stipulated in the constitution, including various substantive limits.

What are the legal implications of a conflict between a new constitutional amendment and an unamendable provision, according to the delegation theory? Unamendable provisions create a normative hierarchy between constitutional norms. Just

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[12] Gözler (2008, 52).
[13] The theory advanced in this thesis, as this chapter elaborates below, is much wider as it supports implicit limitations on the amendment power, even if not explicitly written in the constitutional text.
[14] See Troper (2008, 11).
[15] See Rivers (2002, xxi).
[16] Schmitt (2008, 150).

as an ordinary law prevails over an administrative regulation, and a constitutional law prevails over an ordinary law,[17] a constitutional provision established by the *primary constituent power* prevails over constitutional provisions established by the *secondary constituent power*. When resolving conflicts between constitutional provisions (unamendable provisions contrasted with later amendments), the paramount factor is not their chronological order of enactment *(lex posterior derogat priori)*, but rather, the sources of these constitutional norms. Thus, the *constituent power* is divided conforming to a hierarchy of powers – *primary* and *secondary* – governed by the principle *lex superior derogat inferiori*; the constitutional rule issued by a higher hierarchical authority prevails over that issued by a lower hierarchical authority. Just as ordinary legislation retreats when it conflicts with constitutional norms, so do constitutional amendments retreat when they conflict with unamendable provisions.[18] In other words, a future amendment conflicting with an unamendable provision is not formulated by the same authority, but rather, by an inferior one – the *secondary constituent power*. Since the *primary constituent power* is an authority that is superior to the *secondary* one, the normative creations of the latter should withdraw when conflicting with that of the former.[19]

Unamendable provisions may lose their validity when they face a conflicting valid norm that was *formulated by the same authority*.[20] Therefore, as elaborated in Chapter 6, unamendable provisions cannot limit the *primary constituent power*; they 'invite' it to be resurrected in order to change unamendable subjects.[21]

B. An Unamendable Amendment?

Unamendable provisions raise a unique difficulty when an amendment stipulates by its own terms that it may not be subject to amendments; an 'unamendable amendment'. This is not a hypothetical scenario. The original French unamendability of the republican form of government was inserted into the 1875 Constitution through an amendment in

[17] Cappelletti and Adams (1965-1966, 1214).
[18] I thus endorse the claim of González (2002, 131,153) that one has to distinguish between the kind of popular sovereign-generated and legislature-generated constitutional provisions which are hierarchically ordered so that when an irreconcilable conflict between them occurs, the former trump the latter, regardless of which norm is of more recent.
[19] This is not merely the question of which constitutional norm takes *priority* in a conflict between two constitutional norms, but the issue can affect the *validity* of the conflicting inferior constitutional norm. A court can declare the constitutional provision that conflicts with an unamendable constitutional provision to be invalid. On the distinction between the questions of validity and priority when constitutional norms conflict see Feldman (2011, 137-139). On judicial review of constitutional amendments see Chapter 7.
[20] Cf., Kelsen (1962, 344).
[21] Weintal (2005, 12-13, 19).

1884, stimulating lively debate among scholars.[22] Similarly, in 1861, the original proposal for a 13th Amendment to the U.S. Constitution, known as the 'Corwin Amendment', 'eternally' prohibited Congress from abolishing slavery: 'No amendment shall be made to the Constitution which will authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State'. [23] The Corwin Amendment was passed by both the U.S. House of Representatives and the U.S. Senate in 1861, and was ratified by Ohio, Maryland, and Illinois. The ratification process was only put on hold due to the civil war's intervention, and the final 13th Amendment abolished slavery.[24]

The distinction between *primary* and *secondary constituent power* provides a simple solution to this conundrum. As only the *primary constituent power* can limit the *secondary constituent power*, unamendable amendments lose their validity when they face a conflicting norm *formulated by the same authority*. Accordingly, provisions created by the amendment power could subsequently be amended by the amendment power itself. For that reason, I disagree with the argument that as an unamendable amendment, the Corwin Amendment could not have been altered. [25] A better argument is that an 'implicit limit' exists, according to which 'an amendment cannot establish its own unamendability'. [26] Limitations upon the amendment power, which is a delegated authority, can be imposed solely by the higher authority from which it is derived – the *primary constituent power*.[27]

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[22] For example, Esmein (1928, 545, 549) believed that the national assembly exercises constituent power but only according to the conditions stipulated within the constitution itself. Hence, the provision successfully limits the amendment power on this matter. Duguit (1924, 538-541), adopted the contrary view, according to which the national assembly had all the powers of a constituent assembly, thus it could even change the form of government. See also Garner (1935, 537): 'Such provisions are highly objectionable on grounds of public policy and are of doubtful validity. They rest on the assumption that their authors are infallible and that they have a right to bind future generations to accept as final what they have decreed'; Munro (1938, 393): the provision 'would be no legal barrier if a future national assembly should decide to do what it forbids. There is no way in which a sovereign body can limit its successors' (cited also in Anonymous (1926, 228)); Burgess (1893, 172): 'there is not power…outside of the Assembly to hold it to this pledge. It is, therefore, only a self-limitation, which the Assembly may, at any moment, remove through the exercise of the same power by which it was imposed'.

[23] Cong. Globe, 36th Cong., 2d Sess. 1263 (1861). See Vile (2003, 175). According to Albert (2013A), another way of reading the Corwin Amendment is not as making slavery absolutely unamendable but only as restricting congressional power.

[24] On the Corwin Amendment see generally Bryant (2003, 501); Brandon (1995, 215); Brandon (1998, 136-38); Vorenberg (2001, 21-22).

[25] Friedman (2011, 80).

[26] Greenawalt (1987, 633).

[27] Da Silva (2004, 460). See also Machado (2012, 288): 'in principles, the enactment of entrenchment clauses is a prerogative of the original constituent power. … it may be possible to introduce secondary entrenchment clauses if …their fuction is to declare the previous existence of implictly primary entrenchment clauses.' Here, an interesting question arises; what if an amendment was enacted not through the ordinary amendment process, rather through an invocation of the *primary constituent power* (see Chapter 6). Then, according to the same logic, since it is a norm enacted by the higher authority, it would be possible for it to establish its unamendability.

C. Amending Unamendable Provisions

Most of the world's unamendable provisions are non-self-entrenched provisions, i.e. they establish the unamendability of certain constitutional subjects but they are themselves not entrenched.[28] Can non-self-entrenched provisions be amended? As a matter of practice, the answer is positive. In 1989, the unamendable provision in the Portuguese Constitution of 1976 (Art. 288) was itself amended and the unamendable principle of collective ownership of means of production was omitted, in order to comply with the European Community's norms and in the the context of the collapse of communism.[29] Da Cunha notes that this amendment 'has always shocked us because it undermines the standard meaning and thus causes the Constitution to lose all of its enforceability.'[30] In an attempt to solve the complexity produced by this amendment, scholars have developed various theories surrounding Art. 288. Recall, Art. 288 is very detailed, protecting no less than fourteen subject matters from amendment, not all of which can be described as the basic principles of the constitutional order (see Chapter 2). Therefore, some have claimed that a distinction has to be drawn between unamendable provisions that are connected to the constitution's identity and those that are not, the former being truly unamendable, whereas the latter – unamendable provisions of a second degree – are amendable.[31] This theory of unamendable provisions of a second degree is incompatible with the theory of delegation advocated for in this thesis.[32] Importantly, the court was never asked to review the validity of this controversial amendment.[33]

There are three theoretical approaches for solving the challenge posed by non-self-entrenched provisions. According to the first approach, if unamendable provisions are non-self-entrenched, unamendable principles or provisions may be amended in a *double amendment procedure*. The first stage is to repeal the provision prohibiting certain

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[28] This is, for example, the situation with regard to Bulgarian Const. (1991), art. 57; the German Basic Law (1949), art. 79; the Romanian Const. (1991), art. 14. See Elster (2000B, 102).

[29] Comella (2009, 207 fn 39). On the unamendable provision in the Portuguese Constitution see also Machado (2012, 286-287, 296-297).

[30] Da Cunha (2013, 25).

[31] See Miranda (1990, 524); Medeiros (2007, 931); both cited in Pereira (2012).

[32] According to an alternative explanation, the Portuguese amendment provision requires a normally waiting period of five years since the previous revision, before amending the Constitution (art. 284.1). This waiting period could be waived by a majority of four-fifths of The Assembly of the Republic (art. 284.2). Since during this waiting period, at least one mandate-conferring election will normally take place, one may claim that this time-consuming process, which 'encourages the derived constituent power to think twice before doing away with a fundamental constitutional provision' (Machado (2012, 281)), and involves popular involvement through elections, is a manifestation of a *strong secondary constituent power*, which ought not to be as limited as ordinary amendment powers. This issue is further elaborated in the next chapter.

[33] In fact, the Portuguese unamendable provision has never been invoked in order to invalidate a proposed amendment. See European Commission for Democracy Through Law (2009, para. 213).

amendments through an amendment, an act that is not in itself a violation of the constitution. The second stage is to amend the previously unamendable principle or provision, which is no longer protected from amendments.[34] This approach finds supporters in the French,[35] Norwegian,[36] and American[37] debates.

According to the second approach, there is no need for a two-stage process as the unamendable provision and the protected subject could both be repealed in the same act. As Douglas Linder puts it, 'only a hide-bound formalist would contend that the difference [between one and two amendments] is significant'.[38] Substantively, the outcome is similar.

The third approach rejects such attempts by the amendment power to circumvent limitations that are set upon it. At the outset, it is important to admit that from a purely practical point of view, in order to avoid the double amendment procedure tactic, a clever constitution-maker would draft self-entrenched unamendable provisions, i.e. unamendable provisions that by their express terms not only prohibit amendments of certain subjects, but also prohibit amendments to themselves (a 'double entrenchment mechanism'[39]). True, the unamendable provision cannot, as Vedel puts it, 'be given to a jailer who will guard its intangibility',[40] but it could be self-entrenched. This mechanism, which exists in several constitutions,[41] could block the aforementioned loophole.[42]

I argue that even if unamendable provisions are not self-entrenched, they should be implicitly recognised as unamendable. Georges Liet-Veaux famously described the use of the French Third Republic's legal devices in order to form the Vichy regime as '*Fraude a la Constitution'*.[43] Whereas the double-amendment procedure, which Walter Murphy described as a 'sleazy escape route',[44] may be tolerable from a purely formalistic perspective, such a legal manoeuvre may also be regarded as 'fraud upon the constitution'. From a practical point of view, if unamendable provisions could be

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[34] Da Silva (2004, 456-458).
[35] Bermann and Picard (2008, 13); Vedel (1949, 117), cited in Klein (2011).
[36] See debate in Smith (2011, 375).
[37] Tribe (2000, 111-114). For support and opposition of this approach within the American debate see Orfield (1942, 85).
[38] Linder (1981, 729).
[39] Lumb (1978, 170). On the logical problems inherent in 'self-referring laws' see Suber (1990); Hart (1983, 170); Ross (1969, 1).
[40] Cited in Klein (2011, fn 10).
[41] See, for example, Armenia Const. (1995), art. 114; Bosnia and Herzegovina Const. (1995), art. X2; Honduras Const. (1982), art. 374; Niger Const. (2010), art. 177; Rwanda Const. (2003), art. 193.
[42] See Joseph and Walker (1987, 159).
[43] Liet-Veaux (1943, 116), cited in Klein (1996, 153-156).
[44] Murphy (2007, 504). See also Amar (2006, 293) (calling it 'sly scheme') and Baker (1994, 340 fn.47) (calling it 'disingenuous').

amended by means of the same procedure required to amend other provisions, they would *almost* be devoid of meaning.[45] Why almost? The declaration of unamendability remains important even if conceived as eventually amendable because its removal would still necessitate political and public deliberations regarding the protected constitutional subject. Such deliberations grant the unamendable provision important role. Moreover, the unamendability adds a procedural hurdle – and thus, a better protection – since the double amendment process is still procedurally more difficult than a single amendment process. Lastly, the unamendability of a provision might have a 'chilling effect', leading to hesitation before repealing the so-called unamendable subject.[46]

It is true that, formally speaking, by amending the non-self-entrenched unamendable provision (the first stage), the amendment authority *prima facie* purports to act within the limits of its lawful powers. However, it is clear that substantively, it transgresses those limits. In 1867, the U.S. Supreme Court declared that 'what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not with shadows'.[47] Indeed, this maxim, without which constitutional provisions 'would be meaningless',[48] equally applies with regards to the amendment power. Therefore, Jason Mazzone is correct in claiming that unamendable provisions should be given a purposive interpretation according to which they are implicitly self-entrenched.[49] The double-amendment procedure should therefore be rejected on both theoretical and practical grounds.[50]

II. IMPLICIT LIMITS

In Chapter 3, we have learned that in many jurisdictions, courts have ascertained a certain constitutional core, a set of basic constitutional principles which form the constitution's identity and which cannot be abrogated through the amendment procedure. In this section, I argue that the global trend of recognising implicit limits on the amendment power rests on a solid theoretical basis and is compatible with the general thesis presented in this work.

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[45] Da Silva (2004, 470); Han (2010, 91).
[46] Mazzone (2004-2005, 1818).
[47] *Cummings v. Missouri*, 71 U.S. 277, 325 (1867); see also Orfield (1929-1930, 577).
[48] Singh (1966, 278, 286-287).
[49] Mazzone (2004-2005, 1818).
[50] For a similar approach see Klein (1999B, 37-38); Derosier (2007, 5); and Schwartzberg (2009, 9). To reiterate, in rejecting the double-amendment procedure, I do not claim that unamendable provisions are 'eternal', since even self-entrenched unamendable provisions can be circumvented by acts of the *primary constituent power*.

A. Foundational Structuralism

The first implied limitation derived from the theory of delegation is the most basic: *the constitutional amendment power cannot be used in order to destroy the constitution*. The delegated amendment power is the internal method that the constitution provides for its self-preservation. By destroying the constitution, the delegated power subverts its own *raison d'être* and achieves nothing.[51] As Michael Paulsen notes:

> The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction… The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one, where an alternative construction is fairly possible.[52]

This postulation applies equally to amendment provisions.[53] The amendment authority entrusted with the amendment power cannot use this power in order to destroy the very same instrument from which its authority streams and on which it is built.[54] Thomas Cooley wrote in 1893 that the U.S. Constitution's framers abstained from forbidding changes that would be incompatible with the Constitution's spirit and purpose, simply because they did not believe that those would be possible under the terms of the amendment process itself. An amendment converting a democratic republican government into an aristocracy or a monarchy would not be an amendment, but rather a revolution. His metaphor with regards to the amending power is astoundingly clear:

> The fruit grower does not forbid his servants engrafting the with-hazel or the poisonous sumac on his apple trees; the process is forbidden by a law higher and more imperative than any he could declare, and to which no additional force could possibly by given by re-enactment under this orders.[55]

The amendment power was introduced for the purpose of preserving the constitution, not destroying it. This idea is compatible with Schmitt's claim that constitutional amendment is not constitutional annihilation or elimination,[56] and with

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[51] Child (1926, 28).
[52] Paulsen (2003-2004, 1257).
[53] This was acknowledged in *Kesavanda Bharati v. State of Kerala*, AIR 1973 SC 1461, 1426: 'Article 368 cannot be construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called as lawful "Harakiri."' See Khanna (1977, 11); Keshavamurthy (1982, 86).
[54] Bernal (2013, 353): 'That the derivative constituent power has the power to modify the constitution necessarily presupposes that a constitution must exist prior to and following the exercise of this power.'
[55] Cooley (1893, 118-120). For a similar argument that the framers of the U.S. Constitution regarded the amendment power as limited see Magnusson (2010, 415).
[56] Schmitt (2008, 150).

Marbury's declaration that 'the power to "amend" the Constitution was not intended to include the power to destroy it'.[57] Even in the absence of any explicit limitations, the amendment power clearly cannot be used in order to abolish the constitution. This would be a blatant breach of the trust.

The idea of implicit limits on the amendment power might be analogue to Wesley Hohfeld's scheme of jural correlatives. According to Hohfeld, a legal power is the correlative of legal liability. Hohfeld notes that upon the creation of an agency power, 'the agent is subject to a liability of having his power "revoked" or divested by the principal'.[58] I claim that not only does 'the creation of an agency relation involve[s], inter alia, the grant of legal powers to the so-called agent, and the creation of correlative liabilities in the principal',[59] but also liabilities upon the agent. Put differently, alongside the legal constitutional amendment power rests the liability not to undermine the same constitution itself. 'To be sure', Ulrich Preuss recently wrote, 'the authority to revise the constitution does not include the authority to create a completely new constitution'.[60] To amend the constitution as to destroy it and create a new constitution would be an action *ultra vires*; a usurpation of the amendment power that 'the people' have not delegated to the amendment authority.[61] 'It is time', Upendra Baxi was correct to urge us, 'that we commit ourselves to a categorical assertion that the power to *change* the Constitution cannot be permitted to become the power to *destroy* it'.[62]

The second limitation derives from the first one, but it is one logical step forward: *the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution.*[63] The constitution, in that respect, is not the mere formal existence of the document, but rather it includes the constitution's essential features. Each constitution has certain fundamental core values or principles, which form the 'the spirit of the constitution'.[64] As Gerhard Anschutz wrote in 1922 on the democratic principle that guided the Weimar Constitution of 1919, it is 'the spirit that pervades the whole'.[65] This is what I term the *foundational structuralist* perception of constitutions. According to this perception, constitutions are not merely 'power maps' that reflect the political power

[57] Marbury (1919-1920, 225).
[58] Hohfeld (1917, 727).
[59] Hohfeld (1913, 46).
[60] Preuss (2011, 435).
[61] Weintal (2013, 289).
[62] Baxi (1978, 143).
[63] Cf., *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461. See Krishnaswamy (2010, 74).
[64] Morse (1948-1949, 199). Skinner (1919-1920, 221-225) terms it the 'essential form and character of government' and Williams (1928, 536) terms it the constitution's 'fundamental elements and principles.'
[65] Anschutz (2002, 146).

distribution within the polity.[66] They are more than instruments of empowerment and restrictions. They reflect certain basic political-philosophical principles, which form the constitution's foundational substance, its essence.[67] The constitution is structured upon these basic principles and it is no longer the same without them. Just as the amendment power cannot destroy the constitution, it cannot destroy the constitution's fundamental principles. Ernst Rudolf Huber, a student of Carl Schmitt,[68] is infamous for his support of the Nazi regime. At the same time, his claim regarding the ordering of constitutional norms is important:

> Every constitution consists essentially of such principles, which determine the totality of the constitutional order and make up the "spirit of the constitution." There is no equality of rank among the numerous provisions of a written constitutional document. The main principles of the common order have clear priority; the remaining legal precepts are derived from them. … One can say of a constitution that it is valid only so long as this core of the constitution maintains its existence. If the core of the constitution is destroyed, then the entire constitution is wiped out, even if individual constitutional precepts of inferior rank continue to be legally valid.[69]

That is, when the amendment power alters the basic essential principles of the constitution, it 'substantially varies' from the purpose for which it was originated. It no longer *amends* the constitution but *constitutes* a new one. Since an amendment cannot annihilate or eliminate the constitution, amending its basic elements and principles is prohibited, just as eliminating the constitution is prohibited. As Eivind Smith wrote, 'if certain [unamendable] principles, values, and norms … are seriously altered, the life of the constitution has actually come to an end. From its ashes, a new political regime emerges'.[70] The alteration of the constitution's core results in the collapse of the entire constitution and its replacement by another.[71] This is the basic rationale behind the Indian basic structure doctrine and the Colombian Constitutional Replacement Doctrine (see Chapter 3). As S.P. Sathe explains, a constitutional amendment 'has to be according to the method provided in the Constitution … Total abrogation of the Constitution, which is what we mean by destruction of its basic structure, cannot be comprehended by

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[66] Ducháček (1973).
[67] Note that *foundational structuralism* is not to be understood in terms of natural law, rather as the "'spirit" of legality that pervades the forms of constitutionalism to which societies commit themselves.' See Walters (2008, 261).
[68] Although Huber distanced himself from Schmitt. See Mehring (1999-2000, 1654-1655).
[69] Huber (2002, 328).
[70] Smith (2011, 369).
[71] Conrad (1970, 418-419).

the Constitution'.[72] Thus, Schmitt was right to argue that the amendment process is not designed for modifying the fundamental decisions forming the constitution's substance, since such modification results in a new constitution, not in the amendment of the same constitution. Such constitutive acts are for the people's *primary constituent power*, not the delegated authorised organs.[73]

The third limitation is that *the amending power, like any governmental institution, must act in bona fide*.[74] Based on the theory of delegation, this section argues that the amendment power is not the power to destroy the constitution. Constitutional destruction, Dietrich Conrad remarked, can also occur 'by using the form of amendment to directly exercise other constitutional functions in given cases, disregarding constitutional limitations and upsetting the constitutional disposition of powers'.[75] Conrad states that even Richard Thoma, who otherwise opposed any notion of implicit limitations on the amendment power,[76] maintained that parliament could not, for example, dissolve itself in violation of normal prescribed procedures, or pass a bill of attainder.[77] A 'government with limited powers of legislation', A. M. Holding wrote, 'and at the same time, with unlimited powers of legislation, would be an absurdity', thus claiming that 'no enactment, in substance purely legislative, should be permitted to become a part of the Constitution'.[78] I agree that if the material of an amendment is not commonly 'constitutional'[79]– i.e. it is ordinarily legislative in nature – this raises suspicions that the provision is being given a constitutional status solely in order to 'shield' it from judicial review.[80] The overall surrounding circumstances that led to the decision to amend the constitution in such a way are imperative in the analysis of whether the amending power is being abused or not.[81] Ravneet Kaur writes with relation to the Constitution of Singapore that:

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[72] Sathe (1978, 187).
[73] Schmitt (2008, 152).
[74] Rama Rao (1978, 112).
[75] Conrad (1977-78, 17).
[76] Richard Thoma believed that the parliamentary system with proportional representation can create a genuine democratic decision-making process. Therefore he argued that theoretically the Parliament had unlimited amending power. See Caldwell (2002, 153). Thoma (2002, 163) argued that 'the opinion that … Article 76 cannot be without limits…fails to appreciate the idea…of free, democratic self-determination'.
[77] Thoma (1929, 40ff), cited in Conrad (1977-78, 17).
[78] Holding (1923, 489-490).
[79] Constitutions usually include provisions regarding basic governmental structures and the relations between the main powers and functions of government; basic values and commitments; and human rights. See Gavison (2002, 89).
[80] See, for example, Friedrich (1963B, 221): 'the constitutional legislator … has only the one function of amending the constitution, in accordance with procedures contained in the constitution. That is the only, and therefore very limited, competence of the constitutional legislator. He (or they) can neither make laws and ordinances nor take measures, but is limited to his one function.'
[81] Cf., Israeli Supreme Court decision in HCJ 4908/10 *Knesset Member Bar-On v. The Knesset* (Apr. 7, 2010), regarding a temporary constitutional basic law which deviated from the established rule of annual budget

> The strongest protection against abuse of the amending power is to freeze the Constitution. This, however, is an extreme step which creates an unnecessary barrier to progressive future amendments. Yet, it is important that there exist certain checks to ensure that Constitutional amendments are not arbitrarily or unfairly passed. … the Basic Features Doctrine … reflect[s] attempts by the various systems to find a balance between the two.[82]

The doctrine of implicit limitations on the amendment power is thus a method to protect the constitution against the possibility that 'the legislature of the day, hijacked by individual, group and institutional interests and temporary impulses or permanent passions may use its authority to inflict torture on the Constitution'.[83] This fear from abuse of the amendment power is not a mere theoretical presupposition. As the lessons from India, among other places, teach us, it is built upon historical evidence.

B. Hierarchy of Constitutional Values

The comprehension of the constitution in terms of *foundational structuralism* necessitates an acknowledgment of two notions: that of a hierarchy of constitutional values or principles and that of a constitution's identity.

A constitution is 'a rich lode of principles'.[84] But not all constitutional principles are equally basic.[85] The German jurisprudence on this idea is instructive. The German Basic Law is regarded as having an integrated structure and a hierarchical scheme of principles, including basic principles of government and human rights, with human dignity at the apex. This was recognised by the German Federal Constitutional Court early in 1951 in the *Southwest* case:

> A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate.[86]

Drawing from German jurisprudence, Walter Murphy consistently argued that constitutions in constitutional democracies present not simply a set of values, but rather

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requirement by permitting a bi-yearly budget for 2011 and 2012. The Supreme Court held that temporary requiring a bi-yearly instead of yearly review did not amount to harm of the regime's basic principles that would justify nullification of the basic law.

[82] Kaur (1994, 266).

[83] Guha and Tundawala (2008, 537).

[84] Ackerman (1989-1990, 525).

[85] Macedo (1990, 182).

[86] 1 BVerfGE 14, 32 (1951); see Kommers (1989, 54-55); Kommers (1991, 852); Leibholz (1952, 723).

a hierarchy or ordering of values. This system of values precludes the possibility of adopting an amendment that would infringe human dignity.[87] Elsewhere, Murphy claimed that also the right to privacy is so deeply embedded in the constitution that removing it would abrogate the constitution altogether.[88] Murphy's claims became central to American constitutional debates. John Rawls, for example, defended a similar view, according to which amendments are not intended to disassemble the constitution's structure or repeal constitutional essential. For Rawls, the 1st Amendment's protections are 'entrenched in the sense of being validated by long historical practice. They may be amended but not simply repealed and reversed.... The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning'.[89] Relating to Rawls' proposal, Samuel Freeman accepts the existence of 1st Amendment freedoms so basic that their amendment would amount to illegitimate constitutional suicide.[90] By the same token, Stephen Macedo suggests that amendments that expunge basic guarantees or eliminate fundamental rights and freedoms that are essential to the process of free and rational self-government aim to revolutionise rather than amend.[91] Even Laurance Tribe, who calls for a reserved judiciary role with regard to constitutional amendments,[92] seems willing to embrace the notion that some principles are so fundamental to the constitutional order and so logically central to the system's coherence that they can be regarded as indispensable to the system's legitimacy. Tribe recently wrote that some amendments, even harsh ones such as allowing torture in certain circumstances, while being objectionable could not be said to be 'beyond the pale as a *constitutional* matter if adopted in accordance with Article v'. This might seem to be a rejection of any implicit limits. But then, Tribe continues to note that 'it may well be that some properly adopted formal amendments could themselves be deemed "unconstitutional" because of their radical departure from premises too deeply embedded to be repudiated without a full-blown revolution'.[93]

These leading constitutionalist and liberal political philosophers seem to share with Carl Schmitt the essential notion of substantive implicit limitations on the amendment

[87] Murphy (1979-1980, 756-757). See also Murphy (1987, 12-14); Murphy (1992B, 141-146); Murphy (1995, 163); Murphy (2007, 497-529).
[88] Murphy (1990, 213).
[89] Rawls (1993, 238-239). See further Kelbley (2003-2004, 1503-1506).
[90] Freeman (1994, 663).
[91] Macedo (1990, 183).
[92] Tribe (1983, 433).
[93] Tribe (2008, 33-34) mentions there amendments repealing the republican form of government or repudiating the rule of law, as examaples for radical amendments which might be deemed void.

power.[94] This thesis defends a similar view based on the distinction between *primary* and *secondary constituent power*s. As aforementioned, being a delegated authority, the amendment power must be conceived as inherently limited.

The claim for recognition of a hierarchy of constitutional values is not immune from criticism. Kemal Gözler, for example, argues that even if there might be a moral difference between constitutional norms, there is no hierarchy, since they do not derive their validity from one another.[95] More recently, Richard Albert criticised any attempt to create a hierarchy of constitutional norms:

> Ranking constitutional provisions by irretrievably bestowing extraordinary status on one over others is a perilous practice because it threatens to deplete the text of its intrinsic value as an institution whose authority applies equally, fairly and predictably to citizens and the state.[96]

These criticisms seem to be based on a misapprehension of the idea behind the hierarchy of constitutional values with respect to implicit limitations on the amendment power within a *foundational structuralist* analysis.

A *foundational structuralist* analysis of the constitution does not necessary require the picking of a certain secluded constitutional provision, as 'an isolated island'; rather, it indeed urges us to look at the constitution as a whole.[97] As Conrad writes: 'there are, beyond the wording of particular provisions, systematic principles underlying and connecting the provisions of the Constitution ... [which] give coherence to the Constitution and make it an organic whole'.[98] In his early writings, which were so influential to the Indian endorsement of the basic structure doctrine, Conrad used the metaphor of *pillars* to explain the unamendability of basic constitutional principles: 'any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority'.[99] This sentence was quoted verbatim by Khanna J. in *Kesavananda*,[100] and was persuasive in the judgment of Shahabuddin Ahmed in *Chowdhury v. Bangladesh*: 'The constitution stands on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged the whole constitutional

[94] For a comparison between Schmitt and Rawls on this point see Colón- Ríos (2010A, 221-228).
[95] Gözler (1997A, 109).
[96] Albert (2010, 683).
[97] See Tribe (1987, 172): 'it is, after all, a constitution and not just a disjointed collection of constitutional pieces which must be interpreted.'
[98] Conrad (2003, 186).
[99] Conrad (1970, 379).
[100] AIR 1973 SC 1861, para 1431.

edifice will fall down'.[101] Conrad later remarked that, 'the graphical appeal almost by itself has the force on an argument',[102] highlighting the power of metaphors within legal argumentation. The powerful metaphor of the pillars that hold the constitutional structure corresponds with the *foundational structuralism* perspective endorsed in this thesis.

As a matter of fact, even to those who do not regard the constitution as a *structure* but as an organic instrument, the argument of unamendable basic principles, which provide meaning for the greater whole, remains coherent. The metaphor of a *living constitution* is usually used in its interpretive meaning, i.e. that the language of the document should evolve through judicial decisions according to the changing environment of society.[103] A constitution's amendment process provides another mechanism for such evolution, as a 'built-in provision for growth'.[104] *Prima facie*, the view that a constitution must develop over time supports a broad use of the amendment power. Nevertheless, even if we conceive of the constitution as a *living tree*, which must evolve with the nation's growth and develop with its philosophical and cultural advancement, it has certain *roots* that cannot be uprooted through the growth process.[105] In other words, the metaphor of a *living tree* captures the idea of certain constraints: 'trees, after all, are rooted, in ways that other living organisms are not'.[106] These *roots* are the basic principles of a given constitution. See the words of Carl Friedrich:

> A constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper functions, so also in a constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed.[107]

Therefore, it is not merely a matter of which principles are more fundamental than others. It is not an exercise of 'ranging over the constitutional scheme to pick out elements that might arguably be more fundamental in the hierarchy of values', William Harris correctly claimed, adding that: 'a Constitutional provision would be fundamental only in terms of some articulated political theory that makes sense of the whole

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[101] 41 DLR 1989 App. Div. 165, para. 415.
[102] Conrad (2003, 190).
[103] Kavanagh (2003, 55-56); Ackerman (2006-2007, 1742); Rehnquist (1975-1976, 693).
[104] Miller (1962-1963, 884). On constitutional amendments and the living constitution see Strauss (2010, 115).
[105] Cf., Lahoti (2004, 1-2).
[106] Jackson (2006-2007, 943).
[107] Friedrich (1963A, 272).

Constitution'.[108] The idea of a hierarchy of norms within *foundational structuralism* is to examine whether a constitutional principle or institution is so basic to the constitutional order that changing it – and looking at the whole constitution - would be to change the entire constitutional identity.

C. Constitutional Identity

'A constitution', Peter Häberle states, 'is not merely a juridical text or a normative set of rules, but also an expression of a cultural state of development, a means of cultural expression by the people, a mirror of cultural heritage and the foundation of its expectations'.[109] Constitutions are designed to reflect society's identity and delineate the highest principles shared by the state's citizens.[110] Each constitutional system has its own basic principles.[111] A constitutional identity, as Gary Jacobsohn shows, represents 'a mix of aspirations and commitments expressive of a nation's past'.[112] It is defined by the intermingling of universal values with the nation's particularistic history, customs, values, and aspirations.[113] Jacobsohn observes that constitutional identity is never a static thing, as it emerges from the interplay of inevitably disharmonic elements. But changes to the constitutional identity, 'however significant, rarely culminate in a wholesale transformation of the constitution'.[114] This is because a nation usually aims to remain faithful to a 'basic structure', which comprises its constitutional identity. 'It is changeable', he writes, 'but resistant to its own destruction'.[115]

The identity, for *foundational structuralism* theory, is 'the normative identity of the Constitution, supported by a coherent interpretation of its core constitutional principles or basic features'.[116] Changing this identity would result in the formation of a new constitution. The constitutional identity is the constitution's 'genetic code':

> Every constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific

[108] Harris (1993, 188).
[109] Häberle (2000, 79). See also Wolin (1990, 9).
[110] Chambers (2004, 158-161); Lerner (2011, 4).
[111] Barak (2006, 58).
[112] Jacobson (2006B, 316).
[113] See generally Jacobsohn (2006B, 361); Jacobsohn (2010A). For a division of universal and particular principles see Weintal (2005, 20-25, 62-108) and Chapter 2.
[114] Jacobsohn (2010A, 325-326).
[115] Jacobsohn (2006B, 363).
[116] Krishnaswamy (2010, 118). See also at 146: 'identifying basic features of the constitution…is an attempt to synthesize those core normative principles which may be understood to be central to our constitutional design'.

> identity… These superconstitutional provisions could be referred to as the genetic code of the constitutional arrangements.[117]

This idea may extend back to Aristotle, who believed that a polis should be identified with its constitution.[118] Aristotle asked, 'on what principles ought we to say that a state has retained its identity, or, conversely, that it has lost its identity and become a different state?' Aristotle's answer was that the identity of the polis changes when its constitution is altered due to a disruption of its essential commitments: 'a change in the polis's identity cannot be considered a mere reform, but the birth of a new regime'.[119] This is crucial for the idea of implicit limitations on the amendment power, as Water Murphy argues:

> Thus an "amendment" corrects or modifies the system without fundamentally changing its nature: An "amendment" operates within the theoretical parameters of the existing Constitution. A proposal to transform a central aspect of the compact to create another kind of system – for example, to change a constitutional democracy into an authoritarian state … – would not be an amendment at all, but a re-creation of both the covenant and its people. That deed would lie outside the authority of any set of governmental bodies, for all are creatures of the people's agreement.[120]

In other words, constitutional changes should not be tantamount to constitutional metamorphosis.[121] Conversely, one should not confuse constitutional preservation with constitutional stagnation. As Joseph Raz writes:

> The law of the constitution lies as much in the interpretive decisions of the courts as in the original document that they interpret … But … it is the same constitution. It is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house lives in a house built two hundred years ago. His house had been repaired, added to, and changed many times since. But it is still the same house and so is the constitution. A person may, of course, object to redecorating the house or to changing its windows, saying that it would not be the same. In that sense it is true that an old constitution is not the same as a new constitution, just as an old person is not the same as the same person when young. Sameness in that sense is not the sameness of identity … It is the sameness of all the intrinsic properties of the object. … The point of my coda is to warn against confusing change with loss of identity and against the spurious arguments it breeds. Dispelling errors is all that

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[117] Fusaro and Oliver (2011, 428). See also Da Cunha (2013, 11).
[118] Aristotle (1996, 17).
[119] Aristotle (1962, 98), cited in Colón- Ríos (2010A, 220) and in Jacobsohn (2006A, 478).
[120] Murphy (1993A, 14).
[121] Marasinghe (2006, 178): '…it is not desirable that the amendment process be used to effect fundamental changes in the constitution thereby destroying its identity or spirit.'

a general theory of the constitution can aspire to achieve.[122]

An analogy between a constitution and a house is indeed convenient to explain this: 'just as a house does not lose its identity so long as you are decorating and repairing it on the same foundations on which it was built, so a Constitution does not lose its identity if it changed according to the requirements of changing times so long as its basic foundations are maintained'.[123]

One may again wonder why is it not the prerogative of the amendment power to change even the basic foundations of the system? James McClellan, for example, poses the following assertion:

> Strictly speaking, an amendment to the Constitution is part of the Constitution itself. It is therefore inherently incapable of being unconstitutional. An amendment may nevertheless violate the spirit of the Constitution, overthrow established principles of the system, and so drastically alter the structure as to create a new form of government. Thus an amendment abolishing the States or the separation of powers, though constitutional in a legal sense, would in reality be destructive of the American constitutional system as we know it. Even foolish amendments, however, are constitutional, and it is the prerogative of the American people under Article V to make fools of themselves and to abolish their form of government and replace it with a new system if that is their wish.[124]

McClellan is correct that it is the prerogative of the people to change their system of government, but this cannot be made through the amendment procedure. This should be 'the people's exercising their constituent power, not the old constitution's benediction, that validates the new order'.[125] This is precisely the distinction between the *primary* and *secondary constituent powers*, to use Jacques Baguenard's metaphor; the *primary constituent power* is the power to build a new structure and the *secondary constituent power* is the power to make alterations to an existing building.[126] As the constitution's core cannot be altered without destroying the whole constitution,[127] the delegated amendment power cannot use the power entrusted to it for quashing the constitution or its fundamentals so that it loses its identity.[128] Constitutional amendments 'that touch upon the identity-engendering norms of the constitution', Ulrich Preuss writes, '… are "unconstitutional" because they

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[122] Raz (2009, 370).
[123] Singh (2011A, 183-184); Singh (2011B, 35-36). For a similar analogy see Akzin (1966, 59). The question of change and identity is an old one. See, for example, the 'the ship of Theseus' debate in the writings of Plutarch and Thomas Hobbes. See Swartz (2001, 328-357).
[124] McClellan (2000, 563-566).
[125] Murphy (1993A, 14).
[126] Baguenard (1989, 32), cited in Gözler (1999, 42).
[127] Conrad (1970, 418-419).
[128] Pogliese (1999).

destroy the constitution altogether by destroying the founding myth of its constituent power'.[129] Amending the essential and pivotal principles to the constitution's identity may be viewed as a 'constitutional breakdown'.[130]

D. Textualism

The idea that the amendment power is inherently limited in its scope finds implicit textual support in the literal meaning of the term 'amendment'.[131] Literally, the Latin word *emendere* means 'to remove lies'[132] (mendācĭum = lie); 'to correct fault' [ē ('out') + menda (fault)]. This, Walter Murphy reminds us, does not mean 'to deconstitute and reconstitute'.[133] Based on this textual meaning, Murphy argues that: 'amendments that would change the basic principles on which the people agreed to become a nation or overturn compromises on any principle that made the coming together possible would not be *amendments* at all, but efforts to construct a new constitution'.[134] The textual basis distinguishes between amendments and revolutionary changes to the constitution. An amendment, according to this argument, can alter the existing constitution, but must not comprise a change so radical that it has to be regarded as a new constitution: 'the word "amendment" itself implies limitations. It implies construction rather than destruction.'[135] According to the textual rationale, amendments must operate within the boundaries of the existing constitutional order and its foundational principles.[136]

The textual argument is not novel.[137] In 1894, the California Supreme Court held that: 'the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed'.[138] The textual argument also appeared in the briefs presented

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[129] Preuss (2011, 445).
[130] Freeman (1992, 42). See also Iyer (2003, 3) (terming such amendments as a 'constitutional harakiri'); Harris (1993, 183) (amendments must 'make sense within the pre-existing scheme of constitutional meaning'); Amar (1988, 1045) (this would be a 'fundamental departure from the pre-existing rule of recognition'); Wright (1990-1991, 747) (such a constitutional change would create a 'logic failure').
[131] Schweber (2007, 137); Kay (1997, 163).
[132] Calonne (2006, 145).
[133] Murphy (1995, 177). See also Murphy (1993A, 14).
[134] Murphy (1987, 12-13).
[135] Child (1926, 28), who also noted that since amendments become 'a part of this constitution', this excludes the idea that amendment can make a new or a changed constitution - it has to remain 'this Constitution.' See also Machen (1909-1910, 169-170); Morris (1909, 85); Marbury (1919-1920, 225); Holding (1923, 487).
[136] See McIntosh (2005, 74-75); Barak (2010A, 377); Schaffner (2005, 1493); Han (2010, 82); Murphy (2007, 506).
[137] See, for example, Davis (1881, 197): 'the word "amendment" necessarily implies an improvement upon something which is possessed, and can have no proper application to that which did not previously exist.'
[138] *Livermore v. Waite*, 36 P. 424,426 (Cal. 1894).

before the U.S. Supreme Court against the validity of the 18th Amendment,[139] and more recently in courts' decisions that recognised implicit limitations on the amending power, for example, in India[140] and in Bangladesh.[141]

The textual argument is not exempt from criticism. Dudley McGovney argues that 'amendment' encompasses as an element of euphemism, the assumption that it is an improvement. But 'beyond this euphemistic tinge, amendment as applied to alteration of laws, according to current dictionaries means alteration or change'. [142] Hence the term 'amendment' includes any change whatsoever. This claim negates the original and everyday meaning of the word. Even 'in our everyday discourse', Sotirios Barber notes, 'we distinguish amendments from fundamental changes because the word *amendment* ordinarily signifies incremental improvements or corrections of a larger whole'.[143]

Kemal Gözler claims that it is difficult to infer legal consequences from the grammatical interpretation of the word amendment in the absence of any explicit limitations. The amendment provision can be used in order to change several or even all of the constitution's provisions. Some constitutions, for example, that of Austria (Art. 44), Spain (Art. 168), and Switzerland (Art. 139), explicitly allow for their *total revision*. Lastly, the textual argument may be valid for the English term, but not necessarily in other languages. Francophile constitutions use the term *revision* (e.g. the French Constitution, in Art. 89), the Italian Constitution uses *revision* (Art. 138-139), the Portuguese Constitution uses *revisao*, the Spanish Constitution uses *reforma*, the German Basic Law uses *anderung*, and the Turkish Constitution uses *degisklik*. These terms, Gözler claims, do not carry the exact same meaning as *amendment*.[144]

These arguments carry some force, but they are not entirely convincing. From the theory of delegation, it can be argued that in those numerous and limited cases in which constitutions allow for their *total revision*, this authorisation is an explicit permissibility given to the delegated amending authority to revise the entire document. However, *this is*

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[139] See Dodd (1921, 330-332).

[140] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, J. Khanna, paras. 1426-1427 ('the word "amendment" postulates that the old Constitution survives without loss of its identity…the 'words "amendment of this Constitution"… show that what is amended is the existing constitution and what emerges as a result of amendment is not a new and different constitution') contra J. Ray, para. 846 (the constitution uses 'the word "amendment" … in an ambiguous and clear manner' to so 'mean any kind of change.')

[141] *Anwar Hossain Chowdhury v. Bangladesh*, 41 DLR 1989 App. Div. 165 (Judge B.H. Chowdhury, para. 196; Shahabuddin, J, paras. 336, 417); *Bangladesh Italian Marble Works Ltd v Bangladesh*, (2006) 14 BLT (Special) (HCD) 1; (2010) 62 DLR (HCD) 70 (29.08.2005), 314-315.

[142] McGovney (1920, 514). See also Orfield (1942, 108): 'by an amendment is meant an addition as well as an alteration.'

[143] Barber (1984, 43).

[144] Gözler (2008, 69-71).

the exception rather than the rule. It can also be argued, following Schmitt, that when constitutions allow their total revision, this should be regarded as allowing amendments of the *entire constitution's provisions*, but not of the state's *basic premises*.[145] What is important is the *content* of the amendment, not its *quantum*. An amendment of a single provision can be considered as a revolutionary change, while revising the entire constitution can still maintain its basic constitutional principles. This applies with even greater force for constitutions that use the terms *revision* or *reform*, rather than *total reform*. A revision or a reform can indeed make dramatic changes, but they still cannot destroy the existing constitutional order and replace it with one that denies these basic values.[146] The Latin meaning of the word *reformare* is 'to transform an already existing thing'.[147] By the word 'reforming', Kai Nielsen notes, we mean correction or improvements 'through removing faults, abuses, malpractices, and the like'.[148] Lastly, even in some other languages, the amending provisions carry the same meaning as *amendment*. For instance, the Israeli Basic Laws use the Hebrew term *Tikun* (תיקון), which means 'repair'. In any event, as Ashol Dhamija demonstrates in his comprehensive study on amendment procedures, the vast majority of states' constitutions use the term *amendment*: 69% of 110 national constitutions and 100% out of fifty U.S. States' constitutions.[149]

It is true that, self-standing, the textual argument is inconclusive. As Andrew Arato notes, it 'needs to be supplemented by… a deeper argument'.[150] However, taken as an element in the overall theoretical analysis as elaborated in the previous sections, it may provide additional support to the general claim that the amending power must operate within the existing constitutional framework.[151]

III. CONCLUSION

The formal and substantive theories distinguishing between *primary* and *secondary constituent powers* are not mutually exclusive, but rather mutually reinforcing through the theory of delegation. Being a delegated authority, the amendment power may be explicitly (procedurally and substantively) limited. It must abide these limitations. However, even if it is not explicitly limited, even a 'blank cheque' which leaves everything to the judgment

[145] Schmitt (2008, 152).
[146] Murphy (1992A, 351-352).
[147] Borucka-Arctowa (1991, 80).
[148] Nielsen (1979, 157).
[149] Dhamija (2007, 223).
[150] Arato (2011, 326).
[151] Conrad (1970, 416-417).

and discretion of the constitutional amendment authority has to be for the achievement of a certain objective – amending the constitution and not destroying it, or replacing it with a new one. It is thus implicitly limited by its nature. 'The theory of basic structure', C. V. Keshavamurthy was correct to claim, 'is not a creature of the Judges but a necessary consequence of the organisation of the amending power in the context of a limited government'.[152] This theoretical hypothesis is now increasingly becoming a common feature in comparative constitutionalism.

In the next chapter, it is argued that these limitations are not eternal and can be changed through the exercise of the *primary constituent power*. Moreover, not all amendment powers are equally limited: a scale of amendment powers exists depending upon the proximity of the *primary constituent power*'s appearance through the amendment process.

[152] Keshavamurthy (1982, 89).

CHAPTER 6: THE SPECTRUM OF AMENDMENT POWERS

In the previous two chapters, it was argued that the amendment power is limited by its nature. It was also argued that the growing practice in comparative constitutional law to limit the amendment power (Part I) is based upon a solid theoretical ground.

This is the final chapter in Part II. It aims to complete the journey towards a theory of unamendability. It comprises three sections. In the first section, it is argued that the people are free to change even unamendable fundamental elements of the constitution; yet this power resides not in the amendment power but in the exercise of the *primary constituent power*. Various notions of that power are analysed. This section completes the circle that I began to draw in Chapter 4 with the distinction between *primary* and *secondary constituent powers*. The second section constitutes a bridge between the first section and the last section by describing and analysing the current trend of prescribing a constitutional process for exercising *primary constituent power*. This method, it is argued, is a fallacy. The third section sketches a spectrum of constitutional amendment powers. It considers whether the amendment power is equally limited in jurisdictions where the amendment process attempts to imitate the re-emergence of the *primary constituent power*, by incorporating elements such as referendums, constitutional conventions, as in jurisdictions where it is more similar to regular legislative power. It argues that the more similar the characteristics of the *secondary constituent power* are to those of a democratic *primary constituent power* ('strong amendment power') – i.e., inclusive, deliberative, and time-consuming – the less it should be bound by limitations, and vice versa. This examination thus links the limitations that ought to be imposed upon the amendment power and the amendment's procedure. It allows us to advance toward a general theory of the limited nature of the constitutional amendment power.

I. THE RE-EMERGENCE OF PRIMARY CONSTITUENT POWER

A. Unamendability and Primary Constituent Power

For Richard Parker, 'the first truth about the law' is that 'nothing lasts forever'. Parker argues that constitutions are embedded within the idea of populism – the liberty of

people to shape and reshape their society.[1] Indeed, it is the argument of this thesis that unamendability is not an absolute entrenchment. Unamendability limits the delegated amendment power, the *secondary constituent power*, but it cannot block the *primary constituent power* from its ability to amend even the basic principles of the constitutional order. Recall, once a constitution is constituted and the *primary constituent power* has accomplished its task, a constitutional organ – the amendment authority – is granted with the legal competence of revising the constitution. But what happens to the *constituent power*? In Chapter 4, I rejected an approach according to which *constituent power* is exhausted after the constitution's establishment and maintained that the people always possess the power to establish and change their constitutional order. As Carl Friedrich notes, 'no matter how elaborate the provisions for an amending power may be, they must never … be assumed to have superseded the constituent power'.[2] Take the extreme example of a constitution that does not prescribe an amendment process or even explicitly states that it is completely unamendable. Would that mean that future generations are bound to live under an unamendable constitution? Surely the people possess the power (or, the right) to constitute a new constitution.[3] As James Wilson declares, 'as our constitutions are superior to our legislatures; so the people are superior to our constitutions. … the people may change the constitutions, whenever, and however they please. This right, of which no positive institution can ever deprive them…'.[4]

Therefore, 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 – including unamendable provisions (explicit or implicit). Put differently, the *secondary constituent power* is limited by unamendability. But as a delegated authority, it can be set aside, just as it can be created.[5] The authorising *primary constituent power* remains in the constitutional background and can re-emerge to take its role. The *primary constituent power*, the 'sovereignty at the back of the Constitution', can change even the constitution's basic structure.[6] The U.S. Constitution itself was adopted in violation of the Articles of the Confederation, which were virtually unamendable since they required agreement in

[1] Parker (1993, 583).
[2] Friedrich (1937, 117).
[3] Han (2010, 79); Willoughby (2009, 215-218).
[4] Wilson (1792, 38-39).
[5] Da Cunha (2013, 22): 'through constituent power, the people preserve their natural and essential freedom; therefore the power of rulers (and also of the ruling laws, even of the highest ones, the Constitutions), are delegated powers. People in those high positions may be removed…and laws may be changed.'
[6] Keshavamurthy (1982, 80-81).

Congress and confirmation by the legislatures of every state in the Union.[7] What unamendability (explicit or implicit) means is that certain amendments establishing a 'new constitution' cannot be achieved through the regular amendment procedure, but require a different constituent process.[8]

'The people' are free to change the constitution's fundamentals, yet this power resides not in the amendment procedure, but in the *primary constituent power* of the sovereign people.[9] As Vicki Jackson argues, the idea of unamendability can basically be defended on process-based grounds; it should not be viewed as blocking all the democratic avenues, but rather merely proclaiming that one such avenue – the amendment process – is unavailable. In order to legitimately achieve the sought constitutional change, other procedures (perhaps more demanding) ought to be used.[10] The power to change the constitution's basic principles is appropriately part of the *primary constituent power*, and, like the adoption of a new constitution, should flow from 'the people', in which ultimate sovereignty rests and from which all legitimate authority springs.[11]

Since even the constitution's basic principles can be changed through the avenue of the *primary constituent power*, they are not permanently entrenched or truly eternal; they are solely unamendable in the sense that they cannot be altered by means of an exercise of the *secondary constituent power*.[12] This approach was advanced, for instance, by the Brazilian Federal Supreme Court, which held that in order to preserve the identity and continuity of the constitutional text as a whole, the framers created 'immutable provisions' that impose limits on the *secondary constituent power*, but these provisions do not subordinate the *primary constituent power* itself.[13]

Bruce Ackerman regards America as a *dualist* democracy, a two-track democracy. In a dualist democracy, 'the people' are mainly passive and do not play an active role, except in certain exceptional 'constitutional moments' – the second track of democracy – during which they rise up and play an active role in creating and revising their constitution. Whereas the Constitution is the arena for this higher law-making track, the

[7] Whereas art. VII of the U.S. Constitution provided that it would take effect when nine of the thirteen states ratified it. See generally Kay (1987, 57); Ackerman and Katyal (1995, 475). On this extra-legality and the pople's constituent power see Frank (2007, 103).
[8] Smith (2011, 375-376).
[9] Harris (1993, 193).
[10] Jackson (2013, 47).
[11] Machen (1909-1910, 170).
[12] Guha and Tundawala (2008, 537).
[13] ADIN nº 815-3/DF, DJU de 10/05/96, p. 15131, cited in Melo (2008, 48).

transformative change may take place outside Article V.[14] According to Ackerman, the U.S. system is dualist because constitutional constraints on the government are democratically open to revision. In contrast, *monism* describes democratic power as vested in the elected Parliament. The British Constitution may thus be labelled as a monist system since according to the notion of parliamentary supremacy, fundamental principles cannot limit legislative decision-making. *Foundationalism*, which places certain rights and basic principles above the democratic political (and even constitutional) process, describes the German Basic Law.[15] These models, Ackerman claims, 'better illuminate the constitutional ideals and practice of other Western systems.'[16]

In its broad contour, Ackerman's theory distinguishing between normal politics and constitutional moments seems to be consistent with this thesis's understanding, with an important distinction: within a constitutional democracy, one has to recognise three (rather than two) kinds of powers: *primary constituent power*, *secondary constituent power* (amendment power), and *constituted power* (e.g. legislative power).[17] The *legislative track* is the ordinary track of political life in which the legislature and executive bodies enact, enforce, and implement political decisions through ordinary legislation. This is a sub-constitutional level.

The amendment track is an ordinary track of constitutional politics, through which the bodies entrusted with the authority to amend the constitution may enact, add, annul, or amend constitutional provisions. This is a constitutional level. Like *constituted powers*, the amendment power is itself established in the constitution, yet it is superior to *constituted powers*. This track usually involves a different – and separate – process from the legislative track. Also, as noted further in this chapter, it often includes various constitutional organs apart from the legislature, and may include different procedures for amending different provisions or principles. However, being a delegated power, the amendment power cannot change the basic features of the constitutional order so as to change the constitution's identity and transform it into a new constitution. Such an exercise ought to be done by the *primary,* rather than *secondary, constituent power*. Therefore,

[14] Ackerman (1991, 195, 285). Ackerman described three such moments: the founding moment, Reconstruction and the New Deal. See *id.*, 58. See also Ackerman (1989, 453); Ackerman (1984, 1013); Ackerman (1990, 53); Ackerman (1995, 63).
[15] Ackerman (1991, 6-16).
[16] Ackerman (1990, 53).
[17] Cf., Weintal (2005); Weintal (2011, 449); Weintal (2013, 288-292); Klein (1997, 341); Kalyvas (1999-2000, 1525); Prateek (2008, 458-461).

all constitutions are foundational in the sense that they are built upon certain fundamental principles – what I have termed *foundational structuralism*.[18]

Finally, *the primary constituent track* is the third track of democracy. It is not part of ordinary constitutional politics; rather, it is exercised in extraordinary constitutional moments. It is not bound by prior constitutional rules and – contrary to the amendment authority – may change the basic principles of the constitutional system and even create a new constitutional order. The constitution cannot restrict the exercise of *primary constituent power*, which resides outside of it and can 'exercise its authority *de novo*'.[19]

Therefore, the *secondary constituent power* should not be confused with the *primary constituent power*, as the former is a power established in the constitution, which is bound by explicit and implicit limitation (see Chapters 4 and 5). Hence *primary* and *secondary constituent powers* are related but distinct powers.[20] True, the thin line between *primary* and *secondary constituent power* is blurred in contemporary constitutional societies.[21] As Giorgio Agamben writes, within the current trend of legalisation, 'constituent power is more and more frequently reduced to the power of revision foreseen in the constitution'.[22] Constitutional practice demonstrates that constitutional amendments are often used in order to fundamentally transform the constitutional order, establishing in effect a new constitution.[23] For instance, the Hungarian transformation from communism was employed by way of constitutional amendments to the 1949 Constitution.[24] Whereas such a transformation may well carry various benefits,[25] this complete reform, which

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[18] Ackerman (1991, 13) claims that the U.S. Constitution is dualist and not rights foundationalist since 'it has never…explicitly entrenched existing higher law against subsequent revision by the People'. If American Constitutionalism indeed prioritises democratic decision-making over certain rights and principles, and is thus dualist and not foundationalist, then arguably it is itself foundationalist, for its constitutional system reflects the constitution's foundational commitment to the democratic principle. This rational equally applies with regard to the UK's monist system. If British constitutionalism is indeed based upon the notion of parliamentary sovereignty, then it can also be described as foundationalist since its constitutional system is based upon certain foundations which give it its unique constitutional system (But see Weill (2003, 474); Weill (2004, 380), who argues that British Constitutionalism in the 19th and 20th centuries was governed not by parliamentary sovereignty but by popular sovereignty).

[19] Saunders (2011, 870).

[20] Baxi (1978, 136).

[21] See Thornhill (2012, 374) (claiming that 'the strict functional division between constituent and constituted power has become blurred); Kay (2011, 723): 'It is, admittedly, impossible to draw a precise line between amendment and replacement and the procedures established for the former are sometimes employed in effecting the latter.'

[22] Agamben (1998, 40).

[23] Arato (1992-1993, 676) notes that such a constitutional change 'would signify a constitutional break merely disguised by procedural continuity'. See also Kay (1997, 161).

[24] Arato (1995, 45).

[25] See, for example, Arato (1992-1993, 676) (arguing that 'the semblance of constitutional continuity provided for a transition within unchallenged rules that allowed both sides to agree upon the terms that would … largely eliminate… the powers of one of them'); Arato (2000, 255–56); Parlett (2012, 46): 'The

brought about a new constitution, suffered 'legitimacy problems and clashes of identification'.[26] By the same token, the authoritarian regime in Chile was transformed into a democratic one in the early 1990s through a series of constitutional amendments. While this experience may show how an authoritarian constitution can change to a democratic one, Amaya Alvez Marin describes how 'the use of constitutional amendments, as the path chosen to legitimise the content of the Constitution', was neither inclusive nor deliberative and in effect held up the progress of rights-based constitutionalism. The transformation, which was effected through amendments that were based on the previous constitution, created an element of continuity with the previous authoritarian regime, which hindered the democratization and liberalization process.[27] When amendment provisions are used for creating new constitutional regimes, not only are important issues of legitimacy raised,[28] but there is also a difficulty in clearly breaking with the past regime's constitution (often associated with wrongdoings). Thus nations may favour completely replacing an old constitution.[29]

If it is 'the people' in their capacity as holders of the *primary constituent power* who should decide upon fundamental constitutional transformations, not the instituted amendment authorities, this raises the questions where does this power rest? How can it manifest itself? The following section presents different approaches to these challenges.

B. Conceptions of Primary Constituent Power

So far, I have explained unamendability based on the understanding that amending the constitution through the delegated amendment power so as to destroy the constitution and replace it with a new one, would be an act *ultra vires*. The power to constitute and re-constitute the constitution resides within the people's *primary constituent power*. This understanding is perfectly compatible with commitment to democratic self-government. The problem with this approach, however, is that 'there may be contest over who is it that speaks for the people. "The people", that is, in a sense cannot exist, in an

use of an inherited constitutional order is just one method of ensuring a stable institutional basis for constitution making'.

[26] Szoboszlai (2000, 188).

[27] Marin (2012, 253).

[28] Klein and Sajó (2012, 437). See also Arato (1993-1994, 352).

[29] Dupre and Yeh (2013, 53): 'some transnational democracies made new constitutions after democratic transitions had taken place. Facing the legitimacy crisis during transition, these countries preferred a brand-new constitution to represent a break with the past regime and to construct needed legitimacy for the new one'. See also Ackerman (1992, 61) (urging post-communists countries not to conduct a series of constitutional amendments, rather 'if the aim is to transform the very character of constitutional norms, a clean break seems desirable…')

incontestably legitimate form, without having already been is some sense "constituted"'.[30] Indeed, the very idea of the people as holders of the *primary constituent power* is perplexing and has given rise to heated debates within constitutional theory.[31] The idea of a 'power of the people' acting in an identifiable, comprehensible, and unmediated way in order to constitute for themselves a constitution is a kind of a myth, a fiction.[32] With old constitutions, the idea of 'we the people' as constitutional authors is problematic since the real constitution-makers (who doubtfully represented the people of their period) are long gone. For that reason, David Strauss remarks that we might be talking about 'they (not we) the people'.[33] Moreover, even with young constitutions, 'the people' simply cannot speak directly as a whole, and the will that we attribute to 'the people' ought to be revealed through some kind of representation and deliberation processes.[34] In sum, even if we recognise 'the people' as holders of the *primary constituent power*, they do not necessarily take part in the constitution-making process.[35]

Nevertheless, this fiction of 'the people' carries actual power. It 'create[s] ... pictures in our heads which make the structures of authority tolerable and understandable'.[36] By telling ourselves this mythical story of 'the people',[37] we satisfy a 'sort of psycho-legal need'.[38] The idea of 'the people' thus describes the source of political authority, not necessarily the mode of its exercise.[39] *Constituent power* should not therefore be viewed as an 'actual aggregate entity in the real world', but rather as 'a concept that helps explain the normative basis for a constitution's claim to authority'.[40] 'The people' in which we locate *constituent power* are inevitably an 'imaginary collective body of the group', which represents the consent of the real people.[41] Conceived in these terms, the claim of 'the people' as constitutional authorship is inevitably reflexive, a result of a retrospective self-attribution, self-identification, and a projection into the future.[42] The people conceive themselves as a single sovereign in order to attribute the

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[30] Jackson (2013, 65 fn 61).
[31] On the various challenges to the idea of constituent power see Loughlin and Walker (2007); Oklopcic (2008, 358); Oklopcic (2012B, 81).
[32] Cf. Morgan (1988, 14, 58); Formisano (2008, 17); Powell (1993, 200-201); Kay (2011, 747).
[33] Strauss (2013, 1969).
[34] Kay (2011, 739).
[35] Galligan (2013, 9-11).
[36] Rodgers (1998, 5).
[37] Anonymous (1995-1996, 1752 fn 27). On the roles of myths in the legal world see generally Loughlin (2000, 22-26).
[38] Darby (2002, 221). See also Michelman (1998C, 92); Michelman (1998-1999, 1628).
[39] Popular sovereignty, on that account, is different from, majority-rule. See Monaghan (1996, 165-166).
[40] Tushnet (2012-2013, 1987-1988).
[41] Kay (2011, 738, 743).
[42] Lindahl (2007, 19). See also Lindahl (2011, 121); Anonymous (1995-1996, 1753-1754); Preuss (2011, 444); Oxman (2009).

constitution to a single act of will.[43] Regardless of how historically accurate the story we tell ourselves about 'the people' as constitution-makers, 'the very plenipotentiary scope of the people as the normative constitutional author provides the limits on the normal amending apparatus'.[44] The people's *constituent power* seems to be manifested by two main conceptions: immanent and transcendental.[45]

1. *Immanent Conception*

The first conception of *primary constituent power* can be described as *immanent*. It vests *primary constituent power* within the 'living members of the body politic', thus refusing to accept the people's *constituent power* as mythical.[46] Accordingly, 'the People' as a collective entity are similar to 'the people' as the collections of persons of a certain polity.[47] In its extreme form, the people, exercising their *primary constituent power*, may trump the written constitution, including its unamendable provisions. As noticeable throughout this thesis, the foremost proponent of the idea of *immanent constituent power* is Carl Schmitt. For Schmitt, the *primary constituent power* is never exhausted but remains present 'alongside and above every constitution'.[48] According to Schmitt, whenever the people desire to exercise its *constituent power*, its decision overrides the legal order: 'It is part of the directness of the people's will that it can be expressed independently of every prescribed procedure and every prescribed process'.[49] Interestingly, in that respect, one can find similarities between Schmitt's idea of the *immanent constituent power* and Ackerman's theory of higher law making.[50]

Another modern version of the *immanent* conception of *constituent power* is expressed in the theory of Akhil Amar. According to Amar, through Article V, the people, who are the source of the constitution, delegated the amendment power to ordinary government, without limiting themselves. Article V thus supplements but does

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[43] Loughlin (2010, 224); Levinson (2011A, 193-194).
[44] Harris (1993, 193).
[45] For a different conceptualisation of *constituent power* see Colón-Ríos (2014) (distinguishing between parliamentary sovereignty; the crown and parliament; the right to instruct representatives; the right of resistance; and popular sovereignty). Both my immanent and transcendental conceptions refer to popular sovereignty.
[46] Barshack (2006, 185).
[47] See, for example, Kramer (2004, 7) (referring in 253 to the people as 'an actual authority…not some abstract "people"').
[48] Schmitt (2008, 140).
[49] *Id*, 131.
[50] Arato (1999-2000, 1746-1747). See also Kalyvas (1999-2000, 1540 fn 61): 'The similarities between Schmitt's theory of the constituent power of the people and Ackerman's notions of constitutional politics and dualistic politics are striking.'

not replace popular sovereignty and majority rule. The people, by a majority of voters, via referendum or special convention, retain their reserved and inalienable right to revise the constitution themselves, even outside of the amendment process. Article V, therefore, must not be considered as exclusive since an appeal to the people for constitutional change always remains an option.[51]

Similar to Amar, this thesis claims that the amendment power has to be viewed as a delegated power.[52] Carlos Bernal maintains that a central challenge to my theory of delegation is with 'identification of the delegator … The delegator is the people. Nevertheless, the concept of 'the people' is fuzzy'. [53] The *immanent* conception corresponds with the theory of delegation as it recognises that the power to constitute constitutional norms is held by the real people who, in turn, delegated it to a constitutional organ and may reclaim their authority at any time. According to the pure *immanent* conception, as conveyed by Amar, a majority vote in a simple count of votes would manifest a decision of the people and thus an expression of *constituent power*.[54]

2. Transcendental Conception

In contrast with the *immanent* conception, a second conception describes *constituent power* as *transcendent*, i.e. as vested not in the living people, but rather in the imaginary collective body of society (a corporate body), which resides outside the group to which it belongs.[55] This theory is based upon the mediaeval idea of 'King's Two Bodies'.[56] According to this basic premise, the king's body splits into two: a private (human) and a public (divine). While the private body is consumed, the public (corporate) body is perpetual.[57] Various scholars adopt a modern view of 'People's Two Bodies'.[58]

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[51] Amar (1987, 1425); Amar (1988, 1054-8); Amar (1994, 457-500); Amar (1995, 89-101). It is interesting to compare Amar's theory to Ackerman's proposal that that the U.S. should permit the President to propose specific constitutional amendments, with ratification requiring a favourable vote in Congress, followed by the citizenry's direct approval on ballot measures presented during two successive presidential election cycles. See Ackerman (2000A, 45). For a summary of the theories of Ackerman and Amar and their critics see Torke (1994-1995, 229). For counter theories to Amar see, for example, Dow (1990, 1); Vile (1991A, 271).

[52] Levinson (2006, 177) (claiming that art. V places 'limits on the agents of the people rather than on the general citizenry itself'). For an interesting position see Bacon (1929-1930, 782), who argued that based upon the Tenth Amendment, the people are the only source from which added powers over the people and their rights can be given to the Federal Government, and only they can ratify such an amendment.

[53] Bernal-Pulido and Roznai (2013).

[54] Michelman (1998B, 1728-30).

[55] Yack (2001, 517) argued that this conception contributed to the rise and spread of nationalism.

[56] Kantorowicz (1958).

[57] See Loughlin (2010, 41-46).

[58] To borrow from Wolin (1981, 9).

According to Marcel Gauchet, within a democratic legal system one ought to distinguish between the 'real' people and the 'perpetual constituent people'. Real people can only express a momentary majoritarian will. Constituent people, in contrast, represent a mystical 'trans-temporal' body, which embodies popular sovereignty and is the true sovereign.[59] Accordingly, the present majoritarian will is inferior to the 'trans-temporal' will of the people: 'those who choose and vote, are in themselves only the momentary representatives of the power of the eternal people who endure in self-identity through successive generations and are the veritable titularies of sovereignty'.[60] Likewise, according to Dominique Rousseau, judicial review is based upon a distinction between the peoples' will as *constituent power* and the majoritarian representatives' will. When courts review legislation, they guarantee the people's sovereign will as expressed in the constitution against the will of the political majority. Again, this represents two different notions: the will of the eternal people, which prevails over the will of the present people, as exercised through their representative.[61] Judicial review thus reminds the people that they, and not their representatives, are the true holders of the sovereign power.[62]

Like Gauchet and Rousseau, Jed Rubenfeld distinguishes between the present people and 'generational people' who live under trans-temporal commitments. According to Rubenfeld, freedom and democracy cannot be reduced to the mere immediate current will of the majority; rather, it is a complex project of living a set of commitments that people write themselves into over time.[63] Since these commitments link past, present, and future generations, true sovereignty is generational.[64] This approach rejects the *immanent* conception of *constituent power*: 'A people attains self-government not by perfecting a politics of popular voice, but by [its struggle] to live out over time, its own foundational commitments'.[65] By upholding the constitution against the people's present yet temporary desires, courts represent the people's true, long-standing commitments.[66]

This understanding of members of the generation-crossing society joined as one body is often used by American proponents of *originalism*, according to which society is a 'trans-temporal entity' – composed of people succeeding generations.[67] From this conceptualisation of 'identity across time and space' derives the popular sovereignty

[59] Gauchet (1995, 46-47), cited in Goldoni (2012, 222).
[60] Gauchet (1995, 45), cited in Troper (2003, 119-120).
[61] Rousseau (1999, 367, 374).
[62] See Rousseau (2007, 43).
[63] Rubenfeld (2001, 156). See also Rubenfeld (1997-1998, 1100).
[64] *Id.,* 18–22, 177.
[65] Rubenfeld (1998, 217-218).
[66] Rubenfeld (2001, 168).
[67] Strang (2005, 924); McConnell (1998, 1134).

myth according to which the founders and subsequent generations form a one 'political self' that justifies the existing political order.[68]

Michel Troper claims that the main difficulty of the *transcendental* conception is that the supra-temporal people can never express its will.[69] It appears that the answer to this difficulty lies in the role of revolutions and constitutional moments. According to this understanding, during normal times the imaginary body of the people is *in absentia* and indeed cannot express its will. However, during significant constitutional moments, this mythical body is enacted and rendered present by the group to which it belongs. It is in these exceptional transformative moments when the transcendental power collapses into the present, traversing the polity's past, present and the future.[70]

As Paul Kahn explains, revolutions that break through ordinary time as a new moment of creation represent a 'transcendent act of self-revelation' upon which the modern democratic polity is founded and through which 'we the people' become the new sovereign.[71] In this revolutionary polity, 'all individuals—present and future-participate as members of the popular sovereign. For this reason, the actions of the Founders can continue to bind future generations: all are part of a single We'.[72] More recently, Kahn wrote that 'the postrevolutionary state maintains this narrative of direct action by the popular sovereign, the people. Belief in the popular sovereign sustains a faith in the revolution as a kind of sacred presence'.[73]

Lior Barshack best articulates this idea. Barshack criticises Schmitt's *immanent* conception of the people's will, which always remains alive, for denying the difference between constitutional moments and normal politics.[74] Schmitt's idea of permanent immanence, Barshack claims, is dangerous since it permits permanent ruthlessness and regular violation of human rights.[75] Sovereignty, according to Barshack, 'belongs to the group as an immortal entity that retains its identity through past, present, and future

[68] Kahn (1989, 512-515).
[69] Troper (2003, 119-120).
[70] See, for example, Grimm (2005, 201); Prateek (2008, 454).
[71] Kahn (2006, 266-268). For Kahn (2011, 142), 'to succeed, revolution must transform itself into a regular political form, that is, it must produce a constitution'. See also Kahn (2012, 35): 'A revolution that does not end in constitution would not mark the presence of the popular sovereign, but only chaos. A constitution that does not have its foundation in revolution would be illegitimate—the dead hand of the past binding the present'.
[72] Kahn (2006, 271).
[73] Kahn (2011, 140).
[74] Barshack (2012, 2-3).
[75] *Id.*, 13. Likewise, Barshack (2009, 571) criticises Negri's understanding of constituent power: 'the absolute presence of constituent power negates present lives much as it erases the memory of past generations and the anticipation of future ones.'

generations.'[76] Therefore, this is not originalism.[77] Again this conception is rooted in the corporate understanding of society. [78] *Constituent power* belongs – not to the living – but to the transcendent and absent corporate body. 'The people', as the sovereign in a democracy, remains a transcendent entity, which appears only during special constitutional moments (such as declarations of independence, revolutions, referenda). In these episodes (instances of 'communitas'), the communal body 'descend[s] back into the social and dissolves all structural boundaries'. [79] Thus, in certain periods of constitutional moments, which arrest 'the flow of time', the transcendence is collapsed into the immediate presence.[80] In these periods, with the understanding of the past, present, and future as of the same essence of a collective body, all generations are present.[81] These extraordinary moments define the corporate group.[82] They carry a temporary character, and as such, sovereignty cannot be *immanent*.[83]

Importantly, contrary to Amar's understanding, Barshack emphasises that 'it is not the democratic principle of popular sovereignty that places popular will above constitutional procedure, but the fact of sovereign incarnation and the concomitant relaxation of all principles. The communal body wields supreme legislative power whenever it is enacted, in democratic as well as non-democratic contexts…'.[84] It is the suspension of political parties and a high degree of communal body's involvement that allows sovereignty to step forward in constitutional moments such as referendums:

> The capacity of referenda to render sovereignty present is never guaranteed. When referenda are held too frequently without sufficient public interest, or

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[76] Barshack (2009, 554).

[77] *Id.*, 564: 'the prestige of the generation of the founders can be reconciled with the equal status of past and future in a temporal order that is based on the legal construct of corporate perpetuity…. it postulates genealogical links with past and future generations. The relations of the living with past and future generations are premised on, and mediated by, the legal fictions of an everlasting succession of generations and corporate perpetuity'.

[78] *Id.*, 557: 'The social body comprises not only living members of society. It is the common body of the dead, the living, and the yet-to-be born. All generations partake of the social body in either of the forms that it may assume: as a communal or a corporate body. When the social body is enacted, that is, when it appears as a communal body, the dead and the unborn are rendered present alongside the living. The communal body dissolves intergenerational as well as interpersonal boundaries.'

[79] Barshack (2003, 1155, 1164).

[80] Barshack (2000, 82); Barshack (2012, 19). See also Barshack (2009, 559) (constitutional moments generate 'an experience of permanent immediacy, an eternal present.')

[81] Barshack (2009, 567): 'the fiction of corporate perpetuity acquaints the living with the temporal horizons of past and future through the idea of cross-generational legal continuity as well as through representations of mythical episodes which interrupt and bracket historical time'.

[82] *Id.*, 566-567: 'Corporate perpetuity is grounded fictively in a prehistorical founding episode in which the corporate body was born and the law given. The moment of foundation presides over the horizon of the past but also gives society a future orientation, a destiny. … Between the imaginary moments of the beginning and end of history, the founding moment is periodically reenacted in order to sustain society's adherence to time and to the corporate order as a whole.'

[83] *Id.*, 551, 557.

[84] Barshack (2006, 202).

> when voting patterns reflect factional loyalties and public discussion is dominated by sectarian campaigns, only a massive manipulation of the collective memory will make a referendum appear to future generations as an authentic manifestation of the general will.[85]

The *transcendent* account of *primary constituent power* seems to fit with the idea of unamendability. As noted in Chapter 2, explicit limitations on the amendment power have various characteristics, such as the preservation of the past-cherished identity, the negation of past evils and an aspirational facet. Unamendable provisions look both to the past, present, and future. They aim to represent a certain constitutional identity superior to the present temporary political majority. This account seems compatible with the *transcendent* understanding of *primary constituent power*, which aims to link diverse generations and unite the nation under common basic principles.[86] It invites the people to see themselves as part of something greater than their individuals – having a superior unamendable constitutional identity.[87]

3. Primary Constituent Power and Democracy

The two concepts of *primary constituent power* are distinct from each other not only in space (corporate body v. living people), but also in their temporal conception of constituent power (constitutional moments v. at any given moment).[88] Nonetheless, both conceptions respond to various objections to unamendability (see Chapter 8), since both allow the emergence of the *primary constituent power*, unbound by prior and existing constitutional rules. Moreover, both, at least conceptually, can be reconciled with a theory of delegation since both recognise a separate sovereign acting 'at the back of the constitution' – which can be regarded as the delegator. Once one accepts that there is a separation between 'the people' and their agents, these two conceptions quickly blur in actual constitutional practice. As a matter of fact, these two conceptions are not that different from each other in another sense: in Barshack's *transcendental* conception of a corporate body, the *transcendence* collapses into the *immanent* present in those temporary constitutional moments. Likewise, Amar's democratic popular sovereignty is manifested in special constitutional moments, such as referenda and constituent assemblies. It therefore seems that it is not necessary, for the sake of the argument advanced in this

[85] *Id.*, 212-3.
[86] Comella (2000, 51-52).
[87] Pettys (2008, 337).
[88] On time and authority see Hartog (2011, 33).

thesis, to choose between these two conceptions. Yet, what seems inevitable is to emphasise that both the *transcendent* account of *primary constituent power*, which refers to a mythical 'we the people', and the *immanent* account of *primary constituent power,* which refers to the 'living people', are both rooted in and deeply connected to the notion of democracy. This is in order to accentuate the democratic nature of the *primary constituent power*.

'The dirty little secret' of contemporary jurisprudence, as Roberto Unger describes it, is the discomfort with democracy and fear of popular action.[89] Popular sovereignty's understanding of the *primary constituent power* challenges this discomfort as it declares the people's *primary constituent power* to re-emerge in 'extraordinary moments, [when] politics opens up to make room for conscious popular participation and extra-institutional, spontaneous, collective intervention'.[90]

The understanding of a democratic *primary constituent power* seems to correspond with Sheldon Wolin's conception of democracy as a political practice that involves the manifestation of popular sovereignty. Democracy, advocated by Wolin, is not a 'form', but rather, 'a moment'. It is an episodic moment that dictates the constitution's substance and thus a representative moment in the nation's life. Resembling Barshcak's notion of instances of 'communitas', in these rare and episodic 'moments of commonality …through public deliberations, collective power is used to promote or protect the well-being of the collectivity'.[91] In these exceptional moments, 'power returns to "the Community" and agency to "the People"'.[92] Democracy, thus understood is a 'mode of being', 'a political moment, perhaps the political moment, when the political is remembered and recreated'.[93]

If we believe that the source of political authority rests with the people, that 'the ability to engage in constitutional change is a fundamental act of popular sovereignty',[94] we also need to bridge the gap between the imaginary people and the real people. 'Constitutionalism', Carl Friedrich writes, 'and more especially democracy, presupposes an active group of citizens who are ready to assume responsibility and become the "constituent power"'.[95] Therefore, recent scholarship has called to develop direct democracy tools in order to 'return the epicenter of sovereignty to the people', especially

[89] Unger (1996, 72). See also Waldron (1998, 521).
[90] Kalyvas (2008, 7).
[91] Wolin (1996, 39).
[92] *Id*., 41.
[93] *Id*., 43. See also Wolin (2004, 602-603).
[94] Schwartzberg (2009, 6).
[95] Friedrich (1950, 4).

in constitutional decisions.[96] Ali Riza Coban, for example, argues that it is necessary to have legal arrangements that would ensure a maximum level of democratic participation of the people during constitution making.[97] The recent proliferation of referendums is an indicator of the broader trend towards engaging the people themselves in constitutional manners.[98]

Indeed, the modern conception of *primary constituent power* is strongly associated with the notion of popular democracy. According to studies of late, 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.[99] The constitutional referendum, Richard Kay remarks, 'has become a near staple of modern constitution-making'.[100] As Jeffrey Lenowitz recently demonstrated, a common argument in favour of ratification is that this is 'the only moment in the constitution-making process when the constituent power is able to act and make a constitution'.[101] 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, of course, the historical associations of the use of plebiscites as tools for supporting authoritarian regimes.[102] Therefore, some, such as Antoni Ninet, claim that ratification is insufficient: 'the legitimacy and validity of the constitution requires not only popular ratification, but also real (or true) democratic involvement. A constitution made through ordinary parliaments and representatives is unacceptable'.[103] In other words, for constitutional moments to be democratic, a true manifestation of the people's will, popular participation in constitutional moments should be before, throughout, and after the constitutional norms-creating process and not be limited to a solely 'yes' or 'no' vote

[96] Ninet (2010).
[97] Coban (2012, 56 fn 13).
[98] Tierney (2013, 2194). See also Versteeg (2014, 10) (noting that 'today, 34% of all constitutions require ratification by popular referendum, while in 1950, only 7% did.')
[99] See, for example, Blount (2011, 49); Elkins, Ginsburg and Blount (2008, 361).
[100] Kay (2011, 746). See also Saunders (2012) (popular participation is a distinctive feature of constitution-making in the 21st century).
[101] Lenowitz (2013, 119, and at 202). In his doctoral thesis, Lenowitz demonstrates some of the complications behind this idea. See also Lenowitz (2011, 9).
[102] Butler and Ranney (1994, 17-21). On the plebiscites of Napoleon and 'contemporary' dictators see Friedrich (1937, 115-117). For recent examples of 'abuses' of referendums see European Commission for Democracy Through Law (2009, 37).
[103] Ninet (2013).

in a referendum.[104] It is the manifestation of 'we the people', not simply '*oui*, the people'.[105]

One notable proponent of the democratic constitution-making/changing approach is Joel Colón-Ríos. Colón-Ríos focuses on what he terms 'the second dimension of democracy', which is democracy at the level of fundamental law - the relationship between citizens and their constitution, especially in times of imperative constitutional changes. According to Colón-Ríos, significant constitutional changes require a process that endeavours to reproduce popular participation and democratic openness at the same degree presented during constitution-making moments. Democracy thus understood is an exercise of self-government that necessitates democratic openness and maximisation of popular actual participation.[106] Therefore, in order to acquire democratic legitimacy, fundamental constitutional changes, episodical by their nature, should take place through the most participatory process possible, which allows citizens the opportunity to propose, deliberate, and decide upon such changes. Constitutional regimes must leave a door open for the *constituent power* to re-emerge through extraordinary mechanisms that work separately from the ordinary amendment procedure, such as constituent assemblies, elected by the people for fundamentally changing the constitution and whose outcomes shall be approved in a popular referendum. These participatory mechanisms facilitate the exercise of *constituent power*.[107]

Together with Allan Hutchinson, Colón-Ríos argues that constitutional changes that take place outside of the scope of popular decision-making constrain the potential of democracy's emancipation. If democracy is about self-government and self-rule, then fundamental constitutional rules should originate in an exercise of self-legislation by the people, who, in turn, 'might identify more with the constitutional regime and think of it as their own, not simply as the embodiment of the collective will of a mysterious People'.[108] Their preferred method for this popular participation in important constitutional changes is through an elected constituent assembly, triggered by popular initiative, especially for changing the constitutional regime, and ratified by the people before coming into effect. Positive law would not limit such an assembly, in light of the

[104] Hutchinson and Colón-Ríos (2011, 53); Coban (2012, 73).
[105] For an argument that in order to be democratically legitimate, constitutional reforms should be inclusive and robustly deliberative see Levy (2013, 566) (who proposes there to improve deliberative voting in constitutional referenda). According to Tierney (2009, 382) it 'seems intuitively plausible that a referendum, carefully tailored to meet the specificities of a particular society, can help bring a populace together in a deliberative, constitutional moment.'
[106] Colón-Ríos (2009, 1).
[107] Colón-Ríos (2012C); Colón- Ríos (2010A, 199); Colón-Ríos (2011B); Colón-Ríos (2012A, 53).
[108] Hutchinson and Colón-Ríos (2011, 51).

unique character of the *constituent power*. Therefore, for them, *constituent power* should not be 'muzzled and contained'; rather, it should allow popular agency to create and re-create constitutional regimes.[109] This understanding allows the mythical people to re-activate its *constituent power*.[110]

The *primary constituent power* is never exhausted or completely absorbed into constituted organs. This is not to deny that through an endless series of events that take place within constituted institutions, 'the people' continue to define and redefine themselves.[111] It is only to claim that ontologically, *primary constituent power* maintains its energy 'to bring about a fundamental break … in the nature of the governing regime'.[112] It 'can never be definitively or permanently stabilised'.[113] The conception of a democratic *primary constituent power* means that it must be committed to popular sovereignty. It may exercise itself in forms such as special constitutional assemblies and constitutional referenda.[114] In order for the *primary constituent power* to be direct, these forms must have a special character, i.e. separate from other public functions, thereby replacing revolution with peaceful means incorporating actual, deliberate, free choice by society's members.[115] *Primary constituent power* should not be merely grasped as a popular revolution, but as a means for realising a well-deliberated and thoughtful change.[116] While it is true that 'in the end, there can be no precise algorithm specifying the conditions for defining a people capable of exercising constituent authority',[117] an exercise of *primary constituent power* should be inclusive, participatory, and deliberative. After all, the word *constituere*, Kalyvas reminds us, marks the act of founding together, jointly.[118]

An important aspect is the maintenance of freedoms such as freedom of speech, free and fair election, freedom from arbitrary arrest, and freedom of assembly and association, the absence of which 'spell[s] the death for the legal concept that is

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[109] *Id.*, 52-53.
[110] Colón- Ríos (2010A, 240).
[111] For an argument of the people as process see Espejo (2011).
[112] Loughlin (2008, 64).
[113] Murphy (2006, 105).
[114] Barshack (2006, 190). Ackerman (2000B, 665-667) proposed that we should seek to distinguish between parliament and the people, the former managing routine governmental decisions and the latter expressing its will through a carefully constructed process of serial referenda.
[115] Conrad (1970, 404-410).
[116] Prateek (2008, 454). This might be compared to Ackerman's 'deliberative fora provided for higher lawmaking.' Ackerman (1991, 6).
[117] Kay (2011, 742). Indeed, since there is no clear mechanism for the *primary constituent power* to be exercised, one major obstacle to this theory is that the decision whether a constitutional norm was indeed a true manifestation of the *primary constituent power* must be given retrospectively, and would eventually be subject to the judiciary's legitimation of the extra-constitutional. See Schwartzberg (2011, 1303, 1314).
[118] Kalyvas (2005, 235 and also at 238).

constituent power'.[119] The latter understanding refuses to reduce *primary constituent power* to a mere acclamation – a 'soccer-stadium democracy', in the words of Holmes.[120] This is similar to Christoph Burchard's criticism of Schmitt's conception of *constituent power* for 'there is no discourse, no rational consideration, only irrational masses cheering or booing'.[121] Process matters. As Kostas Chryssogonos explains:

> A Constitution may be characterized as democratic, from the point of view of the holder of constituent power, when it has been elaborated and voted by a collective representative body (constituent assembly, national assembly, etc.), elected through universal, equal and secret suffrage by the people, occasionally with some form of direct participation of the latter…It should be emphasized that a Constitution, which has been elaborated by the organs of an authoritarian regime and submitted directly to a referendum, is not a "democratic" one, in that sense, since in this way the people are deprived of the possibility to have an influential impact on its content.[122]

Rather than allowing abuse of the *constituent power* by actors who claim to represent the people and acting in their name,[123] we should emphasise the democratic nature of the *primary constituent power:* 'if there is a power that must be democratic, then it is in the first place constituent power'.[124]

II. THE CONSTITUTIONALISATION OF PRIMARY CONSTITUENT POWER

A. The Fallacy of Prescribed Constitution-Making Procedures

In the previous section, I noted that even after the establishment of a constitution, the *primary constituent power*, the 'sleeping giant' so to speak,[125] could awake and change even unamendable constitutional principles. Being external to the pre-existing constitutional order, this power cannot be bound by the prior and existing constitutional rules. Consequently, constitutions cannot (and most do not) regulate its emergence. Constitutions, in other words, 'contemplate their amendment but almost never their replacement'. [126]

Nonetheless, some constitutions not only regulate the procedure of their amendment, but also *attempt* to regulate the re-emergence of the *primary constituent power*

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[119] Guha and Tundawala (2008, 543). See also Conrad (1977-1978, 12); Friedrich (1937, 116).
[120] Holmes (1996, 49).
[121] Burchard (2006, 13).
[122] Chryssogonos (2008, 1299-1316).
[123] Cristi (1999-2000, 1768).
[124] Gouveia (2011, 37).
[125] I borrow the description of the people's *constituent power* as a 'sleeping giant' from Cyr (2007, 45 fn 74).
[126] Landau (2011-2012, 616-617). See also Winterhoff (2007, 150-151); Kay (2011, 745).

and establish the rules for their own replacement.[127] For instance, the Constitution of Venezuela of 1999 states that 'The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution' (Art. 347).[128] Other constitutions prescribe a procedure for their 'total reform', 'complete revision', or 'adopting a new constitution'.[129] These examples demonstrate the desire of constitution-makers to institutionalise the *primary constituent power* within the constitutional form.[130]

Since by its nature, the *primary constituent power* is not bound by any constitutional rules, this method seems bizarre. Schmitt had thus argued that the constitutionalisation of *constituent power* is a fallacy: 'no constitutional law, not even a constitution, can confer a constitution-making power and prescribe the form of its initiation'.[131] If *constituent power* is considered superior and external to positive law, law cannot prescribe it. Therefore, Richard Kay claims that these attempts are not only 'paradoxical', but might also 'be dismissed as rhetorical decoration'.[132] Instead of dismissing these provisions, it might be more valuable to regard them not as *constituting*, but rather as *recognising* or *declaring*, existing powers; hence different from amending provisions.

Imagine that a new constitution is constituted through these constitutional mechanisms. What does that mean for constitutional theory? Two plausible answers exist. According to one approach, this process was an exercise of the instituted *secondary constituent power* rather than the *primary constituent power*.[133] Accordingly, it might be argued that the new constitution, brought about by *constituted powers*, is illegitimate or even unconstitutional. This argument should be rejected according to the *theory of delegation* (see Chapter 4). Here, the *primary constituent power* delegated a *secondary constituent power* with the unique authority to replace the constitution and establish a new one.

According to a second approach, it was indeed the *primary constituent power* that played the constitution-making role, yet it simply decided to act according to the existing

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[127] Kay (2011, 725-726); Tushnet (2012-2013, 1988).
[128] Articles 348-349 to the Constitution further regulate this process.
[129] E.g. Argentina Const. (1994), art. 30; Nicaragua Const. (1987), arts.191-193; Swiss Const. (1999), arts. 138, 193, and Bulgaria Const. (1991), arts. 158-162. See Kay (2011, 725); European Commission for Democracy Through Law (2009, 13).
[130] Coban (2012, 56).
[131] Schmitt (2008, 132).
[132] Kay (2011, 727-728).
[133] See, for example, Kalyvas (2005, 228); Guastini (2007, 305): 'in no legal system can constituent power — which is not to be confused with the power of constitutional amendment — be regarded as an institutionalized source: otherwise, it would not be "constituent but "constituted."'

procedures rather than being obliged to them.[134] Carl Friedrich gives the example of a constitutional change that occurred in Switzerland in 1874. The Constitution of 1848 was then 'entirely overhauled and democratized' through the ordinary amendment procedure. The constituent power, according to Friedrich:

> manifested itself through the amending power; but that does not mean that it is identical with it; in fact even to say that it manifested itself through it is something of a misstatement. It would be more accurate to say that the group which might otherwise develop into the constituent power manifests itself through, acts through the amending power.[135]

Since the *primary constituent power* has extra-juridical dimensions, it cannot be fully regulated or stipulated legally.[136] This, however, does not mean that a constitution cannot stipulate the means by which a new constitution would be constituted. It only means that by its nature, *primary constituent power* does not have to abide by it, although it can act accordingly if it so wishes. [137] 'Like it or not', Kay concludes this point, 'a true constituent authority must act without the comfort of legal authorization'.[138] These mechanisms can be viewed not as *containing primary constituent power*, but rather, simply as *vehicles* for its exercise.[139]

Not to be mistaken, these mechanisms may carry important benefits. Exercising *primary constituent power* behind 'a façade of legality' may serve significant political interests.[140] Also, legally regulating a constitutional-replacement process, which would be relatively difficult to carry out, might be a suitable response to abuse of the amendment process that establishes a new constitution or ignoring any procedures whatsoever in the name of the *pouvoir constituant*.[141] Since, as aforementioned, the people's will is divided, such legal rules may create 'organized, complex procedures of deliberation and voting',

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[134] Lenowitz (2013, 87).
[135] Friedrich (1937, 118).
[136] Cristi (1999-2000, 1758, 1765). See also Goldoni and McCorkindale (2013, 2214-2215): 'new beginnings — the raison d'être of the constituent power — are an essential part of political action and by definition cannot be contained or fully announced by existing laws and institutions. … The constituent moment – when constituent power exercises this constitutive capacity - exceeds constituted powers in order to transform them, working as an 'irritant' against existing institutions and the ordinary modes of representative politics.'
[137] Tushnet (2012-2013, 2006): 'The constituent power can exercise itself through the forms of law, but those forms cannot ultimately constrain the constituent power.'
[138] Kay (2011, 735). See also Kahn (2006, 268): 'Constitutions may not have sunset clauses, but neither can they declare illegitimate an investment of the popular sovereign in a new constitution … is always deeper and richer than its particular terms of expression in a constitution.'
[139] Cf., Tierney (2012, 133).
[140] Kay (2011, 733). For a discussion of the use of positive law argument in the justification of revolutions, see Kay (1997, 161).
[141] Landau (2013A, 189). Of course, such mechanisms are also open for abuses.

which would preserve the *primary constituent power*'s political credibility.[142] Lastly, the emergence of *primary constituent power* may be important according to a legal framework for legal certainty and continuity and may enhance the legitimacy of the new document.[143] Therefore, a recent report by the Venice Commission 'strongly endorse[d]' the use of a legal procedure even for the adoption of 'new constitutions', since such a procedure would 'strengthen the stability, legality and legitimacy of the new system'.[144]

B. We The 'Limited' People?

The German Basic Law of 1949 is an interesting example of an attempt to constitutionalise *the primary constituent power*. The final article of the Basic Law reads: 'This Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision' (Art.146). This provision not only anticipated the Basic Law's own destruction,[145] but also reflects the legal positivisation of the *primary constituent power*.[146] Contrary to some of the examples noted earlier, this provision – while recognising the people's *constituent power* – did not stipulate conditions or procedures for its exercise. One may claim that this lack of stipulation seems as a confirmation of the *primary constituent power*'s extra-legal character.[147]

This particular constitutionalisation of *primary constituent power* raises interesting questions as to the theory of unamendability. Recall, the German Basic Law includes in Art. 79(3) an unamendable provision (see Chapter 2). Is the emergence of a new *primary constituent power*, as acknowledged by Art. 146, restricted by the principles enshrined by Art. 79(3)?[148] Some authors have opined that the unamendable principles also apply in such circumstances and thus would guide any future constitution-making.[149] Others remark in contrast that Art. 146 is a legal manner with which to overcome the unamendable provision,[150] while another group claims that this question ought to be

[142] Chryssogonos (2008, 1299-1316).
[143] Coban (2012, 56).
[144] European Commission for Democracy Through Law (2009, 15).
[145] In the acts of the reunification of 23.09.1990, art. 146 was amended as follows: 'after the union and freedom of Germany have been finalized this constitution shall be valid for all the German people and will continue to be valid until the day when a new constitution is accepted by the free will of the German people'. In other words, even at the moment of unification, article 146 was not invoked and the Basic Law was instead amended and was kept in place. See Kay (2011, 727).
[146] Möllers (2007, 97-98).
[147] Coban (2012, 58).
[148] For a debate see Kay (2011, 727); Möllers (2007, 97).
[149] Dreier (2000, art. 146, no.33), cited in Möllers (2007, 97). See debate in Murkens (2013, 173-175).
[150] Böckenförde (2010, 120).

resolved by the Constitutional Court.[151] Indeed, in the Lisbon Case, the Constitutional Court expressly left open the question of whether the German people's *constituent power* might be restricted by the unamendable provisions:

> It may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution.[152]

I agree with Jo Murkens that Art. 79(3) addresses only the amendment power – the *secondary constituent power* – dealing with Parliament's changes to the Basic Law, whereas Art. 146 foresees a new constitution adopted by the *primary constituent power*, which by its nature cannot be bound by the rules of the prior constitution. The new constitution-drafters may take Art. 79(3) into account, but that would depend on their own 'goodwill', rather than on the nature of the unamendable provision as a legal obligation.[153] Consequently, even though the *primary constituent power* is constitutionalised within the German Basic Law, Art. 79(3) is unable to bind later generations when exercising their *primary constituent power*.[154] Art. 79(3) guarantees are unamendable, not (as they are wrongfully referred to as) eternal.

One often noted example to the claim that the exercise of *primary constituent power* is hardly bound by limitations, is the 1962 Amendment to the French Constitution over the form of presidential elections. This Amendment, which passed through a referendum initiated by President de Gaulle, took effect despite its violation of the amendment procedure (Art. 89).[155] It was challenged before the French Constitutional Council, which held that it had no competence to review laws passed by the people in a referendum since they are a direct expression of national sovereignty.[156] The Constitutional Council thus took the approach of *le peuple-roi* – 'the people' is the king; it is the new sovereign, implying that the people always retain the power to revise the constitution. As one advocate stated in 1849 before a Versailles court, 'the people never violate the constitution'.[157] Since this constitutional change occurred outside of the instituted

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[151] Quint (1997, 49).
[152] The Lisbon Case, BVerfg, 2 be/08 of 30 June 2009, para. 217, http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html; See Halberstam and Mollers (2009, 1256).
[153] Murkens (2013, 174-175). See also Coban (2012, 59).
[154] Goerlich (2008, 404); Preuss (2011, 440-443).
[155] Jaume (2007, 82-83); Tierney (2012, 130-136).
[156] CC Decision No. 62-20 DC, 6 November 1962 Referendum Act, Rec., 1962, 27. See Baranger (2011, 392-394).
[157] Cited in Lieber (1859, 388).

amendment process, and as such be regarded as a 'constitutional violation',[158] its authoritative legitimacy could be granted only retrospectively.[159] Also, the employment process may establish a constitutional precedent for a new amendment procedure to be availed of in future occasions.[160] This example is compatible with Barshack's supposition that 'the fuller the sovereign presence, the more relaxed the constitutional structure and the formal procedure that governs the referendum'.[161]

This postulation raises a thorny question: what are the implications of an amendment process which includes the *primary constituent power*'s characteristics of directness and speciality, like popular referendums or elections for special constituent assemblies? Here the people are part of the delegated amendment power. Are the people in that capacity limited? Can an amendment approved by such a process be unconstitutional? A positive answer would subordinate not only decisions of the people's representatives, but also those of the people themselves to the judiciary. It seems that there are two prevailing approaches to this challenge.[162]

According to the first approach, *when the amendment power is exercised by the people it is unlimited.* This is the general approach of Irish jurisprudence. Due to the Christian character of the 1937 Irish Constitution, and its reference to man as possessing natural rights antecedent to positive law,[163] there is a heated debate within Ireland on whether natural law sets limits to the constitutional amendment power.[164] In 1992, two amendments guaranteeing the rights to obtain information about abortion services abroad and to receive such services were adopted through a referendum, according to Art. 46(2) of the Constitution.[165] In response, High Court Justice O'Hanlon, not wearing his judicial hat, argued that the amendment power is limited by basic natural rights, and since the two amendments conflicted with the natural right of the unborn to life, they should be invalidated.[166] When the Supreme Court faced a challenge to the amendments in *re Article 26 and the Information (Termination of Pregnancies) Bill, 1995,* it rejected the claim

[158] Carrozza (2007, 174).
[159] Kalyvas (2005, 231).
[160] Cf., Ackerman (2000A, 415).
[161] Barshack (2006, 212-3).
[162] Gözler (1999, 102). For a general debate see also European Commission for Democracy through Law (1996).
[163] Grogan (1954, 201); Costello (1956, 403); Lewis (1997, 171).
[164] For a recent summary of the idea of 'unconstitutional constitutional amendments' in Ireland see Kavanagh (2012, 45); Roznai (2013A, 566-569).
[165] The Irish Constitution recognises the 'the right to life of the unborn' (art. 40.3.3.). This constitutional protection was inserted into the Constitution by a referendum which took place in 1983. See Gearty (1992, 441).
[166] O'Hanlon (1993, 8). See contra Clarke (1993, 179); Cannon (1995, 28-29).

that natural law was superior to the Constitution, holding that the people, not God, are the creator of the Constitution and the supreme authority. Hence, amendments made by the people become the fundamental and supreme law of the land.[167] The Court repeated the superior right of the people to amend the Constitution in various other decisions.[168] Aileen Kavanagh recently summarised the Court's approach: 'For the time being, the matter seems closed as a matter of legal doctrine: the Irish Supreme Court will not stand in the way of an amendment to the Constitution supported by the people in a referendum'.[169]

Similarly, in Romania, although the 1991 Constitution grants the Constitutional Court an explicit authority to *a-priori* review proposed constitutional amendments,[170] once an amendments is adopted by a referendum (as required by Art. 151), it is definit and final, and the Court has no control over it, since 'such a law-expression of the original will-power is above the will of any power.'[171]

This approach may be supported by the claim that logically, it would be incoherent to posit that a decision adopted by a referendum outside of the amendment process would not be deemed unconstitutional as long as it is a direct expression of the people, whereas a same decision, similarly adopted by a referendum, would be found unconstitutional merely because the referendum process is defined in the constitution. According to this approach, even if the *primary constituent power* rests with the people, albeit essentially anarchic and lawless, it may choose, so to speak, to be exercised within the constitutional framework of constitutional amendment.

According to the second approach, *the amendment power is limited even when exercised directly by the people.* The people in that capacity of inclusion in the amendment process represent a legal organ of the state. As there can be no sovereign within the constitutional political order, the people's power is necessarily limited.[172] As Jeffrey Lenowitz writes:

While a constitutional amendment, even one produced by a popular referendum,

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[167] [1995] IESC 9; 1 IR 1, 38; see O'Connell (1999, 61-66); O'sullivan and Chan (2006, 32); Whyte (1996, 8, 10); Duncan (1995, 127); Doyle (2003, 65-7).

[168] *Riordan v. An Taoiseach*, [1999] IESC 1, 4: 'There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional'; *Hanafin v. Minister of the Environment*, [1996] 2 ILRM 61, 183: 'No organ of the State, including this Court, is competent to review or nullify a decision of the people'; and *id*, 183: 'The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with. The decision is theirs and theirs alone'. All cited in Jacobsohn (2006A, 469).

[169] Kavanagh (2012, 45). See also O'sullivan and Chan (2006, 19-22).

[170] See infra Chapter 7IIA.

[171] Băişanu (2011, 134).

[172] Carré de Malberg (1962, 494) ; Beaud (1994, 437-438).

> can alter the constitution, its process is dictated by the constitution and thus it leaves the normative superiority and sovereignty of the constitution intact. Since … constituent power is inherently unconstrained, derived constituent power is not constituent power at all.[173]

The amendment power, accordingly, is simply a power constituted by the constitution regardless of its shape.[174]

An example of this approach comes from Switzerland, where 100,000 people eligible to vote have the right to propose revisions to the Constitution ('People's Initiative' - *Volksinitiative*). In 1996, both chambers of the Federal Assembly declared a *Volksinitiative*, according to which asylum seekers who enter the state unlawfully would be deported immediately and without the option of appeal, to be invalid for violating the internationally recognised peremptory norm of *non-refoulement.*[175] The Federal Council stated that respecting the fundamental norms of international law is inherent to the *Rechtsstaat* principle of 'rule by law,[176] and violation of said norms would undermine the *Rechtsstaat* and cause the state and the influenced individuals an irreversible damage. It therefore proposed that the Federal Assembly invalidate the *Volksinitiative*,[177] which it did on 14 March 1996.[178] In 1999, Switzerland granted explicit constitutional recognition to the proposition that *jus cogens* norms of international law were a limitation to constitutional reforms, whether total or partial (Arts. 193.4, 194.2).[179] Therefore, in Switzerland, even when the people are directly involved, and even when the constitution allows for its total revision, this faculty is still limited. According to this approach, 'the people' may be regarded in two distinct capacities: as a source of absolute power (*primary constituent power*) and as a constitutional organ established by the constitution for its amendment (*secondary constituent power*).[180]

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[173] Lenowitz (2013, 85).
[174] Smith (2011, 376).
[175] Bundesbeschluss über die Volksinitiative 'für eine vernünftige Asylpolitik und gegen die illegale. Einwanderung'. 14 March 1996, BBI 1996 I 1355, cited and elaborated in de Wet (2004, 101-5). See also Zimmermann (2008, 258). On the peremptory status of the *non-refoulement* principle see Allain (2001, 533).
[176] On the Swiss *Rechtstaat* principle see Fleiner, Misic and Töpperwien (2005, 28-30).
[177] Botschaft über die Volksinitiatieven 'für eine vernünftige Asylpolitik und gegen die illegale Einwanderung'. In BBI 1994 III 1489, 1495-1500, cited in de Wet (2004, 101-105).
[178] This opinion of the Swiss Federal Council was somewhat contrary to a prior decision of 1953, in which it held that no external limitations exist upon the constitutional process that can be deemed superior to the people's will (BBI 1954 I 72). In its later opinion, the Federal Council distinguished between treaty obligations, which state parties can legally terminate and were at issue in the 1953 initiative, and *jus cogens* norms, which were at issue in the 1994 initiative. See de Wet (2004, 102-3).
[179] Biaggini, (2011, 316-17); Diggelmann (2007, 173).
[180] Klein (1978, 213). See also Anonymous (1995-1996, 1759): 'citizens have the right to amend, but they have the power - always - to overthrow … Article V is the internal mechanism by which we, as a constitutional People - though, emphatically, not "We," as a sovereign People - can amend the higher law.

Stephen Tierney's analysis appears lucid. Tierney claims that one has to distinguish between referendums that operate wholly within existing constitutional structures, thereby internal to the constitution, and referendums that transcend the existing order, which are external to the constitution. In the former case,

> the people are engaged directly in producing constitutional law, but it is highly debatable that they are engaged explicitly in "constituting power." Rather, the use of the referendum is provided for by the constitution, its process is regulated by that constitution, and its result takes effect within the normative order of that constitution.

In contrast, the latter case seems to be a different category as it includes the power to 'bring about a new order'.[181] Tierney urges us to be cautious when referring to 'people sovereignty' simply due to an exercise of a referendum, and to pay attention to the mode of that exercise and the role that the people have played within it.[182] On this account, it appears that when the people have a role within the amendment process, such an exercise does not represent the *primary constituent power*. Such referendums 'are constrained to operate within mainstream representative democracy, subordinate to the constitutional rules and subject to constitutional institutions, including courts'.[183] It is only when the people 'act as original constitutional authors, bringing a clear break in the old order; the referendum manifests the "people's" direct democratic capacity to act as the supreme source of constitutional law in foundational constitutional acts'.[184] This dilemma is crucial for any theory of unamendability. It is here, Claude Klein remarks, where 'the crux of the problem of the theory of the amending power' lies.[185] In the next section, I deviate from the dichotomy of the two approaches mentioned above and offer an even more subtle account, one of a *spectrum of constitutional amendment powers*.

III. THE SPECTRUM OF AMENDMENT POWERS

According to the dichotomy described above, there is a *binary* constitutional code of constitutional amendments: an amendment originating via the constitutional process through the *secondary constituent power*, which is limited (even if includes the people), and an

… Article V amenders act as interpreters of the existing constitutional order; they operate within the rules and boundaries of the Constitution.'

[181] Tierney (2012, 12).

[182] *Id.*, 13. See also Tierney (2009, 360).

[183] *Id.*, 13.

[184] *Id.*, 14. See also Tierney (2009, 364): 'the people's direct democratic capacity to act as, or at least to infuence the location and distribution of, the supreme source of constitutional law within a polity, distinguishes constitutional referendums as, potentially at least, true conduits of popular determination.'

[185] Klein (1978, 213).

amendment that is constituted in a constitutional moment through the re-emergence of the *primary constituent power* and thus unlimited. Constitutional systems are more complex than this. They are *polymorphic*.[186]

Just as in materials science, a solid material can exist in multiple forms, so does the amendment power. Constitutions have different procedures for constitutional amendments.[187] Not only do entire constitutions differ from one another in the mechanisms, actors, and procedures involved in the amendment process, but also a same constitution might incorporate different procedures for amending different provisions and principles. This section therefore argues that one ought to regard constitutional amendment powers not in a binary manner (limited/unlimited), but rather as a *spectrum* of scope, a *spectrum of amendment powers*. The more similar the democratic characteristics of the *secondary constituent power* are to those of the *primary constituent power* ('strong amendment power'), the less it should be bound by limitations (including judicial scrutiny), and *vice versa*. The closer it is to a regular legislative power ('weak amendment power'), the more it should be fully bound by limitations (and judicial scrutiny). This calls for an examination of the link between the limitations that ought to be imposed upon amendment powers and amendment procedures.

A. Strong and Weak Constitutional Amendment Powers

Comparative constitutional design demonstrates that there is no single unified method or process for amending constitutions. Constitutions differ between dissimilar degrees of amendability. Some are 'flexible' in that the amendment process is relatively easy, such as ordinary legislative majorities, and some are more 'rigid' in that they require high barriers, such as super-majorities, or additional requirements, such as constituent assemblies, intervening elections, and referendums.[188] In most countries, parliament serves both as ordinary legislator and as holder of the amendment power, but the process of constitutional amendment is commonly subjected to special procedures and requirements. Jon Elster classifies six 'main hurdles' for constitutional amendments: unamendable provisions; a supermajority threshold in parliament; a higher quorum than

[186] I use the term Polymorphic in a constitutional context different from that which is often used to describe constitutional interpretation, according to which legal terms can bear different meanings for different circumstances. For such a use see Siegel (2005, 339).
[187] See, for example, Andenas (2000); Oliver and Fusaro (2011), Contiades (2012); European Commission for Democracy Through Law (2009).
[188] Liphart (2010, 47-48, 207, 219). For different categorisations of amendment procedures see Lutz (1994, 363-64).

ordinary legislation; time delays; state ratification in federal systems; and popular referendums.[189] These hurdles not only make constitutional change more difficult than the way ordinary laws change, but also reflect the notion that the constitution is a special kind of law which should not be amended as easily as ordinary law.[190]

As noted in Chapter 4, the amendment power is situated in a grey area between the ordinary legislative power and the extraordinary *constituent power*. In this grey area, a spectrum of amendment power exists. Some amendment procedures are *weak amendment powers* in the sense that the amendment process is similar (or relatively similar) to the ordinary legislative process in terms of the organs involved, and the temporal and procedural constraints. Others, which significantly deviate from the ordinary legislative process with regard to these features are *strong amendment powers* in the sense that their exercise resembles (or almost resembles) a constitutional moment – nearly an invocation of the *primary constituent power*.

In order to demonstrate this spectrum, I use Edward Schneier's analysis of amendment procedures and the Venice Commission's 'Report on Constitutional Amendment' to exemplify various amendment procedures.[191] The *weakest amendment powers* are those states in which a simple legislative majority is enough to bring about constitutional amendments.[192] An amendment power stronger than the ordinary majority is the one that requires a qualified majority in parliament for the adoption of amendments. Almost all European countries require a certain qualified majority.[193] A requirement of multiple readings in parliament makes the amendment process longer and more difficult, and strengthens the amendment power.[194] Time delays of one to twelve months between the initiative and the first debate in parliament[195] or between the readings[196] is another technique often used. But all of these procedures are still 'weak' from the perspective of a democratic *constituent power* in the sense that they exclude the people from the process.

These procedures of ordinary and qualified majorities in parliament may be reinforced, for instance with a requirement of a popular referendum, intervening

[189] Elster (2000B, 100-104).
[190] Lane (1996, 114).
[191] Schneier (2006, 222-224); European Commission for Democracy Through Law (2009, 11-12).
[192] See Schneier (2006, 223-224).
[193] See European Commission for Democracy Through Law (2009, 9).
[194] See *id.*
[195] See *id.*
[196] See *id.*

elections, convening a special constitutional convention or a combination thereof.[197] As Madhavan Pillai claims in light of the Indian experience:

> The safeguard involved in the two-thirds requirement to amend certain provisions of the Constitution can be whittled down be the executive which tends to have a firm grip over Parliament and thereby reverse the very concept of accountability. Such disastrous situations can be averted by adhering to the referendum device. This will provide an insurance against a party with overwhelming powers playing ducks and drakes with the Constitution.[198]

When constitutions require intervening elections for amendments, this is a *strong amendment power*. It is both inclusive and deliberative, putting the subject matter as an issue in the elections and thus asking the people's opinion of it, and allowing enough opportunity for public and political debates on the proposed amendments. It also attempts to minimise an abuse of the amendment power – as the amending authority would not necessarily be the same before and after the amendment's enactment. Similar *strong amendment powers* are those procedures that require elections to a special constituent assembly for the purpose of amending the constitution. This process is inclusive of the people (through the elections, at the very least) and supplies a deliberative setting.[199] The U.S. Constitution is an interesting case. On one hand, Art. V's process is very demanding and time-consuming (both a two-thirds vote in both houses of Congress and ratification by three-quarters of the state legislatures).[200] These demanding consensus requirements arguably label it as a *strong amendment power*.[201] On the other hand, not only does this cumbersome procedure not directly involve the people, in fact, it is so demanding that some commentators note that 'from the perspective of … the constituent power … the banishing of sovereignty from the internal life of the republic was perhaps too successful. … it is almost impossible to legally change the American constitution'.[202]

The argument that I wish to advance in the following section is simple: *strong amendment powers* should be awarded wider scope than *weak amendment powers*. This idea is compatible with certain existing constitutional arrangements, which utilise a 'constitutional escalator'. As noted earlier, some constitutions incorporate different procedures for constitutional amendments of different constitutional subjects. Those

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[197] Schneier (2006, 224); European Commission for Democracy Through Law (2009, 11-12).
[198] Pillai (1978, 199).
[199] Elster (1998, 97).
[200] Vermeule (2011, 1438). From a comparative perspective, art. V's hurdles are unusually onerous. See Dixon (2011B, 651-664).
[201] Cf., Sager (1990, 951-53).
[202] Arato and Cohen (2009, 317). Critics as Dixon (1967-1968, 933); Griffin (1995, 171) and Levinson (2006, 159-166) have argued that the amendment procedure is the main democratic defects of the U.S. Constitution.

provisions that are deemed more fundamental or protection-worthy are more difficult to amend and enjoy a special protection.[203] These procedures may include, again, increased qualified majorities in parliament, referendums, intervening elections, or convening a special constituent assembly.[204] To mention some examples, certain principles may only be amended by referendum in Belarus (1994, Art. 140), Estonia (1992, Art. 162), Latvia (1992, Art. 77), Lithuania (1992, Art. 148), Singapore (1963, Art. 5), Serbia (2006, Art. 203), and Vanuatu (1980, Art. 86). A different procedure exists in the Russian Constitution of 1993, in which amendments to fundamentals of the constitutional system require conveyance of a Constitutional Assembly (Art. 135). This is also often the case when the constitution allows for a 'total revision' of the constitution or its replacement with a new one. For example, the Austrian Constitution requires a popular referendum for its total revision (Art. 44.3). In Spain, a total revision of the Constitution or amendments to certain basic provisions demand a more robust process, including the dissolution of Parliament and a subsequent approval by a referendum (Art. 168.1).[205] In Costa Rica, The Constitution's general amendment can be effected only by a constituent assembly called for the purpose (1949, Art. 196),[206] and in Bolivia, the total reform of the Constitution, or that which affects its fundamental premises, can take place through an original plenipotentiary constituent assembly, put into motion by popular will through referendum (2009, Art. 411.1).[207] In line with my argument, except with the Russian Constitution, none of the above-mentioned constitutions includes unamendable provisions.

The rationale behind this constitutional escalator is clear; the more fundamental the principles of the constitutional order, the more they should be protected from hasty changes through heightened amendment requirements.[208] This 'selective rigidity' mechanism was recently advocated for by constitutional scholars, such as Richard

[203] See e.g. South African Const. (1996), art. 74; Canada Constitution Act, 1982, Part V. See Corder (2011, 270); Hutchinson (2013, 64-66); Albert (2014, 11-12).
[204] See Coban (2012, 57-66).
[205] See Comella (2000, 62 fn 42); Elvira (2011, 282-284); Ortega and Guijarro (2013, 302-308).
[206] In Resolución 2010-13313, the Supreme Court of Justice of Costa Rica (Constitutional Chamber) held that human rights of minorities cannot be subjected to a referendum process where majorities rule, but stated, in an obiter in part VI of the judgment, that even the derived constituent power cannot amend the constitution in a way that violates 'the essence of fundamental human rights.'
[207] Interestingly, in June 1, 2004, before the adoption of the 2009 Constitution, the Bolivian Tribunal Constitucional Plurinacional declared that it had no jurisdiction to review constitutional norms or decide upon their validity. According to the Tribunal, once a reform has passed it becomes part of the Constitution. Since the Tribunal is the guardian of the Constitution, it has no jurisdiction to assess the constitutionality of a constitutional reform once becomes part of the Constitution. See Expediente 2004-09014-19-RDI.
[208] Suber (1999, 31-32).

Albert[209] and David Landau,[210] for allowing greater protection to the core parts of the democratic order, thus reducing the possibilities of abusing the amendment process, while simultaneously easily allowing amendments of non-fundamental principles.[211] The two scholars also emphasise the importance of the temporal dimension; i.e. intervening elections or time delays before the adoption of constitutional amendments, which resist the ability of powerful political forces to abuse their power and take advantage of their temporary popularity to amend the constitution in a way that would damage democracy.[212]

However, these two scholars approach the issue from the standing point of constitutional design. I wish to approach this issue from the perspective of the theory of *constituent power*. The constitutional escalator is not only a practical safeguard for better protecting certain constitutional principles or institutions. Differentiated amendment rule is a device that aims to imitate, as much as possible, constitutional moments in which the *primary constituent power* is incarnated.[213] As means for generating legitimacy for a particular amendment process, [214] it links amendment procedures to various degrees of unamendability.

B. Linking Amendment Procedures and Unamendability

Strong amendment powers attempt to imitate the re-emergence of *primary constituent power*. Through formal mechanisms, such as referendums, elections, and summoning constituent assemblies, they aim to create an environment in which the people are 'awaking', in a sense, to resume their role as constituent authors. They attempt to create a constitutional moment. As Contiades and Fotiadou explain:

> The people are traditionally considered to have spoken during the exercise of the pouvoir constituant. Amending formulas may be described as replications of the constitutional moment where the pouvoir constituant was exercised, being attempted simulations of that primordial, constitution-making function. … This original constitution-making process is embellished with great symbolic force, the reproduction of which during every constitutional revision would be unfeasible. Yet, desire to somehow preserve the spirit of that moment is often

[209] Albert (2010, 707-710); Albert (2013B, 225); Albert (2014).
[210] Landau (2013A, 189).
[211] As the European Commission for Democracy Through Law (2009, 36) noted, a requirement that all amendments be approved through a referendum risks creating an excessively rigid constitution.
[212] Landau (2013A, 189); Albert (2010, 711). For an argument (with regard to state constitutions) that selective rigidity distorts the balance between flexibility and stability see Plato (2007, 1489-1493).
[213] Here, the myth of the people as holders of *constituent power* serves as the guiding narrative for constitutional design, even if only formally. See Sajó (2009, 27).
[214] Arato (2011, 340).

> apparent in constitutional arrangements that risk sacrificing practically for symbolism.[215]

Such a process should not be considered as equally bound to restriction as *weak constituent power*, solely activated by one constitutional organ in the same procedure as in ordinary politics. This is because, as Barshack clarifies:

> Theoretically inelegant as this result may be, the binding force of constitutional procedure varies in every constitutional moment in proportion to the intensity of sovereign presence. … When the communal body asserts itself in the amendment of a constitution as intensely as it was involved in its original adoption, it is hardly bound by constitutional procedure at all and hardly subject to judicial review over the constitutionality of the amendment.[216]

Therefore, from the perspective of the theory of *constituent power*, it is not merely the protected principle or the fear of abuse which justify the constitutional escalator; allowing the more fundamental principles to be amended only through more heightened procedures, it is also the notion that 'the more exuberant the sovereign presence, the less bound is the collective body by … the non-amendability of certain constitutional principles...'.[217] Different constitutional procedures can aim to create fuller bodies of 'sovereignty'. It is in this way that we can understand the Lithuanian Constitution of 1992, which requires, uniquely, that more than three-fourths of the electorate must participate in a referendum if Art. 1 of the Constitution, according to which 'Lithuania is an independent democratic republic', is to be amended. Further, 'the fuller the enactment of sovereignty, the less justiciable the sovereign action'.[218] When the Irish Supreme Court refuses to review constitutional amendments, declaring that in Ireland 'the people' is the sovereign, it does so because the amendment process directly involves the people through a referendum (albeit as a constitutional organ). The spectrum of the amendment powers links the process of constitutional amendment and the limitations that ought to be imposed upon the amendment power; the stronger the *amendment power,* the less limited it should be. This theoretical argument may be supported by two cumulative rationales.

The first rationale is a *normative* one. Owing to the democratic nature of the *primary constituent power*, amendments that are enacted through *strong amendment powers* carry greater legitimacy (this is social and political legitimacy, rather than a legal or moral one).

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[215] Contiades and Fotiadou (2013, 430).
[216] Barshack (2006, 201).
[217] *Id.*, 201-202.
[218] *Id.*, 198 fn 24.

An author-based theory of 'legitimacy' considers a constitution as 'respect-worthy' in light of its maker, and the people are the most 'legitimate' authors of a democratic constitution. Recall that when the people are involved in the amendment process, they are part of the institutional process. They act in their capacity as a constitutional organ. Nonetheless, when the people are part of the amendment process, they act as a 'political elevator', increasing the legitimacy of a certain constitutional change.[219] For example, referendums are often seen as a crucial test of democratic legitimacy,[220] and indeed, researches demonstrate that referendums maximise legitimacy.[221] Like referendums, special assemblies carry a higher degree of 'popular legitimacy' than ordinary legislatures.[222] A notable example is the South African constitution-making process, which was exceedingly participatory and enjoyed a high level of legitimacy.[223]

Of course, it might be claimed that the binding power of the constitution does not rest solely on 'procedural legitimacy', but on other factors as well. But if the involvement of the people indicates that the current generation accepts the constitutional framework and that the constitution reflects its values, there is a greater claim for the constitution's 'democratic legitimacy'.[224] I am not claiming that a democracy cannot function without strong popular involvement.[225] I am claiming that since 'inclusiveness is the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power',[226] then citizens' participation during exceptional moments of constitution-making increases the constitution's democratic legitimacy.

The second rationale is a *practical* one. Presumably, the more deliberative, multi-institutional and prolonged the processes of amendments are, the less the likelihood of abuse of the amendment power.[227] This echoes Jon Elster's argument that special constituent assemblies should make constitutions, rather than ordinary legislatures that are more likely to be influenced by group and institutional self-interests.[228] Due to their irregularity, constituent assemblies are presumed to be impartial bodies insulated from

[219] Oklopcic (2009, 690).
[220] Oklopcic (2012A, 22).
[221] Butler and Ranney (1994, 14-15).
[222] Miller (2010, 612).
[223] See, for example, Klug (1996, 18).
[224] Cf., Medina (2013, 8).
[225] See, for example, Vinx (2013, 124) (claiming that 'the view that strong popular sovereignty is essential to democracy is false.')
[226] Tushnet (2012-2013, 2000). See also Kalyvas (2005, 237): 'In a democratic regime, the legitimacy of the fundamental norms and institutions depends on how inclusive the participation of the citizens is during the extraordinary and exceptional moment of constitution making.'
[227] Cf., Landau (2013A, 226).
[228] Elster (1995, 370–71, 395). See also Colón-Ríos (2012C, 159).

short-term political bargaining.[229] Interestingly, a similar argument has been made with regard to direct democracy.[230]

Some have argued that exceptional popular mechanisms, like referendums and constitutional assemblies, especially in the absence of ordinarily political institutions, have actually aided charismatic leaders to impose authoritarian constitutions.[231] Others have pointed out that popular inclusiveness in a 'we the majority' form such as referendums, without observing super-majoritarian safeguards, puts minority rights at risk.[232] This lack of safeguards to minorities might even justify strong judicial review of direct democracy.[233] In contrast, others claim that 'people are capable of respecting the rights of others en masse'.[234] John Matsusaka points out that the question of risk to minorities in direct democracy lacks 'rigorous empirical work on this issue, and the work that does exist rests on flawed methodologies'.[235] One recent collection of studies concludes that 'direct democracy and the protection of minorities are not mutually exclusive'.[236] Moreover, it has been argued that anti-minority laws are enacted at least as frequently by legislatures as by direct democracy.[237] Indeed, the question is not necessarily whether mechanism of direct democracy risk minority rights, but whether such mechanisms increase or reduce such risks compared to other representative mechanisms. Again, there is no clear answer.[238]

For our concern, the following matters should be emphasised: any arguments regarding 'direct democracy' should be taken with limited account since we are not

[229] Elster (2006, 185); Elster (2000A, 419-420).
[230] Pettys (2008, 350-351) (arguing that at any given moment, a nation is populated by people who represent, to varying degrees, the past, present and future. This diverse temporal perspective increases the probability that when the current people would have make a decision they would lean toward 'common ground provided by the long-term fundamental commitments that all of those temporal perspectives purport to share.')
[231] Parlett (2012, 4); Landau (2013B, 923). Interestingly, the Constitution of Haiti of 1987 forbids in art. 284(3) 'general elections to amend the constitution by referendum' and forbided in art. 148 of its 1946 Constitution 'any expression of public opinion tending to modify the constitution by means of referendum.'
[232] Monaghan (1996, 121). This might find some support in empirical studies. See, for example, Gamble (1997, 254, 261) (while only third of all popular initiative and referenda which were proposed during three decades in the U.S. were endorsed, 78% of those initiative that restricted minorities of their civil rights where approved); Frey and Goette (1998, 1343) (a study which focused on Swiss and found that 30% of federal, cantonal and municipal votes was directed against minority groups); Hajnal, Gerber and Louch (2002, 154) (analysing initiatives and referendums in California since 1978 and claiming that on racially targeted propositions racial and ethnic minorities lose regularly while in all propositions minorities were on the winning side of the vote); Moore and Ravishankar (2012, 646) (a study which focuses on California and finds that in direct democracy minority voters are modestly more likely to lose that the majority).
[233] Eule (1990, 1503).
[234] Johanningmeier (2007, 1150).
[235] Matsusaka (2005, 168).
[236] Marxer (2012, 10).
[237] Spadijer (2012, 55).
[238] Matsusaka (2008, 116).

engaging with ordinary legislative referendums, but with constitutional referendums taking place in exceptional moments in order to create fundamental changes in the constitution. The two types of referendums are different.[239] More importantly, a referendum does not necessarily engender *strong amendment powers,* as I have described them. The referendum is an additional requirement within the political process.[240] The strong amendment process is meant to be an inclusive, deliberative, and time-consuming process, which allows for a fuller body politic. An amendment procedure that rests solely on a referendum would be weaker than procedures that include a referendum in addition to a special constituent assembly. It is difficult to find circumstances, Colón-Ríos recently claimed, in which a participatory process of constitutional amendment (which takes place in a special extra-ordinary constituent assembly, activated by a popular referendum and whose outcome is also ratified by the people) has resulted in a violation of essential democratic rights. It is usually the government – not the people – that negatively affect such rights.[241] Indeed, the risk of abuse of the amendment power arises especially with weak amendment powers, where the constitutional amendment body is the same body that decides the everyday political decisions:

> If politicians can decide on the framework in the same way they are allowed to act within the framework [determined by the people], the difference between constitution making and law making, and the difference between the constitutions for political decisions and these decisions themselves, disappears. The constitution loses its function.[242]

Therefore, Dieter Grimm argues, 'constitution making should differ from law making not only in terms of the quorum, but also in terms of actors and procedures'.[243] The identity of bodies causes the mingling of functions and interests. But longer-range issues of constitutional planning should not be mixed with the short-term interests of political power. As Dietrich Conrad writes:

The culmination of government and constituent function, has always been

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[239] See generally Tierney (2012); Tierney (2009, 360). Indeed, studies demonstrate that referendums on constitutional revisions are less subject to substantive judicial review than referendums on ordinary legislation. See Morel (2012, 522).

[240] In that respect, it is important to mention the Canadian Secession of Quebec case, in which the Canadian Supreme Court held that although a majority will of a people to secede, as expressed in a referendum, must be taken into a consideration, there are other important principels such as federalism, minority rights and the rule of law which must be observed. According to the rule of law principle, secession of a province should be carried out according to the Canadian constitutioinal rules which govern the amendment process. See *Reference re the Secession of Quebec* [1998] 2 SCR 217, http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/1643/index.do; see also Russell (2004, 22).

[241] Colón-Ríos (2012B).

[242] Grimm (2010A, 40).

[243] *Id.*

> feared to lead, and has led in history, to tyrannical results. … It is the possibility of a Putsch by the legislature, depriving the people of either their constitutional rights of their exercise of constituent power, which has brought into sharp relief the exigencies for a functional limitation of the amending power.[244]

Recent studies have demonstrated that 'processes involving a referendum produce constitutions that are more likely to have virtually every category of right',[245] and 'more representative and inclusive constitution building processes resulted in constitutions favouring free and fair elections, greater political equality, more social justice provisions, human rights protections and stronger accountability mechanisms'.[246] This may *mutatis mutandis* apply to constitutional change. As Blount, Elkins, and Ginsburg remark, 'higher levels of participation are presumed to function like supermajority rules, restricting the adoption of undesirable institutions and protecting prospective minorities in the democratic processes that are established'.[247] This is not necessarily a matter of difficulty of the constitutional change,[248] but of inclusiveness and deliberations. As Christopher Eisgruber notes, 'by establishing a separate and [more] difficult track for some political issues, the constitution may focus public attention upon those decisions and improve deliberation about them'.[249] A more inclusive and deliberative process is aimed at improving the quality of the legislative process's outcome.[250]

Amendment procedures that incorporate inclusive and deliberative mechanisms and allow time for public and institutional deliberations reduce the possibility of abuse and enhance the legitimacy of the endorsed constitutional change.[251] Such procedures, which almost fully represent the *primary constituent power,* should be given a greater margin of change:

> Since some parts of the Constitution may be more important than the others while others much more important than the rest, constituent power is invoked to effect any change that may be brought to the most important features of the Constitution. The more significant a change may be, more likely is it that the procedure for affecting it would be more arduous, difficult and demand a higher level of deliberative legitimacy.[252]

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[244] Conrad (1977-78, 14-16).
[245] Blount, Elkins and Ginsburg (2012, 54).
[246] Samuels (2006, 668).
[247] Blount, Elkins and Ginsburg (2012, 36).
[248] A requirement of a popular ratification certainly adds another hurdle to the amendment process, but approvals of constitutional amendments via referendums appear to be just as difficult as approving it in state legislatures. See Lutz (2006, 166-168); Ferejohn (1997, 523).
[249] Eisgruber (2007, 44).
[250] Cf., Banks (2008, 1050).
[251] Deliberative settings may also increase public trust in the constitutional reform process. See Levy (2010, 838).
[252] Prateek (2008, 459).

Importantly, even *strong amendment powers* still act as delegated authorities – constitutional organs – and are thus limited. Yet, like the amendment power, this limitability is not one-dimensional, but rather moves on a spectrum: 'not all amending routes are equal. The closer amending routes are to the citizenry, the more freedom there is to alter the foundational terms of our political life'.[253] As the nature of amendment powers are directly linked to their scope, so are amendment processes linked to unamendability:

> The nature of the amending power as well as the level of deliberative legitimacy which the amending process imbibes in itself jointly [determines] … what is allowed to be changed and what is not through an amendment. So it is not that the limits on amending power are sketched without any reference to the procedure of amendment. Both the nature and procedure of amendments are critically important to truly understand what these limits may be.[254]

Considering the idea of a spectrum of amendment powers, William Harris's constitutional theory carries much force. Similar to my thesis, Harris distinguishes between the people's sovereign power and the instituted amendment power. While the people have an unlimited constituent power, the amendment authority is a constitutional agent, holding its power in trust and thus bound by limits: 'the attempt to incorporate a full-scale amending power within the document may subject the integrity of the whole design to the unrestrained will of those who hold power in trust for the sovereign people'.[255] Harris links limitations on the amendment power with the issue of wholeness: 'the matter of the wholeness of the Constitution as a design is connected with the wholeness of the collective people as the source of the design's authority'.[256] Therefore, the more amendments seek to influence people's rights and power, or large scale revisions, the more necessary it becomes to seek popular approval through what he terms 'sovereignty-reinforcing' mechanisms such as special constituent conventions. Put differently, there is a reciprocal relationship between the 'wholesale' of the sought change and the 'wholesale' of the required sovereignty's presence. The popular sovereign is identified through the criteria of 'wholeness and deliberateness'. It is external to the constitution and can reconstitute the constitutional order.[257] Harris' theory is akin to my understanding of a spectrum of amendment powers – the argument for a systematic

[253] Anonymous (1995-1996, 1762-1763).
[254] Prateek (2008, 472).
[255] Harris (1993, 167).
[256] *Id.*, 195.
[257] *Id.*, 194-203.

hierarchy of amendment powers based upon the proximity of a democratic *primary constituent power*, and acknowledging the possibility of the *primary constituent power* to re-emerge.

IV. CONCLUSION

The basic theoretical presupposition behind the theory of unamendability is the distinction between the people's *primary constituent power* and the instituted *secondary constituent power*. The *secondary constituent power* is (explicitly or implicitly) limited. Certain constitutional decisions require the re-emergence of the *primary constituent power* (committed to the notion of popular sovereignty). They force 'the real sovereign to return from its retirement in the clouds' [258] in certain extraordinary constitutional moments.

Amendment procedures often try to imitate these constitutional moments by creating inclusive and deliberative extraordinary procedures, such as referendums and constituent assemblies, which would distinguish these constitutional politics from ordinary ones.[259] These are strong *secondary amendment powers*. This chapter argued that the more an amendment process contains inclusive and deliberative democratic mechanisms, the closer it resembles the people's *primary constituent power*. Congruently, since *primary constituent power* is by its nature unlimited, strong *secondary constituent powers*, which present a fuller presence of peoples' sovereignty – while still limited – should be allowed greater latitude of constitutional changes. Therefore, the introductory chapter began by highlighting that the debate regarding limits to constitutional amendments can be regarded as a deeper conflict between substantive and procedural notions of constitutionalism, the theory of spectrum of amendment powers, which links amendment procedures to unamendability, manages to reconcile both substance and procedure.[260]

The spectrum of amendment powers is not merely a theoretical model. It has additional aspects: first, a constitutional design aspect directed at constitution-makers and urging them to design constitutional amendment-rules in an escalator way. In doing so, the more basic constitutional principles would be amendable in a more participatory

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[258] *Id.*, 203.

[259] Tierney (2009, 367) (referendums can be regarded 'as some kind of reversal of the original act of transference, or at least as a temporary return of power to the people.')

[260] See Brandon (1995, 228): 'Harris's constitutionalism harmonizes substance (embodied in the notion of sovereignty) and procedure (embodied in the notion of pedigree).'

process, which is time-consuming, deliberative and inclusive. This is in contrast with the less foundational provisions of the constitution, which should be amendable relatively easily. Second, it is aimed at the judiciary. In cases of weak amendment powers, there should be a greater willingness to accept the exercise of judicial review as compared to places where amending the constitution is formidable and involves various bodies, including the people. Put differently, since the spectrum of amendment power is linked to the question of unamendability, the mirror picture of the spectrum of amendment power is the spectrum of intensity of judicial scrutiny and restraint, which should be exercised over constitutional amendments. This is the issue examined in the next chapter.

PART III

IMPLICATIONS

CHAPTER 7: JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

In 1921, Edouard Lambert argued that owing to two features of American judicial review – the common law technique of judging and substantive jurisprudence, which elevates individualism above social values – the practice of judicial review would extend not only to ordinary legislation, but also to constitutional amendments.[1] At that time, the 'threat' of the possibility that judicial review could extend to constitutional amendments hit the French readers with stupefaction.[2] Seven years later, Carl Schmitt argued that Lambert's core thought is correct and 'will sooner or later show its practical significance'.[3] It seems that this prediction was spot on. Today, the issue is no longer a mere theoretical hypothesis. Judicial review of constitutional amendments is an existing practice in various jurisdictions.[4]

In Part I, it was demonstrated how both explicit and implicit limitations may be imposed on the amendment power. In Part II, I developed a theory of unamendability, which establishes the ground in favour of a limited amendment power. Yet, it is one thing to claim that the amendment power is limited; it is quite another question as to whether such limitations are legally enforceable, in the sense that they are subject to substantive judicial review by courts.[5] One can certainly make the claim that even if the amendment power is limited, whether a particular amendment oversteps those limitations is not a decision for courts to make.[6] Constitutional limitations on the amending power would then constitute a rule without a legal sanction (but perhaps with a political or social sanction) to prevent the amendment authority from exceeding its limits.

This chapter directly follows Part II in that it deals with the practical implications of a theory of unamendability. In other words, if there are limitations on the scope of the

[1] Lambert (1921). See Davis (1987, 561-562).
[2] Davis (1987, 563).
[3] Schmitt (2008, 153).
[4] For comparative studies see O'Connell (1999, 74); Jacobsohn (2006A, 460); Gözler (2008); Halmai (2012, 182).
[5] Wright (1994, 72); European Commission for Democracy Through Law (2009, para. 225).
[6] Tribe (1983, 440-43); Ingham (1928-1929, 168); Murphy (2007, 519-21). For Schmitt, for example, the 'guardian of the constitution' would not be a constitutional court rather the President, see Buis (2009, 83). Nevertheless, it has to be remembered that with the limited exercise of judicial review of ordinary legislation during the Weimar period, judicial review over constitutional amendments was naturally not recognised. See Arato (2011, 335-336) (noting that the 'striking thing about Schmitt's analysis of the limits to the amending power is that he never discusses how these limits are to be enforced.')

amendment power, what does this mean for the role of the courts in a constitutional democracy? In light of the theoretical approach advanced so far, this chapter begins by explaining the rationales behind the practice of judicial review of constitutional amendments.[7] It then describes the existing role of courts in enforcing limitations on the amendment power through a comparative prism. Since the case law concerning judicial review of constitutional amendments is relatively sparse, I use available cases in order to sketch a scale of legal legitimacy of substantive judicial review of amendments. In the third section, I engage with the practical issue of how the review of constitutional amendments – once the authority and legitimacy of such a practice is recognised – should be exercised. I develop a theoretical model for judicial review of constitutional amendments since I believe that there should be guidelines for the sound practice of judicial review of constitutional amendments, due to the importance of this task.[8]

I. THE RATIONALES BEHIND JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

Against the backdrop of the theory regarding the limited scope of the amendment power, this section explains the main rationales behind the practice of judicial review of constitutional amendments. In the process, it reveals that some of the major theoretical arguments in favour of judicial review of legislation are equally persuasive when applied to substantive judicial review of amendments.

A. Separation of Powers

At first look, judicial review of constitutional amendments seems as a violation of the principle of separation of powers. Invalidating an amendment on the grounds of unconstitutionality is *constitutive* in its functional meaning. It is similar to enacting constitutional legislation, which is an activity that is imposed upon the constituent authorities (*primary* or *secondary*) and not upon the judiciary. A deeper look reveals otherwise. In Part II, this thesis established the position that the amendment power is

[7] My paradigmatic jurisdiction is one in which the practice of judicial review is recognised, although analytically at least, judicial review of amendments can be exercised even where judicial review of ordinary legislation is not recognised. See Barak (2011A, 321, fn 4).

[8] In fact, it was suggested that judicial review of constitutional norms ('metaconstitutional review) should be studies as a distinctive legal phenomenon, different from ordinary judicial review. See Fernández (2009).

limited in scope by its nature as a delegated power. As we have seen in Part I, it may be limited explicitly or implicitly. Judicial review of amendments serves as a mechanism to enforce those limitations. Eugene Rostow claims that:

> The power of constitutional review, to be exercised by some part of the government, is implicit in the conception of a written constitution delegating limited powers. … The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government.[9]

Correspondingly, judicial review of constitutional amendments fulfils the vertical separation of powers, which exists between the *primary* and *secondary constituent power* (see Chapter 4).[10] The amending authority bears the function set upon it by the constitution: to amend the constitution according to the amendment procedure and its possible limitations. It must obey any explicit limits set upon it and preserve the constitution. Amending the constitution is different from destroying it and reconstituting a new constitution (see Chapter 5). The vertical separation of powers between the *primary* and *secondary constituent powers* means that the amending authority is independent within its margins as long as it acts within its authority. But it also necessitates a mechanism for determining if the amending authority surpassed its limits.[11]

This mechanism ought to exist outside of the authority that allegedly surpassed its limits. While it does not necessarily have to be within the judiciary, as I state in the following section, this mechanism fits naturally within the judicial process. Judicial review of amendments by an unbiased organ thus ensures that the authorised amending authority does not exceed its delegated power.[12] As such, it protects the principle of separation of powers (between the *primary* and *secondary constituent powers*).

B. The Essence of Judicial Duty

One of the standard arguments Chief Justice John Marshall made in favour of judicial review of legislation in the celebrated *Marbury v. Madison* case[13] was that judicial review is

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[9] Rostow (1952, 193).
[10] See, for example, Guha and Tundawala (2008, 544).
[11] Prateek (2008, 474).
[12] Weintal (2013, 289).
[13] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See Troper (2005, 37-38) (claiming that Marbury contains almost all the arguments that could be raised (and have been, historically) in favor of judicial review).

'of the very essence of judicial duty'.[14] According to this argument, those who apply the law (naturally, courts) must determine what the law is. Hence, when courts confront a case in which a law conflicts with the constitution, they must determine which of the conflicting norms governs the case. A similar argument can be made with regard to judicial review of constitutional amendments. The main function set upon the judiciary is to decide conflicts based upon the constitution and legislation. In order to carry out its constitutional role, the court has to interpret the constitution. Hans Kelsen argues that '[i]f the constitution contains no provision concerning the question who is authorized to examine the constitutionality of statutes, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination'.[15] Likewise, if the constitution is silent on the organ that is authorised to review constitutional amendments, courts – which apply the constitution – should possess this power. Accordingly, as in conflicts between ordinary law and the constitution, when courts face a conflict between constitutional norms, they have to determine, as part of the judicial process, what is the legal norm according to which the conflict is to be resolved. It therefore has to conduct some form of judicial review.

Analytically, there is also a great resemblance between judicial review of ordinary legislation and that of constitutional amendments. Both are done in light of normative obliged standards (whether explicit or implicit). As Claude Klein notes, at least when it comes to unamendable provisions, judicial review of amendments seems to be a similar intellectual operation as ordinary judicial review; it is an examination of the compliance of a given legal standard to a superior standard. In that respect, it does not matter whether the examination is a regulation *vis-à-vis* a law, a statute *vis-à-vis* the constitution, or a constitutional amendment *vis-à-vis* an unamendable provision.[16] Therefore, it would only seem natural, as Ulrich Preuss states, that 'the institution best suited to verify an unconstitutional constitutional amendment is the constitutional court, which has the authority to review the constitutionality of legislative acts'.[17]

[14] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).
[15] Kelsen (1978, 272).
[16] Klein (2010).
[17] Preuss (2011, 441-442).

C. The Rule of the Constitution

According to the 'rule of constitution' justification, government's activities – including its constitutional amendment activities – must be conducted according to the law, according to the constitution. Judicial review 'is necessary (or at least extremely important) to maintaining a disinterested eye on the conduct and activities of government'.[18] When courts declare an amendment as unconstitutional, they thus accomplish the principle of the rule of the constitution.

But should not the review of amendments be left to the political and social spheres? Surely, the political body entrusted with the amendment power is aware of its constitutional limitations. Self-restraint is, unfortunately, not always enough. If we care about the constitution, do we truly want to entrust the role of guardian to the same body that might infringe upon it? In his brief in the case of *Feigenspan v. Bodine*, Elihu Root claimed that: 'it would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined within fixed prescribed limits'.[19] Since the judiciary may impartially determine if the governmental organs observe their constitutional limitations,[20] judicial review is vital to the rule of the constitution. Judicial review of constitutional amendments is a powerful mechanism for protecting the rule of the constitution, in both the formal and substantive senses. In the formal sense, it maintains the constitutional limits, which bind the *secondary constituent power*. In the substantive sense, it aims to protect the basic fundamentals of the constitution, to preserve the constitutional in its totality.

D. The Supremacy of the Constitution

One of the main arguments in favour of judicial review that appeared in the *Marbury v. Madison* was that the Constitution is supreme law, superior to ordinary legislation. Therefore, an ordinary law contrary to the Constitution is void. The purpose of creating a written constitution, according to Marshall, was to create a government with defined

[18] Rodriguez et al (2010, 1476-77).
[19] P. 128 of the brief, as cited in Dodd (1921, 323).
[20] Pushaw (1996, 503).

and limited legislative powers. Judicial enforcement of a law repugnant to the constitution would undermine this purpose.[21]

A parallel rationale may apply to judicial review of constitutional amendments, once we accept the proposition that the amendment power is, like any other power under the constitution, limited and defined. A central idea in the development of judicial review of amendments is that the principle of constitutional supremacy requires courts to ensure that the legislature exercises all of its powers, including its constitutional amending powers, in accordance with the constitution. In that way, judicial review of constitutional amendments accomplishes the supremacy of the constitution. Neither the legislature nor the judiciary are supreme. What is supreme is the constitution. The amendment power is itself a power granted to a constitutional organ by the constitution: 'it is not and cannot be the whole of Constitution'.[22]

A further argument of Marshall is that the people have an 'original right' to establish their government and fundamental principles according to which they wish to be governed. The people's 'original and supreme will' organises the government and may define its limits. If limited authorities can eradicate their own limits at will, there is no purpose for such limitations, as the distinction between a limited and unlimited government would simply be abolished.[23] This argument is particularly relevant with regard to amendment provisions, through which the people delegated their *constituent power* to secondary constitutional organs and prescribed the specific procedure by which these organs may exercise this power, and often under which explicit limitations. In 1931 Carré de Malberg offered a similar idea when he linked the possibility of judicial review and the separation of *constituent* and *constituted power*.[24] Viewed in this regard, the existence of judicial review in order to control constitutionality of amendments is a condition *sine qua non* of a rigid constitution, which is essential for the effective distinction between *primary* and *secondary constituent powers*.[25] Judicial review of amendments assures normative superiority of the *primary constituent power*'s decisions – the people's supreme will.

[21] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-178 (1803).
[22] Baxi (1978, 123).
[23] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).
[24] Carré de Malberg (1984, 126), cited in Troper (2003, 103).
[25] Da Cunha (2007, 11).

E. Political Process Failure

Judicial review, as famously developed by Alexander Bickel, faces a 'counter majoritarian' difficulty since it undermines the will of the majority by allowing unelected and unaccountable judges to overrule the law making of the people's elected representatives.[26] One of the responses to this charge is provided by 'political process' justification. This is best represented by John Hart Ely's theory of representation-reinforcing.[27] Ely admits the charge that judicial review is *prima facie* incompatible with democracy as it is counter-majoritarian.[28] Yet, he advances a theory according to which judicial review should focus on the political process and ensure equal representation in the political process. Courts should intervene when (and only when) the political process fails, when either power-holders obstruct it to preserve the status quo, or when the government denies minorities the protection that it grants the majority. By judicial intervention, the court is preventing the tyranny of the majority.[29] Process arguments such as Ely's, attempt to outline the types of circumstances in which the political process is likely to be untrustworthy, hence justifies judicial intervention.[30]

According to the process argument, in a democratic system of government courts should have an inherent authority to protect basic freedoms of the minority against attempts by the majority to violate them, whether by ordinary or constitutional legislation enacted by majority of the elected representatives, since such a violation would contradict the basic principles upon which the system is based. Courts are the appropriate institution to carry the counter-majoritarian role, since contrary to parliaments they are not directly and immediately dependent on an approval or support of the public's majority for their decisions.[31]

Similar to this familiar argument, it may be argued that in a democratic society a court ought to have the authority to annul even constitutional amendments when a failure exists in the work of the democratic institutions. For such a failure to occur, usually two conditions need to be fulfilled: the work of the amendment authority contradicts basic principles of the democratic system, and the nature of this failure is such that its correction cannot be made through the political institution itself, but must

[26] Bickel (1962).
[27] Ely (1977-1978, 451); Ely (1980, 73-104).
[28] Ely (1980, 4-12).
[29] *Id.*, 102-103. See Cox (1981, 640).
[30] Dorf (2003, 895-897).
[31] On the countermajoritarian role of courts with regard to constitutional amendments see Erickson (2011, 1242-1244).

be made through an independent agent, detached from the ordinary representative political system, i.e. courts. The usual example is of a situation in which the parliament, which was elected for a limited time period, amends the constitution according to the amendment procedure in order to prolong its term.[32] This is not an imaginary hypothesis.[33] In such a scenario, it is clear that no one can expect the elected institution to correct this failure, as it is itself its very source. A court's authority to review such a case and to decide its merits cannot solely depend on the wording of the constitution (although as I mention bellow, such wording can definitely increase the legitimacy of such a review), but one can certainly claim that the court absorbs its authority to review such conflicts from the basic principles of the constitutional order itself.

Indeed, as ordinary legislation, constitutional amendments raise the 'majoritarian' problem. The argument according to which judicial review is necessary in order to protect minorities from the majority's abuse of power, as the people's institutionalised self-control,[34] applies to constitutional amendments to the same extent, if not all the more so. When enacting ordinary legislation, the government is explicitly limited from violating protected constitutional rights (for instance through limitation clauses). This protection, however, limits only the 'ordinary legislative', not the constitutional legislative.[35] In other words, while limitation clauses set the parameters according to which right's violation would be deemed constitutional, this is a sub-constitutional activity. They do not apply when the constitution itself limits rights. Therefore, if a constitutional norm infringes a constitutional right, the former would not be void merely due to the constitutional protection granted to the right, since this infringement takes place at a similar normative level – the constitution. Limitation clauses do not establish the criteria for a constitutional violation by constitution provisions.[36] The latter case is conditioned by the terms that are set upon the amendment power by the amendment

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[32] Cf. Dotan (1996, 152-153).

[33] In June 2006, the National Assembly of Benin, in a parliamentary session which was closed for the public, amended art. 80 of the Constitution by Constitutional Law No. 2006-13, which extended the duration of the parliamentary term (retrospectively to the existing legislature) from four to five years. A month later, the Beninese Constitutional Court declared the amendment to be unconstitutional, holding that due to the importance of the principle of 'national consensus', which is a *principe à valeur constitutionnelle*, constitutional amendments should follow a public and open process. See Decision DCC 06-074 of the Beninese Constitutional Court of 08.07.2006, http://ddata.over-blog.com/1/35/48/78/Benin-2/CC-Benin-censure-revision-2006.pdf; Adjolohoun (2013, 250-251, 273-274); Kante (2008, 167). See also the abuse of power by the Taiwanese Third National Assembly as elaborated in Chapter 3IIID2.

[34] Black (1960, 106-107).

[35] Cf., Israeli Supreme Court: HCJ 1368/94 *Porat v. The State of Israel*, 57 (5) PD 913.

[36] See Barak (2010B, 11, 128-130); Barak (2004, 10-11 fn 29). It may be argued that if the constituent authority would be prevented from amending constitutional rights, this would have put an end to the constituting process. See Barak (1995, 281-282).

clause or unamendable provisions. Therefore, when courts refuse to review constitutional amendments, Denis Baranger claims with regard to the French experience, 'human rights are worse off than they were initially. The normativist legal culture is such that they are not understood as of being exempt from abrogation, while the court acknowledges that a constitutional amendment can curtail or suppress them. … the constitution is shown as being unable to protect liberties'. [37] Judicial review of amendments may be a useful tool for protecting minorities' rights and preventing more general human rights abuses.

One of the dangers embodied in acts of delegation (here delegation from the *primary constituent power* to the *secondary*) is that those to whom power is delegated will abuse it.[38] As noted in Chapter 5, the abuse of power is not to be feared only from the legislative branch, but also from the amendment authority.[39] As David Landau recently demonstrated, amendment procedures are increasingly being abused in order to erode the democratic order. [40] Judicial review in this context can be regarded as a useful mechanism to protect democracy from usurpation by transient majorities.[41] In fact, it was suggested that judicial review of amendments was developed precisely because of the fear of abuse of the amendment power and the recognition that ordinary judicial review was insufficient:

> What if the "amending power" would try to bypass the constitution by amending it in order to allow the adoption of problematic laws, such as those that had already been declared unconstitutional? There thus appeared to be a need for "super-protection" or "superentrenchment."[42]

The governmental nature of the legislative amendment power and the dangers of coupling governmental interest with fundamental constitutional decisions justify judicial intervention when the amendment authority abuses its power. [43] Judicial review of amendments may seem valuable, especially in weak democracies. As Samuel Issacharoff writes, 'with the aim of protecting democracies from collapsing into autocratic power, the oversight of constitutional courts provides a constitutional remedy for a latent democratic disability'.[44]

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[37] Baranger (2011, 424).
[38] Lupia (2001, 3375-3377).
[39] Ponthoreau and Ziller (2002, 139).
[40] Landau (2013A, 189).
[41] Mehta (2002, 193-195).
[42] Klein (2011, 318-319).
[43] Landau (2013A, 231-239).
[44] Issacharoff (2012, 45). Compare with Bernal (2013, 352) (judicial review of amendments may 'protect the integrity of constitutional guarantees of rights and democracy from the risk of manipulation within a hyper-presidential environment.')

II. LEGITIMACY OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

The power to declare a constitutional amendment unconstitutional is no less remarkable than the amendment power itself. Due to their special status, constitutional laws generally enjoy broader and deeper legitimacy than any specific piece of legislation.[45] Accordingly, judicial review of constitutional amendments seems even less legitimate than that of ordinary legislation. In this section, I wish to assess the legitimacy of the judicial review of amendments. Legitimacy, as used in this section, refers to *legal legitimacy* (in contrast with moral or sociological legitimacy) as explained by Richard Fallon.[46] In brief, I assess whether the exercise of judicial review conforms to the legal norms applicable to the issue at hand.[47] I argue that when assessing the legal legitimacy of such judicial exercise, three main variables should be considered: (1) the authority of courts to review constitutional amendments; (2) the existence or non-existence of unamendable provisions; and (3) the constitutional amendment procedure. These variables influence the legal legitimacy of the judicial review of amendments, making a strong case or a weak case for judicial review, and thus creating a legitimacy scale.

A. Authority to Review Constitutional Amendments

The first variable concerns the authority of a court to review constitutional amendments on substantive grounds. A constitution may expressly vest a court with such an authority. This is the case in Romania,[48] Ukraine,[49] Kyrgyzstan,[50] and Kosovo.[51] This is a relatively

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[45] Gavison (2006, 198).

[46] Fallon (2004-2005, 1819): 'The concept of legal legitimacy appears to function somewhat analogously to the concepts of discretion and jurisdiction when applied to judicial decisionmaking. More particularly, a claim of judicial legitimacy characteristically suggests that a court (i) had lawful power to decide the case or issue before it; (2) in doing so, rested its decision only on considerations that it had lawful power to take into account or that it could reasonably believe that it had lawful power to weigh; and (3) reached an outcome that fell within the bounds of reasonable legal judgment.'

[47] Cf., Krishnaswamy (2010, 167).

[48] For example, the Romanian Constitution empowers the Constitutional Court to adjudicate *ex officio* initiatives for revising the Constitution. Such judicial adjudication is *a piori* ('judicial preview') to the amendment's adoption. See Romania Const. (1991), art. 146(a); Deleanu (1995, 120, 124); Deleanu (1996, 63). Indeed, the Romanian Constitutional Court has on several occasions reviewed *ex officio* the constitutionality of revision initiatives. See Gözler (2008, 5-7); Popa (2004).

[49] In Ukraine, a preliminary opinion of the Constitutional Court regarding the conformity of proposed amendments with the requirements of arts. 157 and 158 of the Constitution is an essential stage of the procedure, in order for a constitutional amendment to be adopted by the *Verkhovna Rada* (art. 159). In September 30, 2010 the Constitutional Court nullified constitutional amendment No. 2222-IV of December 8, 2004 (Opinion No. 20-rp/2010). While the Constitutional Court was asked to deliver its opinion (Opinion No. 3-v/2004 of December 10, 2003, and Opinion No. 2-v/2004 of October 12, 2004), on earlier drafts of the amendment (Law No. 4180), the modified draft amendment was not submitted to the Constitutional Court for providing an Opinion, but instead was adopted on December 8, 2004 as Law

easy case, as it raises no question with regards to the courts' authority.[52] This authorisation is a straightforward formal legal justification for such a review. Here, the legal legitimacy to review constitutional amendments is at its peak.

A constitution may expressly vest courts with competence to *formally* review amendments, i.e. only with regard to their form or procedure of adoption.[53] This authorisation undermines the legitimacy of substantive judicial review. The Turkish example is a fascinating one with which to demonstrate this. Following prior events under the 1961 Constitution, when the Turkish Constitutional Court declared itself competent to substantively review constitutional amendments, the 1982 Constitution specifically regulated the adjudication of constitutional amendments. Art. 148 empowered the Constitutional Court to review amendments, but explicitly limited this review to their form and procedural enactment. Prior to 2008, the Turkish Constitutional Court ruled three times on the constitutionality of constitutional amendments under the 1982 Constitution. In all three decisions, the Court declined to substantively review amendments, basically holding that it did not have the authority to review amendments on any grounds other than those stipulated in Art. 148(1).[54] Nonetheless, the Constitutional Court revised its opinion in its headscarf decision of June 5, 2008. In this case, the Constitutional Court examined the constitutionality of constitutional amendments to the principle of equality and the right to education. Although not specifically mentioned in the amendments, the Parliament's intention was to abolish the headscarf ban in universities. The Constitutional Court ruled that the amendments infringed upon the unamendable principle of secularism and were therefore unconstitutional and null. When establishing its authority to review the amendments, the

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No. 2222. Since the amendment was revised and approved by the *Verkhovna Rada* without the obligatory Opinion of the Constitutional Court, its procedure violated the Constitution, hence it was declared unconstitutional and void. See Garlicki and Garlicka (2011, 347-348 fn 8). A summary of the judgment is available at http://www.ccu.gov.ua/en/doccatalog/list?currDir=91909

[50] In Kyrgystan, the Constitutional Court annulled in September 14, 2007, without explicit authority, two constitutional amendments on formal grounds. See Anonymous (2007, 15). In 2011, a constitutional amendment endowed the Constitutional Court with an authority to provide its opinion during a preliminary review of constitutional amendments.

[51] In Kosovo, arts. 113(9) and 144(3) of the Constitution explicitly grant the Court authority of an apriori review of proposed amendments, in abstracto, and to examine whether proposed amendments diminish rights and freedoms guaranteed by Chapter II of the Constitution. If the Court declared any proposed amendment as unconstitutional, the Assembly cannot vote on it. See Hasani (2003, 106 fn 188); Hasani (2013, 128).

[52] Gözler (2008, 4-7).

[53] See for instance, the Chile Const. (1980), art. 82(2); Pfersmann (2012, 97).

[54] Constitutional Court decisions, E.1987/9, K.1987/1518 June 1987, Resmi Gazete [Official Gazette], 4 September 1987 no. 19564; E.2007/72,K.2007/68, 5 July 2007, Resmi Gazete [Official Gazette], 7 August 2007, no. 26606; E.2007/99, K.2007/86, 27 November 2007, Resmi Gazete [Official Gazette], 16 February 2008, no. 26792; See Özbudun (2009, 537 fn 6); Özbudun and Gençkaya (2009, 4–5, 47–49, 109).

Constitutional Court broadly interpreted its competence to formally review amendments as to include examination as to whether these are a 'valid proposal', i.e. whether the amendments are contrary to the unamendable characteristics of the republic as provided in Art. 2 of the Constitution.[55]

This reasoning can be criticised on three main grounds.[56] First, the Court's notion of 'form' seems ill founded. Formal review means that the court ignores the content of the amendment. It must be content-neutral.[57] Clearly, an inquiry whether an amendment conflicts with the republic's characteristics is not a procedural inquiry; it must be undertaken with reference to an amendment's substance. Second, the constitution's text and purpose lead to a similar conclusion: in response to the Constitutional Court's overly broad interpretation of its powers during the 1970s, the framers of the 1982 Constitution intentionally and expressly adopted a narrow definition of the term 'review in respect of form' in Art. 148(2), thus explicitly restricting judicial review only to form.[58]

Moreover, as Gary Jacobsohn correctly notes, this limited jurisdiction is in contrast with the Court's explicit authority to conduct both formal and substantive review of ordinary legislation (Art.148.1).[59] Therefore, this is not a *lacuna*, but rather a conscious negative arrangement.[60] According to the maxim *expressio unius est exclusio alterius*,[61] the existence of the explicit grant of authority to formally review amendments, coupled with the explicit authority to formally and substantively review ordinary legislation, provide evidence that the constitution-makers had considered substantive review of amendments (which had already occurred in prior years); that the omission of substantive review was intentional; and that, therefore, judicial review of an amendment's substance should be excluded.

Third, ironically, in establishing parliament's limited amendment power, the Constitutional Court states that the legislature, as a *constituted power*, must remain within the constitutional limits provided by the *primary constituent power*. Yet, it appears that the Court has forgotten that it itself is a *constituted power* bound by the limits imposed upon it by the *primary constituent power*. Therefore, some have argued that due to its judicial activism, the Turkish Constitutional Court was 'pushing its limits' in terms of

[55] Turkish Constitutional Court decision, June 5, 2008, E. 2008/16; K. 2008/116, Resmi Gazete [Official Gazette], October 22, 2008, No. 27032, pp. 109, 138.
[56] Roznai and Yolcu (2012, 195-202).
[57] See Saygili (2010, 131).
[58] Gözler (2008, 47–48).
[59] Jacobsohn (2009, 5).
[60] On negative arrangements see Barak (2011B, 108-109).
[61] On this maxim see Williams (1930-1931, 191); Mureinik (1987, 264).

legitimacy.[62] To conclude, explicit authority to review amendments merely with regard to their form and process severely casts doubts on the legitimacy of substantive judicial review of amendments.

At the bottom of the legitimacy scale are those cases where the constitution expressly negates any authorisation of judicial review of amendments. Take, for example, clauses 4 and 5 of Art. 368 of the Indian Constitution of 1950, according to which: 'no amendment of this Constitution … made or purporting to have been made under this article… shall be called in question in any court on any ground'; 'there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article'.[63] This provision was added to the Constitution by the 42nd Amendment, in response to prior events when the Supreme Court had declared itself competent to nullify constitutional amendments that contradict the Constitution's basic structure. This provision was reviewed before the Indian Supreme Court in the case of *Minerva Mills Ltd. v. Union of India*, in which the Supreme Court declared that since the limited nature of the amendment power is part of the Constitution's basic structure, the 42nd amendment violated this basic structure and it was therefore unconstitutional (see Chapter 3).[64]

Gözler notes that in light of this provision, as of 1976, the Indian Supreme Court was precluded from reviewing the constitutionality of constitutional amendments. He further criticises the Court's opinion in *Minerva Mills*, arguing that the Court did not have any jurisdiction to rule on the constitutionality of amendments, and because the basic structure doctrine lacks any textual basis in the constitution.[65] I differ from Gözler on this point. If this limitation had been imposed on the judiciary by the *primary constituent power,* then the Court would not possess an authority to review the amendments. However, in the Indian example, the negation of the authority to review the amendment was imposed by the *secondary constituent power*. Here, the amending authority was attempting to extend its limits so it would be limitless. This it could not do. The amendment power – limited by its nature (see Chapter 4) – cannot determine that it is unlimited. This would be *ultra vires*. Hence, the Indian example is not the optimal

[62] Saygili (2010, 138-39). On the Turkish Constitutional Court's eroding legitimacy see Köker (2010, 328).
[63] Compare this with art. 239(6) to the Pakistan Constitution: 'No amendmen of the Constitution shall be called in question in any Court on any ground whatsoever', and art. 239(7): 'For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of Majlis-e-Shoora [Parliament] to amend any of the provisins of the Constituiton'; both inserted to the Constitution by Presedential Order No. 14 of 1985. Cited in Lau (2006, 83).
[64] *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C., 1789, 1981.
[65] Gözler (2008, 8-9).

scenario for explicit negation of the authority to review constitutional amendments. If such negation had appeared in the original constitution, then surely the legitimacy of judicial review would be the weakest.

Lastly, a constitution may be silent on this point; it might simply not regulate this issue. This is the case of most current constitutions. Confronted with such a question, a court cannot avoid a decision arguing *non liquet* – 'it is not clear'.[66] It has to fill this gap and interpret this silence.[67] Is this silence a *lacunae* or a negative arrangement? Whereas a constitutional acknowledgment of judicial review over ordinary legislation would point to the latter, this silence, as I shall demonstrate, was not necessarily interpreted as negating an authority to review amendments. Courts in states such as Germany, Brazil, and the Czech Republic have declared themselves competent to substantively review amendments, even without any expressed authority.[68] Other courts, for example the Hungarian [69] and Slovenian, [70] held that constitutional norms are not within the jurisdiction of the Court.

When the constitution is silent with regard to the authority of courts to review amendments, the legal legitimacy of judicial review of amendments is questionable. What is clear is that the lack of any explicit grant of authority to courts to review amendments is not the 'end of the story', but merely the beginning of the inquiry. Here, the second variable – the existence or absence of any unamendable provisions – proves critical.

B. Existence or Absence of Unamendable Provisions

As elaborated in Chapter 2, many constitutions include unamendable provisions. Such inclusion, I argue, strengthens the case for judicial review. The argument is plain: when unamendable provisions exist, the judicial enforceability of these explicit limitations seems, if not self-evident, then at least less contentious. As we know from *Marbury v. Madison*, an 'effectiveness presumption' exists according to which the constitution-drafter does not waste words: 'it cannot be presumed that any clause in the constitution is intended to be without effect'.[71] Of course, this is merely a presumption that may be

[66] On 'non liquet' see: Rabello (1974, 63).
[67] See Barak (1990, 267).
[68] Gözler (2008, 100); Williams (2011, 33).
[69] See Hungarian Constitutional Court decisions 23/1994. (IV. 29.), No. 1260/B/1997; Decision 61/2011. (VII. 13). For a review see Halmai (2012, 191-199); Gözler (2008, 16).
[70] See Slovenian Constitutional Court's decision of 11 April 1996, number U-I-332/94. See Mavčič (2009, 60 fn 48); Gözler (2008, 17).
[71] *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

rebutted;[72] nonetheless, it equally applies to the argument that unamendable provisions are not to be judicially enforced. If the constitution-makers declared certain provisions as unamendable, the interpreter – commonly the court – ought to supply the mechanism's effectiveness.[73] As Aharon Barak writes:

> Judicial review is a natural mechanism for protecting eternity clauses in the constitution. Judicial review provides (legal) "teeth" to the eternity clause. In this respect, there is no substantive difference between a regular statute that violates the constitution and an amendment to the constitution that violates the eternity clause. Just as judicial review is recognized in the first case (a regular statute that violates the constitution) it should also be recognized in the second case (a constitutional amendment that violates the "eternity clause").[74]

If unamendable provisions are not legally enforced, their protective function is dramatically undermined. This position can be illustrated by several courts' decisions, most notably, in Germany, Brazil, and the Czech Republic.

The first notable example comes from Germany. As elaborated in Chapter 2, Art. 79(3) of the German Basic Law (1949) prohibits amendments affecting the division of the Federation into Länder, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state.[75] Moreover, as elaborated in Chapter 3, German jurisprudence in the post-Nazi regime was characterized by endorsement of natural law ideas, according to which even constitutional norms are limited by a 'higher law'. Nevertheless, after 1953, the Federal Constitutional Court declined to refer to supra-positive principles and concentrated on the explicit limitations to the amendment power.[76] In the *Klass* case, the Constitutional Court considered the constitutionality of an amendment that permitted violations of communication privacy for the purpose of protecting national security, and substituted judicial review with parliamentary review of any alleged violation of this right. Although the Constitutional Court sustained the amendment's validity, three dissenting judges were persuaded that the amendment infringed the principles of human dignity, separation of powers, and the rule of law, and should therefore be annulled.[77] In the 2004 *Electronic Eavesdropping* case, the Constitutional Court held that an amendment permitting eavesdropping in homes does not affect the inviolable human dignity and therefore

[72] Amar (1998-1999, 3).
[73] Weintal (2005, 30).
[74] Barak (2011A, 333).
[75] On the German unamendable clause see Goerlich (2008, 397); Benda (2000, 445); Preuss (2011, 439-440); Schwartzberg (2009, 153-83).
[76] Troper (2003, 102 fn 5).
[77] 30 BVerfGE 1, 24 (1970); see Kommers (1991, 852); O'Connell (1999, 55). An English translation of the case is available in Murphy and Tanenhaus (1977, 659).

accords with Art. 79(3).[78] The Constitutional Court has so far not invalidated constitutional amendments for conflicting with Art. 79(3), which has been narrowly interpreted;[79] yet it is clear that it possesses the authority to review the substance of amendments in light of the unamendable provision, even without any expressed authority in the Basic Law.[80]

The second example is Brazil, in which not only the judicial review of ordinary legislation is an established practice,[81] but also that of constitutional amendments, although the Brazilian Constitution does not expressly provide for such an authority.

The Brazilian Supreme Court has adopted deductive reasoning from the idea of constitutional supremacy and normative hierarchy, according to which when a conflict arises between an unamendable provision (on the Brazilian unamendable provision, see Chapter 2) and a constitutional amendment, the court can declare the amendment unconstitutional and therefore null and void.[82] In ADIMC 466/91, the Supreme Court, in a majority opinion by Justice Celso de Mello, held:

> Constitutional amendments … not being original constitutional norms, are not excluded from the ambit of a successive or repressive control of constitutionality. National Congress, when exercising its derived constituent power, and performing its reforming function, is legally bound by the original constituent power, which has laid down, besides circumstantial entrenchment to reform, an immutable clause, immune to parliamentary revision. Explicit material limitations, defined by paragraph 4 of Art. 60 of the constitution constrain reforming power conferred upon the legislative. The immutability of such thematic nucleus, eventually violated, may render legitimate an abstract normative control and even a concrete control of constitutionality.[83]

Hence, a constitutional norm deriving from the *primary constituent power* and not from the amending power cannot be considered unconstitutional.[84] In a similar vein, in ADIMC 981/93 PR, the Supreme Court held:

> Revisions and amendment, as procedures to introduce constitutional changes, are expressions of an instituted constituent power, thus, limited by nature. The revision … is subject to the limits established by … the constitution. Constitutional changes deriving from a revision are subject to judicial control and scrutiny, as regard the petrous clauses.[85]

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[78] 109 BVerfGE 279 (2004); See Nohlen (2005, 680); Stender-Vorwachs (2004, 1337).
[79] Gözler (2008, 61).
[80] See Kommers (2012, 58-59).
[81] Rosenn (2000, 293).
[82] Maia (2000, 69-72); Brewer-Carías (2004, 22); see ADIMC 926/1993.
[83] ADIMC 466/91 DF; Celso De Melio, J.; RTJ 136/1, 25, quoted in Maia (2000, 72). See also Galindo (2006, 17).
[84] Galindo (2006, 17).
[85] ADIMC 981-8/600/93 PR; Neri da Silveira, J.; Dec. 1993; Lex JSTF 192/56, quoted in Maia (2000, 72).

It thus seems that when examining amendments *vis-à-vis* the unamendable provision, the Supreme Court applies the same logic it uses when examining the constitutionality of ordinary laws. As 'guardian of the constitution', it can declare amendments derived from the *secondary constituent power* 'unconstitutional', when they violate the original constitution.[86]

The third example is the Czech Republic. At first glance, it seems that the Czech Constitutional Court lacks the authority to review constitutional acts since according to Art. 87 of the 1992 Constitution, '(1) The Constitutional Court resolves: a) the nullification of laws or their individual provisions if they are in contradiction with a constitutional law'.[87] Moreover, Art. 88(2) stipulates that 'In decision-making, judges of the Constitutional Court are bound only by constitutional laws'. This was confirmed in a case in 2002 in which the Constitutional Court stated that, 'the Constitutional Court is not authorized to review (let alone abolish) the provisions contained in constitutional acts; its task is only – in concrete cases – to interpret them'.[88] This approach was later reversed.

On 10 September 2009, the Czech Constitutional Court delivered a decision on the constitutionality of the Constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies. The Court ruled that the Constitutional Act is unconstitutional and thus annulled.[89] In its reasoning, the Court particularly relied on Art. 9(2) of the Czech Constitution, according to which 'any changes in the essential requirements for a democratic state governed by the rule of law are impermissible'. The Constitutional Court stated that protection of the Constitution's material core, i.e. the essential requirements for a democratic state governed by the rule of law under Art. 9(2), is not a mere slogan or proclamation, but an actually enforceable constitutional provision. Therefore, the Constitutional Court is competent to review acts designated as constitutional acts in terms of their conformity to the essential requirements of a democratic state governed by the rule of law. Otherwise, the protection of constitutionality would be illusory, since a constitutional act could be used to do practically anything. After deciding that the ad hoc constitutional act violates the

[86] See, e.g. ADIN 939-7 DF, in which the Supreme Court invalidated Constitutional Amendment 3 of February 17, 1993, cited in Maia (2000, 73). See also Mendes (2005, 455-456); Barbosa (2013, I-32-I-33).
[87] See Glos (1993-1994, 1066).
[88] Case Pl. ÚS 21/01, in *Sbírka zákonů* part 42 (11 March 2002), at 2328, cited in Williams (2011, 38).
[89] Czech Republic Constitutional Court Judgment 2009/09/10 - Pl. ÚS 27/09: Constitutional Act on Shortening the Term of Office of the Chamber of Deputies, http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=468&cHash=44785c32dd4c4d1466ba00318b1d7bd5; For reviews of the case see Williams (2011, 33); Kudrna (2010, 43); Tomoszek (2011, 64-66); Dragomaca (2010, 183); Koudelka (2010); Roznai (2014).

principle of generality, which is considered to be an essential requirement of a state governed by the rule of law, the Constitutional Court concluded that 'even the constitutional framers cannot declare constitutional an act that lacks the character of a statute, let alone of a constitutional act'. Such a process, according to the Constitutional Court, is unconstitutional arbitrariness. The Court rejected the claim that it could not review constitutional acts since this would completely erase its role as guardian of constitutionality.

The court's decision naturally attracted criticism within both the political and legal scenes.[90] Some claimed that invalidating a constitutional act that was enacted by the qualified majority using the correct procedure, and without any expressed authority for such a review in the Constitution, conflicts with the constitutional command, according to which the Constitutional Court is bound by the constitution, and seriously violates legal certainty.[91] It seems to me that the Court was correct in holding that it is competent to substantially review constitutional acts. 'Under communism', Cass Sunstein notes, 'constitutional guarantees were not worth the paper on which they were written; leaders felt free to ignore them if the situation so required'.[92] Therefore, especially in post-communist states, the enforceability of the unamendable provisions is vital for protecting constitutionalism.[93]

In contrast with these examples, in some states the existence of unamendable provisions does not necessarily lead to the power of judicial review over the content of constitutional amendments. In these states, one may argue, unamendable provisions are merely declarative.[94] They might have a political or social importance, but they are not enforceable in courts. Norway, France, and the U.S. may exemplify this idea.

The Norwegian Constitution of 1814 states in Art. 112 that constitutional amendments 'must never . . . contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution'.[95] Therefore, at least in theory, the Norwegian courts hold 'the most comprehensive power of judicial review found anywhere', since they are, 'de jure the final

[90] See in Kokeš (2009).
[91] Koudelka (2010, 2).
[92] Sunstein (1995, 51). For a general argument that in the new democracies after the collapse of the Soviet Union, courts are assigned a central role in preserving the democratic order, see Issacharoff (2012, 43).
[93] Although I think the court's reasoning for holding the constitutional act unconstitutional was unconvincing on its merits. See Roznai (2014).
[94] Brooke (2005, 68-71).
[95] On this provision see Smith (2011, 369).

arbiters of constitutional limitations'.[96] Nevertheless, it seems that this explicit limitation is only a directive for the Parliament, not granting the courts any authority.[97] In nearly two hundred years of practice, courts have never adjudicated a conflict between amendments and the unamendable provision, despite the fact that the constitution has been amended more than two hundred times, including some major reforms.[98]

Accordingly, although it was once considered to be of a 'binding nature',[99] it seems that the Parliament – the Storting – has the final word in the interpretation of the constitution's 'spirit' and 'principles', and thus it defines the limits of the amendment power. Therefore, in Norway, the practice of judicial review, which is today undisputed with regard to ordinary legislation,[100] does not comprise substantive review of amendments.[101] Even if not justiciable in courts, the unamendable provision may play a role when debating constitution amendments and thus it has a certain political importance.[102]

France is another interesting example. Notwithstanding the fact that France (like Norway) was one of the originators of unamendable provisions (see Chapter 2), the French system took a rather restrained position with regards to Art. 89, which protects the republican form of government from amendments. While some scholars argue that Art. 89 is a 'paper barrier' so that even the republican form can be repealed by the constituent power,[103] others have argued that it is not 'an empty shell', but rather an enforceable limitation that extends to fundamental principles of the republican legal order.[104] Indeed, in 1992, supporters of the latter approach anticipated that the unamendable provision would be enforceable in courts, as the Conseil Constitutionnel specified that subject to the temporal and substantive restrictions provided in the constitution, the *constituent power* is sovereign.[105] From this statement, it was clear that the amendment power has to observe those substantive limitations imposed upon it by the constitution. This anticipation, however, vanished in 2003 when the Conseil

[96] Cappelletti and Adams (1965-1966, 1217).
[97] Conrad (1970, 380); Klein (1996, 181); Smith (2011, 385).
[98] Smith (2011, 383-384); European Commission for Democracy Through Law (2009, fn 153).
[99] Smith (2011, 384).
[100] Risa (1989, 4.100.17); Ryssdal (1981, 530-535).
[101] Bugge (1995, 308-309). See, importantly, Cappelletti and Adams (1965-1966, 1217) ('[t]he definitely modest role that judicial review has played in the constitutional history of Norway attests to the sobriety of the Storting and to a general desire to proceed in a legal and orderly manner, rather than to the courts' abdication of their constitutional responsibility.')
[102] Opsahl (1969, 164).
[103] Luchaire (1992, 1591).
[104] Specchia (2008, 19).
[105] See Decision No. 92-312 DC of 2 September 1992 (Maastricht II); See Wright (2005, 498); Rousseau (1993, 19-20); Wright (1994, 71); Baranger (2011, 394-396).

Constitutionnel laconically held that judicial review of constitutional amendments is not considered within its competence.[106]

Lastly is the intriguing situation in the U.S. As widely mentioned in Chapter 3, the scope of the amendment power under the U.S. Constitution was given extensive attention during the 1920s and 1930s. After the adoption of the 18th Amendment, it was argued before the courts that the amendment was void for it conflicted with the constitution's fundamental principles and spirit. In the *National Prohibition* case, the U.S. Supreme Court, without refuting the arguments in detail, held that the amendment prohibiting the manufacturing and distribution of alcohol was within the amendment powers.[107] Similarly, in *Leser v. Garnett*, the Supreme Court held that the 19th amendment regarding women's right to vote had been constitutionally established.[108] However, this willingness to review amendments was later rejected in *Coleman v. Miller,* in which the majority deemed the amendment process a political question not subject to judicial review.[109] Judge Black wrote: 'Article v…grants power over the amending of the Constitution to Congress alone… the process itself is political in its entirely, from submission until an amendment becomes part of the Constitution, and it is not subject to judicial guidance, control or interference at any point'.[110] While the court has not directly dealt with amendments that conflict with the unamendable provision of Art. V, it could be inferred from the Court's general approach to the amendment process that it would refrain from adjudicating constitutional amendments, treating them as a 'political question' and thus under the auspices of the political arena.[111]

This approach raises the following question: if unamendable provisions are not justiciable, can they truly be effective? Denis Baranger was correct to ask, with regard to the French case:

> How, if the Conseil Constitutionnel refuses to review amendments, can such limitations be enforced? The answer is clear: de lege lata they cannot, at least in the course of constitutional review as exercised by the Conseil Constitutionnel. This might appear as a blunt disregard of the blank letter of the Constitution, and indeed it might well be just that.[112]

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[106] French Constitutional Council No. 2003-469 DC, March 26, 2003; French Constitutional Council No. 1962-20DC, November 6, 1962. See Le Pillouer (2009, 4-5); Wright (2005, 495); Baranger (2011, 396).
[107] *State of Rhode Island v. Palmer*, 253 U.S. 350 (1920); see Pierson (1925, 54).
[108] 258 U.S. 130 (1922).
[109] 307 U.S. 433, 456 (1939); see Fleming (1994-1995, 375); Dellinger (1983-1984, 389-92).
[110] 307 U.S. 433, 459 (1939).
[111] See, for example, Dodd (1931-1932, 89-90) ('determination of what ought to go into an amendment … is necessarily committed to the discretion of the bodies proposing amendments…'). For debates on this issue see Haddad (1995-1996, 1685); Rees (1976-1977, 896); Anonymous (1978-1979, 1259); Vile (1986, 21).
[112] Baranger (2011, 398).

Explicit limits on constitutional amendments are aimed to secure the constitution from what was considered by the constitution-makers as undesirable amendments, for various reasons (see Chapter 2). As this chapter claimed earlier, judicial review is a natural mechanism to protected unamendable provisions. In this respect – notwithstanding the major theoretical difficulties associated with unamendability, which I analyse in the final chapter – judicial review of an amendment that violates an unamendable provision should be recognised, just as it is recognised when an ordinary law violates the constitution.[113]

The situation becomes much more complicated when it comes to implicit limits on the amendment power. The absence of explicit limits on constitutional amendments significantly undermines the legitimacy of judicial review of amendments. From the fact that the constitution does not contain any limitations, it may be concluded that the amendment power is intended to be very wide.[114] Indeed, as demonstrated in Chapter 3, courts in places such as Sri Lanka, Malaysia, and Singapore, expressly rejected any notion of implicit limitations. In Pakistan, even though the Supreme Court acknowledged a set of 'salient features' of the constitution, which cannot be amended, it drew a distinction between implicit limitations on the amendment power and their judicial enforcement, holding that limitations on the amendment power are to be enforced by the body politic through the ordinary mechanisms of parliamentary democracy, rather than by the judiciary.[115] On the other hand, as our *tour d'horizon* of the basic structure doctrine demonstrates, judicial enforceability of implicit limitations is in many cases possible. Courts around the world, in countries such as India, Bangladesh, Kenya, Colombia, Peru, Belize and Taiwan, have held that the amendment power is inherently limited, even in the absence of any explicit limitations, and that the court – as the guardian of the constitution – has the duty to enforce such implied limitations (see Chapter 3).

Thus, the non-existence of unamendable provisions does 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, it was argued in Chapter 5, has an implicit unamendable core, which cannot be amended through the delegated amendment power, but demands appealing to the *primary constituent power*. Of

[113] See Barak (2011A, 333).
[114] Conrad (1977-78).
[115] Judgment on Seventeenth Amendment and President's Uniform Case (2005) [*Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 2005 SC 719].

course, facing silence regarding limitations on the amendment power, any court's decision regarding a limited amendment power may only derive from judicial activism coupled with 'judicial daring and courage'.[116]

C. Different Procedures for Constitutional Amendments

As noted in Chapter 6, in some constitutions a general procedure exists for ordinary amendments, while a more difficult procedure is required for amendments that entail a 'total revision' of the constitution or that affect specific 'basic principles' of the constitution. The Constitution of Venezuela, for example, distinguishes between an amendment (Art. 340) and a reform of the Constitution (Art. 342), and has regulated different mechanisms for each in separate chapters, to reflect on the distinctive features of each method (Arts. 340-346).[117] These formal distinctions allow for judicial intervention when the amending authority amends certain principles that demand the onerous procedure, but were amended by the ordinary one.[118]

Austria may be the prime example of this. The Austrian Constitution of 1920 does not include any substantive limits on constitutional amendments, yet it draws a procedural distinction between partial and total revision, the former requires enactment by Parliament and the latter requires both enactment and a referendum (Art. 44). According to the Austrian Constitutional Court, a total revision of the Constitution takes place when the Constitution's leading principles (*leitender Grundsatz*) are altered or seriously affected. These principles include democracy, separation of powers, the rule of law, fundamental liberties, and federalism. The Constitutional Court thus created a hierarchy of constitutional norms. The Court's broad interpretation of the concept of 'total revision' allows it to conduct a substantive judicial review of amendments by examining whether amendments alter one of these principles, which would therefore

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[116] Weintal (2005, 50-51). Indeed, the Indian basic structure doctrine is considered to be one of the most significant examples for judicial activism. See Chowdhury (2011, 1055); Sathe (2002); Sen (2009, 63).

[117] In Opinion No. 53, February 3, 2009, http://www.tsj.gov.ve/decisiones/scon/febrero/53-3209-2009-08-1610.HTML, the Supreme Court of Justice of Venezuela (Constitutional Chamber), explained that while amendment involves a minimal alteration, a constitutional reform, is more comprehensive and may comprise the partial revision of the Constitution and the replacement of one or more of the provisions which do not alter the structure and principles of the constitutional text.

[118] One example is *Raven v. Deukmejian*, 801 P. 2d 1077 (1990), in which the Supreme Court of California prohibited an amendment from appearing on the ballot for a referendum on the grounds that it was much fundamentally transformative than an amendment such that it amounted to a revision, which requires different procedure. See Galie and Bopst (1996, 30). In the recent 'Proposition 8' case of May 2010, the Supreme Court of California rejected the claim that violating the right of same-sex couples to marry is a revision rather than an amendment. See *Strauss et al v Horton*, 46 Cal. 4th 364 (2009); Eskridge (2010, 1235).

require a referendum; otherwise, it would violate the Constitution.[119] In a decision of 2001, the Constitutional Court annulled a constitutional amendment that stated that specific states' laws, which were previously declared unconstitutional, could not be deemed unconstitutional. The Constitutional Court held that this deprival of the Constitution's normative authority violates the basic *Rechtsstaat* (rule of law) principle, and therefore deemed the amendment as a 'total revision', requiring a referendum. Since the amendment was adopted by Parliament without a referendum, it was declared unconstitutional and was annulled.[120]

This procedural distinction as a basis for judicial review has also taken place in Nicaragua. The Constitution of Nicaragua of 1987 allows for a 'total' and 'partial' reform in its amendment process, and each demands a different process. A partial reform demands a 60% majority in the National Assembly and an approval in two successive sessions, while a total reform requires a two-thirds approval in the Assembly and a final approval by a special elected Constituent Assembly (Arts. 191-195). In 2005, when the National Assembly approved a set of constitutional amendments that limited the president's power, deeming them to be a partial reform, the Central American Court of Justice held that these amendments undermined the executive's independence and attempted to transform Nicaragua from a presidential system to a parliamentary one. Since such a transformation could be effected solely through the process of a 'total reform', the amendments were unconstitutional and invalid.[121]

More recently, the Philippine Supreme Court successfully blocked a referendum on a major alteration to the Constitution of 1987, which changed, among other things, the presidential system to a parliamentary one. The Supreme Court held that the use of popular initiative is limited to propose only 'amendments' to the Constitution, and more extensive constitutional revisions require an approval by a constitutional convention.[122]

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[119] See Stelzer (2012, 15-18, 26-28); Gözler (2008, 34-39); Somek (1998, 567); Cede (2010, 61).

[120] Decision of Mar. 10, 2001, G 12/00, G 48-51/00; see Gözler (2008, 38-39); Val'o (2010, 29); Pfersmann (2012, 81); Stelzer (2012, 27).

[121] The Central American Court of Justice, record 69-01-03-01-2005 (decision of 29/03/2005), http://cendoc.ccj.org.ni/Documentos/69-01-03-01-2005/0933/Exp%201-3-1-2005Pieza2s.pdf
Interistingly, that same day, the Supreme Court of Nicaragua delivered its ruling on the case, holding that the decision of the Central American Court of Justice was granted without jurisdiction and was invalid. Nicaragua was left with 'two constitutions': valid nationally and invalid internationally. Eventually, the president and the Assembly reached an agreement to reconsider the amendments by the next elections and to suspend their application until after that time. Indeed, after the elections, the new government suspended the implementation of the new amendments indefinitely. See Sentencia [s.] No. 15, 9 March 2005 [Supreme Court of Justice] No. 19, 24 May 2005, p. 51, Pir Tanto, Punto IV (Nicar.). For a detailed review see Schnably (2007-2008, 461-73).

[122] *Lambino v. Comm'n on Elections*, G.R. No. 174153 (Oct. 25, 2006), cited in Kay (2011, 731).

When a separate procedure exists for partial and total revisions, courts must first theorise what would comprise a 'total revision' and then examine the content of the amendment in question and whether it indeed alters certain basic principles so as to be deemed a total revision of the constitution. This is in fact substantive judicial review dressed as a formal or procedural review. Yet, it demonstrates that Joel Colón-Ríos was right to claim that 'in the context of constitutional reform, procedure and substance overlap with each other'.[123] This exercise of judicial review is thus positioned between substantive and procedural forms of judicial review (what Vicki Jackson terms 'substantive-procedural' review), aiming to insure that certain constitutional changes take place through a particular popular-democratic or consensual rooting.[124]

To conclude this section, judicial review – and even the annulment of constitutional amendments, i.e. the phenomenon of 'unconstitutional constitutional amendments' – is no longer merely a theoretical hypothesis, but rather an existing practice in many jurisdictions. This practice, I argued in the first section, rests on a solid theoretical ground.

III. EXERCISING JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

Even after the authority to review a constitutional amendment is established and the legitimacy of such an exercise is recognised, the remaining question is: how should such a review be exercised? Since there is a growing trend towards reviewing constitutional amendments, the implications of such an exercise ought to be considered. This section therefore develops guidelines for the judicial review of constitutional amendments.[125]

A. Interpretation of Constitutional Amendments and of Unamendable Principles

1. Identification of Unamendable Principles or Rules

The first phase of judicial review of constitutional amendments is *identifying what the unamendable principles or rules are*. With regards to explicit limitations on the amendment power, this is a relatively simple task. When analysing unamendable provisions, one has to consider their structure. As noted in Chapter 2, different techniques for protecting

[123] Colón-Ríos (2012C, 134).
[124] Jackson (2013, 58-62). See also Tushnet (2012-2013, 2005-2006) (linking the idea of substantive unconstitutional constitutional amendments with the notion of 'inadmissibility').
[125] For the importance of such guidelines see Dragomaca (2011).

constitutional subjects from amendments exist. The majority of unamendable provisions explicitly refer to certain constitutional subjects (principles or institutions). Others refer specifically to certain constitutional provisions, prohibiting any amendments to them.[126] Still others combine these two approaches to unamendability.[127]

The examination of what is the limit to constitutional amendments is even more formidable when it comes to implicit limitations. Even if we acknowledge the existence of implicit limitations, a central difficulty is from where one draws them? Since implicit limitations have an ambiguous nature, their demarcation is not an easy task.[128] The constitution's 'spirit' or fundamental principles 'cannot be isolated with scientific accuracy'.[129] On the other hand, Indian judges have argued:

> The basic structure of the Constitution is not a vague concept and the apprehensions … that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure.[130]

In order to 'find' unamendable basic principles, one has to resort to *foundational structuralism* and interpret the constitution as a whole (see Chapter 5.II.A).[131] Structuralism, as an interpretive theory, 'emphasizes coherent designs and wholes'.[132] According to this approach, the language of the constitution is not merely the explicit one, but also the implicit one.[133] As advocated by Charles Black, by using structural interpretation, the interpreter can discern the implicit from the constitution's internal architecture – interactions and connections between different constitutional structures – and the text as a whole.[134] Structuralism can give an implicit meaning to whatever is written between the

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[126] See, for example, Armenia Const. (1995), art. 114; Azerbaijan const. (1995), art. 158; Ghana Const. (1969), art. 169(3); Honduras Const., (1965), art. 342.
[127] See, for example, Bahrain Const. (1973), art. 120c; Greek Const. (1975), art. 110(1); Guatamala Const. (1985), art. 281.
[128] See Williams (1928, 532): 'There is nothing in the Constitution itself, from which such an inference may be drawn; therefore, they must go behind and beyond the Constitution to find the basis for, or means of, making that implication. Indeed, they must find somewhere – "Some mystic sentence written by a hand Such as of old did scare the Assyrian king, Girt with his satraps in the blazing feast."'
[129] Orfield (1942, 106).
[130] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, para. 620.
[131] Krishnaswamy (2010, 87). On structural interpretation see Tribe (2008); Kelso (1994, 131-134); Bobbit (1982, ch.6); Westover (2005, 693).
[132] See, for example, Harris (1982, 34) (distinguishing between *Immanent structuralism* which looks for 'overall designs within the document, or closely linked to the document' and *Transcendent structuralism* which looks for 'structures and coherent wholes outside the Constitution which are signalled by the document.')
[133] Barak (2003, 440); Barak (1996, 403); Armstrong (2002, 231). On the relationship between substance and structure see Schauer (2005, 40). On inferring constitutional unenumerated rights from the constitution as a whole see Crump (1995-1996, 795).
[134] Black (1969, 7). See also Bobbit (1982, 74-78).

lines.[135] It is, as Akhil Reed Amar describes it, reading 'the document holistically and attend[ing] to its overarching themes'.[136] Since holistic interpretation considers the constitution's values and basic structure,[137] constitutional history, preambles, and 'basic principles' provisions can provide 'justifying reasons in support of a conclusion adequately supported by the constitutional text'.[138] In other words, implicit limits can be deduced from the constitution itself, its basic structure, and surrounding values and principles. At the end of the day, I agree with Sudhir Krishnaswamy that 'the task of identifying basic features is inherently prone to disagreement',[139] and this is a central criticism against structural interpretation as advocated for in this thesis.[140] However, *foundational structuralism* is a feature of 'holistic constitutionalism' which is 'a method of constitutional articulation and engagement in which the authority and meaning of the various parts are understood and treated as dependent on the integrity of the whole.'[141]

Without lengthily expounding on its role, a note on the importance of constitutional preambles is warranted.[142]A constitution's preamble commonly sets forth the constitution's most important objectives.[143] It is 'the first words of "the people", their *raison d'être* and their *cri de coeur*'.[144] In the U.S. debate, 'Brutus' stated in 1788 that in order to discover the constitution's spirit, it is important first to review its principles, ends, and designs as expressed in the preamble.[145] True, according to general principles of *statutory interpretation,* preambles do not create substantive rights or powers. Nonetheless, it is

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[135] See Tribe (2000, 40): 'The constitution's "structure" is … that which the text shows but does not directly say. Diction, word repetitions, and documentary organizing forms (e.g., the division of the text into articles, or the separate status of the preamble and the amendments), for example, all contribute to a sense of what the Constitution is about that is as obviously 'constitutional' as are the Constitution's words as such'. For debates on unwritten principles see Walters (2008, 245); Goldsworthy (2008, 277); Mullan (2004, 9).

[136] Amar (2000, 30). For Amar's version of holism, see Amar (1999, 747). For an argument that one has to distinguish Black's structural method from holism see Dorf (2003-2004, 832).

[137] Jackson (2001, 1281).

[138] Krishnaswamy (2010, 157). See also Keshavamurthy (1982, 80-81): 'the basic features are identifiable in those provisions devised to realise the value objectives of the Constitution. For this identification recourse may have to be had to the heritage of the community, history and the events setting the stage for the enactment of the Constitution. This analysis would serve to identify the basic structure of any Constitution. … assistance can be had from the Preamble of the Constitution identify the basic features of the Constitution.'

[139] Krishnaswamy (2010, 160).

[140] Haris (2013, 683).

[141] Walker (2010B, 297-298).

[142] See generally Orgad (2010, 714); Frosini (2012); Rubinstein and Orgad (2005, 38).

[143] Carrasco and Rodino (1989-1990, 503-509).

[144] McKenna, Simpson and Williams (2001, 382).

[145] Brutus (2003, 300). There is no evidence that the constitutional convention regarded the preamble as carrying legal weight. See Peaslee (1929), 11-14. Also, following the proposition of Story (1833, 443-444) that the preamble should not be deemed to create any substantive rights or powers not granted in the constitution's body, the Supreme Court held that the preamble alone is an insufficient source of rights. See J*acobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), cited in Axler (1999-2000, 431-432).

doubtful whether the argument is consistent with *constitutional interpretation*.[146] More importantly, it is not argued that the preamble confers any power *per se* or that it has any binding legal status; merely that it is a valuable source from which inferences may be drawn about the constitution's fundamental principles. Carl Schmitt claimed that it is a mistake to view preambles as 'mere statements' since they 'constitute the substance of the constitution'.[147] Thus, the preamble is the part in the constitution that best reflects the society's 'fundamental political decisions'.[148] It expresses 'the ostensible "essence" of the people or nation in whose name the constitution has been drafted'.[149] The best examples for the approach, according to which unamendable principles may be drawn from the preamble, is in constitutions that include in their preambles unalienable principles[150] or entrench 'the spirit of the Preamble' or its fundamental tenets.[151] This is not to deny the problems with reliance on preambles. Preambles are often drafted in an abstract, multi-faced, open-ended, or even a contradictory manner.[152] While this poses a problem for a judge attempting to resolve the tension between competing values, it is less problematic when one embarks on the task of discovering principles enshrined in the preamble.[153] As the Supreme Court Appellate Division of Bangladesh stated: 'our preamble contains the clue to the fundamentals of the Constitution.' Likewise, the Preamble of the Constitution of Belize was crucial to the recent adoption of the basic structure doctrine, as Judge Oswell Legall claimed, the Constitution's Preamble is 'the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions'[154] (see Chapter 3).

Whereas the doctrine of implicit limitations on the amendment power could empower courts to include almost anything under the scope of the 'spirit' or 'principles' of the constitution, from a legal legitimacy point of view, it is preferable for a judge to refer to the basic principles as expressed in the preamble, to which the people yearn and wish to be governed under,[155] than to her own perception or amorphous supra-

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[146] Cf., Pace (1933, 295).
[147] Schmitt (2008, 78-79).
[148] Orgad (2010, 715, 726).
[149] Levinson (2011B, 177). Of course, like other parts of constitutions, preambles borrow from each other. See Ginsburg, Foti and Rockmore (2014).
[150] Estonia Cost. (1992); Bosnia and Herzegovina Const. (1995); Czech Republic Const. (1992); Croatia Const. (1990); Poland Const. (1997); Slovakia Const. (1992).
[151] Nepal Const. (1990); Turkey Const. (1982).
[152] Stith (1996, 48, 54); Himmelfarb (1991-1992, 203-209); Bork (1990, 35).
[153] *Abdul Mannan Khan v. Government of Bangladesh*, Civil Appeal No. 139 of 2005 with Civil Petition For Leave to Appeal No. 569 of 2005 (10.05.2011), 383.
[154] *British Caribbean Bank Ltd v AG Belize* (Claim No. 597 of 2011), para. 50.
[155] Reilly (1998, 904).

constitutional values.[156] It is also claimed that declaring principles enshrined within the preamble to be unamendable would mean that this is a 'one-way street. Once something is built into the basic structure of the Constitution through inclusion in the preamble, it cannot be removed in the future—it may only be augmented'.[157] Even if one accepts this objection, such criticism is not unique to preambles, but a basic opposition to the entire idea of unamendability (see Chapter 8).

2. *Developing a Theory of Unamendable Principles*

Enforceability of unamendable principles is not an easy task, as interpreters (be it courts or any other institution for that matter) need to develop a theory of the unamendable principles. For the Germans – a theory of human dignity; for the French and Italians – a theory of republicanism; for the Norwegians– a theory of the 'spirit' of the constitution; and so on.[158] This is the **second phase** of the exercise of judicial review of amendments, and it is a crucial one. The lack of knowledge as for what precisely is an unamendable principle causes a high degree of uncertainty and with it a great deal of discretion to the judiciary when interpreting unamendable principles.[159] Protected principles, such as 'democracy' and 'the rule of law' have a myriad of different formal and substantive aspects, and the various interpretations of these principles carry significant implications for the scope of the amendment power.[160] For instance, if one conceives a 'republican' form of government as merely juxtaposed with 'monarchy', this is hardly an obstacle. However, if one conceives the term to include various elements of 'constitutional democracy', this places greater limits on the amendment power.[161]

An interesting example comes from Venezuela. Art. 6 of the Constitution states that the Venezuelan government system 'is and always will be ... alternative.' The Constitutional Court observed that this provision demonstrates that the only way to modify these principles would be through a national constituent assembly, by which the

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[156] McKenna, Simpson and Williams (2001, 398-399).
[157] Twomey (2013, 340).
[158] Murphy (1992A, 349). For an analysis of interpretation of unamendable provisions in various jurisdictions such as Germany, France, Greece and Italy see Rigaux (1985, 53-94).
[159] Albarello (2012, 82-84).
[160] A related problem is of course is there (and can there be) any consensus on the meaning of vague unamendable principles. On how complex and contested ideas such as 'the rule of law' can be see Waldron (2002, 137); Fallon (1997, 1).
[161] Friedrich (1959, 812).

whole structure and principles enshrined in the Constitution can be changed.[162] Moreover, according to Art. 340, constitutional amendments cannot alter the Constitution's basic structure. In 2009, the Supreme Court was required to deliver an interpretation on these provisions and to clarify what is meant by the term 'basic structure' of the Constitution, and more specifically, whether an amendment can determine unlimited presidential reelection, even though one of the Constitution's basic principles is the principle of *alternation*. This request was submitted to the Court, in light of proposals to amend Art. 230 (according to which the Presidential term is six years and the President may be re-elected immediately and only once), so as to allow unlimited re-election of President.

In its opinion, the Court held that the term 'basic structure', should be understood not only from a formal perspective as a systematic order of the text, but also from a material point of view, as a body of fundamental policy decisions with an axiological load that feeds and legitimises its realisation by the state and the citizens who live in it.[163] As for the specific question, the Court held that the possibility of continuous re-election does not alter in any way democratic values that inform the constitutional legal system. The principle of alternation requires that the people, holder of sovereignty, have regular opportunity to choose their leaders or representatives. If this possibility is prevented by avoiding or not holding elections, then the principle of alternation is violated.[164]

In these two phases (identifying unamendable principles and developing a theory of unamendable principles) the formulation of unamendable provisions, whether as *rules* that demand strict compliance or as *principles* that are more generalised guidelines, has decisive importance.[165] The basic distinction between rules and principles is that 'rules are applicable in an all-or-nothing fashion',[166] designed as legal directives that demand a strict compliance, and require a yes-or-no decision on their breach. Principles, in contrast, are

[162] Supreme Court of Justice of Venezuela (Constitutional Chamber), Opinion No. 53, February 3, 2009, http://www.tsj.gov.ve/decisiones/scon/febrero/53-3209-2009-08-1610.HTML; This resembles the Court's reasoning in an earlier case of 1999, under the Constitution of 1961, in which the Court held that limitations which are imposed upon the amendment power and which regulate the amendment procedure do not – and cannot – apply to the people in their capacity as holders of the *constituent power*. See Opinion No. 17 of the Supreme Court of Justice of Venezuela, 19.01.1999; Colón-Ríos (2011A, 369-372).
[163] Supreme Court of Justice of Venezuela (Constitutional Chamber), Opinion No. 53, February 3, 2009, http://www.tsj.gov.ve/decisiones/scon/febrero/53-3209-2009-08-1610.HTML
[164] *Id.*
[165] Conrad (2003, 194).
[166] Dworkin (1967-1968, 25); Dworkin (1978, 24).

more general guidelines, which permit balancing and may be realised in various degrees.[167]

Some unamendable provisions, as shown in Chapter 2, take the form of a general protection of principles, while others protect concrete provisions or a detailed list of constitutional subjects. Karl Loewenstein states that 'unhappily, but perhaps inevitably', the German unamendable provisions 'are not concrete and specific articles, but general principles subject to different interpretation'.[168] On the one hand, a protection of general principles is a far more flexible approach. The elasticity and the semantic openness of these terms allow their content to evolve as changes occur in a social context.[169] On the other hand, vague limitations such as a general protection of principles arguably provide only indirect protection for basic rights.[170] A general provision allows courts a greater margin of discretion and interpretive recreation. From an institutional perspective, this might grant courts more power *vis-à-vis* the political branches.[171] From a normative perspective, it is hard to tell whether a general prohibition poses a greater or a more modest limitation on the amendment power, as it depends on the given interpretation – narrow or broad – of the provision. It thus seems that precise, extensive, and detailed provisions could be considered leaving the amending authorities a narrower discretion for amendment. Such provisions, while imposing a stricter margin of interpretation to the courts,[172] grant added legitimacy for their judicial enforcement.

3. Identifying the Prohibition

After identifying what are the protected constitutional subjects, and once there is an established theory of the unamendable principles, the **third phase** is examining *what the prohibited act is*. The act that is prohibited by unamendable provisions varies among different constitutions. While most constitutions simply prohibit 'amending' or 'revising' certain constitutional subjects, some constitutions state that amendments must 'respect' or 'safeguard' certain constitutional subjects.[173] Often, the prohibited act is not 'amending'

[167] Alexy (2000, 295).
[168] Loewenstein (1954-1955, 829).
[169] Pedra (2009, 232).
[170] Sajó (1996, 72 fn 32).
[171] Friedman (2011, 93).
[172] Mohallem (2011, 766-767).
[173] See, for example, Angola Const. (2010), art. 236; Portugal Const. (1976), art. 288.

certain subjects, but rather the mere 'proposal' of amendments.[174] Whereas the ultimate result of these two limitations seems similar, presumably the latter limitation positions the barrier to the prohibited change at an earlier phase than the actual act of amendment, i.e. at the beginning of the political process, so that the proposed change cannot even be debated. A provision prohibiting a *proposal to amend* certain subjects seems more like a directive to the amending authority that hinders a court's intervention, as it would necessitate judicial intervention at an early stage of the political process, often within inter-parliamentary proceedings.

4. *Interpreting the Constitutional Amendment*

Once unamendable principles are identified, and the interpreter recognises a collision between a constitutional amendment and unamendable principles, the **fourth phase** in the exercise of judicial review of amendments is *interpreting the amendment under scrutiny.* An annulment of a constitutional amendment by courts should be the means of last resort. Therefore, before annulling a constitutional amendment, other judicial remedies, such as interpretation, must be considered. Consequently, as an interpretive principle, the *secondary constituent powe*r must be put under the presumption of safeguarding the constitution's basic structure and constitutionally-protected human rights. The general presumption of constitutionality, which applies in the case of ordinary legislation, must operate with greater force to constitutional amendments.[175] Therefore, every interpretive effort must be made to reconcile amendments with protected rights and basic constitutional principles. This is the German method of 'interpretation in conformity with the Constitution' (*Verfassungskonforme Auslegung*). Using such an interpretive method, courts may choose the interpretation that is most compatible with the constitution without annulling the entire amendment. This is thus another 'line of defence' of the constitution, which avoids the remedy of annulment.[176] This doctrine, resembling what Ronald Dworkin refers to as 'the principle of charity',[177] is compatible with the theory of 'foundational structuralism' as advanced in Chapter 5, since, as Sanford Levinson puts it,

[174] See, for example, the difference between the French protections of the republican form of government in the Const. (1958), art. 89(5) and Const. (1946), art. 95.
[175] Conrad (1977-78).
[176] Livneh (1978, 255).
[177] Dworkin (1986, 53); Dworkin (2006, 220). See generally Marmor (2005, 44).

'one cannot begin to engage in constitutional interpretation without having in mind a model of the point of the entire constitutional enterprise'.[178]

The recognition of limits on the amendment power in the form of unamendable (explicit or implicit) basic principles of the constitution necessitates the setting of limits to the doctrine's own boundaries.[179] Surely not every constitutional amendment falls within these boundaries. This brings us to the **final phase** of the exercise of the judicial review of constitutional amendments – scrutiny of the amendment in light of the protected unamendable principle.

B. Standard of Review

Even if we acknowledge that certain basic constitutional principles are unamendable, what is considered an impermissible amendment remains unclear. Is every deviation, violation, or infringement of that sacred principle prohibited? Or is a more severe standard required? When considering the appropriate standard of reviewing constitutional amendments *vis-à-vis* unamendable principles, one can suggest three different levels of standards:

1. Minimal Effect Standard

The first option is the *Minimal Effect Standard*. This is the most stringent standard of the judicial review of amendments. According to this standard, any violation or infringement of an unamendable principle is prohibited no matter how severe the intensity of the infringement is, including amendments that have only a minimal effect on the protected principles. On the one hand, one may claim that the importance of the protected unamendable principles – as pillars of the constitution – necessitates the most stringent protection. If the aim of unamendability is to provide for hermetic protection of a certain set of values or institutions, then any violation of these principles ought to give rise to grounds for judicial intervention. On the other hand, such a standard would not only grant great power to courts, but also would place wide – perhaps too wide – restrictions on the ability to amend the constitution. The theory of unamendability should not be construed as a severe barrier to change. It should be construed as a mechanism enabling constitutional progress, permitting certain flexibility by allowing constitutional

[178] Levinson (2011A, 77).
[179] Krishnaswamy (2010, 131).

amendments, while simultaneously shielding certain core features of the constitution from amendment, thereby preserving the constitutional identity. Moreover, an adoption of the *Minimal Effect Standard* would often lead to an absurd result: take, for example, the unamendability of fundamental rights that exists in various constitutions (see Chapter 2). According to the *Minimal Effect Standard*, any amendment that would infringe upon an unamendable right would be unconstitutional. At the same time, the ordinary legislature exercising its ordinary legislative powers would be able to violate fundamental rights as long as the violation was proportionate according to the different test of each state's constitutional law. This would grant a lower authority (the legislative) greater powers than those possessed by a higher normative authority (the amending). For all these reasons, the *Minimal Effect Standard* should be rejected.

2. *Disproportionate Violation Standard*

The intermediate standard of review is the *Disproportionate Violation Standard*. It is an examination of the proportionality of the violation. The principle of proportionality is nowadays becoming an almost universal doctrine in constitutional adjudication.[180] Proportionality generally requires that a violation of a constitutional right have a 'proper purpose;' that there is a rational connection between the violation and that purpose; that the law is narrowly tailored to achieve that purpose; and that the requirements of the proportionality *stricto* (balancing) test are met.[181] A disproportionate violation of a constitutional right would be considered unconstitutional and thus void. This standard emphasises the balancing of conflicting interests. Following the Czech Constitutional Court's decision, mentioned earlier in this chapter, Maxim Tomoszek argued that the proportionality test is also suitable for the judicial review of amendments. Just as ordinary law may limit the scope of fundamental rights, he claims, so constitutional amendments may limit protected principles. Tomoszek sees no 'technical' obstacle to using the principle of proportionality in review of amendments since the nature of proportionality allows the balancing between conflicting principles. In the case of constitutional amendments, the balance would be between the protected 'unamendable principle', and the pursued interest and means taken by the amendment.[182]

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[180] See Schlink (2012, 291); Stone Sweet and Mathews (2008, 72); Cohen-Eliya and Porat (2013, i) (describing proportionality as 'the most important constitutional doctrine worldwide.')
[181] See Barak (2012, 245-445).
[182] Tomoszek (2010).

While there is great force in this claim, I submit that the *Disproportionate Violation Standard* should be rejected when it comes to constitutional amendments. Technically, proportionality applies to fundamental rights. It measures or balances the disadvantage caused to an individual or a group's rights against the means employed to achieve a certain public interest or a conflicting right, and whether the damage caused by said means is proportionate. It is questionable to what extent the same test can apply to evaluate a disadvantage to principles or constitutional institutions. What is a disproportionate violation of the rule of law, secularism, or the monarchy? Even if one can weigh these principles within the proportionality test, this standard would grant courts a very broad discretion to determine what a proportionate violation is and is not. Most importantly, the aim of unamendability is not to balance between conflicting values. Limitation clauses and unamendable provisions carry different functions. Limitation clauses aim at the legislature and direct it to take the consideration of fundamental rights in everyday politics to the maximum possible.[183] Unamendability, in contrast, is intended to preserve the core nucleus principles of the constitution, its identity.[184] Therefore, the *Disproportionate Violation Standard* is not suitable to the exercise of reviewing constitutional amendments.

3. Fundamental Abandonment Standard

Fundamental Abandonment Standard is the lowest level of scrutiny. According to this standard, only an extraordinary infringement of unamendable principles, one that changes and 'fundamentally abandons' them, would allow judicial annulment of constitutional amendments. This seems to be the approach taken by the German Constitutional Court. The debate between the German judges in the abovementioned *Klass* case of 1970 is fascinating in that respect.[185] Recall, Art. 79(3) of the German Basic Law (1949) prohibits amendments to the Basic Law that *affect* the division of the Federation into Länder, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state. In its judgment, the Court repeated earlier decisions according to which a constitutional provision must be interpreted so that it is consistent with the Basic Law's fundamental principles and

[183] This is an 'optimisation requirement'. See generally, Alexy (2009).
[184] On the relation between limitations on constitutional amendments and constitutional identity see Jacobsohn (2010A, 34-83).
[185] 30 BVerfGE 1, 24 (1970); an English translation of the case is available in Murphy and Tanenhaus (1977, 659).

system of values, as expressed in Art. 79(3). However, when interpreting Art. 79(3), the majority of the court gave the word 'affect' a narrow meaning:

> The purpose of [the unamendable provision] … is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment … and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are from the very beginning not "affected" as "principles" if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character… Restriction on the legislator's amending the Constitution… must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner.[186]

While the majority of the court took the *Fundamental Abandonment Standard*, the minority favoured the stricter *Minimal Effect Standard*. Sections of the minority's opinion are worth full citation:

> [the unamendable provision] … limits constitutional amendments. Such an important, far-reaching, and exceptional provision must certainly not be interpreted in an extensive manner. But it would be a complete misunderstanding of its meaning to assume that its main purpose was only to prevent misuse of the formal legal means of a constitutional amendment to legitimize a totalitarian regime… Art. 79, par. 3 means more: Certain fundamental decisions of the basic Law makers are inviolable … The wording and meaning of Art. 79, par. 3, do not merely forbid complete abolition of all or one of the principles. The word "affect" means less… The constituent elements are also…to be protected against a gradual process of disintegration…'[187]

While the Constitutional Court's *Fundamental Abandonment* approach can be criticised on the grounds that Art. 79(3) prohibits the constitutional legislator from even *affecting* the unamendable principles, not merely abandoning them,[188] this is the appropriate standard to be used when adjudicating constitutional amendment. Unamendability is not aimed at preventing minor changes that contradict unamendable principles or deviate from them. Its main function is to preserve the constitutional order and to protect against revolutionary changes. It insures that amendments do not destroy the constitution and replace it with a new one. Unamendability thus applies to those extraordinary and exceptional circumstances in which the constitutional change strikes at the heart of the constitution's basic principles, depriving them of their minimal conditions of existence. The impact of the conflict between the amendment and the unamendable basic principle must be of such intensity and to such extent that it modifies

[186] See Murphy and Tanenhaus (1977, 661-662).
[187] *Id.*, 662-664.
[188] See Nohlen (2005, 684).

the principle's essence. After its amendment, the unamendable principle would no longer be the same, but essentially modified. Therefore, amendments to unamendable principles that preserve the state's constitutional identity do not justify the annulment of constitutional amendments.[189] The basic question is: 'if this amendment is upheld, are we still going to live under the same constitution?'[190]

This standard is compatible with the Colombian Constitutional Court's test for deciding whether a constitutional amendment amends the constitution or replaces it with a new one (see Chapter 3). An amendment is considered a constitutional replacement if it replaces an element defining the identity of the constitution.[191] Relating to the Colombian constitutional replacement doctrine, Carlos Bernal recently proposed that proportionality could be used in order to determine whether an amendment infringes a central element of deliberative democracy, which would then be considered as a constitutional replacement.[192] At first sight, this might be an approach that supports the proportionality standard. But a closer reading of Bernal's argument reveals that his approach resembles more the *Fundamental Abandonment Standard*. Bernal claims that an amendment would count as a 'replacement of the constitution if, and only if, the infringement is of such magnitude that the political system can no longer be consider as an institutionalization of deliberative democracy'.[193] In other words, an amendment has to *fundamentally abandon* the principle of deliberative democracy in order to be deemed unconstitutional.

The *Fundamental Abandonment Standard* raises two main problems: first, it grants relatively weak protection to unamendable principles, compared to the other two standards; and second, it allows, at least in theory, for a gradual deconstruction of the constitutional system, brought about piece by piece via constitutional amendments.[194] Notwithstanding these difficulties, the *Fundamental Abandonment Standard* should be supported both from normative and institutional perspectives. Normatively, it fulfils the purpose of unamendability. The relatively narrow limitations it imposes on the amendment power allow for progress and concurrently for the preservation of the

[189] Roznai and Yolcu (2012, 205-206) and the references cited therein.
[190] Baranger (2011, 425).
[191] See judgment C-970/2004; Bernal (2013, 343-344). See also Opinion C-1040/05, cited in Bonilla and Ramirez (2011, 99 fn 10): 'there is a difference, then, between the amendment of the Constitution and its replacement. ... [a reform may] contradict the content of constitutional norms, even drastically, since any reform implies transformation. However, the change should not be so radical as to replace the constitutional model currently in force or lead to the replacement of a "defining axis of the identity of the Constitution," with another which is "opposite or completely different."'
[192] Bernal (2013, 357).
[193] *Id.*
[194] This recalls the work of Bernstein (1909), who believed that socialism would be achieved not through capitalism's revolutionary destruction, but through steady advance.

constitution's core principles. It allows for their 'development and suitable modification in consonance with the constitutional system'.[195] Institutionally, it mandates the courts to use their extraordinary power of declaring amendments unconstitutional cautiously. This understanding of what might be considered an unconstitutional constitutional amendment succeeds in reconciling two of Edmund Burke's concerns: first, protection of the constitutional identity reminds each generation that it is not autonomous, but rather remains linked to its past, and, simultaneously, it allows the people to alter the basic principles as a means of conservation.[196]

C. Judicial Restraint

The theory proposed in this thesis explains judicial review of amendments based upon the nature of the amendment power. It thus allows for the placement of great power in the hands of the judiciary. Simultaneously, the guidelines proposed in this chapter imply a call for judicial restraint.[197] As a general rule, courts should not overturn the policy choices of the amendment authority. Therefore, any interpretive effort must be made to interpret constitutional amendments in conformity with the constitution. Moreover, only the clearest cases of transgression would justify judicial intervention. Such cases will be apparent either by an element of abuse of power, of some hidden or collateral purpose appearing behind the purported scope of amendment,[198] or when an amendment fundamentally abandons a basic feature of the constitution by changing its essence, thus threatening the constitution's fundamental structure. Presuming that this power of judicial review is exercised according to these guidelines, this theory is compatible with the principle of separation of powers, for it ensures that exercise of this extreme power would be undertaken only in the most aggravated cases.[199]

Importantly, the willingness to review amendments and the intensity of judicial scrutiny must be connected to the amendment process. Even once conceiving the amendment power as a delegated power, as an agent, fiduciaries' duties are enforced with different degrees of strictness, depending on the nature of the specific relationship under consideration.[200] We have already noted that the amendment power is unique in its nature.

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[195] Conrad (2003, 197).
[196] Burke (2001, 170, 181).
[197] For a similar call see Dragomaca (2011).
[198] Conrad (1977-78, 18).
[199] Prateek (2008, 477).
[200] Leib, Ponet and Serota (2013, 93).

It is *sui generis* (Chapter 4). But not all amendment powers are similar. A spectrum of amendment powers exists. Some are *weak amendment powers,* which resemble ordinary legislation, some are *strong amendment power*s, which allow for popular participation and deliberations in their process mechanisms, and involve a great deal of time (Chapter 6). One can naturally expect (although this is not always the case) that the easier the amendment process, the higher the rate of formal amendments.[201] A very weak *secondary constituent power*, and an overly flexible amendment process, coupled with short-term political interests and temporary majorities increase the fear of abuse of the amendment power.[202] It is here where the strictest judicial oversight is required. Even Lester Orfield, normally an antagonist of the notion of limitations on the amendment power, states that 'undoubtedly, where a simple majority is required, it is not an especially serious matter for the courts to supervise closely the amending process both as to procedure and as to substance. But when so large a majority as three-fourth has finally expressed its will in the highest possible form outside of revolution, it becomes perilous for the judiciary to intervene'.[203] Therefore, the legitimacy of the judicial review of amendments depends, at least in part, on the relative ease or difficulty of amending the constitution.[204] Since strong amendment power carries greater legitimacy and minimises risks of abuse (see Chapter 6), courts should be less willing to intervene in cases of amendments adopted through a strong amendment process. As the Venice Commission noted, amendments that were adopted following special procedures, such as qualified majorities and additional requirements, enjoy a very high degree of democratic legitimacy; therefore, courts should be particularly hesitant to overrule them.[205] The more the amendment is the product of inclusive and deliberative democracy, the less intensive the judicial review of the constitutional amendment should be, and vice versa.[206] It has been remarked that jurists 'must either learn to trust the amending process or repose their faith in non-

[201] Fombad (2007, 59); Ackerman (1999, 423). Rate of amendments depends also on other criteria such as the size of the voting/decision-making body. See Dixon and Holden (2012, 195).
[202] Conrad (1970, 415). This is, of course, a general theory, which can have some exceptions. The UK is an obvious one, as it is an example for a state which its constitution can be altered by a simple majoritarian vote in Parliament, yet it has a tradition of self-restraint and of a stable constitutional order. See Tomkins (2000). It is important to note that in his later writings, Dicey (1894, 69) himself proposed that Bills which affect fundamental aspects of the constitution should be submitted to the UK's electors for their approval prior to becoming a law. This idea of a referendum, Dicey claimed, would emphasis 'the difference between any ordinary law and the fundamental laws of the realm'. See also Dicey (1890, 505): 'the Referendum supplies, under the present state of things, the best, if not the only possible, check upon ill-considered alterations in the fundamental institutions of the country'. See, in general, Weill (2003, 480).
[203] Orfield (1942, 120).
[204] Jacobsohn (2006A, 487); Orfield (1929-1930, 558).
[205] European Commission for Democracy Through Law (2009, 47-47).
[206] Bernal (2013, 357); Prateek (2008, 465-467).

elected judges who will monitor every exercise of the plenary power of amendment with a yardstick which is, in the ultimate analysis, of their own choosing'.[207] I claim that these two variables – judicial scrutiny and the amendment process – are connected.

To conclude this point, if the amendment power is extraordinary, then judicial review of amendments is all the more an extraordinary power, and the court ought to restrain itself and use it carefully.[208] It was claimed that the adoption of the 'basic structure doctrine' turned the Indian Supreme Court into the 'strongest wing of the state',[209] and arguably, the most powerful court in the world. Nonetheless, since its adoption, the doctrine has been successfully invoked only a small number of times to invalidate amendments.[210] One can cogently argue that the Supreme Court has used this power cautiously. While judicial review of constitutional amendments, as the Indian experience teaches, might prevent abuse of power, adjudication of amendments should be a remedy of last resort, as the 'judgment day weapon'.[211] The task of judicial review of constitutional acts is a delicate one, which must be approached with great caution. The hands of a judge writing a judgment annulling a constitutional act may shake due to the seriousness of the exercise, but will be stable enough if he is certain that the circumstances are right.[212]

IV. CONCLUSION

The formal positivistic framework of judicial review is that the constitution is simultaneously the source of authority granted to the courts to review legislation, and the source of substantial criteria and mechanism through which courts conduct the task of a review.[213] Such an approach might reject judicial review of constitutional amendments, not the least without any clear authority or explicit constitutional limitations on the amendment power. Such a framework, notwithstanding its simplicity, is insufficient to encompass the complicated relationship between basic concepts such as democracy, constitutionalism, and judicial review.

The formalistic framework has to be set aside in favour of a new one that examines the relationship between legal institutions, and the fundamental principles and

[207] Dhavan (1978, 178).
[208] Dellinger (1983-1984, 414-416).
[209] Rao (2006, 73).
[210] Jacobsohn (2003-2004, 1795-1796); Krishnaswamy (2010, 129).
[211] For a last resort defense of constitutional review in general see Tuori (2011, 365).
[212] Roznai (2014, 52).
[213] Kelsen (1945, 162).

procedures that stand at the basis of the system of government within which these institutions work. Such a framework, which considers the distinction between the *primary* and *secondary constituent powers,* assists in explaining the judicial review of constitutional amendments. Nevertheless, the theory of unamendability in general and judicial review of constitutional amendments in particular raises many objections. In the next (and final) chapter, I engage with the various objections to the theory of unamendability.

CHAPTER 8: ASSESSING OBJECTIONS TO UNAMENDABILITY

The main ideas advanced in the previous chapters – the acknowledgment of the limited scope of amendment powers and the case for judicial review of constitutional amendments – raise many complications and objections on various grounds.

This chapter engages with the main objections to the theory of unamendability. It devotes a section to the contentious issue of judicial review of constitutional amendments, since the vast majority of criticism against unamendability is only applicable if limitations on amendment power (explicit or implicit) are enforceable.[1] In the literature (mainly, but not only, in the U.S.), there is a dispute regarding the justification for judicial review of ordinary legislation.[2] As I demonstrate, the disagreement surrounding the practice of judicial review, and the familiar democratic challenges that judicial review faces, are intensified when it comes to judicial review of constitutional amendments.

This chapter demonstrates that the approach taken in this thesis, mainly building upon the distinction between the *primary* and *secondary constituent power* (Part II) and the guidelines regarding the proper exercise of judicial review of constitutional amendments (Chapter 7), manage to mitigate the difficulties associated with unamendability.

I. GENERAL OBJECTIONS TO UNAMENDABILITY

A. The 'Dead Hand' Objection

A society should abide by a set of values that it believes in. At the same time, it should not accept any set of values as taken for granted, but critically examine them and modify them if it believes that some elements are either unjustified or ought to be changed with developments of the society. Thus, unamendability poses an obstruction to what some view as healthy social development. When a change in a society's world-view of values takes place without the ability to accordingly amend the constitution, the constitution does not then protect the values that that society believes in, but simply binds the current

[1] Vile (1995, 198-199).
[2] See, for example, Solove (1999, 941); Zurn (2002, 467); Tremblay (2003, 525); McDonald (2004, 1); Waldron (2006, 1346); Alexander (2008, 119); Fallon (2008, 1693); Law (2009, 723); Harel and Kahana (2010, 227).

generation to the values of previous generations.[3] This is a known problem according to which present (and future) generations are ruled by the 'dead hand' of their ancestors.[4]

The amendment process, which serves as a mechanism for the constitution-makers to share part of their authority with future generations, is Janus-faced. It both creates the 'dead hand' difficulty by requiring an often-formidable procedure for amending the constitution and manages to relax it by allowing future generations to change the constitution.[5] Unamendability aims to prevent future generations from amending certain parts of the constitution; therefore, it exacerbates the 'dead hand difficulty' and may also be contested on this ground.[6] One can only recall Art. 28 of the *French Declaration of Rights of Men and Citizens of 24 July 1793,* according to which 'A people have always the right of revising, amending and changing their Constitution. One generation cannot subject to its laws future generations'. Thomas Jefferson[7] and Thomas Paine[8] pronounced similar ideas. Therefore, the idea that a generation can perpetually tie the hands of another and impose its own values upon it is contentious.[9] Elisha Mulford gave an acute expression for this idea, describing an unamendable constitution as:

> The worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which has adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres.[10]

Those hostile to unamendability would simply claim that unamendable provisions may be repealed or ignored at will,[11] and all the more so should not be enforceable in courts. One possible reply to the 'dead hand' objection is that it is founded on a fallacy: the purpose of the constitution is not to empower past generations, but to maintain and reform the fundamental political institutions in a self-conscious manner.[12] A practical

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[3] Sapir (2010, 178-179).
[4] See McConnell (1998, 1127-1128); Ely (1980, 11); Klarman (1997B, 382); Samaha (2008, 606).
[5] Sager (1995-1996, 275); Pettys (2008, 332).
[6] Albert (2010, 667).
[7] In a famous correspondence between James Madison and Thomas Jefferson from September 6, 1789, Jefferson argued that constitutions should be rewritten every generation (every 19 years according to him), declaring that the dead should not govern the living, since 'the earth belongs always to the living generation'. Yarbrough (2006, 176). For an analysis of Jefferson's thesis see Rubenfeld (1997-1998, 1085). In contrast, in Federalist No. 49, Madison contended that frequent 'recurrence to the people' would endanger 'the public tranquillity by interesting too strongly the public passions' and 'deprive the government of that veneration which time bestows' and on which every government depends for stability. See Madison (1817, 274).
[8] Paine (1998, 91-92) claimed that '[E]very age and generation must be as free to act for itself ... [I]t is the living, and not the dead, that are to be accommodated.'
[9] Fombad (2007, 57-58).
[10] Mulford (1870, 155).
[11] See generally Linder (1981, 717).
[12] Eisgruber (1997, 1616).

reply is that when considering the simple fact that a national constitution's median lifespan is a mere nineteen years,[13] any argument regarding unamendability as binding future generations to the 'dead hand of the past' is relaxed.

The main reply is that unamendability does not entirely restrict future generations who may exercise their *primary constituent power* and alter even unamendable provisions. As Jason Mazzone claims, 'limitations on constitutional amendments are ... consistent with democratic government. The people may change each and every provision of their Constitution, but not every change can be accomplished through a constitutional amendment'.[14] Unamendability limits only the *secondary* – and thus limited – *constituent power*. It is entirely consistent with the people's sovereignty as manifested by the *primary constituent power,* through which 'the people' can constitute a new constitutional order. Thus, it would be inaccurate to claim that unamendability is inconsistent with the people's sovereign power or extinguishing sovereignty.[15] On the contrary, unamendability is not only in accord with the people's sovereignty, as it allows them to reform their constitution, but it is also a sovereignty-reinforcement mechanism, as it creates a space of decision-making (that of the fundamental principles of the polity), which is reserved solely for the people.

B. The Revolutionary Means Objection

One of the most serious objections to unamendability is that it might lead to revolutionary means in order to change unamendable principles or rules.[16] Limitations on the amendment power aim to supply stability, to 'freeze' certain principles or institutions. However, paradoxically, they may lead to revolutions. Generally, by restraining public authority and establishing its parameters, constitutions attempt to serve as 'hedges against the unintended consequences of public policy decisions'.[17] Unamendability, however, might itself lead to unintended consequences. Of course, in every complex social environment, unexpected consequences may arise. Revolutionary means can be recourse even in places where the constitution does not enshrine certain provisions or where implicit limitations on the amendment power are not judicially recognised. Nevertheless,

[13] See Elkins, Ginsberg and Melton (2009, 129).
[14] Mazzone (2004-2005, 1843). See also Goerlich (2008, 4040); Hutchinson and Colón-Ríos (2011, 43).
[15] Orfield (1929-1930, 581); McGovney (1920, 511-513); Albert (2010, 676).
[16] Tushnet (2012-2013, 2007).
[17] See Kyvig (2000A, 2).

it seems that unamendability as a mechanism almost forces a society to recourse to extra-constitutional means for changing unamendable principles:

> By resorting to entrenchment to preserve constitutional structure and values, the founding charter leaves citizens with revolution as their only recourse if they ever wish to amend their constitution – an unusually unsavory position that is a vast departure from normal constitutional conditions. [18]

The amendment process is meant *inter alia*, to forestall, as far as possible, revolutionary upheavals. Yet, unamendability blocks any constitutional manner to amend certain principles. It is thus potentially dangerous; citizens might find unamendability to be an intolerable obstacle to political and social change, thus resorting to extra-constitutional means, such as a forcible revolution, in order to change it.[19] 'Ulysses', in the words of Jon Elster, 'would have found the strength to break the ropes that tied him to the mast'.[20]

In other words, if courts can enforce limitations on the amendment power and invalidate unconstitutional amendments, they might 'invalidate the last institutional route the will of the majority has to make itself heard'.[21] Once the court has said its final word regarding an unamendable principle, this might create a situation according to which a revision of that decision can take place only by forcible revolutionary means. [22] Unamendability might therefore invite and encourage extra-constitutional means in order to obtain the desired modification of prohibited content. It follows that, in terms of constitutional dynamics, unamendability serves the exact opposite of its original purpose: not only does it not prevent the changes, but it also encourages the realisation of that change in a revolutionary manner.[23] This might be especially dangerous in developing countries or weak democracies that lack established democratic traditions, or countries with an apparent history of coups, where the temptation to use extra-constitutional measures might be irresistible.[24] To that effect, one might suggest that resorting to unamendability is a 'constitutional stupidity' that might lead to a 'constitutional tragedy'.[25]

The risk that judicial enforcement of unamendability could threaten society's stability, as the constitutional change may be pursued through violent means, raises the inevitable question: if the change were to occur regardless of the temporary hindrance by a few judges, would it not be better to allow the change to occur by peaceful constitutional

[18] Albert (2010, 684-685).
[19] See Friedrich (1968, 138, 143, 145-146); Suber (1999, 31-32); Fombad (2007, 57).
[20] Elster (2000B, 95-96).
[21] Mendes (2005, 461).
[22] *Id.*, 456; Esquirolo (2008-2009, 721).
[23] Vanossi (2000, 188).
[24] See Friedman (2011, 93-96).
[25] I borrow these terms from Eskridge and Levinson (1998).

means?[26] As Mark Tushnet suggests, 'perhaps constitutional theory should treat an unconstitutional amendment as a pro tanto exercise of the right to revolution through the form of law, a form that allows fundamental change to occur without violence'.[27]

This objection relates to another issue which is the effectiveness of unamendability. A famous Yiddish phrase states *hot er gezogt* ('so what if he said so'), reflecting doubts on the power of words alone. In a similar vein, it appears that the main issue with regards to unamendable provisions is their effectiveness. In 1918, Lawrence Lowell wrote that 'the device of providing that a law shall never be repealed is an old one, but I am not aware that it has ever been of any avail'.[28] One sceptic author argued that unamendable provisions are pointless:

> One understands that we deal here with provisions which the respective constitution-makers hold in particular esteem and to which they would like to give added protection. But if this esteem is shared by the rest of the politically-active groups, this by itself should ensure that the standard procedure for constitutional amendments would protect them sufficiently; if, on the other hand, the demand for change were to become so strong that it could overcome these standard procedure, it is hardly imaginable that its protagonists would renounce their objectives only because the Constitution says that the provision is inviolable.[29]

Two premises underlie the effectiveness problem. *First*, unamendability cannot block extra-constitutional activity. 'In a conflict between law and power', Arendt wrote, 'it is seldom the law which will emerge as victory'.[30] To give two examples, the prohibition of the 1824 Mexican Constitution on altering the form of government did not prevent a *coup d'état*, in which the conservatives came into power and in 1836 replaced the Constitution with a new one that rejected federalism.[31] Likewise, in Greece, notwithstanding the unamendability protection of the democratic system of government in the Constitution of 1952, the Constitution was suspended in April 1967 by a military putsch, which established a military dictatorship that lasted until July 1974.[32] Hence, the ability of physical power to force prohibited changes is unquestionable. From a legal perspective, the question is whether such changes would be valid according to the constitutional system's standards.[33]

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[26] Linder (1981, 723).
[27] Tushnet (2012-2013, 2007).
[28] Lowell (1918, 103).
[29] Akzin (1967, 1).
[30] Arendt (2006, 142). See also Akzin (1956, 332): 'no Constitution ... can be expected to survive intact the social cataclysm involved in a true revolution.'
[31] Roel (1968, 256-259); Moses (1891, 4).
[32] Spiliotopoulos (1983, 467). See also Venizelos (1999, 100 especially fn 3).
[33] Murphy (1992A, 348).

Second, the effectiveness of unamendability is directly linked to the effectiveness of the entire constitution. Where the constitution is mostly ignored, regarded as a mere parchment, one cannot expect unamendable provisions to be any more effective or operative than the constitution's other provisions. Likewise, unamendable provisions could be *de jure* valid, but *de facto* ignored. For example, the Brazilian Constitutions of 1891 and 1946 protected the republican form from amendments, but in the third (1937-1945) and fifth (1964-1988) republics, the republican principle was suppressed as the right to vote (among other rights) was severely violated.[34] Therefore, those objecting to unamendability would simply treat it as 'pointless impediments, permissibly ignored'.[35] The issue of unamendable provisions can thus be both a question of norm and fact.[36]

Admittedly, there is no easy answer for these questions, which might seem to be legitimate objections to the theory of unamendability. Especially, unamendability might be counter-productive; it aims to avoid the appearance of revolutionary change but, paradoxically, cannot overcome times of crisis and critical contingencies. Hence, it leads by its own nature to revolutionary means in order to override them. Nevertheless, one has to consider the following claims:

First, the fact that unamendability can be overridden by violent and extra-constitutional means should not severely undermine its usefulness in normal times and in states where political players understand that they have to play according to the democratic rules of the game. In that respect, unamendability can be explained, to borrow from Benjamin Akzin, by the metaphor of a lock on a door. A lock cannot prevent housebreaking by a decisive burglar equipped with effective burglary tools, and even more so, the lock cannot prevent its own – and the entire door's – destruction by sledgehammer or a fire. On the other hand, there is no need for the safety-measure of a lock if we are dealing solely with honest people, because then there is no fear that any of them will attempt to break into one's house. The lock's utility is in impeding and deterring those who usually obey the accepted rules when said rules are accompanied by effective safety-measures, but with the absence thereof and facing an easy opportunity to improve their condition at the expense of fellowmen, might not overcome the temptation to exploit this opportunity. Similarly, unamendability cannot block extra-constitutional measures and is also not needed once the socio-political culture is that of self-restraint, since there is no fear of an attempt to change the political system's

[34] Maia (2000, 60).
[35] Tushnet (2012-2013, 2007).
[36] Muñiz-Fraticelli (2009, 379-380).

fundamentals or to abuse powers. No constitutional schemes – even such that expressly attempt to - can hinder for long the sway of real forces in public life.[37] Unamendability is aimed at preventing the temptation. Karl Loewenstein was not mistaken in his observation that in times of crisis, unamendable provisions are just pieces of paper which political reality could unavoidably be disregarded or ignored. But in normal times, unamendable provisions can be a useful red light to violation inspired by the political parties to change the constitution and stand firm in the normal development of political momentum.[38] Hence, unamendability should not be underestimated.

Second, whereas it is true that protecting basic principles from amendments cannot serve as a complete bar against movements aiming to abolish them, [39] unamendability is not completely useless. Unamendability mandates political deliberation as to whether the amendment in question is compatible with society's basic principles or not. Hence, unamendability and its institutional enforcement may provide sufficient additional time for the people to reconsider their support for a change contrary to their fundamental values and thereby impede the triumph of the revolutionary movements.[40] Gregory Fox and Georg Nolte remark that the framers of the German Basic Law believed that if an unamendable provision 'had been presented in the Weimar constitution, Hitler would have been forced to violate the constitution openly before assuming virtually dictatorial power. … given the traditional orderly and legalistic sentiment of the German people, this might have made the difference'.[41]

Lastly, the idea that unamendability limits only the *secondary constituent power* and not the *primary constituent power* need not necessarily result in a call for violent changes. On the contrary, understanding a democratic *constituent power* simply calls for further development of how the *primary constituent power* may peacefully 'resurrect' (see Chapter 6).

II. OBJECTIONS TO IMPLICIT LIMITATIONS

The argument for implicit limitations raised in Chapter 5 invites various objections based upon the ambiguous and vague nature of the doctrine of implicit limitation (such as the basic structure doctrine). It is often argued that this nature would grant courts sweeping

[37] Zweig (1909, 324). See also Vile (1991A, 295): 'No mere parchment barrier can prevent the people from exercising the right to propose a new constitution if sufficient numbers insist upon doing so and have the necessary power to back up their demands.'
[38] Loewenstein (1972, 169, 180-181).
[39] Conrad (1970, 394).
[40] Ackerman (1991, 20-21).
[41] Fox and Nolte (1995, 19).

powers to decide what the basic principles of the constitution are and might impose severe impediments on the amending power.[42] These issues will be dealt in the next section regarding the objections to judicial enforcement of unamendability. In this section, I focus on the unique objection to the very existence of implicit limitations.

A. The *Expressio Unius est Exclusio Alterius* Objection

The mere recognition of the existence of any implicit limitations on the amendment power is contentious. Had a constitution's framers intended to prohibit certain amendments, one could reasonably expect them to have included a provision to that effect.[43] This problem obviously exists with regards to silent constitutions, i.e. those constitutions that lack any unamendable provisions. It is aggravated when the constitution contains certain unamendable provisions. Indeed, according to the maxim *expressio unius est exclusio alterius* ('The expression of one thing is the exclusion of another'), the existence of explicit limitations provides evidence that the constitution-makers considered limits on the amendment power, the omission of other limitations was intentional, and, therefore, implicit limitations should be excluded.[44] John Vile argues that this is 'perhaps the strongest argument against implicit limits on the amending process'.[45] In 1871, George Helm Yeaman attacked the notion of implicit limitations on the amendment power:

> We cannot have two constitutions, one of the letter and one of the spirit, the letter amendable and the spirit not. Letter, spirit and approved judicial construction all go to make up the constitution. That constitution by its own terms is susceptible of amendment, and the amendments, when adopted in the way pointed out, are binding and must be obeyed.[46]

This is akin to David Dow's argument that Art. V of the U.S. Constitution is exclusive and that its words 'mean what they say'.[47] Likewise, Kemal Gözler defends a formalistic approach according to which, if the constitution does not include any explicit

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[42] See, for example, Schwartzberg (2009, 15); Desai (2000, 90); Mehta (2002, 97); Shankardass (2006, 137).
[43] The rejection of the Indian basic structure doctrine in Singapore was based upon this argument. See above *Teo Soh Lung v. The Minister for Home Affairs* [1989] 2 M.L.J. 449, 456-7.
[44] Pillsbury (1909, 742-743); Williams (1928, 544); Orfield (1942, 115-116); Orfield (1929-1930, 553-555); Linder (1981, 730); Da Silva (2004, 459).
[45] Vile (1985, 383).
[46] Yeaman (1871, 710-711).
[47] Dow (1990-1991, 1); (1995, 127). See also Baker (2000-2000, 3).

substantive limitations, all of the constitution's provisions may be amended. Without explicit limitations, no other limitations exist.[48]

B. Reply: *Reductio ad Absurdum*

These arguments are important, but they are not entirely resounding. First, I share Otto Pfersmann's position that the approach taken by Gözler is too narrow. 'Many things', Pfersmann notes, 'are indirectly explicit, i.e. they are contained in the meaning of the norm-formulation, accessible through interpretation'.[49] CJ Sikri's opinion in *Kesavananda* takes a similar approach: 'in a written constitution it is rarely that everything is said expressly. Powers and limitations are implied from necessity or the scheme of the Constitution'.[50]

Second, and more importantly, according to the delegation theory distinguishing between the *primary* and *secondary constituent* power, 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 any explicit limitations (see Chapter 5).[51] Explicit and implicit limitations are not mutually exclusive; the existence of explicit limitations does not negate the existence of implicit limits, and *vice versa*. The two are mutually reinforcing. Explicit limitations on the amendment power should be regarded as confirmation, a 'valuable indications' in the words of Conrad, that the amendment power is limited, but not as an exhaustive list of limitations. Other principles may be analogous or equally fundamental.[52]

Examples from comparative law strengthen this presumption. For instance, in Turkey, under the 1961 Constitution, there was only one explicit substantive limitation on the amendment power: the unamendability of the republican form of government. Even so, the Turkish Constitutional Court held in 1965 that the amendment power was limited not only by this explicit limitation, but also by implicit limitations:

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[48] Gözler (2008, 102).
[49] Pfersmann (2012, 103).
[50] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, para. 210.
[51] Keshavamurthy (1982, 51): 'To take a view…that limitations on amending power should be read only if they are expressly provided could be to miss the basic reality underlying the fact that the lesser Sovereignty owes its existence and powers to a grant by the Sovereignty at the back of the Constitution which grant as between the principal and the agent is smaller in the absence of express stipulations otherwise'.
[52] Conrad (1970, 379). See also Schmitt (2008, 152) and compare with Fleming (1994-1995, 366) (constitutional entrenchment of certain compromises should not deny unalienable rights held by the people).

> It is clear that the Constituent Assembly…adopted the Article 155 [amendment procedure] in order to enable only the amendments which are conform to the spirit of the constitution. The Constitutional amendments which…destroy the basic rights and freedoms, rule of law principles …. Demolish the essence of the 1961 Constitution…cannot be made in application of the Article 155.[53]

In 1971, the Court reaffirmed its competence to examine whether amendments do not damage the 'coherence and system of the constitution'.[54]

In Italy, Art. 139 of the Italian Constitution of 1947 includes an explicit limitation according to which 'The republican form of the state may not be changed by way of constitutional amendment'. Italian scholars have further elaborated upon the substantive theory presented above, contending that the amendment procedure (Art. 138) cannot be used to deny fundamental norms (*principi supremi*) propounded and protected by the constitution.[55] Among these principles that are to be considered as implicitly unamendable, Italian scholars mention: democracy, inviolable rights, and the rigidity of the constitution itself.[56] The Italian Constitutional Court accepted this approach in its decision 1146/1988, which stated that:

> The Italian Constitution contains some supreme principles that cannot be subverted or modified in their essential content…. Such are principles that the Constitution itself explicitly contemplates as absolute limits to the power of constitutional revision, such as the republican form … as well as principles that, although not expressly mentioned among those not subject to the principle of constitutional revision, are part of the supreme values on which the Italian Constitution is based.[57]

In other words, notwithstanding the unamendable provision, the Constitutional Court recognised further implicit limitations on the amendment of other supreme principles upon which the constitution is based.[58]

Similarly, in Switzerland, the constitution includes an explicit limitation to respect the mandatory rules of international law (Art. 193.4). Nevertheless, constitutional scholars repeatedly call for recognising further implicit limitations, such as the fundamental norms of the Federal Constitution.[59]

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[53] Turkish Constitutional Court's decision of September 26, 1965, No. 1965/40, 4 AMKD 290, 329 (obiter dicta), cited in Gözler (2008, 95-96).
[54] Turkish Constitutional Court's decision of April 3, 1971, No. 1971/37, 9 AMKD 416, 428-429, cited in Gözler (2008, 96-97).
[55] Carrozza (2007, 174-75); Groppi (2012, 210). For such opinions see also Galizzi (2000, 241); Fusaro (2011, 215).
[56] Comella (2009, 107).
[57] Corte Const. judgment no. 1146 of Dec. 15, 1988, quoted in Del Duca and Del Duca (2006, 800-801). See also Groppi (2012, 210-211).
[58] Escarras (1993, 112-116); Luciani (1993, 130-138).
[59] See Biaggini, (2011, 317).

Lastly, in Brazil, while the 1891 Constitution (no longer in force) protected the republican and federal form and the equality of representation of the states in the senate, some authors claimed that other features, such as the federation state's territory, separation of church and state, judicial review, and bill of rights, were also implicitly unamendable. [60] In contemporary Brazilian constitutional debate, others have also advocated in favour of implied limitations. For example, while mentioning some important scholarly positions in the opposite direction (such as Manoel Goncalves and Ferreira Filho), Adriano Sant'ana Pedra argued that the existence of substantive limitations expressly provided in Art. 60(4) of the Constitution of 1988 does not exclude implied substantive limitations, which must be read between the lines of the constitutional text.[61]

It is with this understanding that one can accept Maurice Hauriou's claim, as elaborated in Chapter 3, that there are always implicit supra-constitutional principles: 'not to mention the republican form of government for which there is a text, there are many other principles for which there is no need to text because of its own principles is to exist and assert without text'. [62] Even Georges Burdeau, who took a formal approach in his doctoral thesis,[63] later changed his mind to claim: 'to say that the power of revision is limited, is to support, not only that it is bound by the terms of form and procedure made its exercise by the text – which is obvious – but also that it is incompetent, basically, to repeal the existing constitution and develop a new one… by repealing it, it would destroy the basis of its own jurisdiction'.[64]

I am fully aware that my argument in favour implicit limitations on the amendment power (whether explicit limits exist or not) may seem contradictory in that it both upholds and rejects the constitution; in one breath it views the constitution as so sacred that interference with its basic principles is prohibited, while in the next breath it claims that the constitution's own amendment procedure must be ignored or recognised only to a limited extent.[65] However, to demonstrate the absurdity of relying solely on explicit limitations, imagine the extreme examples of amendments providing that the constitution has no legal validity, or that the Parliament extends its term indefinitely without

[60] See Maia (2000, 61-62).
[61] See Pedra (2009, 222-232).
[62] Hauriou (1923, 297) (my translation).
[63] Burdeau (1930, 78-83).
[64] Burdeau (1983; 231-232), quoted in Gözler (1999, 94) [my translation].
[65] Williams (1928, 543).

elections.[66] Such amendments undermine the entire legitimacy of the constitutional order. Restricting ourselves to a formal theory, according to which the amendment power is solely limited by explicit limitations, would mean that such amendments would be 'constitutional' in the absence of express limitations to the contrary. Yet, it would be absurd to include in every constitution a provision stating that it is prohibited to use the amendment process to destroy the constitution itself, because it is evident that the delegated amendment power cannot destroy the fundamental political system to which it owes its existence. Just as in private law, no action may be founded on illegality or immorality (*ex turpi causa non oritur action*), so too, the constitutional process cannot be used to undermine the constitutional regime itself.[67] To claim otherwise would lead to an illogical outcome. As Ringera J stated in the case which adopted the basic structure doctrine in Kenya:

> Parliament has no power to and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and enact a new Constitution. In my humble view, a contrary interpretation would lead to a farcical and absurd spectacle.[68]

The all-encompassing idea underlying amendment provisions in the first instance was the desire to preserve the constitution.[69] While infallibility is not an attribute of a constitution, its fundamental character and basic structure cannot be overlooked. Otherwise the power to amend may include the power to destroy the constitution, and that would be *reductio ad absurdum*.[70] Thus, the best response to the *expressio unius est exclusio alterius* argument is that 'what is logically impossible does not need to be positively prescribed'.[71]

In reply to this 'amendophobia', the fear that the amendment power will be abused to subvert democracy or constitutionalism, Lester Orfield has argued that the possibility of abuse of power should not be the test for the power's existence.[72] Moreover, even if an abuse of the amendment power occurs, 'it occurs at the hands of a special organization of the nation…so that for all practical purposes it may be said to be the

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[66] As Black (1963, 959) once wrote, 'these are (in part at least) cartoon illustrations. But the cartoon accurately renders the de jure picture, and seems exaggerated only because we now conceive that at least some of these actions have no appeal to anybody.'

[67] Cf., Judge Landau's opinion in Israeli Supreme Court decision *Yeredor v. Chairman, Central Election Committee for the Sixth Knesset*, 19 P.D. 365. (1965). See Guberman (1967, 457).

[68] *Njoya & Others v. Attorney General & Others*, [2004] LLR 4788 (HCK), high Court of Kenya at Nairobu, 25 March 2004, para 61, http://www.chr.up.ac.za/index.php/browse-by-subject/336-kenya-njoya-and-others-v-attorney-general-and-others-2004-ahrlr-157-kehc-2004-.html

[69] Harris (1993, 183).

[70] Iyer (2003, 2).

[71] Da Silva (2004, 459).

[72] Orfield (1942, 123).

people, or at least the highest agent of the people, and one exercising sovereign powers…. it seems anomalous to speak of "abuse" by such a body'.[73] These claims should be refuted. While it is true that the mere possibility of abuse should not be the test to the mere existence of a power, it is unclear why it should not be a test for its scope, especially if ignoring limitations on scope may not only bring absurd results, but may also subvert the entire notion of constitutionalism. Furthermore, it is the basic proposition of this thesis that the amendment power, although an extraordinary one, is not sovereign. It is indeed different from ordinary governmental power, but it is still an *agent* of the people, an agent that is capable of abusing its power. This should not be dismissed as a mere 'argument of fear'. The Indian basic structure doctrine proved to be 'the only bulwark to prevent the basic tenets of a liberal social justice constitution from being totally obliterated'.[74] Even those who reject the notion of implicit limitations, have to admit that the Indian basic structure doctrine was created as a response to abuse of the amendment power, and proved that a limited amendment power may avoid unauthorised usurpation of power and preserve democracy.[75] True, implicit limitations on the amendment power and their judicial enforcement may be seen as 'an imperfect response to imperfections';[76] yet it could be seen, at the very least, as a necessary evil.

III. OBJECTIONS TO JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

A. The Logical Subordination Objection

The constitution creates courts and grants them authority. All powers possessed by constituted organs derive from the constitution. This simple postulation raises the *prima facie* difficulty of logical subordination: how can courts – an organ created by the constitution and subordinated to its provisions – rule upon the constitution's validity? As Joseph Ingham concluded:

> If the Supreme Court, created by, and owing its authority and existence to the Constitution, should assume the power to consider the validity or invalidity of a constitutional amendment … it would be assuming the power to nullify and destroy itself, of its own force, a power which no artificial creation can conceivably possess.[77]

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[73] *Id*., 124.
[74] Sripati (1998, 480). See also Nahar and Dadoo (2008, 571).
[75] Katz (1995-1996, 273); Lakshminath (1978, 159); Keshavamurthy (1982, 82).
[76] Garlicki and Garlicka (2012, 185).
[77] Ingham (1928-1929, 165-166).

The subordination difficulty only arises if one conceives of the amendment power as equivalent to the *primary constituent power*. Indeed, if the court reviewed a provision of an original constitution that established its own authority, this might involve the logical subordination difficulty. The Constitution of Bosnia and Herzegovina is an interesting case study. In two cases before the Constitutional Court, certain constitutional provisions that granted privileges for the three constituent people (Bosnians, Serbs, and Croats) were challenged before the Constitutional Court for conflicting with the principle of equality. The majority of the Constitutional Court held that it lacked the competence to decide upon the constitutionality of the Constitution. Otherwise, if it decided that part of the constitution was 'unconstitutional', it would fail its duty under Art. VI(3)(a) of the Constitution to 'uphold this Constitution'.[78] This differs from the example of South Africa, in which the Constitutional Court declared the Constitution of 1996 to be unconstitutional.[79] As elaborated in Chapter 3, the Interim Constitution of 1993 entrusted the constituent assembly to work within a framework of thirty-four agreed-upon principles, and empowered the Constitutional Court to review the compliance of the draft Constitution with those principles. Therefore, in observing the constitution-making process, the Court acted within its competence, exercising an explicit delegated authority.

An analogy from the distinction between *constituent power* and *legislative power* may elucidate this problem: in ordinary judicial review, the acts of a lawmaker operating under the constitution are reviewed against the background provided by the constitution-maker.[80] Similarly, a constitutional amendment adopted by the *secondary constituent power* may be reviewed against the background provided by the *primary constituent power*. In acknowledging the distinction between the *primary* and *secondary constituent power*, it is

[78] Case No U-5/04 Request of Mr Sulejman Tihić, Decision of 31 March 2006, http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/bih/eng/bih-2006-1-003; Case No U-13/05, Request of Mr Sulejman Tihić, Decision of 26 May 2006, http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/bih/eng/bih-2006-2-005. See Feldman (2011, 142-144); Feldman (2012, 164). Contrary to the Constitutional Court, the ECtHR held that it has the jurisdiction to decide upon the issue. In *Sejdić and Finci v. Bosnia and Herzegovina*, App. No. 27996/06, Eur. Ct. H. R., Judgment of Dec. 22, 2009, the ECtHR held that the constitutional provision limiting the right to be elected in parliamentary and presidential elections to people belonging to Bosniaks, Croats, and Serbs (the 'constituent peoples' of Bosnia and Herzegovina) is discriminatory, and the disqualification of Jewish and Roma origin candidates constitutes a breach of the ECHR. See Milanović (2010, 281); Bardutzky (2010, 309); Tran (2011, 3).

[79] Re Certification of the Constitution of the Republic of South-Africa, 1996(4) SALR 744. See Sachs (1996-1997, 1249); Brooke (2005, 3-14).

[80] Suksi (1995, 6).

possible to grasp that by the exercise of the judicial review of constitutional amendments the judiciary does not act in contradiction of the constitution, but as its preserver.[81]

B. The Undemocratic Objection

The ability to amend the constitution seems an essential element of any democratic society, since a self-governing people ought to be able to challenge, revise, or reform its basic commitments.[82] Unamendability positions certain rules or values not only above ordinary politics, but also above constitutional politics. By not allowing majorities – even super-majorities – to modify these rules or values, unamendability is in clear tension with democratic principles. Critics argue that unamendability 'betrays one of democracy's most attractive legacies: the ability to modify law',[83] or 'deny citizens the democratic right to amend their own constitution and in so doing divest them for the basic sovereign rights of popular choice and continuing self-definition'.[84] Hence, it is no wonder that some might view unamendability as a 'constitutional dictatorship' or 'a legal authoritarianism'.[85] For Carlos Bernal, since the people should have the authority to decide upon the their constitution's essential elements, it is judicial review of constitutional amendments which poses a severe democratic challenge, since 'if the people themselves, directly or through their representatives, have agreed to pass a constitutional amendment, it is because they have decided that the amended element is not an essential element. This decision should be final'.[86]

Whether unamendability and its judicial enforcement are 'undemocratic' involves, I believe, four separate aspects. The first is unamendability itself, i.e. whether the absolute entrenchment itself of any subject (regardless of its content) is undemocratic. The second is whether the content of the protected unamendable subject is undemocratic. The third is the scope of the unamendability, and the fourth is its judicial enforcement. Any answer to these different questions depends on what one considers 'democracy'. If one considers democracy as purely procedural, i.e. simply as a system of self-government in which citizens have the ability to make majority collective decisions, then surely unamendability is 'undemocratic' in some respects. But if one conceives

[81] Beaud (1994, 345).
[82] Hutchinson and Colón-Ríos (2011, 43).
[83] Schwartzberg (2009, 2).
[84] Albert (2010, 667).
[85] Nogueira (2004, 7); Da Cunha (2007, 18).
[86] Bernal (2013, 349).

democracy to include protection of certain basic rights and principles, this adds a substantive pre-condition for a democracy.[87] In that respect, entrenching *certain* principles and values that characterise modern democracy in the substantive sense is not necessarily undemocratic. Therefore, the argument that *any* pre-commitments constraining the amendment power present a challenge to democracy relies on a narrow view of democracy. It confuses democracy with a mere majority. Thus, unamendability may accord with a theory of democracy that conceives democracy as more than merely a people's majority, but rather a system of government that is based on certain values and fundamental rights.[88]

There is no doubt that the unamendability of clauses or principles, which places them beyond the reach of any legislative power, exacerbates the counter-majoritarian difficulty.[89] But then again, unamendability, as a counter-majoritarian institution, aims to neutralize the dangers of majoritarianism.[90] Unamendability could thus be viewed not as undemocratic, but rather as a tool forestalling the possibility of a democracy's self-destruction.[91] Moreover, if we recognise constitutionalism as a system of 'higher law', according to which democratic majoritarianism must give way to certain commitments to principles,[92] or as indispensable legal limits to governmental power,[93] unamendability simply takes this idea to its extreme. But this is only a matter of a degree, not of a kind.

With regard to the content of the unamendable subject, a clear answer cannot be given categorically, and every case must be judged on its own merits. As noted in Chapter 2, some unamendable provisions can hardly be considered a pre-condition for democracy in the substantive sense.[94] Clearly, unamendability can protect issues that would reasonably be considered 'desirable' democratic values, such as fundamental rights or the rule of law. But they can also protect 'undesirable' principles or practices, from a democratic perspective, such as the Corwin Amendment, which was proposed in 1861 and aimed to protect slavery (see Chapter 5).

With regard to the scope of unamendability, the more the unamendable provision covers and the wider its scope, the greater its tension with democracy, because

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[87] See Dworkin (1990, 35); Dworkin (1995, 2); Barak (2009, 23-26); Rostow (1952, 195); Bishin (1977-1978, 1099); Michelman (1998A, 419).
[88] Rousseau (1994, 273-282).
[89] See Mohallem (2011, 766-767).
[90] Albert (2010, 675).
[91] Cf. Holmes (1993C, 239).
[92] Dow (1995, 121-130).
[93] See McIlwain (1975, 132).
[94] For example, Portugal Const. (1976), art. 288(e), which protects from amendments 'The rights of the workers, workers' committees, and trade unions.'

it would place a larger number of principles or rules beyond the reach of any majority. Without the ability of citizens to participate in debates with regards to society's basic values, and in the absence of any mechanism to modify these values, civil motivation to participate in any decision-making process would probably deteriorate, and the public debate would be replaced by apathy. By that, unamendability risks impoverishing democratic debates.[95] In response to this concern, it has to be noted that unamendability does not necessarily completely impoverish popular debates regarding society's values. First, the mere act of unamendability of certain values might place them at the centre of public debate when otherwise such values might not have been even open for dispute. Second, unamendability creates a 'chilling effect' leading to hesitation before repealing an unamendable constitutional subject. This chilling effect can afford time for political and public deliberations regarding the protected constitutional subject and puts it at the centre of the public agenda.

As for the fourth issue, judicial review of amendments, the theory of unamendability acknowledges the problem of an unelected and unaccountable judiciary overriding the people's representatives' decisions. Surely, endowing courts with authority to declare constitutional amendments unconstitutional enhances the counter-majoritarian difficulty embodied in the situation of a non-elected court invalidating legislation enacted by a legislature.[96] How can a small, often divided, set of judges replace the democratic judgment of the people and their representatives? As Rory O'Connell correctly notes, allowing courts to review constitutional amendments might turn the 'people's guardian of the constitution against politicians', into 'a guardian of the constitution against all comers'.[97] Of course, at least with regard to explicit limits on the amendment power, Michel Rosenfeld was right to state that 'any countermajoritarian difficulty would have to be ascribed to the constitution itself rather to judicial interpretation'.[98]

One reply to this objection is that when courts review amendments *vis-à-vis* the constitution's unamendable fundamental principles, they are not acting in a completely counter-majoritarian manner, for they have the support of the high authority of the *primary constituent power*. In other words, judicial review expresses the democratic base of the constitution, i.e., it gives expression to the will of 'the people' as a superior legal norm. When judges enforce unamendability, they are vindicating, not defeating, the true

[95] Sapir (2010, 179).
[96] Bickel (1962, 16-23).
[97] O'Connell (1999, 51).
[98] Rosenfeld (2005, 186 fn 80).

will of the people as expressed in constitutional moments contra to the everyday political process. This will of 'the people' conflicts with the present will of the political majority as expressed by the amending power.[99]

From the perspective of the transcendental conception of the *primary constituent power* (see Chapter 6), judicial review of amendments articulates a different will, a deeper or more basic one, if you like, from the current political majority. The conflict that the court then decides is between the will of the people (exercised by the *primary constituent power*) – a supra temporal will that lasts for long terms (and thus represents past super-majorities) – expressed in the basic principles of the constitution, and the temporary will of the people as expressed in a constitutional amendment. According to this rationale, judicial review of constitutional amendments is not only not undemocratic (or even anti-majoritarian in a way), but rather, it is an expression of the will of the people as manifested in the constitution's basic principles.[100]

Most importantly, the theory of unamendability does not necessarily prevent the people from engaging in the political process and deliberations.[101] As proposed in Chapter 6, via the emergence of the *primary constituent power* (regardless of whether one endorses a *transcendental* or *immanent* conception of that power), even the most basic principles of society can be reformed. That makes the people in their *primary constituent power* capacity, not the courts, the final arbiters of society's basic values.

C. Enhancing Judiciary's Power Objection

The ability of courts to substantively review constitutional amendments allegedly grants them the last word on constitutional issues. It is the ultimate 'judicialisation of mega-politics.'[102] Enforceability of unamendability shifts the locus of constitutional change from those authorities entrusted with the amendment power toward the courts.[103] Courts can use unamendability as a strategic trump, applying it selectively, and overall elevating their powers *vis-à-vis* other branches.[104] This problem is accentuated with regards to implicit limitations on the amendment power, where, in contrast with situations in which the textual standard provides guidance and constraints, the judiciary has sweeping power

[99] Cf. Freeman (1990-1991, 353-354).
[100] Compare with Barak (1996, 403) and echoing Hamilton (1817, 421).
[101] Cf. Tushnet (1995, 299-301) (claiming that minimal judicial review provides an opportunity to the public and legislatures to articulate constitutional norms).
[102] See Hirschl (2004, 169-201).
[103] Schwartzberg (2009, 3, 22, 184-189).
[104] See Mohallem (2011, 781).

to determine the 'spirit', 'basic structure', or 'basic principles' of the constitution.[105] This could be demonstrated by the experience of Nepal and India. In Nepal, before the Nepalese Constitution of 1990 was drafted, debate focused on the idea of creating a list of basic constitutional features that would require for their amendment ratification by a referendum, in addition to adoption by a majority in both houses. Eventually, this idea was rejected in favour of a general unamendability formula, according to which: 'any bill purporting to amend or repeal any Article of this Constitution may be introduced, without contravening the spirit of the Preamble of this Constitution ... Provided that this Article shall not be subject to amendment' (Art. 116.1).[106] It is argued that this compromise only exacerbated the debate as to what exactly is the 'spirit of the Preamble'.[107] Similarly, the Indian basic structure doctrine has been heavily criticised for its open-ended nature and the wide discretion that it grants judges.[108]

Judicial review of amendments may not only lead to a power imbalance by elevating the judiciary's power *vis-à-vis* the executive and legislature branches, but might also fracture the fragile balance of judicial review:[109] One of the arguments justifying the judicial review of ordinary legislation is that courts do not necessarily possess the last word, since unpopular judicial decisions may instigate constitutional amendments to overturn these decisions.[110] In the French constitutional debate, Georges Vedel famously compared constitutional amendments to the ancient institution of '*lit de justice*' by which the sovereign king could appear before the court and overturn a judicial decision. Similarly, in a sort of *lit de justice*, the people can overturn a court's ruling through constitutional amendments.[111] This democratic check would arguably disappear if courts

[105] Schwartzberg (2009, 15-6); Landau (2013A, 189).
[106] Thapa (2005, 237); Stith (1996, 47). On the drafting process of the Constitution, see Hutt (1991, 1028-32).
[107] See Buss (2004, 45); Conrad (2003, 192-194). This prohibition was removed from the interim Const. (2007), art. 148, for several reasons: First, this document was supposed to be a temporary one and to provide the basis for the work of the Constituent Assembly without binding 'constituent power' to any principles; Second, the Preamble of the Interim Constitution was devoid of ethno-cultural narratives; Third, the Maoists - together with other more moderate leftist parties which had greater influence and representation in the Commission that drafted the 2007 constitution - do tend to support a stronger notion of popular sovereignty and oppose granting courts a main role in policing the boundaries of constitutional politics, hence the abandonment of the basic structure limitation. For further studies on the post-1990 constitutional developments in Nepal see Malagodi (2013); Malagodi (2012, 169).
[108] Shankardass (2006, 138); Menon (2006, 59).
[109] Mohallem (2011, 766).
[110] See Dixon (2011C, 98); Stone Sweet (2000, 89); Yap (2006-2007, 104-105); Dellinger (1983-1984, 414-415); Comella (2009, 104-107).
[111] Vedel (1992, 173), cited in Troper (2003, 113); Comella (2009, 105); Baranger (2011, 407). On '*lit de justice*' see Radin (1934-35, 115).

could review constitutional amendments; therefore, it is arguably inappropriate for a court to rule upon the validity of an amendment overturning a judicial decision.[112]

Judicial review of constitutional amendments undeniably enhances the judiciary's power. The theory proposed in this thesis manages to moderate this concern. Again, even if courts have the power to review amendments, they do not possess final decision-making power. Recall, it is not suggested that decisions by the *primary constituent power* be submitted to judicial review, but rather merely those decisions adopted by the more limited *secondary constituent power*.[113] Consequently, the judicial branch is not sovereign and can still be overridden by an exercise of the superior *primary constituent power*.

Not only that, but the theory proposed here manages to maintain a proper balance of powers. Presuming that the judicial review of amendments is exercised according to the standard review proposed in Chapter 7 – the 'fundamental abandonment standard' – this ensures that the exercise of this extreme power would be undertaken only in the most aggravated cases. Moreover, as noted in that chapter, the theory of unamendability calls for judicial restraint. A review of amendments that overturn prior judicial decisions might damage the court's legitimacy.[114] Therefore, courts would be inclined to restrain themselves and refrain from adjudicating the issue of amendments that overrule judicial decisions, especially ones adopted through *strong amendment powers* (see Chapters 6-7). This, however, should not exclude the recognition of the power of judicial review of amendments itself.

In addition, one should not be overly petrified by the possibility of courts annulling constitutional amendments. Commonly, courts can interpret amendments, which have become part of the constitution once adopted, during their ordinary judicial review of legislation.[115] If courts have the authority to interpret the constitution, and in doing so to grant to a constitutional provision a very narrow or broad interpretation, then allowing it to invalidate an amendment is not such a drastic step. True, in the case of interpretation, it would be open to another court to choose a different interpretation in the future. Nevertheless, the results of an interpretation that differs significantly from the legislative intent, or is detached from the provision's wording, could often be more severe than the act of annulment.[116] Otto Pfersmann describes provisions that were given a different meaning from what they actually mean (because otherwise they would be

[112] Tribe (1983, 442-443); Favoreu (1994, 581); Vedel (1993, 96).
[113] Ponthoreau and Ziller (2002, 140).
[114] Dellinger (1983-1984, 414-6).
[115] Baranger (2011, 414).
[116] Roznai (2008, 435).

invalidated by the court) as 'norms without texts'.[117] Such application of interpretation may conflict with principles of legal certainty and separation of powers.[118] As Christine Landfried remarks:

> A clear-cut invalidation of a law can give the legislature more room for political manoeuvring, in that a new law can be enacted. However, the declaration that only one particular interpretation of a law is constitutional often entails precise prescriptions and can quite easily result in law-making by the Constitutional Court.[119]

In the case of annulment, the 'ball returns to the hands' of the amending authority, which can re-constitute the amendment according to the court's decision or otherwise. In the case of interpretation, if the amending authority is not satisfied with the new meaning of the amendment, it would have to annul the amendment through the amendment process, which often includes stubborn obstacles to overcome;[120] only this time, the 'ball has left the hands' of the amending authority. It is now in the public sphere shaped by the hands of the judiciary until its abolishment or replacement with a new amendment.

Lastly, at least when it comes to unamendable provisions, judicial review can be viewed as a useful mechanism for relaxing the main abovementioned difficulties associated with unamendability (anti-democracy, the 'dead-hand' problem, and revolutionary means). This is because enforceability of unamendable provisions allows courts to interpret the protected principles and give them modern meaning. What republicanism meant in France in 1848 is infinitely different from what it means nowadays,[121] and the Norwegian Constitution's spirit and principles are not necessarily those of 1814, but the present ones.[122] Indeed, constitutional identity is never a static thing.[123] It can always be reinterpreted and reconstructed.[124] The courts' ability to review amendments can have important benefits in that respect. While unamendability is aimed, *inter alia*, to provide stability for society, it might cause constitutional stagnation, at least regarding those unamendable values or institutions. The ability of courts to review

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[117] Pfersmann (2009, 88).
[118] See references in Tobisch (2011, 427).
[119] Landfried (1988, 154).
[120] Kyvig (2000B, 10): 'removing an amendment from the constitution requires the same supermajority approval as its initial adoption, thus a reversal of political sentiment of enormous magnitude.'
[121] Baranger (2011, 421).
[122] Opsahl (1991-1992, 185-186).
[123] Jacobsohn (2006B, 363); Jacobsohn (2010A, 335); Jacobsohn (2010B, 47).
[124] Rosenfeld (1994-1995, 1049). Cf., Barshack (2009, 566): 'the meaning of what is taken to constitute the unchanging core of the law, in fact, also changes over time. While the social body and fundamental law are represented, at any given moment, as eternal, they undergo constant developments.'

amendments and to interpret (and reinterpret) unamendable provisions manages simultaneously to preserve the core elements of the protected principles while allowing a certain degree of change, and in so doing mitigates the problem of rigidity with the changing needs of society.[125]

In the same vein, albeit suffering from uncertainty, some view the vagueness of implicit limitations on the amendment power as an advantage.[126] Unlike explicit limitations, implicit limitations do not specify *ex-ante* what are precisely the protected principles. Being judicially formulated, implicit limitations contain an inherent flexibility as they leave space for subsequent future judicial interpretation, clarification, and public and political deliberations.[127]

IV. CONCLUSION

There are many objections to the idea of unamendability. Noah Webster, writing a series of articles in the *American Magazine* in 1787-1788 (as 'Giles Hickory'), criticised any attempt to create an unamendable constitution. This attempt is not only 'arrogant and impudent' since it means to 'legislate for those over whom we have as little authority as we have over a nation in Asia', but it would also be useless since 'a paper declaration is a very feeble barrier against the force of national habits, and inclinations'.[128] I agree that unamendability is a 'complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order'.[129]

Even more objectionable than the mere mechanism of unamendability is the idea that courts may rule upon the constitutionality of constitutional amendments. As elaborated in this chapter (and in Chapter 7), this practice involves significant theoretical, conceptual, and practical issues. It bears weighty implications for the principles of judicial discretion, independence, and accountability,[130] and has institutional significance as it engages with the status and role of the court in a democratic society and with its relations *vis-à-vis* other governmental branches.[131]

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[125] Gören (2009, 12-13).
[126] Stith (1996, 65-66).
[127] Abraham (2000, 204); Issacharoff (2012, 45).
[128] Hickory (1787-1788, 138-139, 140-141), cited in Wood (1998, 379).
[129] European Commission for Democracy Through Law (2009, para. 218).
[130] Collett (2009, 327); Dixon (2011A, 1).
[131] Barak (2008, 62); Barak (2010A, 361); Barak (2011A, 321).

It appears that most arguments against judicial review of amendments are really reopening the traditional case against judicial review. But such arguments, as Dietrich Conrad wrote, 'tend to overlook the limited, essentially corrective and marginal, function of judicial review, if kept within its proper sphere and exercised with judicial discipline'.[132] If judicial review of amendments is exercised with care according to the guidance and standard of scrutiny provided in this thesis, many of the objections against unamendability are relaxed. Most importantly, the theoretical distinction between the *primary* and *secondary constituent powers* supplies an adequate reply to many of the objections to the theory of unamendability.

[132] Conrad (1977-78, 17).

CHAPTER 9: CONCLUSION

I. A THEORY OF UNAMENDABILITY

In 1948, Kurt Gödel, the famous Austrian logician, applied for naturalisation as an American citizen. Preparing for the citizenship examination, Gödel thoroughly studied the American history and Constitution. One day, Gödel called his friend, Princeton University mathematician, Oskar Morgenstern. Years later, Morgenstern described the conversation that he had with Gödel:

> [Gödel] rather excitedly told me that in looking at the Constitution, to his distress, he had found some inner contradictions and that he could show how in a perfectly legal manner it would be possible for somebody to become a dictator and set up a Fascist regime never intended by those who drew up the Constitution.[1]

Morgenstern told him he should not worry since such events were unlikely to ever occur. Since Gödel was persistent, Morgenstern and another mutual friend – Albert Einstein – tried to persuade Gödel not to bring this issue up at the citizenship examination. On the examination day, Einstein and Morgenstern both accompanied Gödel to his interview at the Immigration and Naturalization Service as witnesses. After the examiner questioned both witnesses, the following exchange occurred, according to Morgenstern's own account of the hearing:

> Examiner: 'Now, Mr. Gödel, where do you come from?'
> Gödel: 'Where I come from? Austria.'
> Examiner: 'What kind of government did you have in Austria?'
> Gödel: 'It was a republic, but the constitution was such that it finally was changed into a dictatorship.'
> Examiner: 'Oh! This is very bad. This could not happen in this country.'
> Gödel: Oh, yes, I can prove it.'
> Examiner: 'Oh God, let's not go into this…'[2]

Einstein and Morgenstern were horrified during this exchange, but the examiner swiftly quietened Gödel on this point until Gödel finished his interview. What was the 'inner contradiction' that Gödel discovered within the U.S. Constitution? This will

[1] Morgenstern (2006, 7).
[2] *Id.*

remain a riddle as Gödel left no clues. Some scholars who have studied Gödel suggest that Gödel realised that an unlimited amending power possessed the risk of a tyranny. Since the U.S. Constitution amending provision has no substantive limitations apart from equal representation in the Senate, the amendment power might be utilised to subvert the democratic institutions designated in other provisions of the Constitution, including the amendment provision itself.[3] Is the amendment power sufficiently broad so as to destroy the very basis of the constitution?

A focal point of the thesis is that comparative constitutional law reveals a pattern of behaviour, according to which, in exercise of their powers, amendment authorities are increasingly bound by certain limitations. My survey of unamendable provisions demonstrates that an increasing percentage of world constitutions contain explicit limitations on the constitutional amendment power (Chapter 2). Even in states where the constitution is silent with regard to explicit limitations on the amendment power, I revealed a growing tendency of courts, following the Indian courts' development of the 'basic structure doctrine', to acknowledge a set of implicitly unamendable core principles (See Chapter 3). The global trend in constitutionalism is inclining towards accepting substantive limitations on constitutional amendment powers.[4]

This unamendability is at the centre of the tension between democratic and constitutionalist approaches.[5] Democrats regard unamendability as an obstacle in the way of democratic decision-making. A democratic society, according to this approach, should be able to change any law whatsoever. This notion conflicts with the constitutionalist approach. Certain principles, a constitutionalist would claim, should be above democratic decision-making. Therefore, constitutionalists would generally approve of unamendability.[6]

This thesis seems to be positioned on both sides of the debate. The central theme of the theory of unamendability, as advanced in this thesis, is strongly constitutionalist; it defends a broad and robust concept of limitations to the amendment power, which includes both explicit and implicit substantive limitations. These limitations on the constitutional amendment power are based upon a solid theoretical ground. They are compatible with the nature of amendment powers. The amendment power is not an ordinary constituted power, but a *sui generis* one. However,

[3] Suber (1990, Sec.16); Guerra-Pujol (2013, 637).
[4] Albarello (2012, 67).
[5] A tension that is inherent within a constitutional democracy. Cf., Habermas (2001, 766).
[6] See, generally, Gümplová (2011, 9-22).

it is still a defined constitutional authority. As such, it is (and must be) a limited power (Chapter 4). The *secondary constituent power*, which is a delegated power acting as a trustee of the *primary constituent power*, cannot destroy the constitution or replace it with a new one. Unamendability thus restricts the amending authorities from amending certain constitutional fundamentals. Underlying it rests the understanding that a constitution is built upon certain principles, which grant it its identity. I termed this theory *foundational structuralism* according to which the foundations that hold the constitutional structure are unamendable, since amending them would bring an end to the constitution and create a new one instead (Chapter 5).

The protection of a certain core through the theory of unamendability emphasises the thin line between constitutional success and constitutional failure. On the one hand, 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 bound to fail.[7] On the other hand, 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.[8]

An unlimited amendment power collapses the distinction between constitutional-making and constitutional-amending. Consequently, it can also extinguish the people's *primary constituent power*. If amendment powers were unlimited, what would be kept for the people?[9] But amendment powers are not unlimited, and this unamendability limits only governmental organs – those authorities delegated with the competence to amend the constitution – rather than the people themselves.[10] The people retain the *primary constituent power*; and through its exercise they may amend and establish the political order and its fundamental principles.[11] *Primary constituent power* is manifested through a democratic appearance of popular sovereignty in extraordinary constitutional moments. In these moments, politics moves from the second track of constitutional politics to the third track of extraordinary politics in which the present people, through broad and deep public deliberations, may reshape the polity's

[7] Barber (2010, 27).
[8] Fleming (2010, 40).
[9] Bacon (1929-1930, 778).
[10] Harris (1993, 193-196).
[11] Katz (1995-1996, 278, 288-290); Harris (1993, 174-201).

constitutional identity.[12] Understood in this way, the doctrine of limitations on the amendment power can be seen as a safeguard of the people's *primary constituent power* (Chapter 6).

Therefore, the second theme of this thesis takes a strong democratic approach. It is democratic not only in arguing that the nation's fundamental constitutional decisions belong to the people in their *primary constituent power*, but also that in such capacity, the people are not bound by prior constitutional rules, not even by unamendability. Constitutionalists would not support this idea.

The theory of unamendability also explains the controversial practice of judicial enforcement of unamendability mechanisms. Strong democrats would not approve of this scheme. However, properly understood, judicial enforcement of limitations on the amendment power, actually serves as a mechanism for ensuring the vertical separation of powers between the *primary* and *secondary constituent powers* (Chapter 7). It should therefore not be regarded as completely preventing democratic deliberation on a given 'unamendable' matter, but as making sure that certain changes take place via the proper channel of higher-level democratic deliberations (Chapter 8).[13]

Although destined to be attacked (but also supported) by both democratic and constitutionalist schools of thought, this thesis presents a coherent and consistent position with regard to procedural and substantive dimensions of amendment rule: the non-exclusiveness of amendment provisions and their substantively (explicitly and implicitly) limited nature.[14]

II. RAMIFICATIONS FOR FUTURE RESEARCH

This thesis advances the study of the nature and scope of constitutional amendment powers, clarifying the doctrine of the 'unconstitutional constitutional amendment'. Yet, it exposes other questions for further study:

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[12] Prateek (2008, 462): 'The legitimacy of constituent power is premised on the indisputably higher nature of collective authority that is wielded when "people" as a whole engage themselves with political decision-making. This power is the power to constitute afresh, re-organise thoroughly and to reconsider the direction which constitutional form itself might take in future. In exercise of this power lies the realization of the "of the people, by the people, for the people" sentiment of political organisation. The activity of political organisation and the consequences that flow from it are all judged on how effectively they imbibe and correspond to this participatory sentiment. This participatory sentiment hides in it a great measure of deliberative legitimacy and popular consensus, two important starting points for the activity of political organisation.'

[13] Cf., Tushnet (2012-2013, 2006-2007).

[14] Compare with Michelman (1995, 1306) (highlighting incoherences in various constitutional amendment theories).

First, the distinction between the *secondary constituent power* and the *primary constituent power* is not as neat as advocated in this thesis. Who are the people? How do we recognise them? And through which mechanisms can the people speak in one voice? Remain open questions.[15] The theory of unamendability blocks certain changes through the channel of constitutional amendments. Yet is creates another challenge by allowing powerful actors to invoke the terminology of *primary constituent power* to achieve the prohibited change, thus by-passing unamendability. In that respect, it might be true that 'the unconstitutional constitutional amendments doctrine may achieve less than one would hope'.[16] The conceptual difficulty that 'a people' adopting a constitution simply does not exist from the point of view of concrete constitutional practice, does not undermine the argument. Important constitutional decisions ought to be accepted through extraordinary mechanisms, which include wide popular participation and deliberation, in a way that imitates, or at least comes as close as possible to, an episode of emergence of *primary constituent power*. What is needed is a 'reliable metric for distinguishing genuine exercises of the people's will from fake or manipulated exercises'.[17] The fear of abuse of *primary constituent power* should not hinder our efforts to further develop constitutional theory but encourage us to pursue future research.

Second, according to the theory of unamendability, the *primary constituent power* may re-emerge and, being an 'original, inherent and unlimited' power, is not bound by unamendability.[18] That is why constitution-making moments are described in the literature as a kind of 'wild-west'.[19] The theory of unamendability thus encourages another area of research: does the fact that the *primary constituent power* is not bound by prior rules mean that it is unlimited in the sense that it can disregard any basic principles or should we endorse Benjamin Constant's declaration that 'sovereingty of the people is not unlimited'?[20] According to some naturalist or foundationalist approaches to constitution-making powers, there must be certain limitations even on the *primary constituent power*.[21] In fact, Sieyès himself remarked that 'prior to and above

[15] See, for example, Agné (2012, 836).
[16] Landau (2013C); Landau (2013A, 49-56). See also Landau (2013B, 959).
[17] Landau (2013C). See also Landau (2013A, 49-56).
[18] Keshavamurthy (1982, 12). See also Tushnet (2012-2013, 1988-1989).
[19] Landau (2011-2012, 616).
[20] Constant (1996, 6).
[21] See, for example, Murphy (2007, 514-517); Murphy (1992A, 352); Murphy (1995, 178-179) (even if the whole population agreed to destroy the democratic order and replace it with a new order that would deny them democracy's basic values, this might be prohibited in order to protect themselves and future generations) and Weintal (2005, 18, 20-21); Weintal (2011, 449) (democracy reflects a universal 'definite virtue', which deserves to be a truly eternal principle).

the nation, there is only natural law',[22] which implies that Sieyès viewed *constituent power* as limited by certain principles.[23] If the goal of constitution-making is not to produce a written constitution, but to promote constitutionalism,[24]then a plausible argument is that constitutionalism and constitutions are inseparably linked so that an exercise of *constituent power* cannot undermine constitutionalism but must be linked to certain common principles of law.[25] Also, the very concept of *constituent power* may carry certain inherent limitations, since in order to be consistent with the idea of 'the people giving itself a constitution', it must observe certain fundmanetal rights which are necessary for *constituent power* to preserve itself and reappear in the future.[26] In contrast, one may claim that the recognition of the ability of *constituent power* to overthrow regimes must be two-sided: whereas the transition from fascist regimes to democracy is always welcome, by accepting said transition we must acknowledge the power of a transition in the other direction.[27] This important question is not the pivotal issue under investigation in this work, which is primarily concerned with the nature and scope of amendment powers. Further research should focus on the precise procedural and substantive limitations that are associated with the modern concept of *primary constituent power* and their enforcement.[28]

Third, this thesis' claim that since the amendment power is a delegated limited authority, and therefore certain constitutional amendments which replace the constitution with a new one might be unconstitutional, presents an interesting question; as noted in the introductory chapter, constitutions change not only through amendments, but also – and mainly – through judicial interpretation and constitutional practice. Since courts are also constituted authorities, according to the rationale advanced in this thesis, they are similarly limited in their scope of action. Thus, if certain principles are unamendable, does this mean that courts cannot interpret the constitution in a manner that 'revolutionises' it? Can courts change the essence of core basic principles, an action that requires resorting to the *primary constituent power*? In other

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[22] Sieyès (2003, 137).
[23] Scheuerman (1997, 149). If one takes Sieyès' understanding of the nation as 'the mass of associated men…all equal in rights', it may well be that constituent power is bound to respect certain rights that belong to all peoples. See Sieyès (1795, 95).
[24] Jackson (2008, 1254).
[25] Compare Heller (2002, 279); Widner and Contiades (2013, 58); Gatmaytan (2010, 22).
[26] See, for example, Colón-Ríos (2012C, 111, 117-118); Colón-Ríos and Hutchinson (2012, 608); Harris (1993, 203); Prateek (2008, 464).
[27] Klein (1999B, 33).
[28] Elster (1995, 374-75) acknowledges that external constraints may be placed upon constitution-making process, but such constraints, he claims, are unlikely to work in practice. See also Orfield (1942, 125); Bates (1926, 147).

words, what are the limitations that are imposed upon the judiciary when it conducts constitutional interpretation and can a constitutional interpretation be considered unconstitutional?[29]

These questions are beyond the perimeters of this thesis, which focuses solely on formal constitutional amendments, but owing to the advances promoted in this thesis they can adequately be addressed.

III. SOLVING THE PARADOX

The question of whether a constitutional amendment could be unconstitutional seems to be a paradox, as presented in the introductory chapter. This thesis demonstrates that the phrase 'unconstitutional constitutional amendment' does not entail a paradox, but merely a misapplication of presuppositions. Once the nature of the amendment power is correctly construed, the paradox disappears.

The significance of the contribution to be made by this thesis is two-fold.

First, it draws upon the rich vein of jurisprudential thinking from judiciaries around the world to analyse the puzzle of the unconstitutional constitutional amendment. Nowadays, comparative analysis of constitutional law on the subject is missing. In recent years, the debate has been expanding, but the jurisdictions covered are usually the same (Germany and India are the paradigm models for explicit and implicit limitations on the amendment power, respectively). The experience of other jurisdictions is neglected. This thesis takes a broad approach. It does not focus on one single jurisdiction, not even on one type of legal system (i.e. common or civil law) since a theory of unamendability should hold for most contemporary developed constitutional democracies.

Second, existing theory is lacking. It does not sufficiently address the basis of unamendability and the connection between unamendability and judicial review. This thesis advances constitutional understanding by proposing a theoretical framework for unamendability.

In 1895, A. V. Dicey remarked that 'the plain truth is that a thinker who explains how constitutions are amended inevitably touches upon one of the central points of constitutional law'.[30] Over one hundred years later, this remark remains true. At any given year, according to one assessment, four or five constitutions are replaced and ten

[29] Dragomaca (2011); Grimm (2013, I-8).
[30] Dicey (1895, 388).

to fifteen constitutions are amended.[31] Therefore, the nature and scope of constitutional amendment powers is exactly where constitutional scholarship should focus its energies. Nevertheless, this area is still under-studied and under-theorised. This thesis advances the comparative and theoretical understanding in this area one step forward.

[31] Ginsburg, Elkins and Blount (2009, 5.1–5.23).

APPENDIX: EXPLICIT SUBSTANTIVE LIMITATIONS ON CONSTITUTIONAL AMENDMENTS

State	Year	Article	Limits
1.Afghanistan	2004	149	(1) The provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended. (2) The amendment of the fundamental rights of the people are permitted only in order to make them more effective.
	1990	-	[Art. 2: … no law shall run counter to the principles of the sacred religion of Islam and other values enshrined in this Constitution. Art. 141: amendment of the Constitution in a state of emergency is not allowed]
	1987	-	[Art. 2: … no law shall run counter to the principles of the sacred religion of Islam and other values enshrined in this Constitution. Art. 141: amendment of the Constitution in a state of emergency is not allowed]
	1980	-	
	1964	120	Adherence to the basic principles of Islam, Constitutional Monarch in accordance with the provisions of this Constitution, and the values embodied in Article 8 [rights and duties of the King] shall not be subject to amendment.
	1952, 1931, 1925	-	
2.Albania	1998, 1991, 1976, 1950, 1946, 1939	-	
	1928	224	In the case of articles 1, 2, 6, 50, 51, 52 and 70 of the present statute, no proposal for revision can be made or accepted. [Art. 1. Albania is a democratic, parliamentary and hereditary monarchy. Art. 2. Albania is independent and indivisible, its integrity inviolable, and its territory inalienable. Art. 6. The capital of Albania is Tirana. Art. 50. The King of the Albanians is His Majesty Zog I, of the illustrious Albania family of Zogu. Art. 51. The Heir to the Throne shall be the King's eldest son, and the succession shall continue generation after generation in the direct male line. Art. 52. Should the Heir die or lose his rights to the Throne, his eldest son shall succeed. Art. 70. The Throne of the Albanian Kingdom cannot be united to the Throne of any other

			Kingdom].
	1925	141	Only the republican form of government cannot be modified.
3.Algeria	1989	178	No constitutional revision may infringe on: 1) the republican character of the State; 2) the democratic order based on multi-party system; 3) Islam as the religion of the State; 4) Arabic as the national and official language; 5) fundamental liberties, and citizen's rights; 6) integrity and the unity of the national territory. 7) the national emblem and the national emblem as the symbols of the Revolution and of the Republic.
	1976	195	No project of constitutional revision can infringe upon: 1) the republican form of government; 2) the state's religion; 3) the socialist option; 4) the fundamental freedoms of man and citizen; 5) the integrity of national territory.
	1963, 1958, 1947	-	
4.Andorra	1993	-	
5.Angola	2010	236	Alterations to the Constitution must respect: a) The dignity of the human person; b) National independence, territorial integrity and unity; c) The republican nature of the government; d) The unitary nature of the state; e) Essential core rights, freedoms and guarantees; f) The state based on the rule of law and pluralist democracy; g) The secular nature of the state and the principle of the separation of church and state; h) Universal, direct, secret and periodic suffrage in the election of officeholders to sovereign and local authority bodies; i) The independence of the courts; j) The separation and interdependence of the bodies that exercise sovereign power; k) Local autonomy.
	1975	159	Amendments to and approval of the Constitution of Angola shall comply with the following: (a) Independence, territorial integrity and national unity; (b) The fundamental rights and freedoms and guarantees of citizens; (c) A State based on the rule of law and party political pluralism; (d) Universal, direct, secret and periodic suffrage for the appointment of the elected office holders of

			sovereign bodies and local government; (e) The secular nature of the State and the principle of separation between the State and churches; (f) The separation and interdependence of the courts.
	1928	-	
6.Antigua and Barbuda	1981	-	
7.Argentina	1853 (am. 1994), 1949	-	
	1826		[Art. II. (The Argentine Nation) shall never be the patrimony of any Person or Family].
8.Armenia	1995	114	Articles 1, 2 and 114 of the Constitution may not be amended [Art. 1: The Republic of Armenia is a sovereign, democratic state, based on social justice and the rule of law; Art. 2: In the Republic of Armenia power lies with the people. The people exercise their power through free elections and referenda, as well as through state and local self-governing bodies and public officials as provided by the Constitution. The usurpation of power by any organization or individual constitutes a crime].
9.Australia			
10.Austria	1920	-	
11.Azerbaijan	1995	158	There cannot be proposed the introduction of additions to the Constitution of Azerbaijan Republic with respect to provisions envisaged in Chapter I of the present Constitution [regarding the people as the source of power; Sovereignty of people; questions solved by way of nation-wide voting referendum; Right to represent the people; unity of people; Inadmissibility of usurpation of power.
12.Bahamas	1973	-	
13.Bahrain	1973	120(c)	It is not permissible to propose an amendment to Article 2 of this Constitution, and it is not permissible under any circumstances to propose the amendment of the constitutional monarchy and the principle of inherited rule in Bahrain, as well as the bicameral system and the principles of freedom and equality established in this Constitution. [Art. 2: The religion of the State is Islam. The Islamic Shari'a is a principal source for legislation. The official language is Arabic].
14.Bangladesh	1972	-	
15.Barbados	1966	-	
16.Belarus	1994	-	[Art. 140: Sections 1, 2, 4, 8, of the constitution may be reconsidered only be means of a referendum (principles of the constitutional system; individual rights and liberties; the President, Parliament, Government, the Courts; the application of the constitution and its amendment)].

	1978, 1937	-	
17.Belgium	1994, 1831	-	
18.Belize	1981	-	
19.Benin	1990	156	No revision procedure may be instituted or continued if it adversely affects the integrity of the territory. The republican form of State and laïcité are not subject to revision
	1977	154	Amendments or revisions shall not hand into question the socialist orientation of the Republic
	1970	-	
	1964	99	The republican form of Government may not be the subject of amendment
20.Bhutan	2008	-	
21.Bolivia	2009	-	[Art. 411(1): The total reform of the Constitution, or that which affects its fundamental premises, affects rights, duties and guarantees, or the supremacy and reform of the Constitution, shall take place through an original plenipotentiary Constituent assembly, put into motion by popular will through referendum].
	1967, 1961, 1947, 1945, 1938, 1880, 1878, 1871, 1868, 1861, 1851	-	
	1843	82	The power which the Chambers posses of reforming the Constitution does not extend to the form of Government, or to the independence proclaimed by the Republic.
	1839	146	The power of Congress to reform this Constitution will never extend to Articles 1 and 2 [Art. 1. The Bolivian nation is free and independent, and its government is popular representative. Art. 2. The name Bolivia is unalterable].
	1834, 1831, 1826	-	
22.Bosnia and Herzegovina	1995	X(2)	No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph
	1910	-	
23.Botswana	1966	-	
24.Brazil	1988	60(4)	No proposed constitutional amendment shall be considered that is aimed at abolishing the following; I. The federalist form of the National Government; II. Direct, secret, universal and periodic suffrage;

			III. Separation of powers; IV. Individual rights and guarantees
	1946	217(6)	Bills tending to abolish the Federation or the Republic shall not be admitted as subject for discussion
	1937		
	1934	178(5)	Proposed bills tending to abolish the federative republican form shall not be admitted as an object of deliberation.
	1891	90(4)	Proposals tending to abolish the republican federal form or the equality of representation of the states in the senate may not be made the subject of consideration by the congress.
	1824	-	
25.Brunei Darussalam	1959	-	
26.Bulgaria	1991	-	[Art. 158 specifies certain topics that only the Grand National Assembly can amend].
	1971, 1947, 1879	-	
27.Burkina Faso	1991	165	No bill or proposal of revision of the Constitution is receivable when it effects: the republican nature and form of the State; the multiparty system; the integrity of the national territory.
	1970	106	No amendment procedure may be undertaken or pusrued which threatens the integrity of the territory. The Republican form of Government may not be the subject of amendment.
28.Burundi	2005	299	No procedure of revision can be accepted if it undermines national unity, the cohesive people of Burundi, secularism of the State, reconciliation, democracy, and the territorial integrity of the Republic.
	1992	182	No procedure of revision can be accepted if it undermines national unity, the republican and secular form of the State, and the territorial integrity of the Republic.
	1981	78	No revision procedure may be accepted if it infringes the republican form, national unity and integrity of the republic.
	1974	63	The republican form of government cannot be the object of a revision.
	1962	-	
29.Cambodia	1993	153 (prev. 134)	Any revision or amendment affecting the system of liberal and pluralistic democracy and the regime of constitutional monarchy shall be prohibited.
	1981	-	
	1947	115	The Provisions relating to the monarchical form form of the State, the representative character of the regime and the principles of liberty and equality guaranteed by this Constitution may not be thesubject of any proposed amendment.
		116	No amendment may have the effect of restricting the rights reserved to Toyalty by this Constitution.

30.Cameroon	1972	63	No procedure for the amendment of the Constitution affecting the republican form, unity and territorial integrity of the state and the democratic principles which govern the republic shall be accepted.
	1961	47	Any proposal for the revision of the present Constitution which impairs the unity and integrity of the Federation shall be inadmissible.
31.Canada	1982	-	[Arts. 38-49 stipulate different procedures for amending different provisions]
	1867	-	
32.Cape Verde	1992	313	1. The following shall not be the object of a revision: a) The national independence, national territorial integrity and unity of the state; b) The republican form of the government; c) The separation and interdependence of the organs of sovereignty; e)The autonomy of local power; f) The independence of the courts; g) The pluralism of expression and of political organization and the right of opposition. 2. The revision laws also shall not retain or limit the rights, liberties and guarantees enshrined in the Constitution.
	1980/1	-	
33.Central African Republic	2013	101	Expressly excluded from the review are: - republican and secular state form; -ineligibility of the Head of State of Transition, Transition Prime Minister , members of the Transitional Government and members of the Office of the National Transitional Council Presidential and legislative elections held during the transition period; -disqualification of Judges Constitutional Transition and members of the High Council of Information and Communication Transition presidential and legislative elections; -irrevocability and reduced powers of the Prime Minister; -incompatibilities functions of Head of State of Transition, Transition Prime Minister, Chairman of the National Transitional Council, Constitutional Judge Transition and member of the High Council of Information and Communication Transition; -fundamental rights and freedoms of citizens; -this article.
	2004	108	Expressly excluded from constitutional revision: The republican form and secularism of the state; the number and duration of presidential terms, and conditions of eligibility; the incompatibilities for the office of Head of State; the fundamental rights of the citizen.
	1994/5	101	The republican form of the state cannot be the object of revision.

	1986	42	The republican form of the state cannot be the object of a revision.
	1976	60	The monarchical form of the Empire cannot be the object of a revision.
	1964/5	-	
	1959	37	No amendmen procedure may be retained if it violates the republican form of the government and the democratic principles which govern the Constitution.
34.Chad	1996	223	No amendment is allowed when it threatens the territorial integrity, independence or national unity of the state; the republican form, secular nature of the state, or the principle of separation of powers; the liberty and fundamental rights of the citizens; or political pluralism.
	1989	202	No procedure of revision can be undertaken or continued if it adversely affects: the national unity or independence, the republican form of government and the principle of separation of powers, fundamental rights and freedoms of the citizen.
	1962	75	No amendment procedure may be undertaken or continued which affects the integrity of the territory. The republican form of government shall not be subject to amendment.
	1960	68	No procedure of amendment can be committed or continued if it interferes with the integrity of the territory. The republican nature of the Government is not subject to revision.
35.Chile	1980, 1925, 1833, 1828, 1823, 1822, 1818	-	
36.China	1982, 1978, 1975, 1954, 1946/7, 1931	-	
	1923	1	The Republic of China shall be a unified republic forever.
		138	The form of government shall not be a subject for amendment.
	1912	-	
37.Chechnya	2003	112(3)	Proposals about amending and reviewing parts of the Constitution of the Chechen Republic, creating conflict with the Constitution of the Russian Federation, disturbing the rights and liberties of individuals and citizens, attempting to infringe on the Republican form of the government and foundations of the Constitutional order of the Chechen Republic, are not allowed to be accepted

			by the Constitutional Assembly of the Chechen Republic through its review and carrying out through referendum.
38. Colombia	1991, 1886, 1863, 1858, 1853	-	
	1843	172	The power of Congress to amend this Constitution shall never extend to the articles in Title III, which relates to the form of government.
	1832	218	The power of Congress to amend this Constitution shall never extend to the articles in Title III, which concerns the form of government.
	1830	164	The power of Congress to amend the Constitution shall not include the power to change the form of government, which shall always be republican, popular, representative, and responsible.
	1821	190	…. But the provisions contained in Section 1 of Title I and in Section 2 of Title II may never be amended [sec.1, title I: the Colombian nation; sec. 2, title II: Government of Colombia].
39.Comoros	2001	42	No procedure of revision may be initiated or pursued when it infringes the unity of the territory and the inviolability of the internationally recognized frontiers as well as the autonomy of the Islands.
	1996	68	No procedure of revision may be initiated when it infringes the integrity of the Republic or rights of people. The republican and Islamic character of the state cannot be the object of a revision.
	1992	82	No procedure of revision may be initiated or pursued when it infringes the integrity of the Republic, national unity and multipaty system. The republican and Islamic character of the state cannot be the object of a revision.
	1978	45	No procedure of revision may be initiated or pursued when it infringes the integrity of the Archipel. The republican, federal and Islamic characters of the state cannot be the object of a revision.
40.The Republic of Congo	2002	185	The republican form, the secular character of state, the number of presidential terms and the rights set forth in Title I and II cannot be object of revisions.
	1992	178	No procedure of amendment shall be engaged in or followed when it attempts to touch the integrity of the territory. The republican form, the secularity of the State, and the number of mandates of the President of the Republic shall not be the object of any amendment. Amendment shall not have the object of the reduction or the abolition of fundamental rights and liberties enunciated in Title II.
	1979, 1973,	-	

	1969		
	1963	83	The republican form of Government may not be the subject of amendment.
41.The Democratic Republic of Congo	2006	220	Prohibits all constitutional amendments that have as a goal or effect, the diminution of individual rights and liberties or to reduce the prerogatives of the provinces and other decentralized entities.
	1967, 1964	-	
42.Costa Rica	1949	-	[Art. 196: The general amendment of this constitution can be effected only by a constituent assembly called for the purpose. A law calling such an assembly must be approved by a vote of at least two-thirds of the total membership of the legislative Assembly and does not require the approval of the executive power].
	1917	-	
	1871	-	[Art. 135: The general reformation of this Constitution … can only be effected by a constituent assembly convoked for the purpose].
	1869	-	[Art. 148: The general reform of this Constitution … can only be effected by a constituent assembly convoked for the purpose].
	1859	-	[Art. 141: The general reform of this Constitution … can only be effected by a constituent assembly convoked for the purpose].
	1848	-	
	1847	-	[Art. 187: …the whole of the Charter cannot be repealed, except when the republic having been reorganized, it is found that the general laws of the nation require an absolute reform].
	1844	-	
43.Cote d'Ivoire	2000	127	No procedure of revision can be undertaken or pursued if it carries affects to the integrity of the territory. The republican form and the secular [form] of the State cannot be made the object of a revision.
	1960	73	No revision procedure can be undertaken or continued when it affects the territorial integrity.
44.Croatia	1990	-	
45.Cuba	1976	'Special Provision'	The people of Cuba, almost in their totality, expressed on the 15th and 18th days of the month of June of 2002, the most decided support to the Bill of constitutional reform proposed by the organizations of the masses in extraordinary assembly of all the national locales that were held on the 10th day of the same month of June, on which was ratified in all of its parts the Constitution of the Republic and its proposed text that the socialist character and the political and social system contained in it have been declared irrevocable, with a dignified and categorical response to the demands and threats of the imperialist government of the United States on the

			20th of May of 2002. All has been approved by unanimity, by way of Accord No. V-74 adopted in extraordinary session of the Vth Legislature, celebrated on the 24th, 25th and 26th days of the month of June 2002.
	1940	-	[Art. 286: In the case in which the reform is integral or concerns the national sovereignty or Articles 22, 23, 24 and 87 of this Constitution, or the form of Government, after fulfilling the requirements previously specified, according to whether the initiative originates from the people or in the Congress, elections of Delegates to a Plebiscitary Assembly will be convoked, which will take place six months after [it is] agreed on, which will be limited exclusively to approve or reject the proposed reforms].
	1901/2 1897, 1895, 1878	-	
	1869	-	[Art. 29: This Constitution may be amended when the Chamber unanimously so determines it].
46.Cyprus	1960	182(1)	The Articles or parts of Articles of this Constitution set out in Annex III hereto which have been incorporated from the Zurich Agreement dated 11th February, 1959, are the basic Articles of this Constitution and cannot, in any way, be amended, whether by way of variation, addition or repeal.
47.Czech Republic	1992	9	(1) The Constitution may be amended or altered solely by constitutional laws. (2) Any change of fundamental attributes of the democratic law-observing state is inadmissible. (3) Legal norms cannot be interpreted as warranting the removal or threatening of the foundations of the democratic state.
	1960, 1948, 1920, 1918	-	
48.Denmark	1953, 1915, 1866, 1863, 1849, 1834, 1831	-	
49.Djibouti	1992	88	No revision procedure can be engaged if it calls into question the existence of the State or to infringe the

			integrity of the territory, the republican form of government or the pluralistic character of Djibouti democracy.
50.Dominica	1978	-	
51.Dominican Republic	2010	-	
	2002/3	119	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1994	119	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1966	119	No amendment may be made of the form of government, which shall always be civil, republican, democratic, and representative.
	1961	114	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1960	117	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1955	117	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1947	111	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1942	111	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1934	106	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1929	106	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1924	107	No amendment may be made of the form of government, which should always be civil, republican, democratic and representative.
	1908	110	The Constituent Assembly shall consider and adopt or reject in the first instance the amendment, it being understood that such amendment shall in no way affect the form of government, which latter shall always remain civil, republican, democratic, and representative.
	1907	109	The Constituent Assembly shall consider and adopt or reject in the first instance the amendment, it being understood that such amendment shall in no way affect the form of government, which latter shall always remain civil, republican, democratic, and representative.
	1896	111	The faculty held by Congress to reform the Constitution does not extend to the form of government, which shall always be Republican and democratic, and representative, alternative, and responsible.

	1887	112	The faculty held by Congress to reform the Constitution does not extend to the form of government, which shall always be Republican and democratic, and representative, alternative, and responsible.
	1881	110	The option is to reform Congress the Constitution does not extend to the form of government, which shall always be Republican, Democratic, under the representative form alternative, and responsible. Nor may relate the reform on dilatation of the presidential term.
	1880	107	The faculty held by Congress to reform the Constitution does not extend to the form of government, which shall always be Republican, Democratic, under the representative form alternative, and responsible. Nor may relate the reform on dilatation of the presidential term.
	1879	120	The faculty held by Congress to reform the Constitution does not extend to the form of government, which shall always be Republican, Democratic, under the representative form alternative, and responsible.
	1878	118	The faculty held by Congress to reform the Constitution does not extend to the form of government, which shall always be Republican, Democratic, under the representative form alternative, and responsible.
	1877	-	
	1875	107	The power conferred on the Legislature to reform the Constitution does not extend to the form of government that will always be Republicans, Democrats, under the representative form and responsible alternative
	1874	106	The power conferred on the Legislature to reform the Constitution does not extend to the form of government that will always be Republicans, Democrats, under the representative form and responsible alternative.
	1872	-	
	1866	103	The power which the Congress has for the reformation of the Constitution does not extend to the form of Government, which shall always be Republican, democratic, alternative, and responsible.
	1865	139	The power conferred on the chambers to reform the Constitution does not extend to the form of government that will always be Republicans, Democrats, under the representative form and responsible alternative.
	1858, 1854, 1844, 1821	-	
52.Ecuador	2008	441	The amendment of one or various article of the constitution that does not alter the fundamental

			structure or the nature and constituent elements of the state, does not set constraints on right and guarantees, and does not change the procedure for amending the constitution shall be carried out as follows.
	1998, 1984, 1978	-	
	1967	258	Ordinary Congress can discuss any proposed constitutional amendment, subject to observe the procedures established for the elaboration of laws. However, Congress may not introduce any change to replace the republican form of government or the democratic form of state of Ecuador.
	1946, 1945, 1929, 1906, 1897, 1884, 1878,	-	
	1869	115	At whatever time Congress may judge it convenient to reform some Articles of this Constitution, that reform may be proposed in order that it may be again taken into consideration in another ordinary Legislative Session, and should it then also be ratified by the majority of each Chamber, proceeding with the formalities prescribed in Section 6, Title VI, the reform shall be valid if the majority of voters approve it, voting by "Yes" or "No." But the bases contained in Articles IX., XIV, and XV, can never be altered [IX. The religion of the Republic is Catholic Apostolic Roman…; XIV. The government of Equator is republican, elective, representative, alternate and responsible; XV. The supreme power is divided into legislative, executive, and judicial. Each is to exercise the functions which the present constitution assigns to it, without overstepping the bounds prescribed thereby].
	1861	132	At any time that two thirds of each of the chambers judge should reform some articles of the Constitution, Congress may again propose to take into account where it has been renewed at least half the members Chambers who proposed the reform, and if then it may also ratified by two-thirds of each, proceeding with the formalities prescribed in Section VI of Part VI, shall be valid and will be part of the Constitution, but can never alter the bases contained in Articles 12, 13 and 14. [Art 12. The Religion of the Republic is Catholic, Apostolic, Roman, to the exclusion of any other. The political authorities are obliged to protect and enforce it; [Art. 13. The Government of Ecuador is popular, representative, elective and responsible alternative; Art. 14. The Supreme Power is divided into Legislative, Executive and Judicial. Each

			exercise the powers assigned to him by this Constitution not to exceed the limits which it prescribes].
	1852	143	The power of Congress to reform the Constitution, there never will be extended to Article 13 of Title III, which refers to the religion of state.
	1851	139	The power of the National Assembly to amend this Constitution, shall not extend ever to Article 11 which speaks of the religion of the State or to vary the requirements of Article 12 [article 12. The Government of Ecuador is republican, popular, representative, elective and responsible alternative].
	1843	110	The power of Congress to reform the Constitution does not extend to the third article discusses the form of government (Article 3 - The Government of the Republic of Ecuador is a popular, elected, representative, alternative, responsible, and distributed to its exercise in three branches, legislative, executive, and judicial branches, each shall be exercised separately, and within the limits I said this Constitution can never be together in one person).
	1835, 1830	-	
53.Egypt	2013	226	In all cases, texts pertaining to the principles of freedom and equality stipulated in this Constitution may not be amended, unless the amendment brings more guarantees.
	2012, 1971, 1958, 1956	-	
54.El Salvador	1983	248	Under no circumstances, may the articles of this Constitution, which refer to the form and system of government, to the territory of the Republic, and to the principle that a President cannot succeed himself *(alternabilidad)*, be amended.
	1962, 1950, 1948	-	
	1945	171	But it is hereby declared that in no case shall Articles 80, 81, and 82 prohibiting the reelection of the President, Vice-President, and designados, and concerning the duration of the presidential term, be amended.
	1939	-	[Art. 188(3): It is enacted that in this manner the articles comprised in Parts I, V, VI, VII, VIII and XII, and in this same Part XV may not be altered in any way, but may be modified only by a constituent assembly].
	1886	148	Nevertheless, it is established that in no case shall there be power to reform Articles 80, 81, and 82, which treat of the prohibition of the re- election of the President, Vice-President, and 'Designados', and of the duration of the Presidential period.

	1880, 1883, 1872, 1871, 1841	-	
55.Equatorial Guinea	1991	104	The republican and democratic system of the state as national unity and territorial integrity shall not be subject to any reforms.
	1982	134	The Republican and Democratic Regime of the State of Equatorial Guinea, the National Unity, and the Territorial Integrity may not be the object of any reform.
	1973	157	The Republican and Democratic Regime of the State of Equatorial Guinea, the National Unity, and the Territorial Integrity may not be the object of any reform.
56.Eritrea	1997	-	
	1952	91(2)	Article 16 of the Constitution, by the terms of which the Constitution of Eritrea is based on the principles of democratic government, shall not be amended.
57.Estonia	1992	-	[Art. 162: Chapter I 'General Provisions' and Chapter XV 'Amendments to the Constitution' may be amended only by referendum].
	1937, 1920	-	
58.Ethiopia	1995	10	(1) Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable. (2) Human and democratic rights of citizens and peoples shall be respected.
	1992, 1991, 1987, 1955	-	
	1952	91(2)	Article 16 of the Constitution, by the terms of which the Constitution of Eritrea is based on the principles of democratic government, shall not be amended.
	1936, 1931	-	
59.Fiji	2013	-	[Art. 160(7): In this section, the use of the word 'amend' or 'amendment' is intended to be understood broadly, so that the section applies to any proposal to repeal, replace, revise, or alter any provision or provisions of this Constitution].
	1997	-	[Art. 190 sets certain restrictions on majorities for amending certain provisions].
	1990	164(5)	This section shall not be reviewed or amended by Parliament [Immunity Provisions - Immunity of Members of the Republic of Fiji Military Forces (including the Naval Division), the Police Force and the Fiji Prison Services].
	1970	-	[Art. 67 sets certain restrictions on majorities for amending certain provisions].

60.Finland	1999, 1928, 1919	-	
61.France	1958	89(5)	The republican form of government shall not be subject to amendment.
	1946	95	The republican form of government may not be the subject of any proposal to amend the Constitution.
	1875 (added in 1884)	8(3)	The republican form of government shall not be made the subject of a proposed revision.
	1852, 1848, 1830, 1815, 1814, 1804, 1802, 1799, 1795, 1793, 1791	-	
62.Gabon	1991	117	The Republican form of the State, as well as the pluralist character of the democracy are intangible and cannot be the subject of any revision.
	1990	72	The republican and democratic form of state cannot be object of any revision.
	1961	70	No amendment procedure can be undertaken or continued when it threatens the integrity of the territory. The Republican and democratic form of the State may not be the subject of amendment.
63.Gambia	1996, 1970	-	
64.Georgia	1995	-	
	1921	148	Changing the form of government of the Democratic Republic Georgia cannot be subject of any proposed revision of the Constitution.
65.Germany	1949	79(3)	Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible [Art. 1: Human dignity/Human rights/Legally binding force of basic rights; Art. 20: Constitutional principles (The Federal Republic of Germany is a democratic and social federal state)].
	1919, 1871, 1867, 1820, 1815	-	
66.Ghana	1992	-	[Art. 290 sets different procedures for amending different articles].
	1979	-	[Art. 210 sets different procedures for amending different articles].
	1969	169(3)	Parliament shall have no power to amend this cause,

			the preceding clauses of this article, any provision of Chapter One, and articles 127 and 153 of this constitution [Chapter one: the constitution; art. 127: taxation; art.153: the institution of chieftaincy].
	1960	-	
67.Greece	1975	110(1)	The provisions of the Constitution, save those which determine the basis and the form of government as a Parliamentary Republic with a President as Head of State and those of Articles 2 (1), 4 (1), (4) and (7), 5 (1) and (3), 13 (1) and 26 shall be subject to revision.
	1952	108	Revision of the entire Constitution is prohibited. The provisions of the present Constitution, which determine the regime as that of a crowned democracy as well as its fundamental provisions, shall under no circumstances be revised.
	1927	125	Only non-fundamental provisions of the Constitution may be revised after five years according to the procedure.
	1911	108	The revision of the whole of the Constitution is not permitted. Ten years after this provision has taken effect a revision of the non-fundamental provisions of the Constitution is permitted.
	1864	107	The Constitution may not be revised in its entirety. However, constitutional provisions, not fundamental, which must be designated, may, 10 years after the enactment of the Constitution be revised if the need is duly found.
	1844	-	
68.Grenada	1973	-	
69.Guatemala	1985	281	In no case can Articles 140, 141, 165 (paragraph g), 186, and 187 be amended, nor can any question relating to the republican form of government, to the principle of the non-re-electability for the exercise of the Presidency of the Republic be raised in any form, neither may the effectiveness or application of the articles that provide for alternating the tenure of the Presidency of the Republic be suspended or their content changed or modified in any other way [art.140: Guatemala is a free State, independent and sovereign, organized to guarantee to its inhabitants the enjoyment of their rights and liberties. Its system of government is republican, democratic, and representative; art. 141: Sovereignty is rooted in the people who delegate it for its exercise to the Legislative, Executive, and Judicial Organs. Subordination among them is prohibited; art 165(g): The Congress will have the power to refuse to recognize the President of the Republic if, his constitutional term having expired, he continues in the exercise of his office. In such a case, the Army will automatically fall under the authority [depender] of the Congress; art. 186 (Prohibitions Against Running for the

			Positions of President or Vice President of the Republic); art. 187 (Prohibition of Re-Election).
	1965	267	Amendment of Articles 14, section 4; 33; 166, section 10; 182, and 185, or any article referring to the principle of non-re-election of the president of the republic may never be made. Likewise, the effect of these articles may not be suspended not may their effectiveness or force be lessened in any manner [14(4):the following rights and duties are inherent in citizenship: to defend the principle of rotation and non-re-election in the office of the presidency of the republic, in any manner that it may be exercised, as an invariable rule in the political system of the state; 33:any activity in favor of the reelection of the person occupying the presidency of the republic, or in any other way intended to prolong the term fixed by the constitution for that office, or of violating the principle of rotation and non-re-election for the presidency, is subject to punishment; 166(1):it is the duty of Congress to open and close its sessions;182: the president of the republic shall be elected by the people, by universal suffrage, by an absolute majority of votes and for a term of four years, which may not be extended; 185: A person who at any time has held office as president of the republic by popular election or who has held such office for more than two years as a replacement of the elected president, may not again hold such office for any reason. The reelection or prolongation of the term of the presidential office by any means is punishable under the law. Any mandate so intended is null and void ipso jure].
	1956	-	[Art. 245: Different provisions for amending certain provisions].
	1945	-	[Art. 206: Different provisions for amending certain provisions].
	1879, 1825, 1823	-	
70.Guinea	2010	154	The republican form of government, the principle of secularism, the principle of unity of the state, the principle of separation and equilibrium of powers, political pluralism and syndical, the number and duration of Presidential terms may not be the object of revisions.
	1990	91	The republican form of government of the State, the principle of secularity and the principle of separation of powers shall not be the object of revision.
	1958	50	The Republican form of the State shall not be object of an amendment.

71.Guinea-Bissau	1984	102	No proposal for revision may impose upon: a) the unitary structure or republican form of the State; b) the Laic Statute of the State; c) the integrity of national territory.
	1973	-	
72.Guyana	1980, 1966	-	
73.Haiti	1987	284(4)	No amendment to the Constitution may affect the democratic and republican nature of the state.
	1964	-	
	1946	-	
	1935, 1918, 1889 1874, 1846, 1806 1805, 1801	-	
74.Honduras	1982	374	The foregoing article, this article, the articles of the Constitution relating to the form of government, national territory, the presidential term, the prohibition on re-election to President of the Republic, the citizen who has served as President under any title, and to persons who may not be President of the Republic for the subsequent period may not be amended.
	1965		In no case may Articles 4, 192, 193, 196, and this article be amended by the forgoing procedure [art.4: the government is republican, democratic, and representative; is it composed of the three complementary and independent branches: legislative, executive, and judicial, and is based upon the principle of national integration; Art. 192: The presidential term shall be six years and shall begin on June 6; Art.193: A citizen who has held the office of president under any title for more than half of the constitutional term may not again be president of the republic or hold this office under any title; art.196 (persons who may not be President of the Republic for the subsequent period)].
	1957	339	In no event shall amendments to sections 4° 195,196,199, and this may be done by the above procedure.
	1936	-	[Art. 200 sets different procedures for certain provisions].
	1924	180	An amendment which may be made to the Articles of the Constitution wherein the re-election of the President or of the individuals who take his place is prohibited.
	1904, 1894, 1880 1873,	-	

	1865		
	1848	91	Partial reforms regarding guarantees can never be allowed, unless it be to extend existing ones; nor can any change be introduced in the division of powers.
	1839, 1831, 1825	-	
75.Hungary	2011	-	
	1949	-	
76.Hong Kong	1990	159(3)	Before a bill for amendment to this Law is put on the agenda of the National People's Congress, the Committee for the Basic Law of the Hong Kong Special Administrative Region shall study it and submit its views. No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.
77.Iceland	1944, 1941, 1940, 1920, 1918, 1874, 1871	-	
78.India	1950	-	
79.Indonesia	1945	-	
80.Iran	1979	177	The contents of the articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the holy principle; the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran and the religious school are unalterable.
	1907	2	This Article [according to which laws must never be contrary to the sacred precepts of Islam – y.r] will not be liable to change until the advent of the Twelfth Imam.
	1906	-	
81.Iraq	2005	126(4)	Articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum.
	1970, 1964, 1958, 1932, 1924/5	-	
82.Ireland	1937,1922	-	

83.Israel	(basic laws)	-	
84.Italy	1947	139	The republican form of the state may not be changed by way of constitutional amendment.
	1848	-	
85.Jamaica	1962	-	
86.Japan	1946	-	[important: Art. 9: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. Art. 97: The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate].
	1889	-	
87.Jordan	1952	126(2)	No amendment of the Constitution affecting the rights of the king and the succession to the Throne may be passed during the period of Regency.
	1946, 1928	-	
88.Kazakhstan	1995	91(2)	The unitary status and territorial integrity of the Republic, the forms of government may not be changed.
	1993	129	[Different procedure for amendments concerning the bases of the constitutional system].
89.Kenya	2010	-	[Arts. 255-257: Different procedure for different provisions].
	1969, 1963	-	
90.Kiribati	1979	-	
91.Democratic People's Republic of Korea (north)	1972, 1948	-	
92.Republic of Korea (south)	1948	-	
93.Kosovo	2008	144(3)	Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.
94.Kuwait	1962	175	The provisions relating to the Amiri System in Kuwait and the principles of liberty and equality, provided for in this Constitution, may not be proposed for revision except in relation to the title of the Amirate or to increase the guarantees of liberty and equality.
95.Kyrgyzstan	2010	97(3)	The constitutional chamber shall conclude on the draft law on changes to the present constitution.
	2007	-	[Art. 98(2) Amendments and supplements to the

			present Constitution adopted by the Jogorku Kenesh may be examined in the light of a conclusion of the Constitutional Court.]
	1993	-	[Arts. 85(3)(5); 98: The constitutional court shall render conclusions on a draft amendment to the constitution (chapters 3-8) adopted by the Jogorku Kenesh [not by referendum – y.r.]. If the conclusion is negative, the draft amendment shall be returned to its initiator and may be resubmitted no earlier than one year later].
96.Laos	1991	-	
	1947	43	The provisions relating to the monarchical form, indivisible unitary state, the representative character of the regime and the principles of liberty and equality guaranteed by this constitution may not be the object of any proposal for revision.
97.Latvia	1922	-	[Art. 77: If the Parliament has amended Articles 1, 2, 3, 4, 6, or 77 of the Constitution, such amendments, in order to come into force as law, shall be submitted to a national referendum].
98.Lebanon	1926 [Restored to Force 1937 and 1943]	-	
99.Lesotho	1993, 1966	-	
100.Liberia	1984/61847	-	
101.Libya	2011, 1969	-	
	1951	197	No proposal may be made to review the provisions relating to the monarchial form of government, the order of succession to the Throne, the representative form of government or the principles
102.Liechtenstein	1921, 1862, 1818	-	
103.Lithuania	1992	-	[Art.148 (1) The provision of Article 1 that the State of Lithuania is an independent democratic republic may only be amended by a referendum in which at least three-fourths of the electorate of Lithuania vote in favor thereof. (2) The provisions of Chapter 1 [The State of Lithuania] and Chapter 14 [Amending the Constitution] may be amended only by referendum.]
	1938, 1928, 1922, 1919	-	
104.Luxembourg	1868	-	[Art.115: During a regency, no change can be made to the Constitution concerning the constitutional prerogatives of the Grand Duke, his status as well

			as the order of succession [originally: No change in the Constitution can be made during a regency]].
	1856	-	[Art. 115: No change in the Constitution can be made during a regency].
	1848	-	[Art.119: No change in the Constitution can be made during a regency].
	1841	-	
105.Macedonia	1991	-	[Art. 131 sets different procedures for amending certain provisions].
106.Madagascar	2010	163	The republican form of government, the principle of national territorial integrity, the principle of separation of powers, the principle of autonomy Communities Decentralized Territorial, duration and number of office of President of the Republic, may not be subject to revision
	1992	152	The republican form of the State shall not be subject to amendment.
	1975	108	The republican form of government and the socialist regime of cannot be the object of a revision
	1959	66	The republican form of the State shall not be subject to amendment.
107.Malawi	1994, 1966, 1964	-	
108.Malaysia	1963, 1957	-	Different procedures for different provisions.
109.Maldives	2008, 1997/8 1969	-	
110.Mali	1992	118	No procedure of revision may be engaged in or pursued when it undermines the integrity of the territory. The republican form and the secularity of the State as well as multipartyism may not be made the object of revision.
	1974	73	No procedure of revision can be initiated or continued when it violates the integrity of the territory. The republican form of government may not be subject to revision.
	1960	49	No procedure of revision can be initiated or continued when it violates the integrity of the territory. The republican form of government may not be subject to revision.
111.Malta	1964	-	Different procedures for different provisions.
112.Marshall Islands	1979	-	Different procedures for different provisions.
113.Mauritania	1991	99(3)	No procedure for revision may be initiated if it challenges the existence of the State or undermines the integrity of the territory, the republican form of government, or the pluralist character of Mauritanian democracy.
	1961	54	The amendment procedure may not be undertaken if the bill threatens the existence of the State or the integrity of the territory or the republican form of government.
114.Mauritius	1968	-	Different procedures for different provisions.

115.Mexico	1917, 1857, 1835	-	
	1824	171	The Articles of this Constitution, and of the Constituent Act, which establish the Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be altered.
		3	The Religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic
116.Micronesia	1978	-	
117.Moldova	1994	142	(1) The provisions regarding the sovereignty, independence and unity of the State, as well as those regarding the permanent neutrality of the State may be revised only by referendum based on a majority vote of the registered voting citizens. (2) No revision shall be performed, if it implies the infringement of fundamental rights and freedoms of citizens, or their guarantees. (3) The Constitution may not be revised under a state of national emergency, martial law or war.
118.Monaco	1962, 1911	-	
119.Mongolia	1992, 1960 1940, 1924	-	
120.Montenegro	2007, 1992, 1905	-	
121.Morocco	2011	175	No revision may infringe the provisions relative to the Muslim religion, on the monarchic form of the State, on the democratic choice of the Nation or on [those] acquired in matters of [the] freedoms and of fundamental rights inscribed in this Constitution
	1992	100	The monarchic form of the State as well as the provisions relating to the Islamic religion cannot be the object of a constitutional revision.
	1972	106	Neither the State system of monarchy nor the prescriptions related to the religion of Islam may be subject to a constitutional revision.
	1970	100	The Royalist system, and provisions relating to Islam, shall not be subject to revision.
	1962	108	The monarchic form of the State as well as the provisions relating to the Moslem religion may not form the subject of a constitutional amendment.
122.Mozambique	2004	292	1. Constitutional amendment laws shall have to respect the following: a) the independence, the sovereignty and the unity of the State; b) the republican form of Government; c) the separation between religious denominations

			and the State; d) the fundamental rights, freedoms and guarantees; e) universal, direct, secret, personal, equal and periodic suffrage for the appointment of elective sovereign public offices and elective offices of local administration; f) pluralism of expression and of political organisation, including political parties and the right of democratic opposition; g) the separation and interdependence of the sovereign public offices; h) the scrutiny of constitutionality; i) the independence of the judiciary; j) the autonomy of local authorities; k) the rights of workers and trade unions; l) the rules governing nationality, which cannot be amended in such a way as to restrict or remove rights of citizenship. 2. Amendments pertaining to the matters listed in the preceding paragraph must, obligatorily, be submitted to a referendum
	1990	-	[art.199: amendments which imply fundamental changes in the rights of citizens or in the organization of public power must be submitted, after adoption by the Assembly, to a referendum].
	1975	-	
123.Myanmar (Burma)	2008, 1974, 1947	-	Different procedures for different provisions.
124.Namibia	1990	131	No repeal or amendment of any of the provisions of Chapter 3, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.
125.Nauru	1968	-	
126.Nepal	2063 [2007]	-	
	2047 [1990]	116(1)	Any bill purporting to amend or repeal any Article of this Constitution may be introduced, without contravening the spirit of the Preamble of this Constitution, in either House of the Parliament. Provided that this Article shall not be subject to amendment.
	1962, 1948	-	
127.Netherlands	1983, 1953, 1948 1922	-	
	1887	-	[Art. 196: No change shall be made in the succession to the throne during a regency].
	1848	-	[Art. 198: No amendment to the Constitution or the

			law of succession can take place during a regency].
	1815	-	[Art. 233: No change to the fundamental law or the order of succession can take place during a regency].
128.New Zealand		-	
129.Nicaragua	1987	-	Art.191-195 distinguish between partial and total reform.
	1974	-	Art. 334-338 distinguish between partial and total reform.
	1950	-	Art. 326-328 distinguish between partial and total reform.
	1948	-	
	1939	-	
	1911	-	Art.163-164 set special procedure for 'fundamental amendments'.
	1905	-	Art. 119 sets a different procedure for absolute reform.
	1893	-	Art. 156 sets a different procedure for absolute reform.
	1858	-	Art. 103-104 distinguish between partial and total reform.
	1826	-	
130.Niger	2010	177	The republican form of government, a multiparty system, the principle of separation of state and religion and the provisions of paragraphs 1 and 2 of Article 47 and Article 187 of this Constitution can be no revision. No procedure of revision of this section is admissible [Art.47: The President of the Republic is elected by universal, free, direct, equal and secret a term of five (5) years, renewable (1) only once. (2) In any case, no person may serve more than two presidential terms or extend the mandate for any reason whatsoever. Art.187: An amnesty is granted to perpetrators, sponsors and accomplices of the coup of eighteen of February 2010].
	2009	152	The republican form of government, a multiparty system, the principle of separation of state and religion and the provisions of Article 154 and 159 of this Constitution can be of no revision [art.154: The President of the Republic shall hold office until presidential election to be held in December 2012; art.159: Law n. 2000-001, of January 24, 2000 granting amnesty on coup of 27 January 1996 and April 9, 1999, remains in force in all its provisions].
	1999	136	The republican form of government, the multiparty system, the principle of separation state and religion and the provisions of Articles 36 and 141 of this Constitution can not be subject to revision [presedential term limits and the office of the President of the Republic and amnesty granted to perpetrators of coups 27 January 1996 and 9 April 1999].
	1996	125	The republican form of government, the principle of separation of state and religion, a multiparty

			system, can be of no revision.
	1992	124	The republican form of government, the principle of separation of state and religion, a multiparty system, can be of no revision.
	1989	108	The republican form of government can be of no revision.
	1960	73	No procedure of amendment may be undertaken or pursued if it threatens the integrity of the territory. The republican form of Government may not be the subject of amendments.
131.Nigeria	1999, 1989, 1979, 1963, 1960	-	
132.Norway	1814	112(1)	Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and such amendment requires that two thirds of the Parliament [Storting] agree thereto.
133.Oman	1996	-	
134.Pakistan	1973, 1962, 1956	-	
135.Palau	1981	-	
136.Panama	1972, 1946 1940, 1904, 1875, 1873, 1870, 1868, 1865, 1863, 1855, 1853	-	
	1841	163	The power of Congress to amend this Constitution, never extends to vary the form of government, which it provides, which will always be popular, republican, representative, elective, alternative, and responsible. Nor extends to destroy the freedom of the press.
137.Papua New Guinea	1975	-	
138.Paraguay	1992	-	[Arts. 289-290 distinguish between reform and amendments].
	1967	-	[Arts. 219-231 distinguish between reform and amendments].
	1940	-	[Art. 94 distinguishes between general and partial reform].
	1870, 1844,	-	

	1842, 1816, 1814, 1813, 1811		
139.Peru	1993, 1979, 1933, 1919, 1867, 1860, 1856	-	
	1839	183	The form of a popular Representative Government consolidated in unity, responsible, and alternative; and the division and independence of the Legislative, Executive, and Judicial Powers is unalterable.
	1836, 1834, 1828 1826, 1823, 1822 1821	-	
140.Philippines	1987, 1973, 1935	-	
141.Poland	1997	-	[Art. 235 sets different procedure for different provisions].
	1952, 1935, 1921, 1832, 1815, 1791	-	
142.Portugal	1976	288	The laws revising the Constitution safeguard: a) National independence and the unity of the State; b) The republican form of government; c) The separation of the Churches from the State; d) The rights, freedoms, and safeguards of the citizens; e) The rights of the workers, workers' committees, and trade unions; f) The co-existence of the public, the private, and the cooperative and social sectors, with respect to the property of the means of production; g) The existence of economic plans within the framework of a mixed economy; h) Universal, direct, secret, and periodical suffrage for the appointment of the elected members of the organs of supreme authority, the autonomous regions, and the organs of local government, as well as the system of proportional representation; i) Plurality of expression and political organization, including political parties and the right to a democratic opposition;

			j) Separation and interdependence of the organs of supreme authority; l) The scrutiny of legal provisions for active unconstitutionality and unconstitutionality by omission; m) The independence of the courts; n) The autonomy of local authorities; o) The political and administrative autonomy of the archipelagos of the Azores and Madeira.
	1933	-	
	1911	82(2)	Bills for the revision of the Constitution which do not define precisely the alterations projected cannot be admitted to discussion, nor can those the purport of which is to abolish the republican form of government.
	1838, 1826, 1822 1821	-	
143.Qatar	2004	145	Provisions pertaining to the rule of the State and its inheritance thereof may not be subject to application for amendment.
		146	Provisions pertaining to rights and public liberties may not be subject to amendment save for the purpose of granting more rights and guarantees for the interest of the citizen.
		147	The functions of the Emir set forth in this Constitution may not be subject to an application for amendment during the term of his deputation.
	1972	-	
144.Romania	1991	148	(1) The provisions of this Constitution with regard to the national, independent, unitary, and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of the judiciary, political pluralism, and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens fundamental rights and freedoms, or the safeguards thereof.
	1965, 1948, 1938, 1923, 1866	-	
145.Russian Federation	1993	135	(1) The provisions of Chapters 1 [Fundamentals of the Constitutional System], 2 [Rights and Liberties of Man and Citizen] and 9 [Constitutional Amendments and Revisions] of the Constitution may not be revised by the Federal Assembly. (2) In the event a proposal to revise any provisions in Chapters 1, and 9 of the Constitution is supported by three-fifths of the total number of deputies of the Federation Council and the House of Representatives [State Duma], a Constitutional Assembly is convened in accordance with the

			federal constitutional law. (3) The Constitutional Assembly may either confirm the inviolability of the Constitution or develop a new draft of the Constitution which is adopted by two-thirds of the total number of deputies to the Constitutional Assembly or submitted to popular voting. The Constitution is considered adopted during such poll if more than half of its participants have voted for it, provided more than half of the electorate have taken part in the poll.
	1978	-	[Art. 185. Amendment to articles pertaining to the federal structure of the Russian Federation may not be made unilaterally].
	1947, 1937, 1936 1925, 1923/4 1918, 1917, 1906, 1833	-	
146.Rwanda	2003	193	If the constitutional amendment concerns the term of the President of the Republic or the system of democratic government based on political pluralism, or the constitutional regime established by this Constitution especially the republican form of the government or national sovereignty, the amendment must be passed by referendum, after adoption by each Chamber of Parliament. No amendment to this article is permitted.
	1991	96(2)	No revision bill or proposal may be taken into consideration if it infringes upon the republican form of government, national territorial integrity, or democratic principles ruling the Republic.
	1978	91	No proposal for revision can be considered if it undermines the republican form of state, the integrity of national territory or the democratic principles that govern the republic.
	1962	107	No proposal for revision can be considered if it undermines the republican form of state, the integrity of national territory or the democratic principles that govern the republic.
	1961	-	
147.Saint Kitts and Nevis	1983	-	
148.Saint Lucia	1978	-	
149.Saint Vincent and the Grenadines	1979	-	
150.Samoa	1960	-	
151.San Marino	1974 (declar ation	-	

	of rights)		
152.Sao Tome and Principe	1975	154	Limits on matters of revision: there cannot be constitutional revision to: a) the independence, integrity and unity of the national territory the state; b) the status of the secular state; c) The republican form of government; d) The rights, freedoms and guarantees of cidaddos; e) the universal suffrage, direct, secret and periodic for electing holders of the organs of sovereignty and of regional and local levels; f) The separation and interrelationships of the organs of sovereignty; g) The autonomy of regional and local levels; h) Independence of the courts; i) pluralism of expression and political organization, including political parties and the right to democratic opposition.
153.Saudi Arabia	1992, 1926	-	
154.Senegal	2001	103	Forbids any amendments affecting the republican form of the state.
	1963	89	The republican form of the state cannot be the object of revision.
	1960, 1959	-	
155.Serbia	2006	-	[Art. 203: The National Assembly shall be obliged to put forward the act on amending the Constitution in the republic referendum to have it endorsed, in cases when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, proclamation the state of war and emergency, derogation from human and minority rights in the state of emergency or war or the proceedings of amending the Constitution].
	1963, 1903	-	
	1901	-	[Art. 103 sets different procedure for different provisions].
	1888, 1869	-	
156.Seychelles	1993, 1979	-	
157.Sierra Leone	1991, 1978, 1971, 1961	-	
158.Singapore	1963	-	[Art.5(2a): Unless the President, acting in his discretion, otherwise directs the Speaker in writing,

			a Bill seeking to amend this clause, Articles 17 to 22, 22a to 22o, 35, 65, 66, 69, 70, 93a, 94, 95, 105, 107, 110a, 110b, 151 or any provision in Part IV or XI shall not be passed by Parliament unless it has been supported at a national referendum by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act].
159.Slovak Republic	1992	-	
160.Slovenia	1991	-	
161.Solomon Islands	1978	-	[Art. 61 sets different procedure for different provisions].
162.Somalia	1979	112(3)	Amendments to the constitution shall not affect the following: a) The Republican system of the country; b) The adoption of the principle of socialism; c) Territorial unity; d) The fundamental rights and freedoms of the citizen and individual.
	1960	105	The Constitution shall not be amended under the terms of the preceding article for the purpose of modifying the republican and democratic form of government or for restricting the fundamental rights and freedoms of the citizen and of man guaranteed by the Constitution.
163.South Africa	1996	-	[Art. 74 sets different procedure for different provisions].
	1993	74(1)	No amendment or repeal of - (a) this section or the Constitutional Principles set out in Schedule 4; or (b) any other provision of this Chapter in so far as it relates to - (i) the Constitutional Principles; or (ii) the requirement that the new constitutional text shall comply with the Constitutional Principles, or that such text shall be certified by the Constitutional Court as being in compliance therewith, shall be permissible. [Art. 63 sets different procedure for different provisions].
	1983	-	[Art. 98 sets different procedure for different provisions].
	1961	-	
164.South Sudan	2011	-	
	2005	206(2)	Any amendment affecting the provisions of the Comprehensive Peace agreement shall be introduces only with the approval of both Parties signatory to the Comprehensive Pease Agreement.
165.Spain	1978	-	[art.168(1): When a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Title, Chapter II, Section 1 of Title I, or Title II, the principle shall be approved by a two-thirds majority of the members of each Chamber, and the Parliament shall

			immediately be dissolved. (2) The Chambers elected must ratify the decision and proceed to examine the new Constitutional text, which must be approved by a two-thirds majority of the members of both Chambers. (3) Once the amendment has been passed by the Parliament, it shall be submitted to ratification by referendum].
	1945, 1931, 1876 1869, 1845, 1837, 1812, 1808	-	
166.Sri Lanka	1978, 1946	-	
167.Sudan	2005	224(2)	Any amendment affecting the provisions of the Comprehensive Peace Agreement shall be introduced only with the approval of both Parties signatory to the Comprehensive Peace Agreement.
	1985, 1973/4	-	
168.Suriname	1987	-	
169.Swaziland	2005, 1968	-	[Different procedures for different provisions].
170.Sweden	1986, 1974, 1954, 1809	-	
171.Switzerland	1999	193(4)	The mandatory provisions of international law must not be violated [total revision].
		194(2)	The partial revision must respect the principle of cohesion of subject matter and must not violate mandatory provisions of international law [partial revision].
	1874		[Art. 118-122 distinguishes between partial and total revision].
	1848, 1802 (Helvet -ic)	-	
	1798 (Helvet -ic)	2	The form of government, whatever modifications it may undergo, shall at all times be a representative democracy.
172.Syrian Arab Republic	1973, 1964, 1950	-	
173.Taiwan	1948, 1946/7	-	
174.Tajikistan	1994	100	The form of public administration, the territorial integrity, and the democratic, Law-governed, secular and social nature of the state shall be irrevocable.
175.Tanzania,	1977	-	[Art.98 sets different procedures for different

Republic of			provision].
	1965, 1962	-	
176.Thailand	2007	291(1)	A motion for amendment which has the effect of changing the democratic regime of government with the King as Head of the State or changing the form of the State shall be prohibited.
	1997, 1991, 1978, 1977, 1976, 1974, 1968, 1959, 1952, 1949, 1932	-	
177.Timor-Leste (East Timor)	2002	156	1. Laws revising the Constitution shall respect: a) National independence and the unity of the State; b) The rights, freedoms and guarantees of citizens; c) The republican form of government; d) The separation of powers; e) The independence of the courts; f) The multi-party system and the right of democratic opposition; g) The free, universal, direct, secret and regular suffrage of the office holders of the organs of sovereignty, as well as the system of proportional representation; h) The principle of administrative deconcentration and decentralisation; i) The National Flag; j) The date of proclamation of national independence. 2. Paragraphs c) and i) may be reviewed through a national referendum, in accordance with the law.
178.Togo	1992	144	The republican form and secularism of the state cannot be the subject of a revision.
	1979	53	The republican form of government cannot be an object of revisions. No revision procedure may be instituted or continued when it undermines the integrity of the territory.
	1963	85	No revision procedure may be instituted or continued when it undermines the integrity of the territory. The republican form of government cannot be an object of revisions.
	1961	-	
179.Tonga	1875	79	It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the nobles.
180.Trinidad and Tobago	1976	-	[art. 54 sets different procedure for different provisions].

	1962	-	
181.Tunisia	1959	76	The initiative of revision of the Constitution belongs to the President of the Republic or to one-third at least of the members of the Chamber of Deputies, under reserve that it does not infringe on the republican form of the State. The President of the Republic can submit the Bills of revision of the Constitution to referendum.
182.Turkey	1982	4	The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed. [Art. 1. The Turkish State is a Republic; Art. 2. The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the Preamble; Art. 3. The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish. Its flag, the form of which is prescribed by the relevant law, is composed of a white crescent and star on a red background. Its national anthem is the "Independence March". Its capital is Ankara].
	1961	9	The provision of the Constitution establishing the form of the state as a republic shall not be amended nor shall any motion therefore be made.
	1945	102	An amendment or a modification of Art. 1 of the present law, stating that the form of Government of the Country is a Republic, cannot be proposed under any circumstances or in any form whatsoever.
	1924	102	No proposal may be made in an effort to change Article 1 of the Constitution relative to the form of government.
	1921, 1876	-	
183.Turkmenistan	1992	115	The provisions of the Constitution concerning a republican form of government may not be amended.
184.Tuvalu	1986, 1978	-	
185.Uganda	1995, 1967, 1962	-	[Different procedures for different provisions].
186.Ukraine	1996	157	The Constitution of Ukraine shall not be amended if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.
	1978	-	
187.United Arab Emirates	1971	-	

188.United Kingdom			
189.United States of America	1789	5	Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.
190.Uruguay	1966, 1951, 1934, 1917, 1830	-	
191.Uzbekistan	1992	-	
192.Vanuatu	1980	-	[Art. 86: A bill for an amendment of a provision of the Constitution regarding the status of Bislama, English and French, the electoral system, or the parliamentary system, passed by Parliament under Article 85, shall not come into effect unless it has been supported in a national referendum].
193.Vatican City State			
194.Venezuela	1999	6	The government of the Bolivarian Republic of Venezuela and of the political organs comprising the same, is and shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, with revocable mandates.
		340	The purpose of an amendment is to add to or modify one or more articles of the Constitution, without altering the fundamental structure of the same.
		342	The purpose of constitutional reform is to effect a partial revision of this Constitution and replacement of one or more of the provisions hereof, without modifying the fundamental principles and structure of the text of the Constitution.
	1961	-	[Art. 245-246 distinguish between amendments and reform].
	1953, 1947, 1936, 1925, 1914, 1909, 1904, 1893, 1891 1881, 1874, 1864	-	
	1858	164	The power granted to Congress by the preceding Article does not extend to any alteration of the form of Government, which shall always be republican, popular, representative, responsible, and alternative.

	1830	228	The authority possessed by Congress to modify the Constitution does not extend to the Form of Government, which shall always continue to be republican, popular, representative, responsible, and alternate.
	1819, 1811	-	
195.Vietnam	1992, 1980, 1965, 1960, 1959, 1946	-	
196.Yemen	1991	-	[Art. 158 sets different procedures for different provisions].
	1974, 1971, 1962	-	
197.Yugoslavia	1992	-	[139-141 set different procedures for different provisions].
	1974, 1963, 1953, 1946, 1931, 1929, 1921	-	
198.Zambia	1991	-	[Art. 79 sets different procedures for different provisions].
	1973, 1964	-	
199.Zimbabwe	2013, 1979, 1969	-	

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Angola (1975); (2006); (2010)
Argentina (1994)
Armenia (1995)
Austria (1920)
Azerbaijan (1995)
Bahrain (1973)
Bangladesh (1972)
Belarus (1994)
Bolivia (2009)
Bosnia and Herzegovina Const. (1995)
Brazil (1891); (1946); (1988)
Bulgaria (1991)
Burkina Faso (1991)
Burundi (1992); (2005)

Camaroon (1972)

Cambodia (1993)

Canada (1982)

Cape Verde (1992)

Central African Republic (2004)

Chad (1989)

Chile (1980)

China (1923); (1982)

Colombia (1991)

Congo (1992); (2002)

Costa Rica (1949)

Cote d'Ivoire (1960); (2000);

Croatia (1990)

Cuba (1940); (1976)

Cyprus (1960)

Czech Republic (1992)

Democratic Republic of Congo (2005)

Djibouti (1992)

Dominican Republic (1865); (1866); (1874); (1875); (1878); (1879); (1879); (1880); (1881); (1887); (1896); (1907); (1908); (1924); (1929); (1934); (1942); (1947); (1955); (1960); (1961); (1966); (1994); (2002/2003)

Ecuador (1843); (1851); (1861); (1869); (1967); (2008)

El Salvador (1886); (1945); (1983)

Equatorial Guinea (1991)

Eritrea (1952)

Estonia (1992)

Ethiopia (1952)

Fiji (1990)

France (Declaration of the Rights of Man and of the Citizen of 1789); (1791); (Declaration of the Rights of Man and Citizen of 1793); (1875); (1946); (1958)

Gabon (1990); (1991)

Germany (1919); (1949)

Ghana (1969)

Greece (1884); (1864); (1911); (1927); (1952); (1975)

Guatemala (1965); (1985)

Guinea (1990); (2010)

Guineau-Bissau (1984)

Haiti (1987)

Honduras (1848); (1965); (1982)

Hong Kong (1990)

Hungary (1949)

India (1950)

Iran (1907); (1979)

Iraq (2005)

Ireland (1937)

Italy (1947)

Japan (1889); (1946)

Jordan (1952)

Kazahkstan (1993)

Kenya (1963); (2010)

Kosovo (2008)

Kuwait (1962)

Kyrgyzstan (1993)

Laos (1947)

Latvia (1992)

Libya (1951); (1969)

Lithuania (1992)

Madagascar (1975); (2010)

Malaysia (1957)

Mali (1992)

Mauritania (1991); (2006)

Mexico (1824)

Moldova (1994)

Morocco (1970); (1972); (1992); (2011)

Mozambique (1990); (2004)

Namibia (1990)

Nepal (1990); (2007)

Nicaragua (1987)

Niger (1989); (1992); (1996); (1999); (2009); (2010)

Norway (1814)

Pakistan (1973)

Peru (1839); (1993)

Philippine (1987)

Poland (1997)

Portugal (1911); (1933); (1976)

Qatar (2004)

Romania (1991)

Russia (1978); (1993)

Rwanda (1962); (1978); (1991); (2003)

Sao Tome and Principe (1975)

Senegal (2001)

Serbia (2006)

Singapore (1963)

Slovakia (1992)

Somalia (1960); (1979)

South Africa (1993); (1996)

South Korea (1948)

Sri Lanka (1972); (1978)

Sudan (2005)

Switzerland (1798); (1848); (1999)

Taiwan (1946)

Tajikistan (1994)

Tanzania (1965); (1977)

Thailand (2007)

Timor Leste (East Timor) (2002)

Togo (1992)

Tonga (1875)

Turkey (1961); (1982)

United States, Articles of Confederation (1781); Constitution (1787); Carolina (1669); Pennsylvania (Charter of Privileges 28 October 1701); New Jersey (1776); Virginia (1776); Pennsylvania (1776), Maryland (1776), Delaware (1776); Georgia (1777); Vermont (1777); Massachusetts (1780); the Commonwealth of Puerto Rico (1952)

Vanuatu (1980)

Venezuela (1830); (1858); (1961); (1999)